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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * *
STUDENTS FOR FAIR *
ADMISSIONS, INC., *
Plaintiff, *
vs. *
PRESIDENT AND FELLOWS OF *
HARVARD COLLEGE, et al, *
Defendants. *
* * * * *

CIVIL ACTION
No. 14-14176-ADB

BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT JUDGE
STATUS CONFERENCE

A P P E A R A N C E S

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Courtroom No. 17
John J. Moakley Courthouse
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Boston, Massachusetts 02210
February 25, 2016
11:10 a.m.

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P R O C E E D I N G S

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THE CLERK: All rise.

THE COURT: Good morning, everyone.

VOICES: Good morning, Your Honor.

THE CLERK: Court is in session. Please be seated.

This is Civil Action 14-14176, *Students for Fair Admissions versus President and Fellows of Harvard.*

Will counsel identify themselves for the record.

MR. STRAWBRIDGE: Yes, Patrick Strawbridge from Consovoy McCarthy Park on behalf of the plaintiff Students for Fair Admissions. I'm here with my colleague Michael Park, and Ben Caldwell from Burns & Levinson.

MS. ELLSWORTH: Good morning, Your Honor. Felicia Ellsworth for President and Fellows of Harvard College. And I'm here with Matthew Fox from the Office of General Counsel at Harvard.

THE COURT: Are you replacing Ara or is this just a cameo?

MR. FOX: Just for today. Thank you, Your Honor.

THE COURT: All right. So when I actually looked at this file last night and I thought we had gotten out a draft order between the status and the last conference, and then I realized there was so much paper

1 flying back and forth that we hadn't but we're going to get
2 out an order very quickly after this. It is largely a draft
3 now. It will be informed by what happens today and we will
4 get an order out. If anyone was expecting it, my apologies
5 for that.

6 So I am going to try and go through this sort of
7 methodically and then deal with whatever else you all have
8 on your minds today. But just as sort of a general
9 commentary, the Students For Fair Admissions,
10 Mr. Strawbridge, your paperwork is written as if if you
11 don't get it today you're never going to get it and that is
12 just not the case. There is a lot of the stuff that you're
13 asking for that you're not going to get today but I fully
14 anticipate you will get eventually once we sort of tailor
15 things after *Fisher*.

16 Of course, I feel like the -- I don't know whether
17 to call the death of Scalia untimely or just his death but
18 whatever -- after, of course, I felt appropriate sympathy
19 for him and his family and then my mind went right to
20 *Fisher*. So who knows what is going to happen with that,
21 what kind of time frame we are dealing with now. I don't
22 know if this is one of those cases that is going to turn out
23 to be four/four up there, I don't know, but it seems to me
24 this could extend our time frame on this.

25 *And*, but nonetheless, while we are waiting for

1 *Fisher* I want to get as much done as I can but what I am --
2 with some exceptions. No depositions and no email searches.
3 I just don't want that, those things to be done more than
4 once. So I would like it if we could spend the time to come
5 up with some parameters on what your email searches are
6 going to be but I am not going to have email searches done
7 now and then more different or more email searches done
8 after *Fisher*.

9 So, anyway, and for Harvard's part of this, there
10 is a negotiated protective order here and I want to respect
11 that. It was negotiated between the parties but it is clear
12 from their paperwork and from, I think from the volume that
13 Harvard has designated as "highly confidential," and I
14 understand your rationale for it, but they, I think that
15 they sort of bought a pig in a poke, right. They weren't
16 fully anticipating how much that was going to limit their
17 ability to share the information with their client.

18 And I agree that their client is not your typical
19 sort of client. This case is politicized in some ways and I
20 am not inclined to give them full access to these things but
21 I am inclined to enforce the terms of the protective order
22 and the way that it has been negotiated at this point; but I
23 am just asking you to be reasonable and careful about what
24 you are designating because you're making it difficult for
25 them to do their jobs at this point.

1 And if it gets, if I feel like it gets to the point
2 where I need to take a more interventionist approach to
3 that, I will; but I saw that you undesignated some things
4 and I'm a little unclear what -- I think you both
5 represented different things in the paperwork. But are they
6 allowed to discuss the highly confidential documents with
7 their client or they're not?

8 **MS. ELLSWORTH:** I'll speak to our
9 interpretation of that which is that the protective order
10 allows them to advise their client based on the highly
11 confidential information. You know, the language which
12 Mr. Strawbridge I think pointed out for you is pretty clear
13 that you can't show the actual documents and you can't give
14 the actual contents. I think in our view a reasonable
15 reading of that is that you can discuss and advise your
16 client on the contours of the information that you've
17 learned from it.

18 You know, I mean, this is a restriction that we
19 dealt with in other cases in the past. And one certainly
20 has to be careful and we are not suggesting that we want
21 them to be uncareful in how they interpret that but the idea
22 behind that provision in the protective order is to sort of
23 allow for the very accommodation that I think SFFA thinks it
24 needs.

25 **THE COURT:** So what she just said I think you

1 should be able to live with.

2 **MR. STRAWBRIDGE:** I don't think it's what the
3 protective order says.

4 **THE COURT:** Well, that's her interpretation of
5 the protective order. And if that turns out to be sort an
6 oral modification of the protective order between the two of
7 you, so be it. I mean, I'm not weighing in on that but her,
8 what she just said should allow you to function with your
9 client.

