

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 13-cv-1363 (EGS)

**PLAINTIFF’S COMBINED OPPOSITION TO NON-PARTY DEPONENT
BRYAN PAGLIANO’S MOTION TO FILE EXHIBITS *EX PARTE*
AND UNDER SEAL AND MEMORANDUM OF LAW**

Pursuant to the Court’s June 3, 2016 and June 7, 2016 minute orders, Plaintiff Judicial Watch, Inc. respectfully submits this combined opposition to Non-Party Deponent Bryan Pagliano’s motion to file exhibits *ex parte* and under seal and memorandum of law:

MEMORANDUM OF LAW

I. Introduction.

The issue before the Court is whether Plaintiff may videotape Mr. Pagliano’s deposition as it has done for the four depositions conducted to date and as it intends to do for the two other depositions scheduled for later this month. Mr. Pagliano does not object to the deposition itself. He only objects to the videotaping of it. His request for a protective order should be denied.

II. Argument.

Mr. Pagliano’s request to file his immunity agreements *ex parte* and under seal is unfounded. First, the Court ordered Mr. Pagliano to file a memorandum, along with a

copy of his reported immunity agreements. The Court did not order the immunity agreements to be filed *ex parte* or under seal and could have done so. In addition, Mr. Pagliano ignored the Court's order and failed to provide details pertaining to the scope of his immunity agreements in his memorandum. Second, Mr. Pagliano claims that there is an "understanding" between him and the Justice Department that Mr. Pagliano's immunity agreements would remain confidential. However, Mr. Pagliano does not explain what he means by an "understanding." Nor does he provide any evidence demonstrating that such an understanding exists. Nonetheless, an "understanding" or even an agreement is irrelevant. It does not supersede a court order.¹

Third, Mr. Pagliano's reliance on FOIA to withhold the immunity agreements is misguided. Mr. Pagliano is not required to produce the agreements in response to a FOIA request, but rather in compliance with the Court's order in connection with Mr. Pagliano's anticipated assertion of the Fifth Amendment in civil discovery. Mr. Pagliano also has not provided any evidence whatsoever how the public filing of his immunity agreements could reasonably be expected to interfere with an ongoing investigation. In addition, it is the Justice Department's, not Mr. Pagliano's, assertion to make. Fourth, as this Court has repeatedly emphasized, this case is about the public's "right to know details related to the creation, purpose and use of the clintonemail.com system." Like all

¹ To the extent the Court determines that the agreements should be treated as confidential, Plaintiff, at a minimum, requests the opportunity to review the agreements under seal.

other filings in this case as well as the transcripts of the depositions, Mr. Pagliano's immunity agreements should be "publicly available."²

In addition, the *ex parte* and under seal filing of Mr. Pagliano's immunity agreements is prejudicial to Plaintiff. It hinders Plaintiff's ability to respond to Mr. Pagliano's request for a protective order. It also prevents Plaintiff from tailoring its questions in an effort to limit Mr. Pagliano's need to invoke the Fifth Amendment.³ Mr. Pagliano has requested that his deposition not be videotaped because he will "assert the Fifth Amendment and will decline to answer each and every question after he identifies himself for the record." In support of his request, Mr. Pagliano claims that the immunity agreements will not protect him from future prosecution. Plaintiff however does not know what is contained in any such agreements. Nor does Plaintiff know their scope. Plaintiff therefore cannot sufficiently respond to Mr. Pagliano's claim that it is appropriate for him to assert the Fifth Amendment to every question after his name.

Importantly, Mr. Pagliano does not identify whether he has received statutory or informal immunity. If he received statutory immunity, the resulting effects are predictable. If, on the other hand, Mr. Pagliano received informal immunity, the principles of contract law apply in determining the scope of informal immunity. *See United States v. Plummer*, 941 F.2d 799, 802 (9th Cir. 1991). Under those

² This Circuit has made clear that *ex parte* filings are generally disfavored and a strong presumption exists in favor of public access to judicial proceedings. *United States v. Microsoft Corporation*, 56 F.3d 1448, 1464 (D.C. Cir. 1995).

³ Plaintiff however cannot tailor its questions in a manner that would preclude it from gathering the necessary evidence. In a civil case, adverse inferences are permitted when a witness asserts his Fifth Amendment right against self-incrimination. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

circumstances, the actual language of the agreements is highly instructive. Because he has described the exhibits as “agreements,” Plaintiff can only assume that Mr. Pagliano received informal immunity. If that assumption is correct, the actual agreements will undoubtedly shed light on the areas in which Mr. Pagliano proffered testimony to the Justice Department and on what issues Mr. Pagliano may have reasonable concern for prosecution. It is only with this information that Plaintiff will be able to assess properly whether Mr. Pagliano has a legitimate fear that answers to all of Plaintiff’s questions present a danger to him.

