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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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9 Greg Moore; et al.,  
10 Plaintiffs,

No. CV 19-00290 TUC RM (LAB)

**ORDER**

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11 vs.

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12 Sean Garnand; et al.,  
13 Defendants.

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Pending before the court is a motion, filed by the defendants on October 6, 2020, to  
16 (1) quash the plaintiffs’ deposition subpoenas served on Edwin Arnaud and Matthew Stoner,  
17 (2) excuse the defendants from responding to the plaintiffs’ Fifth Request for Production, and  
18 (3) require the plaintiffs to obtain court permission prior to issuing subsequent discovery.  
19 (Doc. 234) The plaintiffs filed a response on October 20, 2020. (Doc. 236) The defendants  
20 filed a reply on October 27, 2020. (Doc. 238)

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The plaintiffs in this action claim their constitutional rights were violated when the  
22 defendants executed search warrants in connection with a Tucson Police Department arson  
23 investigation into the destruction of the Forgeus Apartments on June 8, 2017. (Doc. 1) The  
24 plaintiffs bring this action pursuant to 42 U.S.C. § 1983. (Doc. 1, p. 4) The first warrant, for  
25 DNA and other personal effects, was executed on June 9, 2017. (Doc. 1, pp. 8-9) The  
26 second warrant, for financial documents, was executed on June 14, 2017. (Doc. 1, pp. 9-11)  
27 The defendants apparently believe that the plaintiffs may be responsible for the fire that  
28 destroyed these apartments. (Doc. 1) They further believe that the fire that destroyed the

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1 Forgeus Apartments displayed similarities to a fire that destroyed an apartment on Blackledge  
2 drive in 2011. (Doc. 1, p. 10) The investigation into the Forgeus fire is ongoing.

3 In the pending motion, the defendants first move, pursuant to Fed.R.Civ.P.  
4 45(d)(3)(A)(iii) and Fed.R.Civ.P. 26(c)(1), for an order quashing the deposition subpoenas  
5 issued for Tucson Police Department employee Edwin Arnaud and Tucson Police Officer  
6 Matthew Stoner. *See* (Doc. 234-2, pp. 16, 19) Arnaud apparently “processed Greg Moore  
7 upon his arrival at the police station on June 9, 2017” when his fingerprints and DNA were  
8 taken pursuant to the first search warrant. (Doc. 234, p. 6) Stoner participated in the  
9 execution of the second search warrant at the Moore residence. *Id.*

10 In general, “[p]arties may obtain discovery regarding any nonprivileged matter that  
11 is relevant to any party’s claim or defense and proportional to the needs of the case,  
12 considering the importance of the issues at stake in the action, the amount in controversy, the  
13 parties’ relative access to relevant information, the parties’ resources, the importance of the  
14 discovery in resolving the issues, and whether the burden or expense of the proposed  
15 discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).

16 Rule 45 reads in pertinent part as follows:

17 On timely motion, the court for the district where compliance is required must  
18 quash or modify a subpoena that:

19 \* \* \*

20 (iii) requires disclosure of privileged or other protected matter, if no exception  
21 or waiver applies . . .

22 Fed. R. Civ. P. 45(d)(3)(A). Pursuant to Rule 26(c):

23 A party or any person from whom discovery is sought may move for a  
24 protective order in the court where the action is pending . . . . The court may,  
25 for good cause, issue an order to protect a party or person from annoyance,  
26 embarrassment, oppression, or undue burden or expense, including one or  
27 more of the following:

28 (A) forbidding the disclosure or discovery . . . .

1 Fed.R.Civ.P. 26(c)(1). Ordinarily, “[t]he burden is upon the party seeking the order to ‘show  
2 good cause’ by demonstrating harm or prejudice that will result from the discovery.” *Rivera*  
3 *v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9<sup>th</sup> Cir. 2004), *cert. denied*, 544 U.S. 905 (2005).