10 **MR. STRAWBRIDGE:** I am not -- I wish I shared
11 the Court's confidence. I'm afraid that I don't. I mean,
12 we do need to be mindful of it. I really don't want to put
13 myself in a situation where we can be accused of having
14 violated the protective order. It's why we made this
15 request and we've gone through this rationale to try to be
16 very deliberate.

17 I mean, I understand what Your Honor is saying
18 about the negotiations and encouraging them to be careful
19 but on a fundamental level this is really where it begins.
20 I don't think it's where it ends. You know, a tremendous
21 amount of this case and how the case is going to be
22 presented is going to revolve around expert analysis as to
23 how this admissions process works.

24 And under the terms of the protective order right
25 now, and I don't think that Ms. Caldwell (sic) --

1 Ms. Ellsworth, I'm sorry, has been entirely clear about the
2 extent to which they're taking a different view now. We
3 can't even disclose the existence of the materials that our
4 expert is looking at let alone the expert's analysis and
5 conclusions based on his review.

6 If it's about not giving him access to the
7 database, my client doesn't want access to the database
8 itself. He doesn't have any interest in looking at the
9 database. But the organization needs to be able to
10 understand what it is talking about.

11 And the only other point I'd make on this is if you
12 read *Crutter*, if you read *Gratz*, we're not looking to
13 litigate this case in a closed courtroom. The Supreme Court
14 is not going to consider that case in a sealed proceeding.
15 This stuff is going to come in. And to shut off our access
16 at this stage of the litigation is really troublesome.

17 **THE COURT:** Some of it is going to come in and
18 we don't know which of that it is going to be until after
19 *Fisher* in fairness. So, and it is not, it is not impeding
20 your ability to use the information with your expert. What
21 it's doing is impeding your ability to show and maybe
22 discuss the documents with your client. And that's, you
23 know, that was always going to be the case with this
24 protective order. It is always the case with almost any
25 protective order, right, that, and, I mean, your client is

1 not a competitor but they're a partisan in this and it is
2 understandable that they don't want to share that level of
3 information with your client.

4 Now, if they're, whether -- I mean, it is a
5 negotiated arm's-length protective order but obviously many
6 and highly competent lawyers. The only issue that concerns
7 me in there is if they're over-designated. I just told them
8 I don't want them to over-designate. And if it turns out
9 that they're over-designating and that really hampers you in
10 some way, we'll visit it again; but I would like to kick
11 that can down the road until after *Fisher* if I can, because
12 once, and not to mix a bunch of bad metaphors, but once the
13 cat is out of the bag, it is out of the bag, right. The
14 information has been shared with your client who, you know,
15 I can't undo that so --

16 **MR. STRAWBRIDGE:** Respectfully, Your Honor --

17 **THE COURT:** Of course.

18 **MR. STRAWBRIDGE:** None of the case law I think
19 supports the kind of conjectural concern when there is a
20 noncompetitive situation and this is --

21 **THE COURT:** But you signed -- you negotiated
22 and entered into that protective order.

23 **MR. STRAWBRIDGE:** Without merely understanding
24 the scope to which they were going to be --

25 **THE COURT:** Well, that is why I am -- that is

1 the nub of it; right? And I just said to them I am not
2 doing anything about this now but if they designate or
3 over-designate or whatever you want to call it to the point
4 where it really begins to hamstring you as this progresses
5 in a more fulsome way later down the road I will have to
6 deal with it but for the time being I am not inclined to
7 interfere with an arm's-length negotiated protective order
8 that -- I don't see the problem as being the protective
9 order. I see the problem as being the amount of
10 designation. And if it continues at that pace and it
11 hampstrings you, then I'll have to wade into it, but --

12 **MR. STRAWBRIDGE:** Well, let me just cut, so we
13 at least have something on the record, let me just pose the
14 question. Is it Harvard's position today that we can
15 discuss the analysis that our expert makes of the database
16 material that they have produced as long as we do not
17 disclose the actual underlying database material itself to
18 our client?

19 **MS. ELLSWORTH:** Mr. Strawbridge and I have
20 discussed this in the past. It's a little hard for us to
21 answer that question without knowing what the analysis looks
22 like, right. So I think there is an interpretation of the
23 protective order that would say that certain analysis that
24 is at a very high level and showing, you know, race (ph.)
25 analyses and things like that, that would probably be okay

1 if the analysis is there were X number of this and Y number
2 of that, that seems to us to get to close to actually
3 disclosing the contents of the database.

4 **THE COURT:** What I think she is saying and
5 what I would courage and what is reasonable to me is that if
6 you're running an analysis of that database, then you should
7 be able to share with your clients the conclusions of that
8 analysis, right. This is what the overall statistics look
9 like, what you put in your PowerPoint, right, but that you
10 probably should be way more careful about sharing things
11 like we took this information from that document and this
12 information from that document and we did this with it and
13 came out with that number, right?

14 And I don't think they need to know, your client, I
15 mean -- and, again, I'm not trying the case -- but it seems
16 to me that the conclusions of the expert, the results of the
17 analysis should be what your client needs. He doesn't need
18 to know the nitty gritty of how you got there. And I never
19 had a client that even wanted to know how anybody got there
20 so.

