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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DIANE ROARK,	Case No.: 6:12-CV-01354-MC
Plaintiff,	**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL**
v.	
UNITED STATES OF AMERICA,	
Defendant.	

Defendant the United States of America, by S. Amanda Marshall, United States Attorney for the District of Oregon, and through James E. Cox, Jr., Assistant United States Attorney for the District of Oregon, submits this response to Plaintiff's motion to compel.

I. ARGUMENT

A. Plaintiff's Motion to Compel Should Be Denied Because the Government Has Met its Disclosure and Discovery Obligations.

Plaintiff asserts that her motion to compel is brought pursuant to Rule 26(a) of the Federal Rules of Civil Procedure. (Dkt. # 103 at 1.) Rule 26(a) is not a basis for a motion to compel. Rather, Rule 26(a) governs the initial disclosures made at the outset of litigation, in which parties disclose the witnesses and documents they may use to support their claims or defenses in this action. Initial disclosures can be waived by the parties, and neither party conducted initial disclosures in this action.

Plaintiff's motion is presumably brought pursuant to Rule 37. That rule provides that parties may move for an order compelling initial disclosures under Rule 26(a) or discovery responses under Rule 30, 31, 33, or 34. Fed. R. Civ. P. 37(a)(3). But Rule 37 does not support Plaintiff's motion either. Plaintiff has not – and cannot – allege that the motion is based on insufficient discovery responses by the government. Thus, Rule 37 does not provide a basis for Plaintiff's motion, and the motion should be denied.[1]

Moreover, the current procedural posture of the case – in which the Court has taken under submission fully briefed cross motions for summary judgment- also warrants denial of the motion. Plaintiff never argued during the briefing period that she was unable to present facts essential to justify opposition to Defendant's motion. *See* Fed. R. Civ. P. 56(d).

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[1] In addition, the motion should also be denied because Plaintiff failed to confer with counsel for Defendant prior to filing the motion, as required under Fed. R. Civ. P. 37(a)(1) and Local Rule 7-1(a).

B. Plaintiff's Motion to Compel Should Be Denied Because There Is No Basis For Providing the Requested Relief.

1. HPSCI Is Not Aware of Any Other Non-Disclosure Agreements Between Plaintiff and HPSCI.

Plaintiff's former employer, the House Permanent Select Committee on Intelligence ("HPSCI"), provided two non-disclosure agreements ("NDAs") to the Court as part of a declaration in support of Defendant's motion for summary judgment. (Dkt # 81.) Plaintiff asks the Court to compel HPSCI to produce any other NDAs that Plaintiff executed. (Dkt # 103 at 2.) Plaintiff claims that "HPSCI has neither confirmed nor denied the existence of a subsequent NDA signed by Plaintiff before her April 2002 retirement, but consistently has ignored requests for such a document." (Dkt # 103 at 3.)

The two NDAs that HPSCI provided to the Court are the only two NDAs between HPSCI and Plaintiff of which HPSCI is aware. HPSCI reviewed its files to produce those NDAs and certainly would have included any other NDAs signed by Plaintiff, if it had discovered any. While the HPSCI declaration submitted with Defendant's motion for summary judgment did not affirmatively state that HPSCI is not aware of any other NDAs (because Defendant did not know it would be an issue), HPSCI is prepared to provide a declaration to this effect, if the Court desires one. [2]

[2] As Defendant noted during the summary judgment briefing, (Dkt # 95 at 12), Plaintiff did sign a Secure Compartmented Information ("SCI") NDA with the CIA on July 24, 2001. (Dkt # 79, Ex. 1.) The SCI NDA is indeed narrower than the HPSCI NDA in that it only governs SCI. But Plaintiff's SCI NDA does not supersede her HPSCI NDA. The SCI NDA is an additional agreement Plaintiff signed with the executive branch of the government as a condition of obtaining access to SCI. (*Id.*)

2. There is no basis for requiring the government to provide any certification regarding the applicability of the Freedom of Information Act to classified and NSAA information.

Plaintiff next requests that the Court compel the government to provide "[d]ocumentation from the Information Security Oversight Office (ISOO) certifying whether, under law or regulation, NSA is subject to Freedom of Information Act provisions and standards regarding classified information and/or unclassified information, and whether this status changes if the National Security Agency Act of 1959 applies only to personnel security issues." (Dkt # 103 at p. 2.) Plaintiff claims that the "ISOO is the appropriate authority to determine and report to the Court on whether NSA is now or would without previously claimed NSA Act authorities be required to meet legislated FOIA standards for declassifying information and for releasing declassified or unclassified information." (*Id.* at p. 6.)