4 The defendants apparently concede that Arnaud and Stoner have discoverable  
5 information. They view as “fair game” Arnaud’s “training, background and experience; TPD  
6 protocol for processing a detainee or arrestee for fingerprints, photographs, and DNA; the  
7 substation set-up; and his interactions with and observations of Greg Moore on June 9,  
8 2017.” (Doc. 234, pp. 6-7) They also view as “fair game” questions about Stoner’s  
9 “training, background and experience; TPD protocol for executing a search warrant; the fact  
10 of and rationale for his sweep of the Cobblestone residence prior to the search beginning on  
11 June 14, 2017; his interactions with, and observations of Patricia Moore on June 14, 2017;  
12 and his handling of any weapon on June 14, 2017 in connection with the Cobblestone search  
13 warrant.” *Id.*

14 Prior to the deposition, the defendants’ counsel attempted to get assurances from the  
15 plaintiff’s counsel that he would not ask questions that fall within the Law Enforcement  
16 Investigatory Privilege (LEIP), which this court has already held applicable to this case.  
17 (Docs. 74, 113) The plaintiff’s counsel refused to provide these assurances stating that “I  
18 disagree regarding your limitations to my areas of questioning. I cannot predict what  
19 direction the depositions will take depending on the answers I receive.” (Doc. 234, p. 8) He  
20 also seemed to believe that the investigation that Arnaud performed on the night of June 8,  
21 2017 “is central to the activities of TPD . . . with regard to the issuance of the SW17SW1017  
22 [the first search warrant].” *Id.* The defendants, however, pointed out that Arnaud “arrived  
23 at the Forgeus fire scene on June 8, 2017 at 2013 hours – just over an hour *after* the search  
24 warrant to enter, search and seize evidence from the scene was obtained by Det. Garnand.”  
25 *Id.* (emphasis in original) It therefore seems unlikely that his investigations would be  
26 relevant on the issue as to whether the first search warrant was supported by probable cause.  
27 Moreover, testimony about his investigations into the cause of the fire fall within the LEIP.

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1 In an apparent attempt to reach a compromise, the plaintiffs’ counsel subsequently  
2 informed the defendants’ counsel that he would ask questions about those topics that both  
3 parties agreed were relevant and discoverable and “defer questioning of these two witnesses  
4 as to any area of testimony that is covered by LE[I]P . . . .” (Doc. 236, pp. 10-11) He agreed  
5 that if he asked a question that the defendants’ counsel believed was privileged under the  
6 LEIP, then the defendants’ counsel could interpose the appropriate objection and instruct the  
7 witness not to answer the question. *Id.* The defendants apparently found this proposal too  
8 burdensome and filed the pending motion to quash the deposition subpoenas.

9 The court finds the plaintiffs’ counsel’s proposal to be reasonable. It appears to the  
10 court that Arnaud and Stoner have discoverable information. And while the plaintiffs’  
11 counsel’s questions might stray into areas that are privileged under the LEIP, the defendants’  
12 counsel should be able to preserve the LEIP by interposing the appropriate objection at the  
13 appropriate time. Accordingly, the defendants’ motion to quash the deposition subpoenas  
14 for Arnaud and Stoner will be denied.

15 The defendants further move that this court excuse them from responding to the  
16 plaintiffs’ Fifth Request for Production (RFP). (Doc. 234); (Doc. 234-2, p. 11) In that RFP,  
17 the plaintiffs instruct the defendant Sean Garnand to “produce . . . all tangible items seized  
18 from the Forgeus property on the night of June 8, 2017, for inspection and imaging.” (Doc.  
19 234-2, p. 13) Apparently, the defendants have already disclosed to the plaintiffs photographs  
20 of some of these items such as a cigarette butt, an STP bottle, and a melted orange bucket.  
21 (Doc. 236, p. 8) The plaintiffs also seek the “names and individual identifiers for all  
22 Terminal and Operator codes, listed in the event chronologies and the unit histories, produced  
23 as DEFS 002-0012, DEF 316-349, and TPDPRR 1331-1332.” (Doc. 234-2, p. 13)

