UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAYMING CHANG, et al.,

Plaintiffs,

v. **Civil Action No. 02-2010 (EGS/JMF)**

UNITED STATES, et al.,

Defendants.

MEMORANDUM ORDER

Currently pending and ready for resolution is the District of Columbia's Motion to Stay Discovery Regarding JOCC Running Resume Data Recovery [#817]. For the reasons stated below, the motion will be denied.

INTRODUCTION

On May 4, 2011, the District of Columbia advised the Special Master that a contractor for a company named NC4 had located data that had been entered into what is called the "E-Team" server during the weekend of September 26-28, the weekend of the fall 2002 IMF meeting during which plaintiffs were arrested. Notice Regarding Fall 2002 IMF JOCC Running Resume Data [#779]. The District reported the following:

> The NC4 contractor has booted the system, searched for target data and located the data that was entered into the E-Team[ ] server during the Fall 2002 IMF Weekend. The contractor is reasonably confident that all data entered during the weekend has been located and is now accessible on the server.

Id. at 1.

That confidence was well placed. The District has now produced that data, a 4,700 page document. Its discovery is significant because until May, 2011, the parties believed that data produced by a second database system, the Group Ware system, was irretrievably lost, meaning that the document known as the Joint Operations Command Center Running Resume could not be found. Its loss was, of course, one of the topics assigned for investigation by the Special Master by Judge Sullivan's Order of May 5, 2010. Order Appointing Special Master [#645] at 3. The E-Team data therefore is the only repository of the contemporaneous entries made by its users during the weekend when plaintiffs were arrested.

Several months later, however, at a hearing held on July 12, 2011, the District reported that it was aware of an attempt on February 26, 2003, to delete data from the E-Team server. Marc A. Bynum, a systems administrator at NC4, testified that he discovered such an attempt. Deposition of Marc A. Bynum, Aug. 23, 2011 at 15-16.

DISCUSSION

I. The Plaintiffs' Proposed Discovery

Plaintiffs have now announced an intention to take discovery and have indicated its scope. See *Chang* Plaintiffs' Opposition to District Motion to Stay Discovery Regarding JOCC Running Resume Data Destruction [#821] at 1 n.1. Specifically, plaintiffs wish to do the following: 1) Take the deposition of the person (identified now only by his user name) who accessed the system on February 26 and February 27, 2003 to delete data; 2) Take the deposition of a representative of the District of Columbia who will be deposed pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure as to the data deletion or destruction; 3) Take the deposition of the individuals who used certain user names on September 27, 2002; and 4) Take the

deposition of senior District officials and their counsel, who will speak to a) notification to the other defendants of the attempt to delete data; b) not advising plaintiffs' counsel and the Court of that fact until appreciably later; c) the delay in providing the identities of persons known to plaintiffs only by user names; and d) their failure to advise the Court earlier that NC4 had determined that the E-Team data could be extracted from the server. Id. See also *Chang* Plaintiffs' Supplemental Filing Regarding *Chang* Plaintiff's [sic] Previous Motion for a Show Cause Order [#820] at 2-3.

II. The District's Motion

The District of Columbia, for its part, has now moved that all discovery on this issue be stayed pending the investigation of this matter by the FBI and United States Attorney's Office to whom it has now referred the matter. District of Columbia's Motion to Stay Discovery Regarding JOCC Running Resume Data Recovery Doc. No. 817.

The parties have submitted their proposed findings of fact and conclusions of law and the question therefore presented is whether I should postpone the issuance of my findings of fact and conclusions of law until the FBI investigation is completed. According to the District, it suffices for me as Special Master to complete my findings solely as to the loss of the original running resume, the one that should have been captured by the Group Ware system. Defendants' Reply to Opposition to Motion to Stay Discovery Regarding JOCC Running Resume Data Recovery [#825] at 5. According to the District, the matter of the destruction of the E-Team data should be withdrawn as a topic for the Special Master because it has now been referred for investigation by federal authorities. Under its proposal, I would apparently return to the E-Team data only after the investigation by the federal authorities has finished.

