

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 [631] to Compel Further Deposition Testimony and Documents from Linda Tripp and Plaintiffs' Motion [667] to Extend Time by One Day to Reply on Plaintiffs' Motion to Compel. Upon consideration of plaintiffs' motions; the oppositions of the government defendants, non-party Tripp, and the United States of America by the Office of the Independent Counsel; plaintiffs' reply; and an in camera review of the documents submitted under claim of privilege by non-party Tripp, the court will GRANT nunc pro tunc Plaintiffs' Motion [667] to Extend Time by One Day to Reply on Plaintiffs' Motion to Compel; and DENY Plaintiffs' Motion [631] to Compel Further Deposition Testimony and Documents from Linda Tripp, 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 motion now before the court is based upon the deposition of non-party Linda Tripp. Tripp's deposition has two potential avenues of relevancy for the present case. First, Tripp claims to have some knowledge of relevant facts pertaining directly to the misuse of plaintiffs' government files. Second, although she is not a plaintiff in this proceeding, the misuse of Tripp's government file, in the form of her background security information, is discoverable to the extent that it is linked to the defendants in the present case.¹

The court has already granted in part a motion for protective order brought by non-party Tripp. Specifically, the court precluded plaintiffs from questioning Tripp "on all matters not reasonably calculated to lead to the discovery of admissible

¹The court has also held that certain information bearing upon an attempt to conceal political motivations for or connection to the misuse of Tripp's background security information may also be discoverable in the present case, as a derivative of the discoverability of a White House connection to the Tripp release. See Alexander v. FBI, Civ. No. 96-2123, Memorandum and Order (D.D.C. Mar. 31, 1999) (holding this topic to be discoverable in the context of the deposition of Kenneth Bacon, Assistant Secretary of Defense).

evidence on the issues of the obtaining or misuse of Tripp's government files, the obtaining and misuse of the plaintiffs' government files, or matter subsumed by these subject areas." See Alexander v. FBI, Civ. No. 96-2123, Memorandum and Order at 10, ¶ 4(a) (D.D.C. Dec. 7, 1998). The court also stated that it was not granting plaintiffs "a `roving commission' to investigate the subject matter of other alleged scandals involving the White House, the deponent, or any other entity." Id. at 5. The court went on to specifically exclude the Lewinsky and White House Travel Office matters from the scope of discoverable material.² With these components of the protective order in mind, the court allowed the Tripp deposition to proceed, vacating the stay that had been put in place upon motion of the Office of the Independent Counsel.

Plaintiffs took non-party Tripp's deposition on December 14, 1998, and January 5, 13, and 22, 1999. According to the government defendants, Tripp testified for a total of approximately fourteen hours, eight of which were dedicated to questioning by plaintiffs.

Plaintiffs now move to compel further testimony and document production from non-party Tripp. First, plaintiffs move to compel Tripp to submit to further oral deposition testimony on five topics:

²The court excepted from the protective order plaintiffs' line of questioning as to the misuse of Billy Dale's FBI file, even though Billy Dale is also connected to the White House Travel Office investigation.

1. The databases in use at the White House Counsel's office while Tripp was employed there.
2. The identity of people who attended "Whitewater damage control" meetings in the White House Counsel's office.
3. The substance of a particular conversation between Tripp and Deputy White House Counsel Cheryl Mills.
4. The substance of a conversation between Tripp and Deputy White House Counsel Bruce Lindsay regarding Kathleen Willey.
5. How Tripp came to see letters that Kathleen Willey later sent to President Clinton.

Plaintiffs also seek to compel further document production from Tripp on three requests:

6. Portions of audio tapes of telephone conversations between Tripp and Monica Lewinsky.
7. Portions of notes of a telephone call between Lindsay and Tripp.
8. Portions of a book proposal prepared on Tripp's behalf.

II. Analysis

A. *Applicable Law*

Plaintiffs move to compel the testimonial and documentary items enumerated above based on Rule 37 of the Federal Rules of Civil Procedure. As the court has stated on previous occasions in this case, 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).

This showing of discoverability is all the more important in the present dispute because the court has already granted non-party Tripp a protective order “on all matters not reasonably calculated to lead to the discovery of admissible evidence on the issues of the obtaining or misuse of Tripp’s government files, the obtaining and misuse of the plaintiffs’ government files, or matter subsumed by these subject areas.” See Alexander v. FBI, Civ. No. 96-2123, Memorandum and Order at 10, ¶ 4(a) (D.D.C. Dec. 7, 1998).

Once plaintiffs have made this initial showing, however, it becomes the opposing parties’ (and non-parties’) burden to prove the applicable privilege they claim, if any.

