UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES of AMERICA	)	
v.	)	**Criminal No. 12-40026-FDS**
JOHN J. O'BRIEN, ELIZABETH V. TAVARES, and WILLIAM H. BURKE, III,	)	
Defendants.	)	

ORDER ON GOVERNMENT'S OBJECTION TO
CHIEF MAGISTRATE JUDGE SOROKIN'S APRIL 5, 2013 ORDER

SAYLOR, J.

The government has objected to a discovery order dated April 5, 2013, issued by Chief Magistrate Judge Sorokin that granted in part and denied in part a government motion for clarification, reconsideration, or stay. That motion for reconsideration was filed in response to an earlier order of the Chief Magistrate Judge, dated March 13, 2013, that directed the government to produce certain additional discovery to defendants. In particular, the government objects to that portion of the order that concern defendants' discovery requests (a), (g), and (6). For the following reasons, the objection will be sustained in part and overruled in part.

I. Background

The background to this dispute is set forth in the March 13 order of the Chief Magistrate Judge and will not be repeated here.

II. Standard of Review

The relevant statute, 28 U.S.C. §636(b)(1)(A), provides that the district judge "may reconsider" a non-dispositive order by a magistrate judge "where it has been shown that the

magistrate judge's order is clearly erroneous or contrary to law." *See* Rule 2(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts ("[t]he district judge to whom the case is assigned . . . will modify or set aside any portion of the magistrate judge's order determined to be clearly erroneous or contrary to law").

III. Analysis

A. Defendants' Request (a)

Defendants' Request (a) seeks "information that jobs were not given to unqualified candidates, including information that any of the individuals named in the indictment were qualified for the positions they held." The government contends that "the individuals named in the indictment, and other individuals hired by probation officials during the course of the conspiracy, all appear to have possessed the minimum qualifications required for the positions for which they applied." The government further contends that "thousands of pages of hiring files and raw interview data has been made available to the defendants. The government has not conducted an in-depth analysis of this information and is therefore unable to respond to this request and order as it is phrased."

The materials at issue (assuming any exist) appear to consist, at least principally, of witness statements; it appears that the underlying hiring files and related documents have been produced. The question is whether information falling within the request is required to be produced as "exculpatory information" under Local Rule 116.2 of the Local Rules of the District of Massachusetts, or otherwise under Fed. R. Crim. P. 16 or *Brady v. Maryland*, 373 U.S. 83 (1963).

The government's theory of prosecution (simplified) is that (on multiple occasions, and for improper reasons) a *qualified* candidate was hired for a particular position, rather than the

most qualified candidate. It does not contend that any *unqualified* candidate was ever hired; to the contrary, and as noted, it contends that "all [hired candidates] appear to have possessed the minimum qualifications required for the positions for which they applied."

It therefore appears that information concerning the hiring of any *unqualified* candidates is not part of the government's case-in-chief—because it concedes that "jobs were not given to unqualified candidates." Proof that "jobs were not given to unqualified candidates" thus does not contradict or cast doubt on the government's case. To that extent, therefore, defendants' Request (a) appears to seek information that is irrelevant, does not exist, or is not "exculpatory information" within the meaning of Local Rule 116.2.

Defendants also seek "information that any of the individuals named in the indictment were qualified for the positions they hold." Again, it appears that the government concedes that all of the named individuals were at least minimally qualified. It therefore appears that no such information is discoverable under Local Rule 116.2.[1]

The government's objection to the April 5 order as to Defendants' Request (a) is therefore sustained, as the order compelling that disclosure was clearly erroneous.

B. Defendants' Request (g)

Defendants' Request (g) seeks "[i]nformation that candidate(s) recommended by a member of the legislature did not receive the specific job for which the candidate(s) were recommended." The government contends that it

> is aware that many sponsored candidates applied for various positions within probation and that numerous positions had multiple sponsored candidates vying for each job. Therefore, not each sponsored candidate could obtain the specific job requested. This outcome is entirely consistent with the government's

[1] To be clear, Request (a) does *not* seek information as to whether the individuals named in the indictment were in fact the *most* qualified candidates.

> allegation that the candidates hired by probation were those sponsored by the more powerful legislators.

