

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER,	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 96-2123
	)	97-1288
	)	(RCL)
FEDERAL BUREAU OF	)	
INVESTIGATION, et al.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM AND ORDER

This matter comes before the Court on Plaintiffs' Motion [441] to Compel Further Deposition Testimony from Mari L. Anderson and for Sanctions; D. Craig Livingstone's Cross-Motion [N/D] for Costs and Fees; and Defendant Executive Office of the President's Motion [480] for Attorneys' Fees and Costs. Upon consideration of these motions, oppositions, and replies thereto, the court will DENY Plaintiffs' Motion [441] to Compel Further Deposition Testimony from Mari L. Anderson and for Sanctions; DENY D. Craig Livingstone's Cross-Motion [N/D] for Costs and Fees; and DENY Defendant Executive Office of the President's Motion [480] for Attorneys' Fees and Costs, as discussed and ordered below.

I. Background

The underlying allegations in this case arise from what has become popularly known as "Filegate." Plaintiffs allege that their

privacy interests were violated when the FBI improperly handed over to the White House hundreds of FBI files of former political appointees and government employees from the Reagan and Bush Administrations.

The dispute now before the court centers around the deposition of Mari L. Anderson, former Executive Assistant to Craig Livingstone in the White House Office of Personnel Security (OPS). According to plaintiffs' allegations, OPS is where the plaintiffs' FBI files were acquired. For much of her employment with OPS, Anderson worked in the same room as Craig Livingstone and Anthony Marceca, both of whom are central players under the facts alleged by plaintiffs.

Plaintiffs seek to compel further testimony from Anderson on a variety of matters for which Anderson was instructed not to respond by counsel for the Executive Office of the President, which was representing Anderson's interests in an official capacity as a former government employee.

## II. Plaintiffs' Motion to Compel

### A. *Rule 45 and Voluntary Appearance*

The first matter that must be addressed in relation to plaintiffs' motion to compel is that of the power of this court to compel further deposition testimony from non-party Anderson, assuming for the moment that plaintiffs were to prevail on the

merits of their motion. Plaintiffs do not dispute that Anderson was never served with a subpoena in connection with her first deposition, is not a party or an officer of a party, and is currently a resident of Atlanta, Georgia, as she was at the time of her original deposition. Anderson testified voluntarily at her earlier deposition, at the expense of defendant EOP, in the District of Columbia. Anderson also agreed at her deposition that, should further deposition testimony be needed, she would voluntarily submit to such further examination, on the condition that her expenses be paid and to the extent that her class schedule would allow. Anderson Depo. at 6, 186, 226, & 353-54.

Normally, "a subpoena must be served on a person not a party whose deposition is to be taken." CHARLES ALAN WRIGHT, FEDERAL COURTS § 84, at 610. Rule 45 of the Federal Rules of Civil Procedure provides the procedures for subpoenaing people who are not parties (or officers of parties) to the litigation. See FED. R. CIV. P. 45. Under Rule 45:

a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition . . . specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition specified in the subpoena.

FED. R. CIV. P. 45(b)(2).

In this case, however, a Rule 45 subpoena is not required because non-party Anderson consents to further examination, albeit

with two conditions. First, Anderson must be compensated for her reasonable expenditures related to her voluntarily traveling from Atlanta, Georgia to Washington, D.C. Second, any further deposition would need to conform to her class schedule, as she is currently a full-time student. In short, authority under Rule 45 is not required as long as plaintiffs agree to these conditions.<sup>1</sup> Therefore, the court will reject defendant EOP's arguments based upon Rule 45 authority, conditioned upon the plaintiffs' agreement to the conditions placed upon further testimony by non-party Anderson. Because Anderson has consented to such an arrangement, the court will now turn to the relevance of the testimony that plaintiffs seek to compel and the validity of defendant EOP's claims of privilege.