B. *Plaintiffs’ Motion to Compel*

i. Item 1

The court will deny plaintiffs’ request to compel further testimony on the databases in use at the White House Counsel’s office while Tripp was employed there. At the deposition, Tripp testified that she saw Deputy White House Counsel William Kennedy’s

secretary, Betsy Pond, entering data from certain files onto Pond's computer. According to Tripp, this data came from files that appeared to be the same files that Pond had earlier told Tripp looked like FBI files.

Logically, plaintiffs sought to develop facts about the type and nature of the computer system onto which Pond was loading this information. When asked about what computer system Pond was using when entering this data, however, Tripp answered: "I don't know what database [Pond] was inputting into. I never asked." Tripp Depo. at 101. Thus, it appears that Tripp simply has no knowledge of the specific database in use.

Next, plaintiffs inquired more generally of Tripp as to "what types of databases during the time that you worked in the White House Counsel's office were you aware of?" Tripp Depo. at 104. To this question, both non-party Tripp and the government defendants objected, on the basis of discoverability under the protective order.

After the first day of Tripp's deposition, and after this question had been objected to by the government, the court held a hearing on several matters pertaining to the deposition. On December 17, 1998, the court issued an order pertaining to this very issue of White House databases and Tripp's deposition. In that order, the court held:

Further questioning of Ms. Tripp about White House security systems is . . . PROHIBITED. Further questioning about White House computer systems is

permissible, but in light of her testimony that it was Ms. Pond who was in-putting the FBI files and Ms. Tripp did not see the screen or know the system, this seems a waste of time to go further with this witness rather than Ms. Pond. This questioning does not provide good cause to extend plaintiffs' six-hour limit on direct examination.

Alexander v. FBI, Civ. No. 96-2123, Order (D.D.C. Dec. 17, 1998) (emphasis in original). Thus, to the extent that plaintiffs' question inquires about White House security systems, plaintiffs' question has already been prohibited.

The remaining issue, then, is whether Tripp must respond to plaintiffs' question to the extent it relates only to computer systems, as opposed to security systems. As seen above, the court has already held that this line of inquiry is permissible, but it has also stated that it would not grant plaintiffs an extension of deposition time to pursue these answers. See id. Moreover, the court has already sua sponte granted leave to plaintiffs to depose Pond in light of Tripp's testimony. See id. Given this leave and the court's December 17, 1998 denial of further time to explore this topic, the court finds that the discovery sought from Tripp is "obtainable from some other source that is more convenient," that plaintiffs have "had ample opportunity by discovery in the action to obtain the information sought," and "the burden or expense of the proposed discovery outweighs its likely benefits." FED. R. CIV. P. 26(b)(2). Plaintiffs had a full hour of deposition time remaining after the court issued its December 17, 1998 order, and they chose not to ask Tripp the question to which they now seek to

compel an answer. The court has already held that Tripp's failure to answer this question did not create good cause for an extension of plaintiffs' examination time; plaintiffs have provided no reason for the court to change that conclusion. Therefore, plaintiffs' request to compel an answer to item 1 will be denied.

ii. Item 2

The court will deny plaintiffs' request to compel further testimony on the identity of people who attended "Whitewater damage control" meetings in the White House Counsel's office. At the deposition, Tripp testified that certain members of the President's staff attended meetings involving the President's response to the Whitewater investigation. Because Tripp left her employment at the White House in August 1994, any knowledge that she might have on this subject would pertain to meetings before this time.

Even with regard to these meetings, however, Tripp appears to have responded to plaintiffs' questions as to the names of attendees. Plaintiffs specifically asked: "Who generally attended these meetings?" Tripp Depo. at 281. Tripp was allowed to answer this question, and she listed at least eight people. Id. at 281-83. Nonetheless, plaintiffs still ask this court to compel non-party Tripp to submit to further testimony on this point. Because

Tripp has already answered the question, however, the court will deny plaintiffs' request.³

Furthermore, the court has difficulty seeing the relevance of White House meetings that occurred in 1993-1994 to the present case. The court has already cautioned plaintiffs' counsel that "[w]e are not going into other scandals here." See Transcript of December 15, 1998 Hearing, at 30-31. For these reasons, plaintiffs' request to compel further testimony from non-party Tripp as to item 2 will be denied.

iii. Item 3

The court will deny plaintiffs' request to compel further testimony on the substance of a particular conversation between Tripp and Deputy White House Counsel Cheryl Mills. At the deposition, Tripp testified that she had a discussion with Bruce Lindsay at which time she voiced her concerns over improper conduct in the White House Counsel's office. Tripp Depo. at 803-04. Part of Tripp's concerns pertained to the handling of FBI files. See id. Tripp further testified that Mills and Lindsay appeared to be

