

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 9:08-cv-80736-KAM

JANE DOE 1 AND JANE DOE 2,

Petitioners,

v.

UNITED STATES,

Respondent.

_____ /

**JANE DOE 1 AND JANE DOE 2'S REPLY IN SUPPORT OF MOTION FOR FINDING
OF WAIVER OF WORK PRODUCT AND SIMILAR PROTECTIONS BY
GOVERNMENT AND FOR PRODUCTION OF DOCUMENTS**

Jane Doe 1 and Jane Doe 2 (also referred to as “the victims”), by and through undersigned counsel, now file this reply in support of their motion for a finding that the Government has waived work production protections (DE 414).

I. The Government Has Waived Work Production Protection By Presenting its Internal Deliberations to the Court as a Basis for Ruling on the Pending Cross-Motions for Summary Judgment.

Both the victims and the Government agree that the relevant legal standard governing the question of waiver of work-production protections comes from *Stern v. O'Quinn*, 253 F.R.D. 663, 676–77 (S.D. Fla. 2008), which held that “a party waives work-product privilege protection when (1) assertion of the protection results from some affirmative act by the party invoking the protection; (2) through this affirmative act, the asserting party puts the protected information at issue by making it relevant to the case; and (3) application of the protection would deny the opposing party access to information vital to its defense.” While conceding this legal standard, the Government appears to rely on either prong (2) or prong (3) for the position that no waiver has taken place – even though the Government has filed affidavits disclosing its internal deliberative process. If we understand the Government’s argument correctly, it believes that because it is defending its actions as a proper exercise of prosecutorial discretion under 18 U.S.C. § 3771(d)(6), no further inquiry is allowed into the matters which it seeks to shroud in work-product protection. DE 421 at 2-6. The Government argues that its internal deliberations led to a decision not to notify victims because the line prosecutor wanted to avoid the possibility that “Epstein’s counsel would impeach the victims and my credibility by asserting that I told victims they could receive money for implicating Epstein.” DE 403-10, ¶ 21. The Government

asserts that the Court is not empowered to review the propriety of what it believes was a discretionary decision to avoid possible impeachment of the victims.

The initial and obvious problem with the Government's argument is that it has not limited its use of internal deliberations to questions surrounding possible impeachment. As the victims pointed out in their initial motion, the Government has made far more extensive use of its claimed benign motivations. Consider these examples:

- The claim that the victim notification letters were not deceptive.

As the Court knows, a central issue in the case is whether the Government sent deceptive letters to victims requesting their "continued patience while we conduct a thorough investigation." See DE 361 at 31-32, ¶¶ 93-95. The Government is now arguing that the Court should grant summary judgment in its favor because these letters "were not deceptions" but rather "*reflected the investigative team's view* that there might well be a federal prosecution and that at least some of the victims would become prosecution witnesses at trial." DE 408 at 10 (emphasis added). The issue what the "investigative team's view" was when the Government mailed the letters is thus placed at issue by the Government in this case and the victims are entitled to discovery on what the investigative team's views really were and whether those views were reasonable.

- Whether the Government Treated the Victims Unfairly.

The victims argue that the Government violated their right "to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). In its response to this claim, the Government now maintains that "even if the resolution of the Epstein investigation under the NPA's terms may not have been optimal and may be subject to criticism, the discretionary actions of the U.S. Attorney's Office in resolving the federal investigation as it did through the NPA simply do not constitute unfair treatment of the victims and did not fail to respect the dignity and privacy of the victims." DE 408 at 19. The issue of whether the Government treated the victims "unfairly" in light of all of the surrounding circumstances is thus squarely at issue and the Government's motivations are central to that determination.

- Whether the Government's Decisions Were Due to Victims' Concerns.

The Government maintains that its actions were informed by the fact that "during the course of its investigation, the Government learned that many of Epstein's victims were troubled by the existence of the Government's criminal investigation and a majority expressed concern that their identities and their involvement with Epstein might be made

public.” DE 408 at 16-17. Considering that these are common concerns for victims in these types of case, this defense seems highly suspicious as an explanation for failing to honor the rights of those victims. In any event, asserting that it was these concerns that drove its actions, the Government has obviously placed at issue whether, in fact, it was other concerns more unique to this case that were at play.

- Whether the Government Used Its “Best Efforts.”

The Government has argued it met its “best efforts” obligation under the CVRA because, “[g]iven the resolution that the U.S. Attorney’s Office was seeking to achieve, balancing the competing interests and concerns in this matter in an exercise of prosecutorial discretion . . . and given the fact that the Government was trying to minimize damaging impeachment evidence in the event that the negotiated resolution embodied in the NPA failed . . . it cannot be disputed that the U.S. Attorney’s Office used its best efforts [to protect victims’ rights].” DE 408 at 19. Of course, this assertion is disputed and the Government’s “best efforts” defense requires exploration of all these issues.