24 The defendants argue that evidence collected at the scene such as the cigarette butt  
25 and the STP can “could only pertain to Greg Moore’s criminal defense . . . [and] has no  
26 relevance to the Moore’s civil claims.” (Doc. 234, p. 5) Similarly, they maintain that the  
27 request for “names and individual identifiers” is not calculated to uncover relevant  
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1 information and “can only be read as seeking to create a list of potential witnesses to assist  
2 Greg Moore’s criminal defense.” *Id.*

3 In their response, the plaintiffs assert that the tangible items are relevant because they  
4 might provide clues to the true arsonist. They maintain that markings on the STP bottle  
5 could have provided clues that would have enabled the defendant Garnand to find out who  
6 purchased it. (Doc. 236, pp. 6-8) They further suggest that these items might be linked to  
7 squatters who were previously evicted from the Blacklidge property. (Doc. 236, pp. 6-8)  
8 The plaintiffs argue that these items are relevant to the First Claim in the Complaint, that the  
9 defendants engaged in judicial deception to secure the first warrant, 17SW1017, and the  
10 Eighth Claim, that the defendant Garnand reopened a closed investigation in retaliation for  
11 the plaintiff’s first amendment activities. (Doc. 236, p. 4)

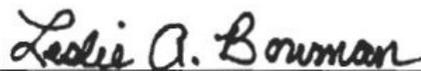
12 The court is not convinced that the tangible items are relevant on the issue of judicial  
13 deception or the issue of retaliation. In order to prove deception or retaliation, the plaintiffs  
14 would need to prove two things. First, they would have to show that the tangible items  
15 contained clues like fingerprints or sales tags. Second, they would have to show that the  
16 defendants realized the evidentiary value of the clues, intentionally decided to ignore them,  
17 and pursued an unreasonable investigation of the plaintiffs. The defendants conduct of the  
18 arson investigation, however, is currently subject to the LEIP and is not discoverable. Until  
19 and unless the LEIP is lifted, it does not appear that inspection of tangible items would yield  
20 relevant information. The plaintiffs did not address the defendants’ argument that the  
21 “names and individual identifiers for all Terminal and Operator codes” are not relevant.  
22 Accordingly, the court will grant the motion for a protective order as it pertains to the  
23 plaintiff’s Fifth Request for Production.

24 Finally, the defendants move for an order requiring the plaintiffs to obtain court  
25 permission prior to issuing subsequent discovery. (Doc. 234) The defendants cite a number  
26 of cases in support of their argument that abuse of discovery can result in sanctions but none  
27 for the proposition that this court may act as a discovery gatekeeper. Assuming without  
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1 deciding that the court could do so, the court finds that there is no justification for imposing  
2 this requirement at present. While some of the plaintiff's discovery requests have been  
3 denied by this court, that has not been the case with all of them. The court finds, for  
4 example, that the plaintiff's deposition subpoenas for Arnaud and Stoner were properly  
5 issued. The defendants' motion for an order precluding the plaintiffs from obtaining  
6 discovery without prior permission from the court will be denied.

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8 IT IS ORDERED that the motion, filed by the defendants on October 6, 2020, to (1)  
9 quash the plaintiffs' deposition subpoenas served on Edwin Arnaud and Matthew Stoner, (2)  
10 excuse the defendants from responding to the plaintiffs' Fifth Request for Production, and  
11 (3) require the plaintiffs to obtain court permission prior to issuing subsequent discovery is  
12 GRANTED IN PART. (Doc. 234) The defendants are excused from responding to the  
13 plaintiffs' Fifth Request for Production. The remainder of the motion is denied.

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15 DATED this 12<sup>th</sup> day of February, 2021.

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21 Leslie A. Bowman  
22 United States Magistrate Judge  
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