³The court is aware that Tripp testified: "I have not spent a great deal of time on this. I will give you off the top of my head the names that I recall, bearing in mind that it won't be a complete list. Given time, I think I could give you a complete list." Tripp Depo. at 282. Because the court also finds this to be irrelevant information, the possibility of Tripp remembering more attendees does not affect the court's decision today.

very close professionally and that "based on [Tripp's] observation of [Lindsay and Mills's] relationship, it would be quite likely that they might have discussed this very issue." Id. at 861. Immediately before Tripp made this comment, plaintiffs had asked her about any conversations she may have had with Mills. On this line of questioning, plaintiffs asked Tripp whether Mills "ever said anything to [Tripp] that caused [her] concern?" Id. at 853. Tripp commented that Mills never said anything that caused Tripp any concern of a professional nature, but she may have said something that caused Tripp concern of a personal nature. After consultation with her counsel, both Tripp's attorney and government defendants' attorney objected on the basis of relevance.⁴ Tripp's attorney proffered that the communication "deals with a highly personal [matter] related to Ms. Mills that is completely irrelevant to the scope of this deposition and would tend to cause embarrassment or harm to her." Id. at 857. Despite this proffer, plaintiffs seek to compel this testimony because the communication constitutes a "secret" that may subject Mills to "coercive pressures" should she become a witness in this case.

The court will deny plaintiffs' motion to compel Tripp to testify as to Mills's conversation with Tripp. First, the court notes that the question pending is simply whether Mills ever said anything that caused Tripp concern. This question is obviously

⁴Tripp's counsel also objected on the basis of attorney-client privilege.

overbroad and the court will only consider plaintiffs' motion to seek information pertaining to government files. To this extent, however, her counsel has already proffered that this information is "completely irrelevant" to the scope of Tripp's deposition under the protective order. Based on this proffer, the court will deny plaintiffs' motion to compel this information.⁵ The court will, however, order Tripp to submit an in camera affidavit to the court containing the substance of this conversation so that the court can confirm Tripp's counsel's proffer.

iv. Item 4

The court will deny plaintiffs' request to compel further testimony on the substance of a conversation between Tripp and Deputy White House Counsel Bruce Lindsay regarding Kathleen Willey. At the deposition, the following exchange took place, which pertained to a conversation that occurred while Tripp and Lindsay were both employed at the White House:

⁵Tripp's counsel stated during the deposition that he would "submit [Tripp's] response to the Court for an in-camera review and allow the Judge to make the determination." Tripp Depo. at 857. Such an in camera submission would be consistent with earlier instances of similar questioning of a personal nature in this case. See Order of December 17, 1998 (ordering in camera proffers from Tripp and Kennedy as to confidential personnel matters involving Betsy Pond and Deborah Gorham). This submission would also give the court a basis to confirm Tripp's counsel's conclusory proffer of irrelevance and Tripp's conclusory statement in her affidavit. See Tripp Aff. at 1-2. Therefore, the court will order Tripp to file with the court an in camera affidavit stating the substance of the conversation with Mills.

[Tripp:] I have failed to mention that in the conversation with Bruce Lindsay, in the one that I testified was lengthy, I had mentioned Kathleen Willey, and I pretty much at that time thought that that would be relayed to the President and I wanted it to be.

[Plaintiffs' counsel:] What about Kathleen Willey?

[Tripp's counsel:] Objection, again, we are going beyond the scope and relevance.

[Government's counsel:] Objection.

. . .

[Plaintiffs' counsel:] Well the reason I'm getting into it . . . is because it shows a course of communication and conduct and it shows the intimacy of the relationship between Lindsay and the President.

Tripp Depo. at 884-84. In their motion to compel, plaintiffs supplement their reasoning on the discoverability of what Tripp told Lindsay about Willey by pointing to a sentence from the court's memorandum opinion regarding Terry Good where the court stated that "if the [Willey] file [kept by the White House's Office of Records Management] was maintained in a way that implicated the Privacy Act, then its misuse could prove to be circumstantial evidence of file misuse aimed at the plaintiffs." See Alexander v. FBI, Civ. No. 96-2123, Memorandum and Order at 3 (D.D.C. Dec. 7, 1998). According to plaintiffs, the conversation between Tripp and Lindsay "likely" contains important information about the release of letters that Willey later wrote to President Clinton. Therefore, argue plaintiffs, they are entitled to know the substance of a conversation between Tripp and Lindsay. Tripp, government defendants, and the Office of the Independent Counsel

all object to this inquiry on the basis of relevance and the court's protective order. The court will sustain these objections.