- Whether a Defense of Equitable and Judicial Estoppel is Appropriate.

The Government has argued that it is entitled to summary judgment based on both the doctrines of equitable estoppel and judicial estoppel. DE 408 at 23-29. These broad doctrines require a full assessment of the relevant facts and circumstances, including whether the Government has “unclean hands” that would bar it from proceeding in equity. DE 416 at 54-59. The internal motivations of the Government are also highly relevant to the defenses that the Government is raising.

These are just some of the illustrations of how the Government is now making use of its motivations – to both attempt to defeat the victims’ summary judgment motion and to obtain summary judgment in its favor. And since none of these arguments revolve around the “prosecutorial discretion” of the prosecutors, 18 U.S.C. § 3771(d)(6) is not even implicated – much less implicated to such a degree as to entirely bar discovery on this issues. The Government has thus raised issues apart from any prosecutorial discretion by submitting affidavits about its internal deliberations. Accordingly, it has implicitly waived work product protection over those deliberations and should be ordered to produce the discovery materials that it previously withheld based on that protection.

II. The CVRA Does Not Allow the Government to Bar Any Discovery into the Basis for its Motivations Merely by Invoking the Concept of “Prosecutorial Discretion.”

Other, even more fundamental problems exist in the Government’s position. The Government seems to believe that mere incantation of the phrase “prosecutorial discretion” permits it to withhold relevant documents in this case, including the exact documents that would be necessary to test the whether the defense has any merit. The victims, however, are free to contest the factual premise underlying that claim of prosecutorial discretion. And, in any event, the Government’s exercise of its discretion must be consistent with the CVRA’s statutory commands. Because such issues are at the center of this case, the Government’s affirmative efforts to inject its deliberations into this case demand a finding of implicit waiver of work production protections over those deliberations.

A. The Victims Are Entitled to Contest the Factual Premise of the Government’s Argument that it Exercised Discretion for the Stated Reasons.

In its response, the Government asserts that the reason for (as it puts it) “not sharing with the victims the U.S. Attorney’s Office’s efforts to obtain monetary compensation” for the victims was that, had the Office done that and negotiations been unsuccessful, “Epstein’s counsel would impeach the victims and [the line prosecutor’s] credibility by asserting that” the victims “could receive money for implicating Epstein.” DE 421 at 2. Even taken at face value, the Government’s argument only provides a possible excuse for it concealing “efforts to obtain monetary compensation” – i.e., the NPA’s the financial provisions. It provides no basis for concealing the many other parts of the NPA, such as the provisions immunizing Epstein (and his co-conspirators) from federal prosecution. Moreover, again taking the Government’s position at face value, it provides no justification whatsoever from concealing the NPA from the victims at

the time Epstein was walking into State court to enter his guilty pleas to trigger the NPA – or even afterwards, as in fact occurred.

But the overarching problem with the Government’s position is that the victims dispute the Government’s purported benevolent motivations. As the Court knows, the victims have from the very outset of this case argued that “[t]he only reason that the Office concealed the existence of the non-prosecution agreement from the victims was . . . to avoid a firestorm of public controversy that would have erupted if the sweetheart plea deal with a politically-connected billionaire had been revealed.” DE 48 at 3. The victims’ allegations have substantial support – as the victims’ pending summary judgment demonstrates.

To be sure, as expected, the Government has not agreed with this unflattering assessment of its motivations. But unexpectedly, the Government believes that it can withhold important discovery about its reasons for concealing the NPA while simultaneously seeking summary judgment based on an (untested) declaration from the line prosecutor about her purported benign motivations. This is a clear example of a party “wield[ing] the work-product protection as a sword to cut out the heart of an opposing party’s case while simultaneously brandishing it as a shield from disclosure of any Achilles heels.” *Stern v. O’Quinn*, 253 F.R.D. 663, 677 (S.D. Fla. 2008). Or, as the Eleventh Circuit has articulated the principle, a litigant “can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product [protected] materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.” *United States v. Nobles*, 422 U.S. 225, 239–40 (1975) (footnote omitted).

