

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK BEAM and RENEE BEAM,

Plaintiffs,

v.

DONALD F. McGAHN II, FEDERAL
ELECTION COMMISSION
CHAIRMAN,

Defendant.

Civil No. 07-1227

Judge Pallmeyer
Mag. Judge Cole

**DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION
TO PLAINTIFFS' MOTION TO COMPEL RESPONSES TO INTERROGATORIES,
FOR PRODUCTION OF DOCUMENTS, AND FOR DEPOSITIONS**

Pursuant to this Court's Minute Order dated January 7, 2009, the Federal Election Commission (Commission or FEC) hereby opposes Plaintiffs' Motion to Compel Defendants' Responses to Interrogatories, for Production of Documents, and for Depositions, filed on January 2, 2009 (Motion to Compel). The only remaining claim in plaintiffs' lawsuit is the allegation that the Commission violated the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 *et seq.*, by improperly obtaining plaintiffs' private financial information from the Department of Justice (DOJ). Both the Commission and DOJ have now provided plaintiffs with sworn declarations demonstrating that the Commission never received plaintiffs' private financial information from DOJ, and plaintiffs have offered no basis to question those declarations. Pursuant to the Court's January 7 order, the Commission today is providing to plaintiffs further responses to its interrogatories, as well as a privilege log identifying documents withheld in

response to plaintiffs' broad document requests, which seek materials well beyond any potential relevance to the claim remaining in this case. The Court should deny plaintiffs further relief related to their motion to compel because the burden of their discovery requests far outweighs any potential relevance, and because the additional information sought is protected by statutory confidentiality as well as important privileges and immunities. In particular, the Commission demonstrates below that there is no basis to compel the extraordinary depositions of several agency attorneys, including counsel of record.

BACKGROUND

On March 2, 2007, the Beams filed this action alleging that DOJ and the Commission violated the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 (FECA or Act) by permitting DOJ to proceed with its criminal investigation of plaintiffs and other persons affiliated with the Michigan law firm of Fieger, Fieger, Kinney, Johnson & Giroux for alleged violations of the Act in connection with contributions to the presidential campaign of John Edwards in 2004. The complaint alleged that DOJ lacked the power to pursue criminal prosecutions for violations of the FECA absent a prior Commission referral of the matter. Plaintiffs claimed that the Commission's failure to conduct an investigation prior to any DOJ action was the result of collusion with DOJ to harm the Beams because they had supported the Edwards campaign.¹

On June 22, 2007, the Court dismissed the Beams' complaint without prejudice. (Docket #46.) The Beams responded by filing their First Amended Complaint on June 29, 2007. (Docket

¹ Associates of the Fieger law firm have made this referral claim in three other actions. All of these actions have been dismissed. Two of these dismissals have been upheld in the courts of appeals, while the third appeal is still pending. See *Fieger v. United States Attorney General*, 542 F.3d 1111 (6th Cir. 2008); *Bialek v. Mukasey*, 529 F.3d 1267 (10th Cir. 2008); *Marcus v. Mukasey*, Civ. No. 07-398 (D. Az. March 10, 2008), *appeal filed*, No. 08-15643 (9th Cir.).

#47.) This new complaint included the referral claim that had been previously dismissed, but it also added a constitutional retaliation claim and a claim that the FEC and DOJ had violated the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 *et seq.*, by improperly obtaining the Beams' private financial information.

On March 7, 2008, the Court dismissed the Beams' First Amended Complaint, but granted leave to file a Second Amended Complaint. *Beam v. Gonzales*, 548 F. Supp. 2d 596 (N.D. Ill. 2008) (Docket #90). The Court found that plaintiffs had at that time failed to show Article III standing with respect to their RFPA claim.

The Beams filed their Second Amended Complaint on March 24, 2008. (Docket #91.) The new complaint abandoned the referral claim, and instead relied upon constitutional retaliation, selective prosecution, and RFPA claims. Plaintiffs' selective prosecution count alleged that then-Commissioner Michael Toner had improperly suggested in September 2006 that the Beams had violated 2 U.S.C. § 441f by making campaign contributions in the name of another — an apparent reference to a Commission "reason to believe" notification sent by then-Chairman Toner on behalf of the Commission. The Commission and DOJ again filed motions to dismiss.

The Court granted the renewed motions to dismiss on October 15, 2008, in all respects except one. *See Beam v. Mukasey*, 2008 WL 4614324 (N.D. Ill. Oct. 15, 2008) (Docket #108). The Court dismissed all claims against DOJ with prejudice. With respect to the FEC, the Court dismissed all of the claims except an RFPA claim that the Commission had allegedly obtained the Beams' private financial information through an improper transfer from DOJ under 12 U.S.C. § 3412, even if DOJ had properly obtained the information in the first instance. That provision requires agencies and departments that transfer financial records to another agency to

make a certification and provide notice to the customer under certain circumstances. The Court emphasized the limited nature of the remaining claim: “If Plaintiffs still lack any evidence that an RFPA violation occurred after they have had the chance to engage in discovery, summary judgment in favor of the FEC may well be appropriate.” 2008 WL 4614324, at *8.

