UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VAL H. DEMARS,

Defendant.

CR 15-MJ-130

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF FIRST MOTION TO RECONSIDER DISCOVERY MOTION ORDER

Val H. DeMars, the Defendant above-named, by and through his attorney, Assistant Federal Public Defender Gary G. Colbath, Jr., respectfully moves the Court for its Order reconsidering and changing its ruling related to Defendant's prior Motion to Compel Discovery as ruled on in the Court's Order of January 19, 2016, Docket No. 12. This Memorandum of Law is offered in support of Defendant's Motion pursuant to local Rule 47.1 of the United States District Court for the District of South Dakota

INTRODUCTION

Defendant has received various items of discovery and information from the government both prior to issuance of the Court's ruling on Defendant's motion to compel and in response thereto. However, Defendant is still without substantial, substantive discovery and material information and documentation, not within his control or ability to meaningfully acquire, that is relevant and necessary for him to defend the instant action. Accordingly, Defendant urges the Court to reconsider its prior ruling regarding discovery and require the government to produce additional and un-redacted discovery as is further set forth below.

A. Items Denied and Disputed

I. Re: Item (b) the "Delegation of Authority to Incident Commanders"

The government alleged in its prior filings that the Delegation of Authority ". . . is an internal document that the United States Forest Service would likely implement on other large scale operations. (Doc. 4 at p. 1)." Thereupon, it sought the Court's prior review in camera, suggesting some official necessity to evade public disclosure. The Court accepted this proffer, without authoritative justification, determining that this document should be provided with its Budget Planning and Financial Management Guidance sections redacted.

Defendant maintains that the Delegation of Authority is relevant in its entirety; there is no basis for its partial exclusion, and it should be produced in full. His specified request for this document, and its clear conjunction with his affirmed "public authority" defense should compel disclosure without question. Its contents on the infrastructure, procedures, incentives, and allocation of funds and resources in its purposes are integral to its operation as a policy action, and relevant along with its other broad mandates and provisions. In denying these two sections, the Court suggests an undue burden on the Defendant to justify particular parts and elements of a document he has never seen.

Moreover the Delegation of Authority is NOT an "Internal document," but rather it is a public policy document, an item of administrative record, that in the past has been fully available to citizens by FOIA request, without redactions. There is no legitimate government interest in its concealment, nor merit in postures before this Court to justify such a premise. The fact that the Forest Service has "implemented" such a Delegation of Authority for every Rainbow Gathering

since 1998 is material to this defense, and of comparative importance in all its provisions. Certainly the conditions upon its disclosure to Defendant under the due process protections of discovery cannot be more restrictive than those applied to citizens at-large seeking public information under FOIA. Consequently, the Court should compel discovery of a full and complete, un-redacted copy of the Delegation of Authority.

II. Re: Item (c) Listing of Agencies and Agency Representatives on Incident Command Team

The government and the Court misconstrue this request: It was not for ". . . a formal agency list" per se, or limited to particular pages with this explicit content or linked to this event. It called for a "Listing" which may derive from other directives, contracts, memos, emails, or notes, or otherwise might include such documents showing this information. Defendant duly limited his request to simple line-items known to government sources and easily compiled, rather than imposing a burden to produce the paperwork comprehensively. However, it is erroneous and misleading to allege that such documents do not exist. The government is certainly aware of and could readily provide a statement, memo, or other documentation of those agencies and entities whom participated as part of the 2015 Gathering Incident Command Team.

This accords with the real workings of "Incident Command," which are also misconstrued: Participating agencies do not casually "offer assistance". . . they are formally enrolled and bound by standing or ad hoc agreements and regional emergency management laws. In this way, the "unified command" scheme is structured to aggregate their jurisdictions and powers under the lead agency -- USFS Law Enforcement & Investigations (LEI), which takes

over primary administrative powers by and through the Incident Commander chosen from its ranks.

This is triggered by the Delegation of Authority from the USDA Forest Service, the civilian agency mandated by Congress to manage the National Forests. Supporting compacts with other agencies are no less real and explicit, defining their roles and representatives on the Team. Each agency provides certain manpower or other resources to the team, as it so chooses, and the NFS, and in turn the government, is well aware of exactly who provides what assistance to Incident Command. Defendant seeks that information, in whatever form, in furtherance of his burden to show such participants, or members thereof, conveyed to him or were capable of doing so, the public authority to permit him to engage in the actions he did.