Through detailed affidavits from the line prosecutor and others, the Government itself has thrust its internal deliberations into the middle of this case. Indeed, the Government claims that its purported compassionate reasons are so free from doubt that the Court should grant summary judgment and deprive the victims (yet again) of any day in court. Given the Government's thrust, fairness demands that the victims are entitled to any contradictory information that may exist in the Government's files. The Government has affirmatively and implicitly waived work product protection over these important documents and the victims are entitled to review them to see if they contradict the Government's claims.¹

B. The Government's Exercise of Prosecutorial Discretion Must Be Consistent with the CVRA's Statutory Commands.

The Government also misreads the scope of the "prosecutorial discretion" provision in the CVRA. That provision provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his discretion." 18 U.S.C. § 3771(d)(6). The Government appears to interpret this provision as barring any inquiry into any decision that it may have at any time in this case. But such a reading would eviscerate the CVRA, since anything the Government did could then be ascribed to unreviewable "prosecutorial discretion." To offer a simple illustration that refutes the Government's broad claim, the prosecutors clearly could not decide – as a matter of "prosecutorial discretion" – not to provide notices to crime victims of court hearings. The CVRA itself commands the contrary, promising victims the right to "notice of any public court proceeding," 18 U.S.C. § 3771(a)(2),

¹ In its response to the victims' motion, the Government has not raised any other argument suggesting that a finding of waiver would be inappropriate. For example, the Government has not challenged the importance of the documents to the victims' arguments with regard to the pending summary judgment motions. Nor does the Government raise any claim that producing the work product information would unduly burden it and, indeed, the Government has apparently already collected most of the relevant documents.

and then directing that federal judges “shall ensure that the crime victim is afforded the rights described in [the CVRA].” 18 U.S.C. § 3771(b).

The prosecutorial discretion provision protects not a Government right to treat crime victims as it wishes, but rather well-settled discretion regarding the filing of charges and the strategy in pursuing a prosecution. The provision confirms that crime victims do not have “the right to dictate government strategy or demand who to prosecute.” *United States v. Thetford*, 935 F.Supp.2d 1289 (N.D. Ala. 2013) (citing *In re W.R. Huff Asset Mgt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005)). But as the Court knows, from the very outset of this case, the victims have disclaimed any intention of commandeering the prosecutors’ right to decide whether or not to prosecute Epstein and his co-conspirators. Indeed, as the Court held in rejecting the Government’s similar plea to dismiss this case, “The fallacy with this strand of the government’s ... argument derives from its misidentification of the alleged injury sought to be remedied in the case: The victims’ CVRA injury is *not* the government’s failure to prosecute Epstein federally – an end within the sole control of the government. Rather, it is the government’s failure to confer with the victims before disposing of the contemplated federal charges.” DE 189 at 10 (emphasis in original). Inquiry into the Government’s failure to protect crime victims’ rights does not tread on protected prosecutorial discretion.

III. THE GOVERNMENT HAS WAIVED THE ATTORNEY-CLIENT PRIVILEGE.

So far as the victims can determine, the Government has withheld most of the documents at issue in this motion based on work-product protection. But, for the sake of completeness, to the extent the Government is also asserting some sort of attorney-client privilege over the documents (DE 421 at 6-7), the same arguments made above demonstrate that it has waived that

privilege. The Government does not dispute that the same implicit waiver can be made of the attorney client privilege. *See GAB Business Servs., Inc. v. Syndicate* 627, 809 F.2d 755, 762 (11th Cir.1987) (discussing the implied waiver concept in the context of the attorney-client privilege). Indeed, the Government concedes that “a party who injects into the case an issue that in fairness requires an examination of communications otherwise protected by the attorney-client privilege loses that privilege.” DE 421 at 7 (*citing Cox v. Administrator, U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994)). The Government has clearly injected its deliberations into the case, and fairness requires that the Court find the Government has waived attorney-client privilege.

IV. THE COURT SHOULD ORDER THE GOVERNMENT TO PRODUCE DOCUMENTS PREVIOUSLY WITHHELD.

For the reasons explained above, the Government has waived work-product protection and attorney-client privilege over issues related to its internal deliberations – issues it has injected into the center of this case. But the Government makes one last argument: that when work-product protection is waived, waiver is generally “limited to the information actually disclosed, not subject matter waiver.” DE 421 (*citing Stern v. O’Quinn*, 253 F.R.D. at 683). But the Government is conflating two different types of waiver: implicit waiver (i.e., by injecting an issue into a case) and “disclosure waiver” (i.e., by disclosing a document). *See id.* at 681 (discussing “disclosure waiver” in the connect of disclosure of “protected materials”). Because the victims’ argument is based on the subjects and issues that the Government is raising – rather than the fact that it has disclosed a particular document – the limitations in the disclosure waiver doctrine are inapplicable.

CONCLUSION

The Court should direct the Government to produce to the victims all documents that it previously withheld based on work-product and similar protections, including all documents concerning its internal deliberations regarding the non-prosecution agreement it reached with Epstein and related discussions about victim notifications.

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Respectfully Submitted,

/s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on September 1, 2017, on the following
using the Court's CM/ECF system:

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