Plaintiffs served written discovery requests on the Commission on November 4, 2008, and the Commission served its Objections and Responses on December 5. *See* Exh. 1, FEC’s Objections and Responses to Plaintiffs’ Request for Production of Documents and Interrogatories dated Dec. 5, 2008.² In its responses, the Commission notified plaintiffs that DOJ never transmitted any private financial information regarding them to the FEC. *See* Exh. 1. The Commission also explained that, pursuant to a mandatory audit under 26 U.S.C. § 9038, it had received from the Edwards 2004 campaign committee three of plaintiffs’ checks; DOJ did *not* provide these checks. Moreover, both the Commission and DOJ have now provided sworn declarations confirming that DOJ has not transferred any of plaintiffs’ financial records to the Commission. *See* Exh. 2, Declaration of Audra L. Wassom, dated Dec. 8, 2008; Exh. 3, Declaration of M. Kendall Day, dated Dec. 3, 2008. After the Commission served its written discovery responses, plaintiffs noticed the depositions of four Commission attorneys (including litigation counsel in this case) and one Commission investigator that the agency had identified as having communicated with DOJ regarding plaintiffs. *See* Exh. D to Plaintiffs’ Motion to Compel (Docket #113). Each of these deposition notices also asked the deponent to produce

² Plaintiffs’ Motion to Compel, which the Court considered at the presentment hearing on January 7, 2009, erroneously included FEC discovery responses from November 2007, but failed to include the December 2008 FEC responses that were the actual subject of plaintiffs’ Motion. The Commission attaches the correct discovery responses from 2008. *See* Exh. 1. Because plaintiffs have waived their right to confidentiality under 2 U.S.C. § 437g(a)(12) with regard to their status as respondents in an FEC investigation, the Commission files these responses and other materials on the public record.

essentially all Commission documents regarding anyone associated with the Fieger firm, all communications between the FEC and DOJ regarding the Fieger firm or plaintiffs, and all communications between the deponent or her “agents” and the White House relating to any associate of the Fieger firm.

I. THE COURT SHOULD DENY FURTHER RELIEF ON THE MOTION TO COMPEL BECAUSE THE BURDEN PRESENTED FAR OUTWEIGHS ANY POTENTIAL RELEVANCE TO THE ONLY CLAIM THAT REMAINS BEFORE THE COURT

Discovery must be limited when “the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2). *See Appraisers Coalition v. Appraisal Institute*, 1995 WL 557393, at *2 (N.D. Ill. Sept. 19, 1995) (citing Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 2036 (2d ed. 1994)). The Commission has already demonstrated in its discovery responses that it did not receive any private financial information about the Beams from DOJ. Since the additional discovery plaintiffs seek has virtually no relevance to plaintiffs’ only remaining claim under the RFPA, and since production would cause great burden to the Commission, there is no reason to compel its production here.

As the Court made clear in dismissing all other claims in October 2008, the only issue remaining in this case is whether the Commission obtained any of plaintiffs’ private financial documents from DOJ in a manner that violated the RFPA — specifically whether such a transfer occurred without any required certification and notice by the transferring agency. *See* 2008 WL 4614324, at *8. Sworn declarations provided to plaintiffs by the Commission and DOJ establish that no transfer of financial information about the Beams took place, so no RFPA violation could have occurred. Yet plaintiffs’ discovery seeks to explore a wide range of contacts the Commission may have had with DOJ regarding anyone associated with the Fieger firm, all information related to the Commission’s decision to find “reason to believe” as to plaintiffs, and

even communications between Commission personnel and the White House. Plaintiffs' discovery does not focus on the RFPA issue, but instead on information related to plaintiffs' prior claims as to the nature and origins of DOJ's alleged investigation into potential violations of the FECA by persons associated with the Fieger firm. However, as explained above, those claims were dismissed by the Court in orders dated June 2007, March 2008, and October 2008. Accordingly, any matter that does not relate to the remaining RFPA issue is not reasonably calculated to lead to admissible evidence under Fed. R. Civ. P. 26(b).

Plaintiffs cannot meet the applicable discovery standard, which focuses on relevance to *claims* in an action, not the general *subject matter*. Under Fed. R. Civ. P. 26, a party may "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ..." Fed. R. Civ. P. 26(b)(1). Plaintiffs argue that the proper standard to use in evaluating their motion is whether the material they seek "is relevant to the subject matter involved in the pending action" Plaintiffs' Mem. at 3. However, that language from the former Fed. R. Civ. P. 26(b)(1) was superseded by the 2000 amendments to the federal rules, which established the narrower standard of whether the information sought is "relevant to any party's claim or defense ..." Fed. R. Civ. P. 26(b)(1) (2008). "The revised rule simply provides one additional justification for the Court to put the brakes on discovery that strays from the claims or defenses being asserted." *Sanyo Laser Products, Inc., v. Arista Records, Inc.*, 214 F.R.D. 496, 500 (S.D. Ind. 2003). Plaintiffs' wide-ranging, additional discovery requests stray far beyond the sole remaining question here: whether the Commission improperly received plaintiffs' financial records from DOJ.³

³ The current discovery rule does provide that "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1). "If there is an objection that discovery goes beyond material relevant to the parties'

At a minimum, under either standard, “[s]ome threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.” *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992). *See also Packman v. Chicago Tribune Company*, 267 F.3d 628, 647 (7th Cir. 2001) (finding no abuse of discretion in denying motion to compel when information is not relevant to plaintiff’s claims); *Griffin v. City of Milwaukee*, 74 F.3d 824 , 829 (7th Cir. 1996) (upholding denial of discovery on the basis of relevancy and executive privilege); *Haroco Inc. v. American Nat’l Bank and Trust Co.*, 38 F.3d 1429, 1439 (7th Cir. 1994) (upholding district court’s rejection of litigant’s proposed discovery as irrelevant); *Shipkovitz v. United States*, 1 Cl. Ct. 400, 401 (1983) (explaining that in considering motion to compel “initial question is that of relevance”). The Supreme Court has emphasized that in the discovery context relevance is no trivial matter:

[T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they be construed to secure the just, *speedy*, and *inexpensive* determination of every action. To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be relevant should be firmly applied, and the district courts should not neglect their power to restrict discovery where justice requires protection for a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...