Defendant's briefs on the parties' cross-motions for summary judgment contain the legal authority for the government's assertion that documents containing National Security Agency Act ("NSAA") information cannot be returned to Plaintiff. (Dkt. # 79, 95 and 96.) The NSAA is not limited to personnel security matters but, rather, states that "nothing in this Act or any other law … shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." 50 U.S.C. § 3605. As Defendant argued in its briefing, while this is not a FOIA case, NSAA information is protected from release under FOIA. *See Lahr v. Nat'l Transpo. Safety Bd.*, 569 F.3d 964, 984-85 (9th Cir. 2009) Plaintiff is free to argue in opposition to the government's position, but there is no basis for seeking some kind of advisory information or opinion from a separate agency within the government.

3. The government has identified the documents from the 2007 search in its possession, and the pending cross-motions for summary judgment are the proper means to address the status of that property.

Plaintiff's third request is that the Court compel the government to

> [r]eturn or provide the number and individualized list of retained documents referenced as "classified documents missing headers and footers" (all now admittedly unclassified) within the 2007 unsealed affidavit and search warrant and return the documents. Provide an affidavit and warrant for the surreptitious search; if there were none, document the authority under which it was carried out. Document any extensions or waivers of the notification requirement. Provide any other paperwork related to the search, including a report of results.

(Dkt #103 at 2.) Plaintiff's request should be denied because the status of the property retained by the government from the 2007 search and seizure is appropriately addressed within the context of the parties' cross-motions for summary judgment.

The government has provided an index of the documents it has not returned from the 2007 search along with the basis for retention of each document. (Dkt # 80, 81, 84.) Plaintiff has requested the return of most of this property, and that issue is the subject of the parties' pending motions for summary judgment. Thus, there is no basis for an additional motion on the same issue.

Defendant disputes Plaintiff's contention that the 2007 search was illegal or was based on other illegal searches. More importantly, though, that dispute is not material to the issue in this case, which is the government's right to retain property that includes classified information or non-classified protected information. The government's bases for not returning the property apply regardless of the constitutionality of the 2007 search.

4. The NSA Is Not Able To Provide the Information Plaintiff Requests About the Document Allegedly Returned to Mr. Wiebe.

Plaintiff's fourth and final request is that the Court order the NSA to provide "NSA documentation confirming that an NSA Original Classification Authority, and any other NSA

authorities in addition, twice released as unclassified, to J. Kirk Wiebe as detailed in his affidavit, a description approximately 13 pages long of the Thin Thread system. A copy of the declassified and released paper itself should also be provided to the Court." (Dkt # 103 at 2.) Plaintiff justifies this request on the ground that Defendant "has refused to confirm or deny that the papers deliberately were released to Wiebe, while referencing the possibility that classified papers might mistakenly have been released to Wiebe." (Dkt # 103 at 8.) Plaintiff's request is based on her argument that the NSA returned a document to Mr. Wiebe that is identical to one of the documents on Plaintiff's computer hard drive that the NSA contends is classified.

Plaintiff's request should be denied because the NSA is unable to verify whether the document allegedly returned to Mr. Wiebe is identical to the classified document on Plaintiff's computer hard drive, precisely because the document is now in Mr. Wiebe's possession. Moreover, the government does not have any copies of the alleged document to which it can refer. Under the terms of judgment in the Maryland case, the NSA was not permitted to keep any of the property at issue or copies thereof. The NSA confirmed that it had destroyed all of the property on November 5, 2014.[3]

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[3] In any event, even if the documents are identical, that would not undermine the determination made by the original classification authority that the document on Plaintiff's computer is classified. It would simply indicate that the government inadvertently released a classified document back to Mr. Wiebe in the Maryland case. While unfortunate, such an inadvertent release can happen, particularly given the substantial volume of material the government was required to review in the Maryland litigation, including 11 hard drives and 7 CDs. (Wiebe, et al., Dkt # 46 at pp. 3-7.) In accordance with Executive Order 13526, Sec. 1.1(c), such an inadvertent disclosure would not result in the automatic declassification of such information.

II. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that Plaintiff's motion to compel be denied.

DATED this 3rd day of March 2015.

Respectfully submitted,

S. AMANDA MARSHALL
United States Attorney
District of Oregon

/s/ James E. Cox, Jr.
JAMES E. COX, JR.
Assistant United States Attorney
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Defendant's Response to Plaintiff's Motion to Compel** was placed in a postage prepaid envelope and deposited in the United States Mail at Portland, Oregon on March 3, 2015, addressed to:

Diane Roark
2000 N. Scenic View Dr.
Stayton, OR 97383

And was sent via email to the following email address:

gardenofeden@wvi.com

/s/ Shari McClellan
SHARI McCLELLAN