21 **MR. STRAWBRIDGE:** I mean, I suppose there is,
22 there is some uncertainty as to where you draw those two
23 lines between what is nitty gritty and what is a conclusion
24 and what is the basis for a conclusion. And that's where it
25 gets very complicated.

1 I mean, I respectfully disagree that our client
2 doesn't need to know this, that we don't need to have the
3 ability to share this with one client representative. If
4 Your Honor's mind is made up on this, you know, I would
5 inquire as to whether it is going to be addressed in the
6 draft order, because we have requested some relief on this
7 that will at least allow us to consider whether we want to
8 seek further review?

9 **THE COURT:** Let me see. So this was largely
10 drafted after our last -- it is not addressed in the current
11 draft exactly but if you want me to put something in there
12 I will.

13 **MR. STRAWBRIDGE:** Yes, we just --

14 **THE COURT:** I mean --

15 **MR. STRAWBRIDGE:** I would respectfully just
16 ask the Court to, you know, if you look at the language of
17 *Danny V* (ph.), if you look at some of the First Circuit's
18 discussion of what sort of standard is necessary and how
19 important it is that clients not be overly restricted, I
20 think when you pull that all together we'd ask you to just
21 take a look at it.

22 But if Your Honor is of the view that our client
23 cannot be given access at least on equal footing with their
24 in-house counsel --

25 **THE COURT:** I am of that view.

1 **MR. STRAWBRIDGE:** And we'd request that it be
2 in the order, please.

3 **THE COURT:** That's fine. I am happy to put
4 that in the order. You don't have to preface anything with
5 "respectfully" or "honestly" because I really expect, I
6 assume both of those two things.

7 All right. So let me try and wade through this all
8 and you can tell me what I have left out.

9 So it -- so on policies, manuals and guidelines,
10 Ms. Ellsworth, are you now willing to produce 1 through 14,
11 17 and 20? I'm talking about 17 and 20. They ask for 1
12 through 14. You say you are producing it but you don't
13 actually identify 1 through 14.

14 **MS. ELLSWORTH:** Yeah, 1 through 14 and --
15 well, one relates to either electronic databases, printed
16 databases and manuals and guidebooks in connection with the
17 same.

18 What we have agreed to produce is, I think probably
19 the closest RFP to it is probably RFP two which is code
20 books and guide books from the database information that's
21 already been produced.

22 Other database information to the extent it exists
23 has not been produced to them. I'm not sure any code books
24 or guidebooks exist as to that. So what we've said is that
25 essentially any code books, guidebooks, manuals, et cetera,

1 for the information that has already been produced under
2 Your Honor's order we will be happy to produce at this point
3 as to that RFP.

4 **THE COURT:** So I want to make sure that the
5 order is clear. So are you -- is that yes to 1 through 14
6 or do you want me to say it --

7 **MS. ELLSWORTH:** It's not 1 through 14 because
8 1 through 14 would be much broader. It would be two I
9 think.

10 **THE COURT:** Okay. Two on the RFP?

11 **MS. ELLSWORTH:** Correct.

12 **THE COURT:** And then 17 and 20?

13 **MS. ELLSWORTH:** Correct, subject to our other
14 objections.

15 **THE COURT:** So 2, 17 and 20. Does that
16 satisfy you, Mr. Strawbridge?

17 **MR. STRAWBRIDGE:** I think with the caveat that
18 we may want to revisit it after *Fisher*, I think that that's
19 satisfactory. I understand the qualification with respect
20 to 1 and 2 is with respect to the data being produced here,
21 they're going to produce the associated data books or guide
22 books, whatever exists, so that's fine.

23 **THE COURT:** Okay. You can come back on that
24 if it doesn't work out.

25 The application files for SFFA members, they agreed

1 to produce that once they've gotten consent from those
2 people. Is that accurate?

3 **MS. ELLSWORTH:** Correct.

4 **THE COURT:** And I assume that satisfies you
5 with regard to those?

6 **MR. STRAWBRIDGE:** Yes. I'll confer with my
7 counterpart here as to whether there is a particular form
8 they want it but that's fine.

9 **THE COURT:** Okay. No. 15 which is documents
10 concerning the racial composition of the pool of applicants.
11 And we, I think we talked about at our last one that if such
12 a thing existed in sort of a generic form that you would
13 produce those to them. Where are we on that?

14 **MS. ELLSWORTH:** So, Your Honor, what we've
15 indicated in our letter from a couple days ago is that to
16 the extent that what SFFA is looking for is the aggregate,
17 you know, applicant and admit data, that's discernible from
18 the database that's already been produced. It has the
19 racial information and it has whether someone was admitted
20 or not for those two years' of data that's already been
21 produced so that has already been produced.

22 So, there is also a request for enrolled students'
23 data that the plaintiff agreed to and we didn't agree to
24 produce any enrolled students' data as to anything in our
25 RFP responses and we're happy to discuss that. I am not

1 sure where Your Honor is on that.

2 **THE COURT:** Well, do you agree that what they
3 produced to date allows you to extract the information you
4 are looking for?

