

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-80736-CIV-MARRA/JOHNSON

JANE DOE NO. 1 AND JANE DOE NO. 2,
Petitioners,

vs.
UNITED STATES OF AMERICA,
Respondent.

RESPONDENT'S OPPOSITION TO VICTIMS' MOTION TO
UNSEAL NON-PROSECUTION AGREEMENT

Respondent, by and through its undersigned counsel, files its Opposition to Victims' Motion to Unseal Non-Prosecution Agreement, and states:

I. THE MOTION TO UNSEAL SHOULD BE DENIED BECAUSE THE NON-PROSECUTION AGREEMENT HAS NEVER BEEN FILED UNDER SEAL IN THIS COURT

Petitioners have filed their motion to unseal non-prosecution agreement, claiming that no good cause exists for sealing it. As an initial matter, the motion should be denied because the non-prosecution agreement entered into between the United States Attorney's Office and Jeffrey Epstein was never filed in the instant case by the United States, either under seal or otherwise. On August 14, 2008, this Court held a telephonic hearing to discuss petitioners' request for a copy of the non-prosecution agreement. The United States advised the Court that the Agreement had a confidentiality provision, which the United States was obligated to honor. The United States requested that, if the Agreement was to be produced to petitioners, that it should be done pursuant to a protective order, to ensure that further dissemination of the Agreement would not occur. At that time, petitioners had no objection to such a procedure.

On August 21, 2008, this Court entered its Order to Compel Production and Protective Order (D.E. 26).

Subpart (b) of the Order provides that, "Petitioners and their attorneys shall not disclose the Agreement or its terms to any third party absent further court order, following notice to and an opportunity for Epstein's counsel to be heard." D.E. 26 at 1. Presumably, petitioner's motion to unseal is an effort to modify the terms of the Protective Order, to enable them to disclose the Agreement to third parties.

Since the Agreement has not been filed under seal with this Court, the legal authority cited by petitioners regarding sealing of documents, United States v. Ochoa-Vasque, 428 F.3d 1015 (11th Cir. 2005), is completely inapposite. The parties who negotiated the Agreement, the United States Attorney's Office and Jeffrey Epstein, determined that the Agreement should remain confidential. They were free to do so, and violated no law in making such an agreement. Since the Agreement has become relevant to the instant lawsuit, petitioners have been given access to it, upon the condition that it not be disclosed further. Petitioners have no legal right to disclose the Agreement to third parties, or standing to challenge the confidentiality provision.

In order to have standing, petitioners must show: (1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla., 351 F.3d 1112, 1116 (11th Cir. 2003). Petitioners have already obtained access to the agreement, so they cannot claim a denial of access as an injury in fact. Their motion to unseal refers to their stated desire to confer with other victims of Epstein and their attorneys “to determine whether they were likewise provided with inaccurate information about the nature of the plea agreement.” D.E. 26 at 5.

This argument is rather odd since the Protective Order contemplates that other individuals who have been identified as victims by the U.S. Attorney’s Office would have access to the Agreement, so long as they agreed to abide by the terms of the Protective Order. See D.E. 26 at 1-2, subpart (d). If these other victims have requested access to the Agreement, and agreed to the terms of the Protective Order, then petitioners should have no difficulty in conferring with them about information received concerning the Agreement.

Petitioners’ claim that they wish to discuss the “possible legal responses” to the Government, including the National Alliance of Victims’ Rights Attorneys, also provides no basis for vacatur of the Protective Order.

Petitioners contend that the “sealing order would apparently block these forms of consultation ...” D.E. 28 at 5. First, there is no sealing order. Second, the Protective Order does not prevent petitioners from consulting with anyone; it only prevents them from disclosing the Agreement. Petitioners fail to mention why it is necessary for the National Alliance of Victims’ Rights Attorneys to have the Agreement in hand, in order to meaningfully consult with them.

II. THE GOVERNMENT ACCURATELY DESCRIBED THE PROVISIONS OF THE AGREEMENT, AT THE TIME THE RESPONSES WERE FILED WITH THE COURT

Petitioners castigate the Government for inaccurately describing the non-prosecution agreement. D.E. 28 at 2-5. They contend a particular provision cited by the Government does not appear in the copy of the Agreement produced to them.

During the telephonic hearing on August 14, 2008, Government counsel advised the Court and petitioners’ counsel that there was an on-going dispute between the Government and Epstein’s attorneys over what constituted the Agreement. Government counsel advised that the Agreement had three parts. The first part was executed in September 2007, the second part, an addendum, was executed in October 2007; and the third part was a letter from the United States Attorney to Epstein’s attorneys, suggesting a further modification of the Agreement. The Government advised the Court that it believed all three parts comprised the Agreement,

while it now appears Epstein's attorney's were contending the Agreement was comprised only of parts one and two.

At the commencement of the instant litigation, in July 2008, the Government believed the Agreement was comprised of all three parts mentioned above. This belief was expressed in the Government's July 9, 2008 response to the Emergency Petition for Enforcement of Victims Rights Act, as well as the Declaration of A. Marie Villafaña, Assistant U.S. Attorney, which accompanied the Government's response. This belief continued until August 2008, when the Government advised Epstein's attorneys that the victims had demanded disclosure of the Agreement to them, and discussions ensued about what constituted the Agreement. Epstein's attorneys then told the Government that Epstein believed the Agreement was only the first and second parts.

These were the parts disclosed to petitioners pursuant to the Protective Order.