As stated above, the court issued a protective order precluding plaintiffs from eliciting testimony "on all matters not reasonably calculated to lead to the discovery of admissible evidence on the issues of the obtaining or misuse of Tripp's government files, the obtaining and misuse of the plaintiffs' government files, or matter subsumed by these subject areas." See Alexander v. FBI, Civ. No. 96-2123, Memorandum and Order at 10, ¶ 4(a) (D.D.C. Dec. 7, 1998). No reasonable reading of this language can encompass plaintiffs' broad question about the subject matter of a conversation that Tripp had with Lindsay, before she left the White House in 1994, regarding Willey. There is no reason to believe that this conversation had anything to do with the release of any information that fell under the requirements of the Privacy Act, aside from plaintiffs' baseless speculation. The court cannot accept plaintiffs's argument that this inquiry was intended to reveal information about how Willey's letters were kept since plaintiffs simply never bothered to ask narrower questions. This is not surprising, however, given that they would fall outside of the protective order issued by the court. For these reasons, the court will deny plaintiffs' motion to compel further testimony on item 4.

v. Item 5

The court will deny plaintiffs' request to compel further testimony on how Tripp came to see letters that Kathleen Willey later sent to President Clinton.⁶ At the end of her deposition, Tripp testified that during the time she worked in the White House, before September 1994, she saw letters that Willey had written to President Clinton. Plaintiffs' counsel asked how she came upon the letters, to which Tripp, government defendants, and the Office of the Independent Counsel objected, based on relevance and the court's protective order. The court will sustain these objections.

First, the question asked by plaintiff does not pertain to the subject matters of the release of plaintiffs' FBI files or of Tripp's background security information. Thus, it falls outside of the protective order issued in this case, and plaintiffs' question therefore seeks undiscoverable matter.

Second, although plaintiffs in this instance make a better attempt to explain the relevance of the Willey issue to this case, this theory was not put into practice at the deposition. Specifically, plaintiffs argue that if Willey's letters were kept in a certain system of records and otherwise qualified for Privacy Act protection, then their misuse may be relevant to this case. Although this reasoning approaches a tenable position, the court still rejects this argument in this instance because plaintiffs' counsel simply never asked any questions that would bear upon the

⁶Plaintiffs do not dispute that Tripp saw these letters before Willey sent them to the President.

logic that they now seek to compel answers under. Put another way, plaintiffs have developed the habit of asking overbroad questions which may (but probably will not) fortuitously lead to relevant information; however, these types of questions cannot be said to be "reasonably calculated" to lead to the discovery of admissible evidence. See FED. R. CIV. P. 26(b). Typically plaintiffs will then file a motion to compel the overbroad category of information inquired about in the deposition but argue that their deposition questions were merely "foundational." In conjunction with this argument, plaintiffs usually set forward a more narrowly tailored position on why the question should be compelled. As plaintiffs must have learned by now, and as they should have already known, the court is not disposed to compel further oral deposition testimony, especially by a non-party, based on overbroad questions that have little apparent connection to the reasoning they set forth in their motions to compel.

In short, the question posed by plaintiffs' counsel falls outside of the protective order entered as to Tripp's deposition. Even if no such protective order existed, however, plaintiffs' question bears no reasonable relationship to the reasoning set forth in plaintiffs' motion to compel. Tripp's knowledge of these letters came before they were even sent to the President, so she could have no information as to their status as Privacy Act records. For these reasons, the court will deny plaintiffs' motion to compel further testimony on item 5.

vi. Item 6

The court will deny plaintiffs' request to compel the production of relevant portions of audio tapes of telephone conversations between Tripp and Monica Lewinsky. Only non-party Tripp objects to the production of this material. Tripp's objections are that the production of these tapes: (1) would be unduly burdensome; (2) would be beyond the scope of permissible discovery as described in the protective order; and (3) would violate Tripp's asserted right of self-incrimination under the Fifth Amendment because the information, if it exists, "relates to matters involved in the Maryland Gand Jury proceedings for her alleged violations of the Maryland Wiretap statute." Linda R. Tripp's Response to Plaintiffs' Request for Documents Pursuant to Subpoena at 5. Moreover, Tripp states in her opposition that "she does not possess or control those items sought" by plaintiffs. Plaintiffs' Opposition at 4.⁷ Plaintiffs respond that, at least by affidavit, Tripp has denied only possession, but not custody or control, of the audiotapes. In their view, FED. R. CIV. P. 45 requires production even if Tripp is in custody or control but not possession. Moreover, plaintiffs argue that the Fifth Amendment does not apply to "the contents of preexisting, voluntarily

⁷Tripp has filed an affidavit with her opposition which states that "I am not in possession of any alleged audiotapes containing the voice of Monica Lewinsky." Tripp Aff. at 2.

prepared documents," citing United States v. Hubbell, No. 98-3080, slip op. at 46 (D.C. Cir. Jan. 26, 1999).