This Circuit strongly discourages blanket assertions of the Fifth Amendment. *See United States v. Thornton*, 733 F.2d 121, 125-126 (D.C. Cir. 1984) (“Usually, a trial court cannot speculate whether all relevant questions would or would not tend to incriminate the witness; accordingly, the court normally requires that the privilege be asserted in response to specific questions.”); *see also United States v. Ortiz*, 82 F.3d 1066, 1073 (D.C. Cir. 1996). Until Mr. Pagliano hears each and every question asked by Plaintiff, he cannot know whether he would have a reasonable belief that his answers to every question would “support a conviction under a federal criminal statute” or “would furnish a link in the chain of evidence needed to prosecute [Mr. Pagliano] for a federal crime.” *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Mr. Pagliano can only refuse to answer each question if he can demonstrate that “there is a reasonable basis for believing a danger to [Mr. Pagliano] *might exist* in answering a particular question.” *Thornton*, 733 F.2d at 126 (emphasis in the original). Mr. Pagliano has not satisfied this burden. *See Hoffman*, 341 U.S. at 486 (“The witness is not exonerated from answering merely

because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination.”).

Mr. Pagliano has failed to demonstrate that he has a legitimate fear that answers to all of Plaintiff’s questions present a danger to him. The underlying issue currently before the Court is whether Mrs. Clinton and the State Department deliberately thwarted FOIA. To answer that question, the Court granted discovery to provide Plaintiff with the opportunity to uncover evidence concerning the creation and operation of the clintonemail.com system for State Department business as well as the State Department’s approach and practice for processing FOIA requests that potentially implicated former Secretary Clinton’s and Ms. Abedin’s emails and the State Department’s processing of the FOIA request at issue in this case. Although Plaintiff has not seen the immunity agreements and therefore does not know on what issues Mr. Pagliano proffered testimony, Plaintiff believes that at least some, if not all, of the questions it will ask during Mr. Pagliano’s deposition can be answered without Mr. Pagliano incriminating himself. Based on the limited information provided by Mr. Pagliano to date, it is not at all evident how Mr. Pagliano has a reasonable belief that answering questions about the creation and operation of the clintonemail.com system for State Department business or the processing of FOIA requests for Mrs. Clinton’s and Ms. Abedin’s emails would lead to his prosecution under a federal criminal statute.⁴

At this time, Plaintiff is not prepared to submit an extensive or complete line of questioning for Mr. Pagliano’s deposition. However, Plaintiff can provide the Court with

⁴ Mr. Pagliano does not allege any fear of prosecution in connection with potential testimony about the processing of FOIA requests.

some of the broad issue areas that it intends to cover during Mr. Pagliano's deposition. To the extent the Court grants Mr. Pagliano's request to file the immunity agreements *ex parte* and under seal,⁵ Plaintiff hopes this proffer will assist the Court in determining whether Mr. Pagliano's claim that asserting the Fifth Amendment in response to every question after his name is appropriate. *See Ortiz*, 82 F.3d at 1073 ("[C]ounsel did not proffer a line of questioning to demonstrate that the witness was not entitled to assert a blanket privilege much less indicate any doubt about the asserted privilege."). At this time, at a minimum, Plaintiff intends to ask Mr. Pagliano questions related to:

- His education, training, and employment history from 2008 to the present, including whether he was being paid by Mrs. Clinton while he was a State Department employee;
- His involvement in the creation and the operation of the clintonemail.com system;
- In what capacity (State Department or an employee of Mrs. Clinton) was he involved in the creation and operation of the clintonemail.com system;
- His involvement in the processing of FOIA requests to the State Department that potentially implicated emails of Mrs. Clinton and Ms. Abedin and this FOIA request;
- Discussions he had with employees within the Office of the Executive Secretariat responsible for the logistics and operations concerning Mrs. Clinton's communications while she was Secretary of State;
- Discussions he had with employees within the Office of the Executive Secretariat responsible for records management of Mrs. Clinton's files and records, including email, while she was Secretary of State;

⁵ If the Court denies Mr. Pagliano's motion to file the immunity agreements *ex parte* and under seal – in whole or in part – Plaintiff requests another opportunity to address the information contained in such agreements.

- Discussions he had with employees within the Office of the Secretary about Mrs. Clinton's and Ms. Abedin's use of email for State Department government business;
- Discussions he had with Under Secretary for Management Patrick Kennedy concerning the creation and operation of the clintonemail.com system as well as Mrs. Clinton's and Ms. Abedin's use of email for State Department business; and
- Discussions he had with Cheryl D. Mills concerning the creation and operation of the clintonemail.com system as well as Mrs. Clinton's and Ms. Abedin's use of email for State Department business.

III. Conclusion.

For the reasons stated above as well as in Plaintiff's opposition to non-party deponent Bryan Pagliano's motion for a protective order, Plaintiff respectfully requests that Mr. Pagliano's motion to file exhibits *ex parte* and under seal be denied, Mr. Pagliano's motion for a protective order be denied, and the Court order Mr. Pagliano to sit for a videotaped deposition.

Dated: June 10, 2016

Respectfully submitted,

/s/ Michael Bekesha
Michael Bekesha
D.C. Bar No. 995749
JUDICIAL WATCH, INC.
425 Third Street S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff

Defendant.

Civil Action No. 13-cv-1363 (EGS)

1. Mr. Pagliano's motion to file exhibits *ex parte* and under seal is **DENIED**;
2. Mr. Pagliano's motion for a protective order is **DENIED**; and
3. Mr. Pagliano is to sit for a videotaped deposition.

The Hon. Emmet G. Sullivan, U.S.D.J.