B. *Testimony Sought*

Plaintiffs seek to compel further testimony from Anderson on three questions, all three of which she was instructed not to answer at her original deposition:

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<sup>1</sup>Defendant EOP has no responsibility to produce Anderson for further deposition testimony, and it has no duty to pay for such further testimony, unless the court finds that defendant EOP was not justified in its objections or claims of privilege. If the court were to find that defendant EOP improperly prevented Anderson from testifying on certain relevant topics at her original deposition, then it could, as a sanction, order Anderson's deposition to be continued at defendant EOP's expense. Because the court does not find that defendant EOP's objections or claims of privilege were improper, however, a more detailed analysis of this point will not be given.

1. Whether Anderson discussed with her attorneys a document entitled "Fact Sheet: The Testimony of Mari Anderson," which was attached to excerpts from her Senate deposition testimony.
2. The names of persons whose files were reviewed outside of the Office of Personnel Security.
3. The names of people who requested, as well as those who were authorized to receive, copies of SCI material.<sup>2</sup>

*C. Analysis—Relevance and Privileges*

Plaintiffs move to compel the testimonial items described above based on Rule 37 of the Federal Rules of Civil Procedure. As the court has stated before, it is the plaintiffs' duty to first show that the matter they seek to compel is discoverable. This rule comes from the definition of the scope of relevant discovery under Rule 26(b) of the Federal Rules of Civil Procedure, which states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). Once the plaintiffs have met this burden, however, defendant EOP must then prove its claim of privilege.

1. Item 1

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<sup>2</sup>Sensitive Compartmented Information (SCI) clearances are clearances above "top secret."

The court will deny plaintiffs' request to compel an answer to whether Anderson discussed with her attorneys a document entitled "Fact Sheet: The Testimony of Mari Anderson," which was attached to excerpts from her Senate deposition testimony, because this information is protected by the attorney-client privilege. This document is a summary of testimony that she gave in the course of Congress's investigation of the FBI files matter. During Anderson's deposition, plaintiffs' counsel asked: "Did you discuss [the] questions and answers [discussed in the document] when you met with the attorneys for the Justice Department?" Anderson Depo. at 223. According to plaintiffs, "[t]he questions and answers contained in the Fact Sheet are central to plaintiffs' claims because they relate to how the [Office of Personnel Security] obtained FBI files, how these files were checked out of OPS, what types of files were checked out and why they were checked out. . . . Consequently, without asking Ms. Anderson to divulge the substance of specific attorney-client communications, plaintiffs' counsel inquired whether Ms. Anderson had discussed these questions with Clinton Justice Department counsel." Plaintiffs' Motion at 2. Further, plaintiffs contend that this information—whether there were in fact such discussions—is not privileged because plaintiffs are entitled to certain basic information about the privileged communications and because Anderson's testimony is a matter of public record.

The court will deny plaintiffs' motion to compel Anderson to answer this question. The court has already explained before in this case that plaintiffs are not entitled to probe into the communications made between a deponent and her attorney as to documents that were reviewed in preparation for her deposition. See Alexander v. FBI, Civ. No. 96-2123, Memorandum Opinion at 52 (D.D.C. May 28, 1998) (denying plaintiffs' request to compel the deponent to answer, inter alia, whether she "went over [a specific document] carefully with [her attorneys]" because this inquired into privileged communications). The disclosure of these types of confidential communications—whether a specific document was discussed in preparing a deponent for a deposition—would unavoidably disclose confidential communications between an attorney and her client in furtherance of the legal representation. Thus, plaintiffs' request to compel further testimony on item 1 will be denied.

Plaintiffs' first argument, that they are entitled to general subject matter about the communication—which in itself would answer plaintiffs' question—is belied by their own pending question. Plaintiffs want to know if Anderson talked with her attorney in conjunction with this deposition as to one specific document. Plaintiffs are not entitled to know whether this narrow issue was discussed. Were they so entitled, plaintiffs could ask about every narrow issue under the sun and then proclaim that they only seek "general" information as to this topic. This approach, of course,

cannot be allowed because these communications are privileged and plaintiffs cannot obtain information about these communications under the guise of determining the validity of a privilege. Plaintiffs' second argument, that the Fact Sheet is a public document and therefore Anderson's conversations with her attorney about the documents are unprivileged, must also be rejected. Plaintiffs attempted and were allowed to question Anderson on the public document itself. Anderson Depo. at 220-26; 426. She testified that she has never seen the document. Id. Producing a document, however, does not waive the attorney-client privilege as to otherwise privileged conversations simply because they pertain to the public document. These communications are not public or otherwise voluntarily disclosed, and their privileged nature has therefore not been waived. See Upjohn v. United States, 449 U.S. 383, 395 (1981). For these reasons, plaintiffs' argument must fail.