The government further contends that

> [n]one of the requested information is exculpatory with respect to the charges in this case. The government has not alleged, nor does the government have to prove, a *quid pro quo* between the Probation Department and the Legislature in order to prove that the defendants engaged in the charged scheme to defraud.

The government also contends that "this information is ascertainable from the discovery already produced and made available to the defendants."

The Chief Magistrate Judge concluded that

> [i]nformation regarding instances in which "sponsored" candidates were not hired or promoted is plainly exculpatory, in light of the allegations in the Indictment. *See, e.g.*, Indictment at Count 1, ¶ 17 (alleging the defendants kept "sponsor lists" in order "to ensure that the sponsored candidates obtained employment"); *see also id.* at Count 1, ¶ 16 (alleging the object of the conspiracy was to "obtain[] employment and promotions for individuals who were not the most qualified, but who the defendants understood to be best politically connected or 'sponsored'").

After careful review, the Court cannot conclude that the ruling of the Chief Magistrate Judge was clearly erroneous. It is true that information that a particular individual was *not* hired, despite having a legislative sponsor, does not necessarily contradict the government's theory of the case. Nonetheless, such information could tend to cast doubt on the government's case, and therefore could constitute "exculpatory information" under the Local Rule. The order of the Chief Magistrate Judge is not clearly erroneous or contrary to law, and therefore the government's objection to the April 5 order as to defendants' Request (g) is overruled.

C. Defendants' Request (6)

Chief Magistrate Judge Sorokin also ordered the government to produce "reports, memorandum, and notes of all individuals who were interviewed informally by Independent Counsel." He ruled that "Rule 16 does not limit disclosure to information that is exculpatory,"

but also includes certain information material for preparation of the defense, citing *United States v. Pesaturo*, 519 F. Supp. 2d 177, 189 (D. Mass. 2007), and *United States v. Poulin*, 592 F. Supp 2d 137, 143 (D. Me. 2008). The government's motion for reconsideration argued that it did not need to disclose these materials because the defendants had "not made a *prima facie* showing that the items requested are material to preparing their defense." Chief Magistrate Judge Sorokin denied the government's motion for reconsideration for two reasons: (1) "[t]he arguments now advanced by the government were not, but could have been, advanced in its original papers," and (2) "the information before the Court regarding the nature of the informal reports establishes their materiality." He further noted that "the government has not asserted that the documents are not material, only that the defendants have not established that the documents are material."

The parties appear to agree that this information is not subject to the Jencks Act, and therefore the limitation on discovery set forth in Rule 16(a)(2) is not applicable. Neither party contends that the information is exculpatory. It is therefore discoverable, if at all, as items "material to preparing the defense" under Fed. R. Crim. P. 16(a)(1)(E).

It is true that the defense has to make at least a *prima facie* showing of materiality before items are discoverable under Rule 16(a)(1)(E). To hold otherwise would permit the defense to engage in fishing expeditions, to obtain discovery based on abstract or conclusory allegations, or otherwise to obtain discovery far beyond the confines contemplated by the drafters of Rule 16. Here, the defense appears to have made no such formal showing. It is also true, however, that the government did not advance that argument until the motion for reconsideration, and thus may have waived its right to insist on that showing.

In any event, this case presents somewhat unique circumstances. The documents sought were created by independent counsel conducting an investigation into the same activities that are

the subject of the indictment, including interviews of the same witnesses. There is no claim of privilege or attorney work-product. Presumably those witnesses gave grand jury testimony or otherwise made statements that ultimately will have to be produced under the Jencks Act. The discovery question raised here appears to relate to other notes and memoranda of interviews of those witnesses prepared by independent counsel. Under these unusual circumstances—in which it is undisputed that the independent counsel investigation took place, and that the witnesses were interviewed as to the same subject matters—the Court cannot conclude that it was clearly erroneous to conclude either that the necessary showing of materiality had been made or that the requirement of such a showing had been waived.

Accordingly, the order of the Chief Magistrate Judge is not clearly erroneous or contrary to law, and therefore the government's objection to the April 5 order as to defendants' Request (6) is overruled.

IV. Conclusion

For the foregoing reasons, the government's objections to the discovery order dated April 5, 2013, issued by Chief Magistrate Judge Sorokin are sustained as to defendants' Request (a) and overruled as to defendants' Request (g) and Request (6).

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: June 18, 2013