

# **EXHIBIT C**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 3:12-cr-00431-HA

v.

ORDER

DAVID JOSEPH PEDERSEN,

**FILED UNDER SEAL**

Defendant.

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HAGGERTY, District Judge:

Defendant David Joseph Pedersen (Pedersen) is charged in a fifteen count indictment. Pedersen is charged in Count One with Racketeering, in violation of 18 U.S.C. § 1962(c); in Count Two with participating in a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, in violation of 18 U.S.C. § 1962(d); and the remaining thirteen counts relate to acts of violence, use and possession of firearms, and other criminal activity alleged to have been

PAGE 1 - SEALED ORDER

committed during a nine-day period in Washington, Oregon, and California, from September 26, 2011 through October 5, 2011. Pedersen's co-defendant, Holly Ann Grigsby (Grigsby), pleaded guilty to Count One of the indictment on March 11, 2014. Pedersen has requested access to the Federal Criminal Discovery Blue Book in anticipation of a hearing set for April 7-10, 2014, concerning Pedersen's oral motion for a finding of bad faith. For the following reasons, the government shall provide counsel to Pedersen with a copy of the Discovery Blue Book pursuant to a protective order.

### **BACKGROUND**

During the pendency of this case, there has been evidence suggesting that the government has not adhered to its discovery obligations and has violated Pedersen's Sixth Amendment rights by interfering with and intercepting attorney-client communications. During oral argument on October 16, 2013, both Pedersen and Grigsby made oral motions requesting that the court find the government had acted in bad faith. Following the hearing on October 16, 2013, there has been considerable discovery and litigation concerning the government's conduct in this case, much of it handled by what has come to be known as "Filter Team Two." On January 16, 2014, the prosecution team requested [347] an evidentiary hearing prior to any findings from this court concerning the government's conduct. That hearing is scheduled to begin April 7, 2014.

The Discovery Blue Book is a publication of the U.S. Department of Justice Office of Legal Education. It was produced in 2011 after prosecutorial misconduct was uncovered in the corruption trial of Senator Ted Stevens. In preparation for the "bad faith" hearing, Pedersen requested access to the Discovery Blue Book, "believing that compliance, or lack thereof, would be relevant to any finding of bad faith on the discovery issues." Joint Status Report Reply on

Evidentiary Hearing Protocol at 2. The government, through Filter Team Two, opposes disclosure of the Discovery Blue Book and has provided a copy of it to the court for *in camera* review. Presently, there is litigation concerning a Freedom of Information Act request for access to the Discovery Blue Book pending in the U.S. District Court for the District of Columbia.<sup>1</sup>

## **BACKGROUND**

Filter Team Two asserts that the Discovery Blue Book is not relevant or material to Pedersen's allegations of bad faith and is protected by the work product doctrine.

a. Relevance and Materiality

The cover sheet to the Discovery Blue Book notes that the book "is not intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by any prospective or actual witness or parties." (citing *United States v. Caceres*, 440 U.S. 741 (1979)). The Discovery Blue Book is a comprehensive publication concerning the government's discovery obligations and incorporates numerous sources of official Department of Justice policy as well as legal analysis pertaining to those obligations. It is provided to Assistant United States Attorneys and law enforcement personnel as a training manual. As noted in the first page of the introduction to the Discovery Blue Book, "[t]his manual is a resource for assessing the government's (and the defendant's) discovery obligations, to help ensure full and timely compliance with them." While Pedersen may be able to access similar information from disparate sources, the Discovery Blue Book is a relatively comprehensive guide to the Department of Justice's policies and procedures regarding the

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<sup>1</sup> *Nat'l Ass'n of Criminal Defense Lawyers v. Exec. Office for U.S. Attorneys*, Case No. 14-cv-269 (D.D.C. 2014)

provision of criminal discovery. What content is, and is not, found in the Discovery Blue Book is plainly relevant to assessing Pedersen's allegations of bad faith even if the manual itself provides no substantive or procedural rights. The prosecution's adherence, or lack thereof, to the suggestions in the manual is informative and "is material to preparing the defense" for the upcoming hearing. Accordingly, the only basis to withhold the Discovery Blue Book is if it is privileged.

b. Work Product Doctrine

The work product doctrine protects "from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *Admiral Ins. Co. v. Dist. St.*, 881 F.2d 1486, 1494 (9th Cir. 1989)(citing Fed. R. Civ. P. 26(b)(3)). In order "to qualify for protection under Rule 26(b)(3), documents must have two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004) (citations and quotations omitted). When a document has dual purposes, the Ninth Circuit employs the "because of" standard:

This formulation states that a document should be deemed prepared 'in anticipation of litigation' and thus eligible for work product protection . . . if 'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.'

*Id.* (quoting Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice & Procedure § 2024 (2d ed. 1994)). This standard does not "consider whether litigation was a primary or secondary motive behind the creation of the document" but instead "considers the

totality of the circumstances and affords protection when it can fairly be said that the 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of *that* litigation." *Id.* at 908 (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2nd Cir.1998) (emphasis added)).

The Discovery Blue Book was created as a training tool to assist the government in meeting its discovery obligations in criminal cases. Because those using the manual are frequently involved in litigation, and it was prepared for their use, it will often be used in preparation for litigation. It can fairly be said that it would not have been produced but for the prospect of future litigation. However, when analyzing the totality of the circumstances of this case, it is obvious the book was not created with this case, or any other, in mind. Because "the prospect of future litigation touches virtually any object of a prosecutor's attention, . . . the work product exemption, read over-broadly, could preclude almost all disclosure from an agency with substantial responsibilities for law enforcement." *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1203 (D.C. Cir. 1991) (citation and quotations omitted). In order to avoid the overbroad application of the work product doctrine, the D.C. Circuit has held that only "where an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product." *Id.* This court adopts the test utilized in the D.C. Circuit and concludes that the Discovery Blue Book does not constitute protected work product as it was not created with this litigation "in mind" and must be provided to the defense.

Nevertheless, the court is mindful that there is ongoing litigation in the District Court for the District of Columbia concerning this topic. Because that court will have an opportunity to


render a decision concerning the applicability of any privilege to the Discovery Blue Book after full summary judgment briefing, this court is ordering that the Discovery Blue Book be provided to Pedersen pursuant to a protective order. The parties are ordered to confer regarding language for an appropriate protective order. Pursuant to that order, the defense will not be entitled to copy or in any way disseminate the contents of the Discovery Blue Book to any person not on the defense team, and will not be permitted to maintain a copy of the Discovery Blue Book after litigation concerning Pedersen's motion for a finding of bad faith has been resolved. The parties may also wish to confer regarding the propriety of any cross-examination utilizing substantive material from the Discovery Blue Book.

**CONCLUSION**

For the reasons provided, the government shall provide a copy of the Discovery Blue Book to Pedersen's defense team on March 31, 2014, assuming that the parties have conferred regarding the appropriate language of the protective order.

IT IS SO ORDERED.

Dated this 27 day of March, 2014.

  
ANCER L. HAGGERTY  
United States District Judge