The alteration of government powers for the Rainbow Gathering is also more broadly material to Defendant's constitutional defense. Further, by virtue of his intended public authority defense, it follows that Defendant needs to precisely delineate the National Forest authorities in effect, including those enacted by proxy in the Incident Command scheme.

Portions of Defendant's requests were not provided as the government averred that such items were "not in the possession of the government." However, this assertion in no way relieves, in a case such as this, the prosecution from its production obligations. *See*, *United States v. Chalmers*, 410 F. Supp. 2d 278 (S.D.N.Y. 2006) (prosecution must disclose material documents in possession of government agency "so closely aligned with the prosecution as to be considered part of the prosecution team"). Certainly the USFS and its associated law enforcement agencies make up the "prosecution team" for the instant citations and proceeding.

Indeed, many courts who have looked as the issue of what constitutes "the government's possession" have made such broad interpretation:

> Rule 16(a)(1)(C) " 'triggers the government's disclosure obligation only with respect to documents within the federal government's actual possession, custody, or control.' " *United States v. Dominguez-Villa*, 954 F.2d 562, 566 ((9th Cir. 1992) (quoting *United States v. Gatto*, 763 F.2d 1040, 1048 (9th Cir. 1985)). A document is within the possession of the government if the prosecutor has knowledge of it and access to it, and a "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *United States v. Bryan*, 868 F.2d at 1036; see *United States v. Jensen*, 608 F.2d at 1357 ("There is some duty of inter-agency discovery, which normally can be discharged 'by searching, or requesting that search be made, of the files of administrative or police investigations of the defendant, in addition to his [prosecutor's] own files.' " (quoting 8 Moore's Federal Practice P 16.05, at 16-65 (2d ed. 1979 rev.)); *United States v. NYNEX Corp*., 781 F. Supp. 19, 25 (D.D.C. 1991) (prosecution must produce materials possessed by other federal agencies allied with the prosecution).

III. Re: Item (g) Daily Incident Reports by the Incident Command Team Staff and Item (h) All Cleanup Reports, including the Final United States Forest Service Report on the 2015 Rainbow Gathering

The Court conflates two separate requests material to this request, critiquing a lack of "specificity" in support of both; Item (h) is not further addressed, but Item (g) draws this additional test: "It is unclear to the Court how the incident reports that are unrelated to his violations are material to his defense and would 'significantly alter the quantum of proof' in his favor." (Docket No. 12, p. 6.)

What is common to these items is that both concern policies as applied to the 2015 Rainbow Gathering at the time Defendant was cited, and are known to be customary publications by these agencies for the Gathering each year, routinely available in the past. Both are relevant and not burdensome to produce; they are distinct in their respective sources and thrust: Item (g)

is compiled by USFS-LEI personnel on the Incident Command Team; cumulatively these Incident Reports document the nature and extent of targeted enforcement against Rainbow Gathering attendees, related to or resulting from altered powers in the Black Hills National Forest. Item (h) comes from Forest Service resource staff, observing the progress and completion of site restoration, and publishing a summary report thereafter. This information confirms the environmental performance of attendees to high standards, in accord with public interests and authorities. This information confirms the environmental performance of attendees to high standards in accord with public interests and supports Defendant's belief that he was acting with public authority in his stewardship of water resources, and in his efforts with others toward the successful restoration of the site.

These items should be produced forthwith: They are material to the defense, given their policy context to Defendant's conduct and the alleged rights violations incurred. It is self-evident that these requests were adequately justified within the scope of Defendant's affirmed grounds and the tests for discovery, and there is no basis for withholding them to the prejudice of his Constitutional and statutory defenses.

B. Further Argument for Reconsideration

I. The "Specificity" Test:

Defendant sets forth substantive reasons for his requests succinctly in two filings:

> The information requested relates directly to the USFS handling of the pre-event planning of the 2015 Rainbow Gathering, the preemptive measures taken by the government to "regulate" the Gathering, and the implementation of those plans and measures, including specifically how they affect and relate to Defendant. (Def. Initial Memorandum, p. 4.)

> The items sought are material. Generally, Defendant questions the delegation of regulatory powers at the time he was cited, and more importantly the official actions taken under color of USFS authorities to ticket him which he asserts were done in violation of his constitutional rights. (Def. Reply, pp. 3-4.)

