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August 20, 2021

VIA ECF
Hon. Marcia M. Henry, U.S.M.J.
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Dr. Joseph Wilson, Ph.D. v. State of New York et al.
Civil Action No. 1:15-cv-00023-CBA-MMH

Dear Judge Henry:

We write pursuant to the Court's Minute Entry and Order dated August 4, 2021, which directed us to file this letter motion requesting that the Court "So Order" plaintiff Dr. Joseph Wilson ("**Plaintiff**")'s subpoena for the New York State Office of the Attorney General ("**OAG**")'s investigative file on Mr. Wilson. For the reasons identified below, we respectfully request that the Court So-Order our proposed Subpoena to the OAG (attached as Exhibit A hereto).

Relevant Background

As set forth in the Fourth Amended Complaint (ECF 129, the "**FAC**"), Plaintiff asserts three causes of action for: (1) unlawful search and seizure, based upon the search of Plaintiff's offices at the City University of New York, and the seizure of his property by defendants Dr. Paisley Currah ("**Currah**") and Marcia Isaacson ("**Isaacson**"), in violation of the Fourth Amendment of the U.S. Constitution pursuant to 42 U.S.C. § 1983 (*see* FAC ¶¶ 54 – 62); (2) Defamation against defendant Terrence Cheng ("**Cheng**") (*see* FAC ¶¶ 63 – 68); and (3) Conversion, under New York state law, against defendants Currah and Isaacson in relation to the seizure of Plaintiff's property (*see* FAC ¶¶ 69 – 78).

Plaintiff requested, in a Joint Status report dated June 21, 2021 (ECF 135), that he be permitted to subpoena third party CUNY for information related to his computer and for production of at least twenty-two (22) additional boxes of relevant documents. He also requested that he be permitted to subpoena the OAG Public Integrity Bureau Investigative File (the "**OAG Investigative File**") concerning Plaintiff and that defendants be required to provide a privilege log (*see* ECF 135). The Individual Defendants, who are represented by Assistant Attorney General

Mark Klein, took the position that Plaintiff should be precluded from seeking the OAG Investigative File pursuant to the Law Enforcement Privilege and the work product doctrine (and possibly other applicable privileges). *Id.*, at 9. The Court reserved judgment after a teleconference dated August 3, 2020, and directed Plaintiff to file the instant letter motion seeking the OAG Investigative File by August 20, 2021 (April 30, 2021 Order).

Legal Standard Applicable to the OAG Investigative File

The Second Circuit identified the legal standard applicable to assertions of the Law Enforcement privilege in the case of *Macnamara v. City of New York* (*In re The City of New York)*, 607 F.3d 923, 940 (2d Cir. 2010). In *Macnamara*, the Court explained that "because the law enforcement privilege is a qualified privilege, not an absolute privilege, there are circumstances in which information subject to the privilege must nevertheless be disclosed." *Id*. The Court held that "the party asserting the law enforcement privilege bears the burden of showing that the privilege applies to the documents in question" and that "the documents contain information that the law enforcement privilege is intended to protect." *Id*. at 944.[1] The Court explained that the type of information to which the privilege attaches includes "information pertaining to 'law enforcement techniques and procedures,' information that would undermine 'the confidentiality of sources,' information that would endanger 'witness and law enforcement personnel [or] the privacy of individuals involved in an investigation,' and information that would 'otherwise … interfere[] with an investigation." *Id*.

Once a party has invoked the Law Enforcement privilege, the party opposing the privilege must overcome the "strong presumption against disclosure" by demonstrating that: (1) its suit is in good faith; (2) the information sought is otherwise unavailable; and (3) the party has a "compelling need" for the information. *A.N.S.W.E.R. Coal. v. Jewell*, 292 F.R.D. 44, 51 (D.D.C. 2013) (citing *MacNamara v. City of New York*, 607 F.3d at 945; *Dorsett v. County of Nassau*, 762 F.Supp.2d 500, 522 (E.D.N.Y.2011) (applying presumption)). Only after the party overcomes this "strong presumption" does the Second Circuit apply a ten-factor balancing test identified in *Jewell*, above. *See MacNamara v. City of New York*, 607 F.3d at 945.[2]

[1] The purpose of the privilege is "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Id*. at 941 (citing *Dep't of Investigation*, 856 F.2d at 484; *accord United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir.1995)).

[2] The ten-factor test examines: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is nonfrivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources[; and] (10) the importance of the information sought to the plaintiff's case. *See A.N.S.W.E.R. Coal. v. Jewell*, 292 F.R.D. 44, 50 (D.D.C. 2013).

Application of Legal Standard

As a threshold matter, the Individual Defendants lack standing to assert any exemption from disclosure of the OAG Investigative File on behalf of third parties. *See Jewell*, 292 F.R.D. at 50 (the government may invoke the Law Enforcement privilege by presenting a formal claim of privilege by the head of the relevant law enforcement agency, after actual personal consideration by that individual, with a detailed explanation of the information withheld and the privilege's applicability to that information). Moreover, there is no showing that the OAG Investigative File contains any information protected pursuant to *Macnamara* (*e.g.*, information that identifies law enforcement techniques and procedures, confidential sources, information that would endanger witnesses or law enforcement officers, etc.). However, even assuming that the Law Enforcement privilege is properly asserted, the presumption against disclosure is outweighed where, as here, Plaintiff's suit is in good faith, the information sought by Plaintiff is only available from the OAG Investigative File, and Plaintiff has a compelling need for that information. *Jewell*, *supra*, at 51.

Plaintiff easily establishes that his suit is in good faith, because his Complaint has already been tested and has surmounted defendants' motions to dismiss and/or strike the action (*see*, *e.g.*, ECF Dkt 55.). Moreover, the information sought by Plaintiff is only available from the OAG Investigative file: (i) did defendants' conduct their search at the direction of law enforcement; and (ii) how was the search conducted. Plaintiff has a compelling need for this information because it will determine which legal standard applies to Plaintiff's search and seizure claim, and whether the elements of Plaintiff's claim are satisfied under whatever standard applies. Under *O'Connor v. Ortega*, 480 U.S. 709 (1987) and its progeny, there is an exception to the requirement for a search warrant or for probable cause when a governmental employer conducts an administrative search for work-related non-investigatory reasons or is conducting an investigation into purported workplace misconduct. In such cases, the warrant and probable cause requirements are dispensed with in favor of a reasonableness standard (the "operational realities" test) that balances the government's regulatory interest against the individual's privacy interest. However, the plurality's view in *O'Connor* teaches that when an intrusion is by a supervisor rather than a law enforcement, the reasonableness of an employee's expectation of privacy changes. *Id*. at 717. Accordingly, the legal standard applicable to Plaintiff's claim is dependent, in part, on whether defendants were acting at the direction of law enforcement, which the OAG Investigative File will reveal. Regardless of the answer to that question, the OAG Investigative File will also indicate who conducted the search, how it was conducted, what property belonging to Plaintiff was taken, and what happened to that property. These facts are essential to determining whether the search and seizure of Plaintiff's office and property were reasonableness under whichever legal standard applies under the *O'Connor* line of cases. The location and status of Plaintiff's property is also essential to adjudication of Plaintiffs conversion claim.

For the foregoing reasons, Plaintiff's application for a So-Ordered subpoena of the OAG Investigative file should be granted.

Respectfully submitted,

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cc: All counsel of record (via ECF).