Herbert v. Lando, 441 U.S. 153, 177 (1979) (internal quotation marks, brackets, and parentheses omitted). Here, plaintiffs’ discovery goes far beyond DOJ’s alleged transfer of their financial records, which we have shown did not occur. The Commission should not be required to assume

claims or defenses, the Court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action.” *Kerasotes v. Lamont*, 2006 WL 1474597, at *2 (C.D. Ill. May 25, 2006) (citing Fed. R. Civ. P. 26(b)(1) and Advisory Committee Notes to the 2000 Amendments). Plaintiffs have not even attempted to meet this heightened “good cause” standard, and they could not, in view of the burdensomeness of their requests and the clear evidence that the Commission never received any financial records about the Beams from DOJ.

the tremendous burden of responding to irrelevant discovery well beyond the only remaining issue, especially when there is no credible reason to doubt the evidence already provided.⁴

II. THE BURDEN POSED BY THE DEPOSITIONS OF COMMISSION ATTORNEYS FAR OUTWEIGHS ANY POTENTIAL RELEVANCE, AND THE DEPOSITIONS WOULD ENCROACH EXTENSIVELY ON PROTECTED INFORMATION

Plaintiffs seek to compel the depositions of Commission staff identified as having communicated with DOJ regarding plaintiffs. *See* Exh. 1. They are four Commission attorneys and one investigator who works closely with the enforcement attorneys and acts as their agent. The Beams seek to depose these persons “in order to find out the ‘who, how, and why’ plaintiffs’ financial records were disclosed and/or transferred between the DOJ and the FEC.” Motion to Compel (Docket #113) at 4–5. However, two of the attorneys, Harry J. Summers and Benjamin A. Streeter, are counsel of record in this case. They communicated with DOJ because until October 2008, DOJ was a co-defendant in this case. The remaining two attorneys, Audra L. Wassom and Mark D. Shonkwiler, as well as investigator Roger A. Hearron, have worked on the Commission’s administrative enforcement matter involving potential civil violations of the FECA by plaintiffs and others. None of these staff can explain “how” or “why” the Commission

⁴ In dismissing plaintiffs’ First Amended Complaint in March 2008, this Court discussed the factual basis for the Commission’s September 2006 “reason to believe” notification to plaintiffs in finding that plaintiffs then lacked standing:

Plaintiffs offer no basis for their assumption that the FEC could only have come upon this information by seizing the Beams’ bank records. And Plaintiffs themselves emphasize the investigation of Fieger’s or the Fieger law firm’s financial records. The court assumes that the FEC could have uncovered information in those records, or in the Edwards campaign’s public filings, that might have generated suspicion that Mr. Beam violated § 441f.

Beam v. Gonzales, 548 F. Supp. 2d 596, 604 (N.D. Ill. 2008). Plaintiffs have still not offered any basis for their assumption that the FEC received their bank records from DOJ.

received plaintiffs' bank records from DOJ, because that never happened. Requiring them to be deposed would shed no further light on plaintiffs' baseless assumptions, but would instead threaten the judicial process and infringe important privileges and protections.⁵

"The courts have not looked with favor upon attempts to depose opposing counsel. The practice is disruptive of the adversarial process and lowers the standards of the legal profession." *Harriston v. Chicago Tribune Co.*, 134 F.R.D. 232, 233 (N.D. Ill. 1990) (Norgle, J.) (internal quotes and citations omitted). "The practice of subjecting opposing counsel to depositions should be discouraged." *Newell v. State of Wisc. Teamsters Joint Council No. 39*, 2007 U.S. Dist. Lexis 72917, at *16 (E.D. Wisc. 2007) (internal citations omitted). Efforts to depose opposing counsel should rarely succeed because they offer "a unique opportunity for harassment; it disrupts the opposing attorney's preparation for trial, and could ultimately lead to disqualification of opposing counsel if the attorney is called as a trial witness." *Prevue Pet Products, Inc. v. Avian Adventures, Inc.*, 200 F.R.D. 413, 418 (N.D. Ill. 2001) (internal quotes and citation omitted) (Schenkier, Mag. J.).

Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the 'chilling effect' that

⁵ The Commission specifically limited its initial interrogatory responses to persons who had interacted with DOJ regarding plaintiffs. Today the Commission is supplementing its interrogatory responses to provide the names of other staff who communicated with DOJ about other associates of the Fieger firm. These other staff are all Commission attorneys (including additional counsel of record in this or the three similar lawsuits filed by associates of the Fieger firm), with the exception of Madelynn Lane of the FEC Reports Analysis Division's Authorized Committee Branch, which is responsible for reviewing disclosure reports filed by candidate committees like Edwards for President 2004.

such practice will have on the truthful communications from the client to the attorney is obvious.

Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). To minimize these harms to the American system of jurisprudence, the Eighth Circuit enunciated a three part balancing test that has been widely adopted in many jurisdictions, including by many judges in the Northern District of Illinois. *See Newell*, 2007 U.S. Dist. Lexis 72917, at *18 (collecting Seventh Circuit cases). Courts may order opposing counsel to be deposed where the party seeking the deposition has shown that: (1) no other means exists to obtain the information; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. *See id.*

In this case, plaintiffs cannot meet the second or third parts of the test. The information plaintiffs would seek in the depositions of Commission staff is not crucial to the preparation of their case. As we have shown, the sole issue remaining in this case is whether DOJ transferred to the FEC any of plaintiffs' personal financial information in violation of the RFPA. But the evidence now shows that there was no such transfer. There is simply no reason to explore the "who, how, and why" of a non-existent transfer or the wide range of other information plaintiffs seek. Hence, any deposition of a Commission staff member focused on the origins of such a transfer would amount to a needless fishing expedition.