2. Item 2

The court will deny plaintiffs' request to compel Anderson to state the names of persons whose files were reviewed outside of the Office of Personnel Security because, to the extent this question is unanswered, it seeks irrelevant matter. At her deposition, Anderson testified that her boss, Craig Livingstone, would sometimes leave the Office of Personnel Security with government files without noting such instances on the standard file check-out

log. Anderson Depo. at 151-52; 287. According to Anderson, Livingstone did so at the White House Counsel's Office's request when an issue of concern would arise in an employee's background report. Id. at 163, 170. According to a declaration filed subsequent to Anderson's deposition by Charles F.C. Ruff, Counsel to the President, the White House Counsel's Office "is responsible for making determinations about the suitability of those individuals needing regular access to the White House complex." Ruff Decl. ¶ 5. These determinations rely "in large part" on FBI background investigation reports kept in an individual's personnel security file, which was maintained by the Office of Personnel Security. See id. In its brief, defendant EOP also states that, in addition to taking these government files to the White House Counsel's Office, Livingstone would take government files to Special Agent in Charge Arnold Cole of the Secret Service. Defendant EOP's Opp. at 12 n.6. The Secret Service would review the FBI background investigation reports of their employees who were to be issued permanent White House clearances. Id.

At one point in the deposition, Anderson was asked about the government files that Livingstone would remove from his office. Anderson testified that she could remember some of the files that Livingstone took. Anderson Depo. at 289. When plaintiffs asked Anderson to name the files she could remember, defendant EOP objected and instructed Anderson not to answer based upon the "significant privacy interests of the individuals in question that

could be tread upon." Id. at 289. Specifically, defendant EOP contends that revealing whose files were reviewed would disclose sensitive details about certain suitability reviews as to current White House employees. Importantly, defendant EOP's counsel clarified: "I think it would be appropriate to ask whether [the files pertained to] current White House employees or former White House employees. To that we have no objection, but if they're current White House employees, no." Id. at 289-90. Anderson later testified that the files Livingstone took were only of then-current White House employees. Anderson Depo. at 291.

In response to defendant EOP's objection, plaintiffs argue that all matters bearing on the obtaining and misuse of government files are relevant to plaintiffs' claims. Plaintiffs' Motion at 12. Plaintiffs further contend that "[w]ithout knowing the names of these individuals, it is not possible for plaintiffs to determine if such persons were perceived adversaries of the Clinton Administration or its allies, nor is it possible to determine if information about such persons was given or misused by non-authorized individuals." Id. at 13.

The court will deny plaintiffs' request to compel further testimony to item 2 because it seeks irrelevant testimony. Anderson clearly stated that all of the files that she could recall Livingstone removing without logging out were files of then-current White House employees. Thus, these occurrences cannot possibly serve as evidence of government files misuse relevant to

plaintiffs' claims because the individuals' files testified to by Anderson were all Clinton Administration employees. Plaintiffs are not allowed to investigate the handling of every government file in existence. Again, the line must be drawn somewhere. The court will not compel further testimony on the use of Clinton Administration employee files—for which the only testimony of Anderson confirms that these files were taken for legitimate purposes unrelated to any claim of plaintiffs—absent some other extraordinary circumstances showing relevance. Needless to say, these circumstances do not exist at present. Therefore, plaintiffs' request to compel further testimony on item 2 will be denied.