5 **MR. STRAWBRIDGE:** I don't think that what
6 they've produced is sufficient and, Your Honor, I'm happy,
7 if I could approach very briefly --

8 **THE COURT:** Sure.

9 **MR. STRAWBRIDGE:** -- I think I'd like to show
10 you.

11 **THE COURT:** Sure.

12 (Whereupon, a document was handed to the Court.)

13 **MR. STRAWBRIDGE:** I have handed you page two
14 of two from a deposition in this case. It has been marked
15 "highly confidential" so I am not going to disclose the
16 contents of it other than to note that this page describes a
17 particular document, a set of documents prepared during the
18 admissions process.

19 **THE COURT:** Where are you? Start me on a
20 line.

21 **MR. STRAWBRIDGE:** It's basically the entire,
22 if you start at the first question on line seven and
23 follow --

24 **THE COURT:** Give me a second here.

25 (Pause in proceedings while the Court read the

1 document.)

2 **THE COURT:** Okay. And that leads to, your
3 position is this document exists. I assume you are about to
4 tell me they haven't given it to you.

5 **MR. STRAWBRIDGE:** And I would, the one point I
6 would also make is that there is a big difference between
7 the ability to look at a database after the fact and discern
8 where it all ended up as opposed to contemporaneous evidence
9 as to how they were using race during the admissions
10 process. That's the evidence that this document in
11 particular captures.

12 And this is the kind of document that I think Your
13 Honor said at the last hearing was the sort of thing they
14 ought to produce. We would ask that this set of documents
15 generated during the admission cycles, particular periods
16 during the admissions cycles be produced.

17 **MS. ELLSWORTH:** Your Honor, RFP 15 asks for
18 all documents from a relevant period concerning the racial
19 composition of the pool of applicants, admitted students or
20 enrollees. And our response and objection was that we would
21 produce documents sufficient to show the racial composition
22 of the pool of applicants, admitted students, and admitted
23 students, so that's the objection that we made there.

24 If there is a specific back and forth about this
25 specific RFP, I think where we are on this, what we've

1 agreed to produce is sufficient to show the composition of
2 the class, which they can get that. Now, I'm not denying
3 that the document that is the subject of this testimony
4 exists or some document like this --

5 **THE COURT:** Your position is that they haven't
6 asked for it?

7 **MS. ELLSWORTH:** My position is that that's the
8 type of, within the process kind of the granular
9 information, at least our interpretation of Your Honor's
10 rulings so far is the type of information that should await
11 *Fisher II* and the contours of the case as opposed to we're
12 looking for just the aggregate, the breakdown. They have
13 the database and they can play with it whatever way they're
14 able to do so.

15 **THE COURT:** I don't, I haven't seen this
16 document. I don't really know what it says but this seems
17 to me to be a generic sort of document that doesn't identify
18 individual students that should go over unless there is
19 some --

20 **MS. ELLSWORTH:** The document that is the
21 subject of this testimony, you're right, Your Honor, at
22 least most of it that I am aware of would not identify
23 individual students.

24 **THE COURT:** I think that they should get that
25 document if they have asked for it. Have you asked for it?

1 **MR. STRAWBRIDGE:** Oh, yes, we have asked for
2 it. Her position is that they had not yet agreed to produce
3 it when we were initially exchanging objections and
4 responses but we certainly have asked for this document.
5 It's encumbered by our request.

6 **THE COURT:** So, you know, I mean, my
7 presumption is that documents should go over except email
8 searches. I think we should wait to define the search terms
9 because I don't think that should be done more than once, or
10 that identifies private student information.

11 So I don't see any reason why a document like this
12 would not go over at this point to them.

13 **MS. ELLSWORTH:** Okay, Your Honor. I mean, I
14 hear you and we'll find, locate any versions of this
15 document from the time period that we've been producing
16 from.

17 I do think this sways into the EIS searching but I
18 hear your order and we're happy to find it.

19 **THE COURT:** I mean, this doesn't seem to me
20 like it is, I mean, I view the EIS searching where you're
21 doing a word search and you come up with a million documents
22 and someone has to go through them to weed out which 300,000
23 were actually responsive, that's what I am trying to avoid.

24 But where you have an identifiable document,
25 they're probably sitting in a folder someplace, it is not

1 going to require any real discretion about what goes over
2 and what doesn't, when you pull that group of documents, I
3 think those are the things that should go over.

4 I don't want you to have to engage in sort of a
5 massive document review and production before we know what
6 the parameters of *Fisher* are going to be; but where there is
7 discrete sets of documents that don't require that sort of
8 review function, I would like those to go over, unless they
9 reveal confidential student information or some other trade
10 secret or whatever Harvard wants to call their process at
11 this point.

12 **MS. ELLSWORTH:** Okay. I understand the
13 Court's view on that.

14 **THE COURT:** Okay. I am actually, I am going
15 to go back through all of these documents but I happen to
16 have them in front of me right now, Harvard's most recent
17 one which is the order, I'm marching through these, but
18 we'll go back and capture whatever is not in this one.

19 Documents concerning race and admission process
20 which are SFFA's request 22, 23, 32 and 33. I'm not
21 prepared to order those be produced now. I think those are
22 the types of documents that should wait until after *Fisher*,
23 unless *Fisher* gets to be extremely protracted which maybe we
24 can revisit some of this, but these all seem like they would
25 require email searches. I think they are premature at this

1 point in the process.