In addition, such a deposition would necessarily encroach upon protected information. As we explain below, it would implicate the attorney work product doctrine, not only in the current case, but in the other three civil cases filed by Fieger firm associates and the pending FEC enforcement matter. It would also implicate 2 U.S.C. § 437g(a)(12), the confidentiality

statute protecting pending FEC administrative investigations.⁶ Deposing Commission attorneys about contacts with DOJ would likely reveal the mental impressions, thoughts and plans of the attorneys defending the FEC from the claims of associates of the Fieger firm, as well as the thoughts and impressions of attorneys involved in FEC enforcement proceedings. Moreover, allowing plaintiffs to pursue the information they seek would implicate the law enforcement investigative privilege. *See infra* pp. 12-13.

The document requests accompanying plaintiffs' deposition notices confirm that plaintiffs impermissibly seek discovery of information subject to statutory confidentiality. For example, plaintiffs seek all Commission documents regarding anyone associated with the Fieger firm. *See* Exh. 1. Moreover, this expansive request clearly goes beyond matters relevant to the RFPA claim remaining in this case.⁷

⁶ As we have noted, 2 U.S.C. § 437g(a)(12) prohibits anyone from revealing the existence of a Commission administrative investigation without the consent of the person with respect to whom the investigation is made. Plaintiffs' attorney has provided the Commission with such a waiver with regard to the Beams, but not with respect to anyone else. In any event, the enforcement procedures in 2 U.S.C. § 437g(a) are designed to maintain confidentiality until an administrative investigation has been completed, so Commission attorneys should not be subjected to questioning about ongoing investigations. *See generally* 2 U.S.C. §§ 437g(a)(4)(B), 437g(a)(12); *In re Sealed Case*, 237 F.3d 657 (D.C. Cir. 2001).

⁷ Under Rule 26(b)(5), "if a party's pending objections apply to allegedly privileged documents, the party need not log the document until the court rules on its objections." *United States v. Philip Morris Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (internal quotation marks omitted); *see also* 8 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 2016.1 (2008). Plaintiffs' claim that the Commission has waived its privilege claims by not logging particular documents is unsupported by authority. The cases on which plaintiffs rely, *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992), and *Allen v. Chicago Transit Authority*, 198 F.R.D. 495, 498 n.1 (N.D. Ill. 2001), only stand for the proposition that a log is necessary if and when a court reaches the privilege claims and must evaluate them. Indeed, in each of those cases no log was produced in the first instance. The courts ordered a log to be produced only when needed to evaluate the privilege claims, and the courts found no waiver had occurred. Because the Commission has now produced a log of documents potentially responsive to plaintiffs' document requests, such privilege claims can be evaluated if this Court determines that the discovery plaintiffs seek is relevant to the remaining RFPA claim.

Plaintiffs are not entitled to materials relating to ongoing administrative matters. The confidentiality provision of the Act, 2 U.S.C. § 437g(a)(12)(A), provides that “[a]ny notification or investigation under [section 437g] shall not be made public ... without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.” As the D.C. Circuit has explained, section 437g(a)(12)(A) is rooted in a concern that is analogous to the “strong confidentiality interest” served by Federal Rule of Criminal Procedure 6(e)(6) in which “secrecy is vital” to an investigation. *In re Sealed Case*, 237 F.3d at 666-67. In *AFL-CIO v. FEC*, 333 F.3d 168, 178-79 (D.C. Cir. 2003), the D.C. Circuit held that disclosing politically sensitive information even from the Commission’s *closed* investigative files violated the First Amendment rights of respondents. Consistent with that decision, since January 1, 2004, the Commission has adopted a policy of placing on the public record, upon the termination of an enforcement matter, only documents integral to its decision-making process and other documents that would assist in understanding the record. *See* 68 Fed. Reg. 70,427.

Material related to ongoing investigations is also protected by the law enforcement investigatory privilege, also referred to as the “law enforcement evidentiary privilege,” which safeguards “documents that would tend to reveal law enforcement investigative techniques,” *Black v. Sheraton Corp. of America*, 564 F.2d 531, 541, 545 (D.C. Cir. 1977). *See* Fed. R. Evid. 501 (recognizing common law privileges). The privilege protects from disclosure “documents whose revelation might impair the necessary functioning of a department of the executive branch.” *Black*, 564 F.2d at 542. Plaintiffs point to no authority for the proposition that civil discovery is available regarding ongoing law enforcement investigations. Once the government shows that this conditional privilege is applicable, the party seeking the information has the burden of demonstrating that its need for the information outweighs the harm to the government

if the privilege is lifted, and there is “a pretty strong presumption against lifting the privilege.” *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997) (“[o]therwise the courts will be thrust too deeply into the ... investigative process”). The law enforcement investigatory privilege applies both to completed investigations and ongoing ones. *Black v. Sheraton Corp.*, 564 F.2d at 546. Because plaintiffs cannot show a compelling need for this material to resolve the legal question at issue here, plaintiffs cannot overcome the law enforcement investigative privilege.

Plaintiffs also seek information protected by the attorney work product doctrine. The requested material encompasses information about interactions among Commission counsel about one or more pending enforcement matters, and between the Commission and DOJ counsel about this case and other lawsuits that associates of the Fieger firm have filed. However, Supreme Court precedent and Fed. R. Civ. P. 26(b)(3) shield from discovery counsel’s work product, which includes memoranda, reports, correspondence, or other information that would disclose the mental impressions, conclusions, opinions, or legal theories of an attorney or other party representative prepared in anticipation of litigation. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). This privilege protects from discovery materials “prepared or obtained because of the prospect of litigation,” *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996) (emphasis omitted), as well as an attorney’s mental impressions, opinions, and legal theories concerning litigation, *Hickman*, 329 U.S. at 510-11. *See also* Fed. R. Civ. P. 26(b)(3). While the anticipation of litigation is required for this privilege to attach, an agency law enforcement proceeding like that conducted by the Commission under 2 U.S.C. § 437g is an obvious potential precursor to litigation. *See Kent Corp. v. NLRB*, 530 F.2d 612, 623-24 (5th Cir. 1976). To the extent plaintiffs’ discovery on Commission attorneys inquires into their

defense of the various lawsuits brought by associates of the Fieger firm, that subject clearly involves lawyering on actual litigation at the heart of the work product doctrine.