The court will deny plaintiffs' request to compel this information. Tripp states in her brief that she has no possession or control over the tapes plaintiffs seek. "[A] witness may not be compelled to produce material that the witness neither controls nor possesses." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2456 (1995); see also FED. R. CIV. P. 45. Although Tripp's affidavit states only that she does not have possession of the tapes, if any exist, the court finds that the representations in her brief adequately support her contention in response to plaintiffs' Rule 45 subpoena. Moreover, plaintiffs have not sought to compel Tripp to answer questions asked at her deposition regarding the relevant portions of these tapes, to which Tripp invoked the privilege against self-incrimination under the Fifth Amendment. Because plaintiffs have not so moved, the court has no need to address Tripp's privilege claim. The court will not (and cannot) order Tripp to produce tapes that are not within her possession or control. See FED. R. CIV. P. 45. Thus, plaintiffs' request to produce this material must be denied.

vii. Item 7

The court will deny plaintiffs' request to compel production of portions of notes of a telephone call between Lindsay and Tripp. Similarly to item 5, plaintiffs seek to compel Tripp to produce

these notes because "the violation of Ms. Willey's privacy rights by the Clinton White House through an unauthorized release of her letters is within the scope of discovery for this case." Plaintiffs' Motion at 17. Non-party Tripp objected to this item in plaintiffs' subpoena duces tecum because it went beyond the protective order and sought irrelevant matter. Additionally, Tripp submitted these notes for an in camera review.

Like plaintiffs' request for further testimony regarding a conversation between Tripp and Lindsay about Willey, plaintiffs' request for notes Tripp may have kept during a conversation she had with Lindsay about Willey (although not necessarily the same conversation as before) fails for three reasons. First, this request seeks material beyond what is allowed under the protective order because it does not inquire about the misuse of plaintiffs' files, the release of Tripp's background security file, or any matter subsumed therein. Instead, it inquires about a conversation Tripp had about a person who allegedly had her own letters to the President released. Second, disregarding the protective order for the moment, plaintiffs' request seeks material not reasonably calculated to lead to the discovery of admissible evidence. As mentioned above, the only plausible theory of relevance presented so far as to the Willey letters is that it may be evidence of an instance of a Privacy Act violation and government file misuse by defendants and therefore circumstantially relevant to plaintiffs' case. The conversation from which Tripp took notes, however,

occurred before Willey even sent her letters to the President. Thus, Tripp could have no relevant knowledge about how these letters were kept and whether this record-keeping implicated the Privacy Act. Third, the Office of the Independent Counsel states that this information has already been released by Congress. Plaintiffs did not contest this assertion in their reply brief. Thus, the court assumes that plaintiffs do not contest this argument. For these reasons, plaintiffs' motion to compel item 7 will be denied.

viii. Item 8

The court will deny plaintiffs' request to compel production of relevant portions of a book proposal prepared on Tripp's behalf. Tripp testified at her deposition that she had a "book proposal" prepared by a syndicated columnist based upon information given by Tripp. Tripp produced a ten-page redacted version of this book proposal to plaintiffs, pursuant to their subpoena duces tecum. The thirty-seven pages of redacted information has been produced in camera to the court, and plaintiffs now seek to compel any relevant information from this submission.

Upon review of this submission, the court finds that the material withheld by Tripp need not be produced for two reasons. First, the material contained in the book proposal falls outside of the scope of discovery under the protective order because it does not deal with the release of plaintiffs' FBI files, the release of

Tripp's background security information, or matter subsumed by either of these topics. Second, aside from the protective order, the information contained in the book proposal appears to have no bearing upon this case and is therefore irrelevant. Therefore, the court will deny plaintiffs' motion to compel item 8.

III. Conclusion

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

1. Plaintiffs' Motion [631] to Compel Further Deposition Testimony and Documents from Linda Tripp is DENIED.

2. Non-party Tripp shall file with the court an in camera affidavit stating the substance of the pertinent conversation with Cheryl Mills, as discussed in this memorandum opinion.

3. Plaintiffs' Motion [667] to Extend Time by One Day to Reply on Plaintiffs' Motion to Compel is GRANTED, nunc pro tunc.

SO ORDERED.

Date:

Royce C. Lamberth
United States District Court