2 I guess I should say that is 22, 23 and 32. 33
3 which is what -- those are documents that, what are you --
4 it's your, you are correlating academic performance to
5 demographic characteristics, is that what 33 asks for?

6 **MR. STRAWBRIDGE:** Yes, Your Honor, the
7 Complaint discusses, and it will be Harvard's burden to show
8 that whatever, however they're using race in their
9 admissions process, that it's going to be effective in
10 achieving their stated goal which presumably is a diverse
11 campus climate that stretches beyond the date of admission.
12 And, therefore, we had asked for, among other things,
13 academic performance data broken down by ethnicity, you
14 know, for the four-year period at least covering the
15 material when we had initially made this request.

16 Harvard submitted that they would consider
17 producing it on an aggregate basis, not a specific anonymous
18 student basis. We said we were interested in that aggregate
19 data. At that point Harvard asserted the stay and basically
20 shut down the discussions but we think that's highly
21 relevant information. It's going to be necessary to the
22 Court's consideration. And because it does not identify
23 students on a specific level and it can be easily discerned
24 from the existing electronic records, we think that should
25 be produced.

1 **THE COURT:** So in your letter you actually
2 address all of their points except this one, at least I
3 didn't see it here. So what is Harvard's view on 33?

4 **MS. ELLSWORTH:** On 33, Your Honor, I mean,
5 again, this, there are many different subparts of this: The
6 application rate of high school students to Harvard; the
7 rate at which applicants are admitted. This is seeking
8 documents that seek to measure, estimate or predict using
9 race how people will apply, how people might enroll, how
10 enrolled students may perform once they actually matriculate
11 at Harvard.

12 First of all, I would note that, again, this I
13 think will require an EIS search for us to determine whether
14 any documents are responsive to this request. I'm not
15 certain how we had intended to respond to their objections,
16 or our objections and responses.

17 And, secondly, again, on enrolled students, we
18 don't view that as being an appropriate part of this case.
19 We regard that information very zealously and are very
20 cognizant of the privacy intrusion on enrolled students from
21 this case which is really about the admissions process.

22 So I think trying to -- I don't believe that these
23 fall into a category of some discrete document or data set
24 that we could pull from. It's about predicting or using
25 race to predict performance. You know, again, we don't

1 agree that's appropriately part of the case but certainly as
2 a sort of more functional discovery matter it would be very
3 difficult to obtain at this point in time.

4 **THE COURT:** I am not so interested in the
5 predictive part of that. I think that gets saved. But if
6 you have raw statistical anonymous data on how different
7 demographic groups are performing, does that exist?

8 **MS. ELLSWORTH:** Once enrolled at Harvard?

9 **THE COURT:** Well, I am going to hold back on
10 the predictive stuff; but, yes, they claim in their
11 Complaint that you, you allege -- I think I have this
12 right -- that you allege that candidates that are let in on
13 sort of an affirmative action type of theory underperform
14 others; right?

15 **MR. STRAWBRIDGE:** Correct, and ultimately have
16 a negative effect both on the quality and the quantity --

17 **THE COURT:** I mean, at some point they are
18 going to be entitled to that information. And I, the
19 predictive part of it I am going to hold back on. I have
20 taken that off the table for now but it's the statistical
21 analysis of how those demographic groups are performing at
22 Harvard, to address that issue in their Complaint. Do those
23 sorts of documents exist?

24 **MS. ELLSWORTH:** So as to enrolled students, I
25 want to make sure I understand the question. Whether there

1 is information in Harvard's possession about enrolled
2 students, majors or GPA, things like that?

3 **THE COURT:** Enrolled students, I mean, I'm not
4 sure, what are you talking about? Are you talking about
5 students that have already graduated? Is that going to
6 be --

7 **MR. STRAWBRIDGE:** I think that we would like
8 to look at this aggregate data over a time period, at least
9 four years, probably maybe a little bit longer, to see how,
10 you know, the admissions process actually manifests itself
11 once the students get on campus and go through the process.

12 I think Your Honor has identified what the issue is
13 and we obviously need a rolling basis for a period of time.
14 We have been negotiating and discussing how that could be
15 produced on an aggregate basis by ethnicity. Obviously
16 there are a lot of parameters and functions but it's our
17 understanding that all this information can be gleaned from,
18 you know, enrollment records.

19 **THE COURT:** Do you have it or -- at this point
20 I am not going to -- well, do you have it? How is that
21 information kept?

22 **MS. ELLSWORTH:** I mean, the Office of the
23 Registrar has certain information about enrolled students.

24 **THE COURT:** Do you keep that data someplace?
25 Do you look at that data?

1 **MS. ELLSWORTH:** Does Harvard look at that
2 data? To be honest, Your Honor, I don't know the answer to
3 that question.

4 **THE COURT:** Have they kept documents that
5 capture that? I'm not going to ask you to make something
6 for them.

7 **MS. ELLSWORTH:** I would have to confer as to
8 whether there are documents that are currently in existence
9 versus simply a database that somebody could query.