In sum, the burden of the depositions of Commission staff that plaintiffs seek far outweighs their potential relevance to the remaining claim in this case, and the depositions would threaten the judicial process and encroach impermissibly on protected information.

CONCLUSION

For the reasons stated above, the Court should deny plaintiffs further relief on their motion to compel discovery.

Respectfully submitted,

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January 28, 2009

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing Defendant Federal Election Commission's Opposition to Plaintiffs' Motion to Compel Responses to Interrogatories, for Production of Documents, and for Depositions via electronic delivery and first class mail upon the following parties of record this 28th day of January, 2009:

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FEC EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK BEAM and RENEE BEAM,

Plaintiffs,

v.

DONALD F. McGAHN II, FEDERAL
ELECTION COMMISSION
CHAIRMAN,

Defendant.

Civil No. 07cv1227

Judge Pallmeyer
Mag. Judge Cole

**DEFENDANT FEDERAL ELECTION COMMISSION'S
OBJECTIONS AND RESPONSES TO PLAINTIFFS'
REQUEST FOR PRODUCTION OF DOCUMENTS
AND INTERROGATORIES**

Pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, defendant Federal Election Commission (FEC or Commission) hereby provides the following Objections and Responses to the Plaintiffs' Request for Production of Documents served on November 4, 2008, (Document Requests) and First Set of Interrogatories served on November 10, 2008 (First Interrogatories).

GENERAL OBJECTIONS

1. The Commission objects to plaintiffs' Document Requests and First Interrogatories to the extent they seek the disclosure of material that is not relevant to resolving the only claim still pending before this Court, whether the Commission obtained any of

plaintiffs' private financial information from the Department of Justice in a manner that would violate the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 *et seq.* See Plaintiffs' Second Amended Complaint (Docket #91), Count I (¶¶ 12 - 20). As this Court stated in its October 15, 2008 Memorandum Opinion and Order (Docket #108), "If Plaintiffs still lack any evidence that an RFPA violation occurred after they have had a chance to engage in discovery, summary judgment in favor of the FEC may well be appropriate." (Mem. Op. at 15).

Accordingly, any matter that does not relate to this narrow RFPA issue is irrelevant.

2. The Commission objects to plaintiffs' Document Requests and First Interrogatories to the extent that they call for the disclosure of information that contains privileged attorney-client communications, constitutes attorney work product, discloses the mental impressions, conclusions, opinions or legal theories of any attorneys or other representatives of the Commission, was prepared in anticipation of litigation, or is otherwise protected from disclosure under applicable legal privileges, immunities, laws or rules.

3. The Commission objects to plaintiffs' Document Requests and First Interrogatories to the extent that they request production of documents protected from disclosure by the deliberative process privilege, the law enforcement investigative privilege, or governmental information that is otherwise confidential under law. In particular, the Commission objects to those Document Requests and First Interrogatories that improperly seek information regarding the Commission's enforcement, investigative, or policy-related decision making.

4. The Commission objects to plaintiffs' Document Requests and First Interrogatories to the extent that they request production of documents protected from disclosure under the Privacy Act, 5 U.S.C. § 552a *et seq.*

5. The Commission objects to plaintiffs' Document Requests and First Interrogatories to the extent that they request documents protected from public disclosure under the confidentiality provision in 2 U.S.C. § 437g(a)(12), the confidentiality provision of the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 (FECA), especially to the extent that plaintiffs seek information regarding ongoing FECA investigations.

6. The Commission objects to plaintiffs' Document Requests and First Interrogatories to the extent that they purport to require production of documents or information that is obtainable from some other source that is more convenient, less burdensome, or less expensive, including information that is publicly available or already in plaintiffs' possession. Such publicly available documents include, but are not limited to, the documents on the Commission's website (www.fec.gov) and in the Commission's public records office, such as Commission publications, regulatory history, and closed investigatory and litigation files.

7. The Commission objects to these Document Requests and First Interrogatories as unreasonably broad; unduly burdensome, expensive, or oppressive; unreasonably cumulative or duplicative; not limited in scope; or otherwise beyond the scope of permissible discovery.

8. The Commission objects to the instructions accompanying plaintiffs' Document Requests and First Interrogatories to the extent that they purport to impose obligations beyond those in the Federal Rules of Civil Procedure, local rules, or any Order promulgated by this Court.

9. The Commission reserves any and all objections as to competency, relevance, materiality, privilege, admissibility, or any other grounds on which an objection may be made. The Commission reserves the right to object to further discovery into the subject matter of these

discovery requests and also reserves the right to supplement and amend its objections pursuant to Fed. R. Civ. P. 26(e).

10. Any response to a discovery request that inadvertently discloses privileged or otherwise protected information is not intended to and shall not be deemed or construed to be a waiver of any privilege or right of the Commission. Insofar as a response by the Commission may be deemed to be a waiver of any privilege or right, such waiver shall be deemed to be a waiver limited to that particular response only.