3. Item 3

The court will deny plaintiffs' request to compel Anderson to state the names of the people who requested, as well as who were authorized to receive, copies of "Sensitive Compartmented Information" (SCI) clearance lists because this information is irrelevant. At Anderson's deposition, plaintiffs' counsel asked Anderson questions on both of these items. Defendant EOP objected to Anderson answering either of these questions, however, because of the potential for the release of classified information.

The court will deny plaintiffs' request to compel testimony on item 3. Plaintiffs contend that they need the names of the persons on the SCI clearance list as well as any persons who requested

access to the persons named on that list because such information "could reveal the names of persons who would be authorized to view FBI files and other government files containing Privacy Act information." Plaintiffs' Motion at 8-9. Defendant EOP argues, and plaintiffs do not dispute, however, that "[t]he SCI clearance lists do not . . . reveal the names of persons authorized to review personnel security files. The SCI program and personnel security program are quite separate, and `SCI clearance has nothing to do with access to EOP's Security Office of OPS personnel security files containing FBI background information . . . . Simply because an individual has been granted access to SCI information does not entitle that individual to review or have access to personnel security files containing FBI background reports.'" Defendant EOP's Opp. at 31 (citing Easley Decl. ¶¶ 7-8). Thus, to the extent that plaintiffs seek to establish relevance by similar instances of governmental misuse of background security information—i.e., the FBI file information at issue in this case—plaintiffs' theory of relevance fails.

In attempting to avoid this obstacle, plaintiffs reply that, although the SCI program may have nothing to do with the background security information files, plaintiffs need access to this SCI information because the people with access or attempting to gain access to SCI materials may have access to "government files in general, which are clearly relevant to [p]laintiffs' claims." Plaintiffs' Motion at 19 n.9. Again, plaintiffs are not allowed to

ask any question that they might choose and then justify it by simply arguing that "it relates to a government file and is therefore relevant." Plaintiffs may only obtain information reasonably calculated to lead to the discovery of admissible evidence, see FED. R. CIV. P. 26(b), and they are not allowed "to explore matter which does not presently appear germane on the theory that it might conceivably become so." Food Lion, Inc. v. United Food and Commercial Workers International Union, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997). Because these SCI matters are simply too tangential to any possible relevance in this case, the court will deny plaintiffs' request to compel item 3.

### III. Sanctions

Plaintiffs have moved for sanctions under FED. R. CIV. P. 37, 28 U.S.C. § 1927, and the inherent powers of the court. Because the court has rejected the merits of plaintiffs' motion to compel in full, their motion for sanctions will be denied.

Livingstone's motion for sanctions will also be denied. Livingstone cross-moves for sanctions against plaintiffs' counsel under 28 U.S.C. § 1927. This statute provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (1994). The Court of Appeals for the District of Columbia Circuit has not yet decided whether the standard for the imposition of sanctions under this provision should be "recklessness" or the higher standard of "bad faith." See LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 905 (D.C. Cir. 1998). In either instance, however, the court finds that the facts of this case do not warrant the findings necessary for the imposition of sanctions under 28 U.S.C. § 1927.

Livingstone offers two bases for granting him sanctions against plaintiffs' counsel: (1) plaintiffs' request for sanctions against Livingstone's counsel; and (2) plaintiffs' request to compel Livingstone's counsel to submit to a deposition<sup>3</sup>. Thus, the merits of Livingstone's present sanctions request depends upon the validity and justifiability of plaintiffs' underlying requests for relief against Livingstone's counsel. As such, it is the appropriateness of plaintiffs' two requests that must be analyzed in order to determine whether Livingstone is entitled to sanctions.

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<sup>3</sup>In the last line of plaintiffs' motion to compel, plaintiffs ask that the court compel Livingstone's counsel to submit to a deposition regarding the whereabouts of certain disks that plaintiffs believe Livingstone removed from the Office of Personnel Security which may contain relevant information. Plaintiffs argue that if Livingstone's attorney has any knowledge of such a removal, then the attorney's deposition may be warranted and allowed under the crime/fraud exception to the attorney-client privilege. Plaintiffs have not stressed this argument, however, given the little amount of factual or legal argument dedicated by plaintiffs to making this point.