10 **THE COURT:** I mean, if somebody has done a
11 statistical analysis that shows that this group performed in
12 this way, that group performs in that way, whatever that
13 information is, however it's kept, historical information,
14 historical anonymized information. I am not so concerned
15 about the distinction between currently enrolled. I am more
16 inclined to protect the currently enrolled to be, to -- but
17 if you keep that historical information and it is anonymous
18 and it is available, that should probably go to them unless
19 you can, unless there is some way in which it falls out of
20 the parameters I articulated that I hadn't thought of.

21 **MS. ELLSWORTH:** Well, I don't think it
22 necessarily falls out of the parameters of discovery as Your
23 Honor has been suggesting today.

24 I think our larger concern there is that we don't
25 believe the performance data about either currently enrolled

1 or previously enrolled students is actually something that
2 should be produced in this case.

3 **THE COURT:** Well, why? Because they have
4 alleged it in their Complaint? Why would they not be
5 allowed to explore it in discovery?

6 **MS. ELLSWORTH:** We simply don't think that it
7 is relevant to the question before the Court as to the race
8 in the admissions process and the permissible --

9 **THE COURT:** Well, that is an interesting
10 point. So under current case law they would be entitled to
11 that information but what I am extrapolating from what you
12 are saying is that *Fisher* may change those parameters in
13 which case the performance may not become so relevant.

14 **MS. ELLSWORTH:** It may, and I think that even
15 under current case law it is not clear as to how relevant
16 this -- I think it's what academics call the mismatched
17 theory. It's not the theory that we buy into. I understand
18 that the plaintiffs have made allegations in their
19 Complaint; but from our point of view the relevant question
20 for this Court is the admission process as it was conducted
21 by Harvard and whatever information goes into that process.

22 **THE COURT:** Well, the admissions process is
23 conducted by, they're allowed to consider race for certain
24 limited purposes. And what he is saying is that however
25 Harvard is currently considering race in its admission

1 process, they want to argue that it is not achieving those
2 purposes, right. So they can't make that argument unless
3 they see the data.

4 So, you know, my expectation is that at some point
5 they are going to get it but now I am thinking about how
6 *Fisher* might impact that and I may, I may have them hold off
7 on 33 too but --

8 **MR. STRAWBRIDGE:** If I can just push --

9 **THE COURT:** Yes, go ahead.

10 **MR. STRAWBRIDGE:** Just --

11 **THE COURT:** Respectfully push, and honestly.

12 (Laughter.)

13 **MR. STRAWBRIDGE:** Now you are making fun of me
14 I think.

15 (Laughter.)

16 **MR. STRAWBRIDGE:** I mean, what we are looking
17 for here is not I don't think particularly burdensome. This
18 is aggregate data that's available in the Registrar's
19 Office. It is just pulling a subset of electronic data that
20 they already have so that we can do some basic analysis on.
21 It is relevant and, you know, there is a tendency in this
22 case I'm afraid for Harvard to insist that *Fisher* is going
23 to change everything without actually putting any meat on
24 those bones or explaining specifically how *Fisher* might
25 change it. I mean --

1 **THE COURT:** You know, you are going to get it,
2 right. I mean, I am not, this is not a ruling for all time.
3 I will tell you, I mean, to be perfectly honest, which I
4 always try to be, you know, I want, I am sensitive to the
5 issues that they have raised but I am also sensitive to, you
6 know, some of the other issues in this. And if, you know,
7 if you are going to suggest that certain demographic groups
8 perform or underperform or over-perform other demographic
9 groups, I mean, that can have sort of political implications
10 that I am not entirely comfortable putting out there unless
11 we need to I guess is the way I will put that.

12 **MR. STRAWBRIDGE:** I guess my response to that
13 is we're under a legal regime that today and after *Fisher* is
14 still going to require strict scrutiny to the use of race.
15 Whether it's a politically uncomfortable conversation or not
16 has no bearing on whether they can meet that standard. It
17 is one of the asserted bases for their use of race and it
18 needs to be tested.

19 **THE COURT:** Let me interrupt you. What if
20 *Fisher* says you cannot consider race and Harvard says, Okay,
21 we are not going to consider race anymore in any way, shape,
22 or form?

23 **MR. STRAWBRIDGE:** Well, that would be a
24 victory for Students For Fair Admissions.

25 **THE COURT:** And then that data would never,

1 the data would become irrelevant.

2 **MR. STRAWBRIDGE:** I guess at some point, Your
3 Honor, if we are going to try to move some part of the case
4 forward, this seems like a pretty reasonable and narrow and
5 non-specific student way to move part of the case forward
6 during *Fisher*. If Your Honor's inclination is to wait
7 because of all the potential ramifications that *Fisher* might
8 have, then Your Honor will make her decision.

9 But I just, this seems to us like a small ask and
10 something that is easily done on a nonspecific basis and is
11 the kind of appropriate way to make progress on the case
12 during the next few months.

13 **THE COURT:** Yes, I mean, I am pretty
14 comfortable with the progress that I am pushing you to make
15 during *Fisher*. I know you are thinking it is not merely
16 enough but they are thinking it is way more than they want
17 to do so the fact that everyone is equally unhappy gives me
18 some assurance that I am reasonably on the right track.