III. Analysis

It is the law of this Circuit that not even the simultaneous investigations by a grand jury and an agency of the United States compel the staying of one in favor of the other: "The Constitution [ ] does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." SEC v. Dresser Industries, 628 F.2d 1368, 1375 (D.C. Cir. 1980). See also United States v. 8 Gilcrease Lane, Quincy, Florida 32351, 638 F.3d 297 (D.C. Cir. 2011) (court not obliged to stay forfeiture pending outcome of criminal case; Constitution does not require stay of civil proceedings pending outcome of criminal proceedings).

A court has discretion to take action, however, "where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter." Dresser, 628 F.2d at 1376. In such a situation, the simultaneous prosecution of the civil and criminal actions may 1) undermine a person's privilege against self-incrimination; 2) expand a party's right to discovery from the government beyond the limits of Rule 16(b) of the Federal Rules of Criminal Procedure; 3) expose the defense to the prosecution before trial; or 4) otherwise prejudice the case. Id.

The District cannot, or course, avail itself of whatever limited authority Dresser grants to stay proceedings whenever an individual is a subject of both a grand jury and an agency investigation.[1] The District is not and cannot ever be a defendant in a criminal action and it

[1] See, e.g., Estate of Gaither v. District of Columbia, No. 03-CIV-1458, 2005 WL 3272130 (D.D.C. Dec. 2, 2005) (discovery stayed in civil action based on stabbing death of inmate to permit trial of alleged killer when 1) resolution of criminal case might help plaintiffs; 2) civil discovery could have detrimental effect on government prosecution; and 3) proceeding with civil case could raise complicated privilege questions that criminal trial might obviate); United States ex rel. Westrick v. Second Chance, No. 04-CIV-280, 2007 WL 1020808 (D.D.C. March 31, 2007) (stay of qui tam action denied even though Assistant United States Attorney

therefore cannot claim the protections of the Fifth Amendment or protest that it will be prejudiced in a criminal prosecution. See Forrest v. Corzine, 757 F. Supp. 2d 473, 478 (D.N.J. 2010) (§ 1983 action against municipality not stayed because of investigation by federal authorities into police officers employed by municipality; municipality could not claim Fifth Amendment rights and any protection it could claim could be handled by protective orders that are preferable to stay). Thus, the traditional factors that have been weighed when a defendant in a civil action is or potentially may be a defendant in a criminal action are not pertinent here. The best the District can do is to rely on the court's power to stay the matters before it. Dresser, 628 F.2d at 1375 (discretionary power to stay proceedings acknowledged). That power, however, should not be exercised here.

First, all that we know is that the District has referred the question of the deletion of the data to the FBI and the United States Attorney's Office. There is no indication that any investigation has begun. Since one cannot even hazard a guess as to when that investigation will end, the District is in effect asking for an indefinite stay that is not in any way conditioned upon the occurrence of some known or reasonably anticipated event. Such indefinite stays are anathema in the federal courts in the absence of the most pressing need. Landis v. N. Am. Co., 299 U.S. 248, 254-255 (1936); Forrest, 757 F. Supp. 2d at 478; KLA-Tencor Corp. v. Murphy, 717 F. Supp. 2d 895, 903 (N.D. Cal. 2010).

Additionally, the investigation may or may not yield a criminal prosecution. If it does yield one, this case will, one supposes, have to await its resolution by trial or plea of guilty. On

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indicated that the defendants in qui tam action would be indicted; indefinite stay disfavored; possibility that government could gain evidence from defendant not entitled to in criminal case could be eliminated by protective orders).

the other hand, if it does not yield a prosecution there will have been no reason to wait because that investigation will not yield any information that will be useful in this case. In my experience, the District's suggestion that the FBI or the United States Attorney will make "findings and recommendations"[2] at the conclusion of its investigation is fanciful. Grand jury proceedings are secret and the Executive Branch is not required to announce why it has declined to prosecute any one. Frankly, if the investigation ends without a prosecution, we will be lucky to get a one sentence letter from the United States Attorney's Office indicating that the matter is closed. Thus, we may await indefinitely for a "report" that never comes. It made more sense for the two tramps to wait for Godot in Samuel Beckett's play "Waiting for Godot."