Where his Motion to Compel is denied in key points, the question is what further "specificity" might be required to justify these requests in the Court's view. Defendant avers that these statements are sufficient for purposes of discovery in their scope and direct implications:

> By definition, invoking a Constitutional defense may engage both the immediate circumstances of a citation and an ongoing pattern of rights violations concurrent with its issuance, ongoing in the past, and posing recurrent violations in the future.
>
> Addressing matters of USFS planning and regulation related to the Rainbow Gathering, the scope of concern goes beyond any singular or incidental police action; the Defense broadly engages the workings of public agency policy as applied to these expressive assemblies.
>
> The delegation of regulatory powers is an extraordinary policy action in response to speech, by necessity to be examined in the aggregated and realigned authorities under unified command, the operations of emergency law, and the public interests served.
>
> In this context, enforcement under color of Black Hills NFS authorities must be understood in its pretextual intent, in light of the affiliations and cross-purposes of the actual agents.

Conversely, it is realistic and supported by lawful procedure for Defendant to disclaim any conclusive proof of relevance in advance without seeing the documents: ". . . In order to establish the proof and evidence necessary to sustain such violation, Defendant must have the disclosures requested of the government. Without such documents, no further specific showing of relevance can be made nor does the government cite any authorities requiring the same from Defendant." (Defendant's Reply, p. 4.)

It is the nature of these proceedings that evidentiary relevance is "discovered" in disclosures subject to review. A ". . . prima facie showing of materiality" requires only that information requested be reasonably related to the case and likely to ". . . play an important role in uncovering admissible evidence, aiding witness preparation . . . or assisting impeachment or rebuttal." *U.S. v. Tornquist*, No. CR 11-50118, 2012 WL 2862864, *3 (D.S.D. July 11, 2012). The prior test is not intended to parse particular items or their projected use in legal arguments; it applies broadly to their topical frame. This is a simple facial standard in discovery, serving to deter wildly disconnected queries and "fishing expeditions" -- not to impede defendants in obtaining information in which relevant facts might be "uncovered," pry into privileged legal theories, or to burden due process rights.

II. The FOIA Ploy:

The Court avoids the question of FOIA demands interposed in criminal discovery: "The United States did not argue in its responses to the pending motion that defense counsel would need to use FOIA as an avenue for obtaining the information. Thus, this argument will not be addressed." (Docket No. 12, p. 2 - fn 2.)

In fact, such demands were invoked by the government to obstruct disclosures, and this fact was raised in Defendant's Memorandum of Law (p. 3) and the Reply (p. 3), so this issue was properly before the Court, not to be ignored. The government's recourse to this device ominously flaunts discovery rules, which require such documents to be produced on request, and Justice Department policies which have evolved to mandate open disclosure. FED. R. CRIM..P. 16(a)(1)(E), (F).

The intent of the Rule is to afford defendants broad access to information that "might be" of exculpatory value, subject to review and assessment. The test for disclosure is not a prior proof of relevance, presupposing arguments yet to be made -- it is whether ". . . (i) the item is material to preparing the defense." FED. R. CRIM. P. 16(a)(1)(E)(i). (Emphasis added.)

It is within the rights and privilege of the defense to examine such items, determine their use and define their meaning in a legal analysis of its choosing. Defense counsel can advance a reasonable interest, but cannot responsibly predict the use of facts literally "before the fact." It is then the duty of the Court to adjudge relevance of these facts as presented in full context -- not to preempt access on speculative or specious grounds. FOIA does not supplant or obviate requirements of discovery in a criminal case, nor do comparable standards of disclosure and exclusion apply. The government failed to urge this in its motion filings because no authorities exist to support its prior position with defense counsel that FOIA was a necessary means of obtaining any requested material. FOIA procedures have no place in this case or any: The government has made this an issue by its prosecutorial methods, to the discredit of its motives; such conduct warrants the Court's censure, not its willful disregard, and should weigh heavily in favor of Defendant's Motion to Compel.

CONCLUSION

In order for Defendant to effectively and fully put forth a defense to the charges alleged against him, he needs the information requested. Defendant has a Due Process right to defend himself and is entitled to all information possessed by the government in conjunction with this

matter and permits his exercise of such rights. Accordingly, he urges the Court to reconsider its prior rulings and order full disclosure or all previously requested material.

Dated this 28th day of March, 2016.

Respectfully submitted,

NEIL FULTON
Federal Public Defender
By:

/s/ Gary G. Colbath, Jr.
Gary G. Colbath, Jr., Assistant Federal Public Defender
Attorney for Defendant
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
703 Main Street, Second Floor
Rapid City, SD 57701
Telephone: 605-343-5110; Facsimile: 605-343-1498
filinguser_SDND@fd.org