19 So I think I am going to hold off on 33. I do
20 think 33, assuming that *Fisher* doesn't completely
21 reconfigure the landscape, is something you are going to be
22 entitled to. I mean, they are going to be entitled to it
23 so, you know, assuming you decide you want to give them now
24 sort of statistical trending information, that is up to you
25 but I am going to hold off on it until we have *Fisher*.

1 So I am going to hold off on 22, 23, 32 and 33. I
2 am also going to hold off on 37 and 38 which is
3 consideration of the race neutral activities. Really I
4 think that is like the heart of *Fisher*.

5 All right. On the over designation of documents, I
6 hope it doesn't get to this point but I will review the
7 documents in camera individually if I have to. I mean, I
8 will just put that out there but I would really rather not
9 but if you all can't -- I am just, I am so disinclined to
10 modify the terms of the protective order at this point that
11 it seems like the only available remaining alternative is to
12 review the documents and we will do that.

13 SFFA asked for a redaction log. I am not really, I
14 guess I don't really understand this one. Are you producing
15 redacted document, is that what you are doing?

16 **MS. ELLSWORTH:** Certain of the documents have
17 the student information redacted from them.

18 **THE COURT:** Is there anything being redacted
19 besides student information?

20 **MS. ELLSWORTH:** Well, for privilege, although
21 I don't believe that's actually implicated here, but student
22 name, address and other information. Mr. Strawbridge is
23 probably, I'll preview what he might be saying, which is
24 that certain of the information that we've redacted from
25 hard copy documents that are produced is the subject of the

1 dispute on the database fields as to, for example, high
2 school, so there is some interplay between those two
3 questions I think.

4 **THE COURT:** Does the protective order require
5 a redaction log?

6 **MS. ELLSWORTH:** No, it doesn't. It doesn't
7 speak to it one way or the other, I don't think.

8 **MR. STRAWBRIDGE:** I'll say this. The
9 protective order anticipates that they are permitted to
10 redact certain sensitive information which we were willing
11 to agree to not realizing how it was ultimately going to
12 manifest itself.

13 So, and the modification, our request on the
14 redaction log, if they're redacting a word here or there and
15 you can see, you can discern from the document what
16 information has been redacted, we don't need a redaction log
17 on this. But our concern was at one point there was a
18 17-page, approximately, a document that was redacted in its
19 entirety. And if that's what's going to happen going
20 forward, if we can make sense of redactions, I mean, our
21 view here is going forward we need some kind of way in which
22 we can discern what these documents are and what the
23 information being redacted is.

24 And so for the non-contextual redactions, when
25 they're redacting entire pages of documents, we think a log

1 is necessary.

2 (Whereupon, the Court and the Clerk conferred.)

3 **THE COURT:** Is that, what he says accurate?

4 **MS. ELLSWORTH:** Yeah, there was one document
5 which was an application file that was part of a training
6 binder I believe so it was an actual student application
7 file and that was redacted in full.

8 All the other documents I believe one can tell from
9 context what the, what it was that was being redacted so I
10 think the modification that Mr. Strawbridge has requested
11 is, aside from this one document, is consistent with what
12 has been done.

13 **THE COURT:** I am going to hold off on ordering
14 a log at this point; but if you are producing lots of
15 redacted documents in such a way that they can't figure out
16 what you're redacting, I will order some sort of limited log
17 on that.

18 So my suggestion is that maybe you can use labels,
19 student application or whatever. I am not going to require
20 a formal log. I think it is a reasonable request that when
21 you are redacting entire documents such that you can't
22 figure out what it is that you should get some help.

23 **MS. ELLSWORTH:** I appreciate that and I,
24 understood.

25 **THE COURT:** Okay. All right. These data

1 fields that you all are arguing about, some of these I just
2 can't understand like what is --

3 **MS. ELLSWORTH:** Your Honor, before we get too
4 into the weeds on the database fields, there are individuals
5 in the courtroom who are not affiliated with the case.
6 These are pretty highly sensitive. I don't know how Your
7 Honor wants to handle that but it is not --

8 **THE COURT:** Okay. Let's hold off on that.
9 Let's see what else we can do here.

10 **MS. ELLSWORTH:** Thank you, Your Honor.

11 **THE COURT:** Let me make sure I am covering
12 everything. I am going backward on these letters.

13 All right. So now I have in front of me, I am
14 moving backwards with these letters, now I have SFFA's
15 letter of February 10th which is document 134-1. And stop
16 me if I go into things that shouldn't be discussed in this
17 setting but I think that they make a pretty good argument on
18 zip code and the high school information.

19 And I know what your response is or I anticipated
20 that there are many high schools that only have one
21 applicant and they say that satisfies as -- that makes it
22 reveal too much information. But that, I don't think that
23 that point, that's sort of FERPA covered information, right.
24 So I think FERPA is the issue but -- and they argue, and I
25 think fairly persuasively, that there is other, that they

1 are not intending on identifying specific students, that
2 they're precluded from going and talking to those students
3 anyway even if they did identify them. But, you know, zip
4 code and the high school is not itself personally
5 identifying information about anybody.