Subject to and without waiving any of the foregoing General Objections, which are hereby incorporated into each response given below, the Commission responds to plaintiffs' Document Requests and First Interrogatories as follows:

**FEC'S RESPONSES TO PLAINTIFFS' REQUEST FOR
THE PRODUCTION OF DOCUMENTS**

1. Produce any and all documents of any kind, including but not limited to memoranda, correspondence and e-mails, dated from January 2001 through the present, between officials, agents, and/or employees of the FEC and officials, agents, and/or employees of the DOJ relating to possible violations of the Federal Election Campaign Act by Jack and/or Renee Beam.

OBJECTIONS: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Document Request as: (1) irrelevant to the RFPA issue which is the only issue pending in this case; (2) seeking material protected from disclosure under the work product doctrine or the attorney-client, deliberative process, or law enforcement investigative privileges. The Commission reserves the right to produce a log of privileged documents if the Commission's relevance objection is not sustained.

RESPONSE: There are no non-privileged documents responsive to this request.

2. Produce any and all documents of any kind, including but not limited to memoranda, correspondence and e-mails, dated from January 2001 through the present, between officials, agents, and/or employees of the FEC and officials, agents, and/or employees of the DOJ

relating to possible violations of the Federal Election Campaign Act by the law firm of Fieger, Fieger, Kenney & Johnson, including its partners, employees, contractors, associates, and their children and spouses.

OBJECTIONS: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Document Request as: (1) irrelevant to the RFPA issue which is the only issue pending in this case; (2) seeking material privileged under the work product doctrine or the attorney-client, deliberative process, or law enforcement investigative privileges; and (3) seeking information protected from disclosure by 2 U.S.C. § 437g(a)(12). The Commission reserves the right to produce a log of documents if the Commission's other objections are not sustained.

RESPONSE: Non-privileged documents responsive to this request were provided to counsel for plaintiffs on September 30, 2008, in response to a request made pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

3. Please produce any and all financial records, from whatever source obtained, for Jack and/or Renee Beam, dated from January 2001 through the present, in the possession of the FEC.

RESPONSE: The Commission has received no financial records of plaintiffs from the Department of Justice. The Commission provides herewith copies of three checks it received from the Edwards for President Committee in connection with the Commission's audit of that presidential campaign committee pursuant to 26 U.S.C. § 9038 of the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.* To the extent disclosure of these materials to persons other than Jack and Renee Beam and their counsel may be deemed public disclosure of an investigation under 2 U.S.C. § 437g(a)(12), the materials are subject to the restrictions in 2 U.S.C. § 437g(a)(12). Because the Commission did not obtain these materials from the Department of Justice, they are not relevant to the RFPA issue that is the sole issue

remaining in this case, and because the materials were not obtained from a financial institution, they are not subject to the RFPA. *See* 12 U.S.C. § 3402.

4. Produce any and all financial records, from whatever source obtained, for the law firm of Fieger, Fieger, Kenney & Johnson, dated January 2001 through the present, in the possession of the FEC.

OBJECTIONS: Subject to the General Objections stated above and without waiving any of them, the Commission objects to this Document Request as: (1) irrelevant to the RFPA issue which is the only issue pending in this case; (2) seeking material protected from disclosure under the work product doctrine or the attorney-client, deliberative process, or law enforcement investigative privileges; and (3) seeking information protected from disclosure by 2 U.S.C. § 437g(a)(12). The Commission reserves the right to produce a log of documents if the Commission's other objections are not sustained.

RESPONSE: The Commission possesses responsive financial materials used as government exhibits during the public trial in the criminal case United States of America v. Geoffrey Fieger, et al., No. 07-20414, in the United States District Court for the Eastern District of Michigan, Southern Division. Copies of these public documents are already in the possession of counsel for plaintiffs, who also appeared as counsel for certain of the defendants in the Michigan criminal case.

5. Produce any and all documents of any kind, including but not limited to memoranda, correspondence and e-mails, dated from January 2001 through the present, between (to/from) FEC officials, employees or agents including former FEC Chairman Michael E. Toner and White House officials, employees or agents including former White House Aide Karl Rove and former White House Counsel Harriet Miers, or their agents and/or assistants, including any and all present and/or former employees and/or agents of the Executive Office of the President and/or Vice President, relating in any way to the Federal Election Campaign Act.

OBJECTIONS: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Document Request as: (1) irrelevant to the

RFPA issue which is the only issue pending in this case; and (2) seeking material protected from disclosure under the Privacy Act, 5 U.S.C. § 552a *et seq.*. The Commission reserves the right to produce a log of documents if the Commission's relevance objection is not sustained.

6. Produce any and all documents of any kind, including but not limited to memoranda, correspondence and e-mails, dated from January 2001 through the present, relating to the Federal Election Commission's decision to notify Jack and Renee Beam that the FEC had "reason to believe" that they violated 2 U.S.C. § 441f.

OBJECTIONS: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Document Request as: (1) irrelevant to the RFPA issue which is the only issue pending in this case; (2) unduly burdensome in seeking material already in the possession of plaintiffs; (3) seeking material protected from disclosure under the work product doctrine or the attorney-client, deliberative process, or law enforcement investigative privileges. The Commission reserves the right to produce a log of privileged documents if the Commission's other objections are not sustained.

RESPONSE: There are no non-privileged documents responsive to this request.

7. Produce any and all documents of any kind, including but not limited to memoranda, correspondence and e-mails, dated from January 2001 through the present, between officials, agents, and/or employees of the FEC and officials, agents and/or employees of the DOJ relating to possible violations of the Federal Election Campaign Act by Jack and/or Renee Beam.

OBJECTIONS: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Document Request as: (1) irrelevant to the RFPA issue which is the only issue pending in this case; (2) seeking material protected from disclosure under the work product doctrine or the attorney-client, deliberative process, or law enforcement investigative privileges; (3) unduly burdensome in that the Request is identical to Document Request No. 1. The Commission reserves the right to produce a log of privileged documents if the Commission's first objection is not sustained.