Judge Sullivan has now indicated that it is appropriate for the Special Master to take testimony and prepare findings of fact and conclusions of law as to (1) any effort to delete data from the E-Team server; (2) any knowledge by agents, representatives, and employees of the District of that effort; and (3) any knowledge by counsel for the District of that effort and all the circumstances that pertain or relate to counsel's advising fellow defendants, plaintiffs' counsel, and this Court of what [counsel] had learned about the effort to delete data. Minute Order (Sept. 27, 2011). Mr. Bynum has testified that such effort was made and his testimony will not be challenged. We also know the username of the person who made the effort and plaintiffs represent that they know who he is. It is not certain whether he will invoke the Fifth Amendment if he is asked about that effort, although it is surely more likely than not that he will if advised by counsel. Others who knew of that effort contemporaneously are in a similar position since their knowledge and failure to stop it may raise issues of accessorial or conspiratorial liability. But,

[2] [#817] at 7.

we already know that the effort was made and that we may not be able to learn any more because individuals' right not to incriminate themselves flows from the Fifth Amendment. There is nothing any one can do about that.

Additionally, if someone is prosecuted, his or her Fifth Amendment right persists until at least the conclusion of the prosecution and that may be a year or more away. If no one is prosecuted, the question becomes more complicated. In this Circuit, a witness may claim the privilege when the answer to a question may furnish a link in the chain of evidence needed to prosecute him and when the risk of prosecution is substantial and real and not merely fanciful. In re Corrugated Container Antitrust Litig., 662 F.2d 875, 881-83 (D.C. Cir. 1981). Whether the declination of prosecution in itself renders the risk of prosecution fanciful is, at best, an open and complicated question. Interestingly, the District of Columbia Court of Appeals, in an en banc opinion that surveyed thoroughly all of the case law, has concluded that "the overwhelming majority of cases . . . have determined that the trial judge should not speculate about or predict the likelihood of prosecution in relation to an assertion of the constitutional privilege against self-incrimination" and that "a court may only assess the possibility of future prosecution not the probability." Carter v. United States, 684 A.2d 331, 336-337 (D.C. 1996) (en banc). Under that precedent, only a showing of an absolute bar to prosecution such as the ones created by double jeopardy, immunity, or the statute of limitations suffices. Id. at 338. If the court of appeals for this Circuit were to follow Carter, and were to substitute "impossible" for "fanciful", the only possible bar in this case, the statute of limitations, would have to be considered. The statute of limitations might well bar a prosecution based on what occurred in 2003, eight years ago, but it would not bar a prosecution based on, let us stay, a conspiracy to cover up the deletion that was

hatched in 2010 when it became clear that a Special Master would be taking testimony under oath about the loss of the running resume.

All one can say at this point is that it is, at best, unclear whether witnesses will have Fifth Amendment privileges if the United States declines prosecution. That cannot possibly be resolved until the federal authorities complete their investigation and then decline to prosecute. As already explained, no one can predict when that will be. Again, we are still waiting for Godot and there is no news about when he will appear. Surely, it makes much more sense in a case about to enter its second decade to soldier on, even if it is possible that a witness will invoke the Fifth Amendment. Right now, there is nothing we can do about it and we must therefore proceed. It is therefore, hereby,

ORDERED that District of Columbia's Motion to Stay Discovery Regarding JOCC Running Resume Data Recovery [#817] is **DENIED.**

SO ORDERED.

Digitally signed by John M. Facciola
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Date: 2011.10.04 14:52:52 -04'00'

JOHN M. FACCIOLA
UNITED STATES DISTRICT COURT JUDGE