Plaintiffs' motion for sanctions against Livingstone's counsel arises from Livingstone's counsel's objection to a certain question asked of Anderson. At the deposition, plaintiffs' counsel asked Anderson: "You are aware that when Mr. Livingstone left the White House he took those computer disks with him?" Livingstone contends that no factual predicate was laid for this question and that no good faith basis in fact existed for this question. Accordingly, Livingstone objected on the basis that the question "assumed facts not in evidence" and now moves for sanctions on this point. Under the federal rules, Livingstone's counsel's objection was clearly proper and would have been sustained. See FED. R. CIV. P. 32(d)(3)(B). Therefore, were plaintiffs only moving for sanctions based on these facts, their motion would be frivolous and Livingstone could have a proper basis for sanctions against plaintiffs' counsel. However, plaintiffs had an additional basis for their sanctions motion—Livingstone's counsel's inappropriate commentary. After explaining the basis for Livingstone's counsel's objection, the following exchange, which truly provides the basis for plaintiffs' sanctions motion, occurred:

[By plaintiffs' counsel:] All you have to do is register objection to form.

[By Livingstone's counsel:] I'm explaining to you why I'm objecting to that question.

[By plaintiffs' counsel:] I understand why you're objecting. You're injecting testimony. If the question is not properly phrased as to form, then you certainly have an opportunity to raise that with the court rather than telling the witness the answer.

[By Livingstone's counsel:] You obviously need help in forming questions.

[By plaintiffs' counsel:] I don't think I need your help, Mr. Cohen.

[By Livingstone's counsel:] Well, you need somebody's.

Anderson Depo. at 408. Given this type of behavior on the part of Livingstone's attorney, the court is unwilling to find that plaintiffs' motion for sanctions was brought recklessly or in bad faith. As a result, Livingstone's counsel is not entitled to sanctions on the basis of plaintiffs' sanctions motion.

As to Livingstone's counsel's second basis—plaintiffs' request that Livingstone's counsel submit to a deposition as to the whereabouts of certain disks of his client—the court believes that this request does not satisfy the elements of 28 U.S.C. § 1927 in order for sanctions to be awarded against plaintiffs. Plaintiffs' request, which was not pressed in their motion to compel, does not demonstrate the kind of "serious and studied disregard for orderly process of justice" contemplated by the statute. See Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968). The court does agree, however, that a request to depose Livingstone's counsel should be made more directly through a motion for leave of court and a subpoena. Nonetheless, because plaintiffs' request was not truly briefed or seriously argued by plaintiffs and was not so flagrant as to trigger 28 U.S.C. § 1927, the court will deny

Livingstone's cross-motion for sanctions against plaintiffs' counsel.

Finally, the court will deny defendant EOP's request for sanctions against plaintiffs' counsel. This motion is based on two grounds. First, defendant EOP argues that plaintiffs' motion merits sanctions because they could not possibly have thought the motion was proper given Anderson's non-party status and out-of-jurisdiction residence. The court has already rejected this argument, however, because Anderson conditionally consented to further testimony, should further testimony be required. Thus, defendant EOP is incorrect in the assertion that plaintiffs' motion was improper in this regard. Second, defendant EOP contends that each substantive item of plaintiffs' motion to compel warrants sanctions. The court disagrees. Although the court has ruled against plaintiffs on each of these items, the court believes that plaintiffs' efforts in attempting to compel this information are not sanctionable. Therefore, defendant EOP's motion will be denied.

### III. Conclusion

For the reasons given above, the court HEREBY ORDERS that:

1. Plaintiffs' Motion [441] to Compel Further Deposition Testimony from Mari L. Anderson and for Sanctions is DENIED.

2. D. Craig Livingstone's Cross-Motion [N/D] for Costs and Fees is DENIED.

3. Defendant Executive Office of the President's Motion  
[480] for Attorneys' Fees and Costs is DENIED.

SO ORDERED.

Date:

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Royce C. Lamberth  
United States District Court