RESPONSE: There are no non-privileged documents responsive to this request.

FEC'S RESPONSES TO PLAINTIFFS' FIRST INTERROGATORIES

1. Please describe in detail, identify, and list any and all past and/or present employees and/or agents of the Federal Election Commission, including present and/or past Commissioners, who communicated with, either orally, written or otherwise, with any past and/or present employees or agents of the Justice Department regarding in any way Geoffrey Fieger, the law firm of Fieger, Fieger, Kenney & Johnson (or Fieger, Fieger, Kenney, Johnson & Giroux, including its partners, employees, contractors, associates, and their children and/or spouses including Jack and/or Renee Beam.

OBJECTIONS: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Interrogatory as: (1) irrelevant to the RFPA issue which is the only issue pending in this case; (2) seeking material protected from disclosure under the work product doctrine or the attorney-client, deliberative process, or law enforcement investigative privileges; and (3) protected from disclosure by 2 U.S.C. § 437g(a)(12).

RESPONSE: The following current and former attorneys of the Commission's Office of General Counsel have communicated during this period with employees and/or agents of the Department of Justice with respect to plaintiffs: Audra L. Wassom, Mark D. Shonkwiler, Roger A. Hearn, Colleen T. Sealander, Harry J. Summers, and Benjamin A. Streeter III.

2. Please describe in detail, identify, and list any and all past and/or present employees and/or agents of the Federal Election Commission, including present and/or past Commissioners, who have knowledge regarding communications with, either orally, written or otherwise, with any past and/or present employees or agents of the White House regarding in any way Geoffrey Fieger, the law firm of Fieger, Fieger, Kenney & Johnson (or Fieger, Fieger, Kenney, Johnson & Giroux, including its partners, employees, contractors, associates, and their children and/or spouses including Jack and/or Renee Beam.

OBJECTION: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Interrogatory as irrelevant to the RFPA issue which is the only issue pending in this case.

3. Please describe in detail, identify, and list any and all past and/or present employees and/or agents of the Federal Election Commission, including present and/or past Commissioners, who have knowledge regarding communications with, either orally, written or otherwise, with any members, employees and/or agents of the White House relating in any way to the policies, customs, procedures, and/or protocols regarding either the civil and/or criminal enforcement of the Federal Election Campaign Act.

OBJECTION: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Interrogatory as irrelevant to the RFPA issue which is the only issue pending in this case.

4. Please describe in detail, identify, and list any and all past and/or present employees and/or agents of the Federal Election Commission, including present and/or past Commissioners, who communicated with, either orally, written or otherwise, with any past and/or present employees and/or agents of the Justice Department relating in any way to the Federal Election Commission's decision and/or agreement with the Justice Department to discontinue and/or temporarily stop its civil investigation and/or enforcement proceeding against Geoffrey Fieger, the law firm of Fieger, Fieger, Kenney & Johnson (or Fieger, Fieger, Kenney, Johnson & Giroux, including its partners, employees, contractors, associates, and their children and/or spouses including Jack and/or Renee Beam while the Justice Department conducted its criminal investigation and/or prosecution of Mr. Fieger and/or the Fieger law firm and/or its employees, agents and/or its employees, agents and/or their spouses.

OBJECTIONS: Subject to the General Objections stated above and without waiving any of them, the Commission further objects to this Interrogatory as: (1) irrelevant to the RFPA issue which is the only issue pending in this case; (2) seeking material protected from disclosure under the work product doctrine or the attorney-client, deliberative process, or law enforcement privileges; and (3) seeking material protected from disclosure by 2 U.S.C. § 437g(a)(12).

RESPONSE: The following current and former attorneys of the Commission's Office of General Counsel have communicated during this period with employees and/or agents of the Department of Justice with respect to plaintiffs: Audra L. Wassom, Mark D. Shonkwiler, Roger A. Harron, Colleen T. Sealander, Harry J. Summers, and Benjamin A. Streeter III.

Respectfully submitted,

/s/ Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

/s/ David Kolker
David Kolker
Associate General Counsel

/s/ Harry J. Summers
Harry J. Summers
Assistant General Counsel

/s/ Benjamin A. Streeter III
Benjamin A. Streeter III
Attorney
bstreeter@fec.gov

December 5, 2008

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing interrogatory answers are true and correct. Executed on December 5, 2008.

/s/ Harry J. Summers

Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463
hsummers@fec.gov

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing Objections and Responses of Defendant Federal Election Commission to Plaintiffs' Request for Production of Documents and Interrogatories via electronic delivery and first class mail upon the following parties of record this 5th day of December, 2008:

Michael R. Dezsi, Esq.
FIEGER, FIEGER KENNEY, JOHNSON & GIROUOX
19390 West Ten Mile Road
Southfield, Michigan 48075-2463

/s/ Benjamin A. Streeter III

Benjamin A. Streeter III

Attorney
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463
bstreeter@fec.gov

FOIA/B



REDACTED

JACK BEAM **375**

CMA Cash Management Account

DATE 1-20-03 25-80/440

PAY TO THE ORDER OF EDWARDS FOR PRESIDENT \$ 1,000.⁰⁰

ONE THOUSAND AND 00/100 DOLLARS

AS Merrill Lynch

BANK ONE BANK ONE, COLUMBUS, IN
Columbus, Ohio 47201

MEMO _____

Jack Beam
 IN 0375

F02/4



REDACTED

JACK BEAM

CMA Cash Management Account[®] 377

DATE 1-28-03

PAY TO THE ORDER OF

EDWARDS FOR PRESIDENT

\$ 1,000.⁰⁰

25-80/440

ONE THOUSAND AND 00/100

DOLLARS

AS
Merrill Lynch

BANK ONE BANK ONE COLUMBUS, VA
Member SIPC

MEMO

Jack Beam
0378

F02/5



REDACTED

RENEE E BEAM

CMA Cash Management Account 195

DATE 1-30-03

25-80/440

PAY TO THE ORDER OF EDWARDS FOR PRESIDENT

\$ 2,000.⁰⁰

TWO THOUSAND AND 00/100

DOLLARS

Merrill Lynch

BANK ONE. 1997 ONE DOLLAR BILL IN COMPLIANCE WITH

Renee E Beam

MEMO

0195

FEC EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK BEAM and RENEE BEAM,

Plaintiffs,

v.

DONALD F. McGAHN II, FEDERAL
ELECTION COMMISSION
CHAIRMAN, in his official capacity,

Defendant.

Civil No. 07cv1227

Judge Pallmeyer
Mag. Judge Cole

Declaration of Audra L. Wassom

Audra L. Wassom avers that she is competent to testify in this matter based upon her personal knowledge, and if called upon to testify, would state as follows:

1. I have been an attorney in the Enforcement Division of the Federal Election Commission's Office of General Counsel since October of 2004. From October 2004 to the beginning of August 2008, I was a staff attorney in the Enforcement Division. Since the beginning of August 2008, I have been an Acting Assistant General Counsel in the Enforcement Division.
2. As a staff attorney, I was the primary attorney handling Matter Under Review ("MUR") 5818, in which Jack and Renee Beam, among others, are respondents. As part of my duties related to that matter, I was the primary contact with the Department of Justice for all communications related to the matter. Consequently, prior to September 2008 all documents transmitted by the Department of Justice to the Federal Election Commission relating to MUR 5818 were directed to my attention.
3. Since I have become an Acting Assistant General Counsel, two other staff attorneys have taken over responsibility for this matter. However, the Department of Justice has not transmitted any new documents to the Federal Election Commission pertaining to this matter since my role as the primary attorney ended.

4. A search of documents related to this matter in the possession of the Federal Election Commission revealed that the Department of Justice transmitted no personal financial information pertaining to Jack or Renee Beam to the Federal Election Commission at any time during my involvement in MUR 5818.
5. To search for any personal financial information transmitted to the Federal Election Commission by the Department of Justice pertaining to Jack or Renee Beam, we reviewed all e-mail communications in our possession between employees, including myself, in the Office of General Counsel of the Federal Election Commission and employees of the Department of Justice related to MUR 5818, all documents provided to the Federal Election Commission by the Department of Justice in hard copy, and all documents provided to the Federal Election Commission by the Department of Justice in electronic format (CD-ROM).
6. In addition, I consulted with Kendall Day of the Office of Public Integrity in the Department of Justice. He confirmed that the Department of Justice had not transmitted any personal financial information pertaining to Jack or Renee Beam to the Federal Election Commission. Moreover, Mr. Day assured me that he took care to not transfer to me or anyone else in the Federal Election Commission any grand jury material arising from the criminal case in the Eastern District of Michigan known as United States of America v. Geoffrey Fieger, et al, criminal case no. 07-20414 that had not otherwise been made public or used as an exhibit in the public trial in that criminal case.
7. We do have copies of three checks written by Jack and Renee Beam to the Edwards for President Committee: a \$1,000 check written on January 20, 2003 by Jack Beam (check #375), a \$1,000 check written on January 28, 2003 by Jack Beam (check # 377), and a \$2,000 check written on January 30, 2003 by Renee Beam (check # 195). We did not receive copies of those checks from the Department of Justice. The Enforcement Division of the Office of General Counsel obtained the copies of those checks from Audit Division of the Federal Election Commission. The Audit Division obtained the copies of those checks from the Edwards for President committee in conjunction with the 26 U.S.C. § 9038 audit of that committee.

8. We have no personal financial information pertaining to Jack or Renee Beam other than the copies of the three checks written to the Edwards for President committee, which were obtained internally and not from the Department of Justice.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 8th day of December, 2008.

A handwritten signature in black ink, appearing to read "Audra L. Wassom", written over a horizontal line.

Audra L. Wassom

Acting Assistant General
Counsel for the Enforcement
Division, Federal Election
Commission

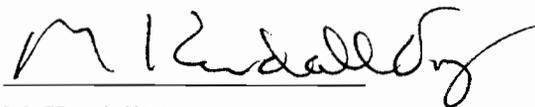
FEC EXHIBIT 3

Declaration of M. Kendall Day

1. I have worked for the Department of Justice since September 2003. I am currently employed as a Trial Attorney in the Public Integrity Section of the Criminal Division, having joined that section in March, 2005.
2. From April 2005 through June 2008, I was the Trial Attorney assigned by my section to investigate allegations of campaign finance violations occurring in the Eastern District of Michigan. From May of 2005 through June 2008, I jointly worked the investigation and eventual prosecution with Supervisory AUSA Lynn Helland in the U.S. Attorney's Office for the Eastern District of Michigan. From May 2005 through early 2007, another AUSA was also assigned to the case, Christopher Varner.
3. Of the three prosecutors working the investigation, I was the one tasked with communicating with the FEC. I did not provide any bank records for Jack and Rene Beam to the FEC.
4. Even though I was the one communicating with the FEC, I checked with the others involved in the investigation. AUSAs Helland and Varner, and the FBI case agent, all confirmed to me that they did not provide any bank records for Jack and Rene Beam to the FEC.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12/3/08

A handwritten signature in black ink, appearing to read "M. Kendall Day", written over a horizontal line.

M. Kendall Day
Trial Attorney