6 And I guess I want to hear your thoughts on that.

7 **MS. ELLSWORTH:** Thank you, Your Honor. I
8 mean, our argument is as we've laid it out which is that
9 particularly in conjunction with the information that has
10 already been produced and in conjunction with the fact that,
11 you know, for I think it's approximately half of the
12 admitted class, and they are the only students from their
13 high school, either admitted or in certain cases applied,
14 that goes beyond high school, for some it is in towns, for
15 some it's in the entire state, so it does come very close to
16 really making clear who these individuals are.

17 And we think, again, to Your Honor's point about
18 this, this is not a situation for all time, particularly
19 during the pendency of *Fisher II*, this type of information
20 going over perhaps unnecessarily is we think an intrusion on
21 the student and applicant privacy. Whether it's covered by
22 FERPA or not, it is still an intrusion on that privacy and
23 we think at this time it's not warranted.

24 That's our position on high school and zip code. I
25 understand Your Honor's view that it is not necessarily on

1 its own individually identifying but in conjunction with the
2 other information, in conjunction with the sort of context,
3 we think it does actually render many of the applicants
4 quite easily identifiable and that is the --

5 **THE COURT:** How hard would it be -- their
6 basic argument is that -- I think, correct me if I am wrong,
7 Mr. Strawbridge -- but if you had two students from the same
8 high school applying and they look alike and one is admitted
9 and one isn't, they want to know if that's been a racial
10 distinction; right? Am I right about that?

11 **MR. STRAWBRIDGE:** We think that that's the
12 obvious example where it is going to be easiest to kind of
13 weed out any complicating factors, you've got the most
14 similarly situated to people in that case.

15 **THE COURT:** And I know you said, what did you
16 tell me the last name, that half of all the students are the
17 only persons from their high school to apply?

18 **MS. ELLSWORTH:** Something like that, yes.

19 **THE COURT:** So the information was only, if
20 you have only one person from a high school applying, the
21 information is irrelevant to you.

22 **MS. ELLSWORTH:** I should correct, Your Honor,
23 have for only the person admitted, not to apply. I don't
24 know if that matters.

25 **THE COURT:** So if you only have one person,

1 you have no comparison.

2 **MR. STRAWBRIDGE:** Well, until you get to the
3 fact that there are multiple admission cycles. I mean,
4 right, admitted one this year, only had one person apply
5 this year but the previous applicants for prior years.

6 I mean, so, two, second, we don't think it's
7 irrelevant. It is still going to be a basis to determine
8 similarly-situated people from the same state, from the same
9 city, from, who have other similarities.

10 **THE COURT:** What I am wondering is if there is
11 some way to give them generally what they want but exclude
12 the schools with really small numbers.

13 **MR. STRAWBRIDGE:** Can I make one point, Your
14 Honor?

15 **THE COURT:** Yes.

16 **MR. STRAWBRIDGE:** I just want to make sure
17 that Your Honor is clear, because we did put this in the
18 letter.

19 Not only has the protective order prohibited us
20 from trying to contact these students, the protective order
21 actually prohibits us from making any effort to take the
22 information that's produced to us and identify them as in
23 trying to determine who from this high school applied that
24 year.

25 **THE COURT:** Right, I get that. I mean, the

1 point I was trying to make was that the information is
2 fairly generically identified and that there is multiple
3 levels of protection even after that information.

4 But it also seems to me that where you are dealing
5 with an individual student, we have one student each year,
6 that the information is not of much use. What is more
7 useful to you is when you have two or three people from the
8 same school or the same zip code; right?

9 **MR. STRAWBRIDGE:** I'm certainly not prepared
10 to sit here and say that a student's high school, that this
11 is the only context in which a student's high school is
12 relevant. There are a lot of ways in which high school
13 might be relevant and which it might be useful to know.

14 **THE COURT:** Is there some way to segregate out
15 the data so they get that information on high schools that
16 have more than five applicants?

17 **MS. ELLSWORTH:** Doing that would require a
18 cell-by-cell review and comparison against other data to
19 find out whether that this particular high school had
20 more --

21 **THE COURT:** You can't just sort by that, you
22 can't sort by number of people from a school and cut it?

23 **MS. ELLSWORTH:** To my knowledge I don't know
24 that we could do that in a way that would be reliable. I
25 mean, we certainly have fields that relate to the number of

1 people who applied from a given school. I am just not, I'm
2 not aware if we can cut in that way. I don't know that we
3 would be comfortable relying on that. I think we would feel
4 incumbent upon us to actually review and determine what
5 could be produced and what couldn't which would be quite a
6 burdensome undertaking at this point in time.

7 **THE COURT:** I mean, I think in some form, I
8 mean, they're going to be entitled to that information and
9 the only question is whether we do it now or we hold off on
10 that.

11 **MR. STRAWBRIDGE:** Just on that point, Your
12 Honor, this is information that is essential to analyzing
13 the material that we've already received so, I mean, this
14 is, we're just cleaning up on material that has already been
15 produced pursuant to an order of this Court. I don't think
16 that waiting for *Fisher* is going to achieve very much in
17 terms of protecting their privacy.

18 **THE COURT:** I am inclined to agree with him.
19 There are other ones of these that are discussed further in
20 this letter that I am inclined to not give them. That seems
21 like more personally a subset of information but I'd like to
22 find a way to give them the basic geographical information
23 that they're looking for in some form or another.

24 But if it's possible to be sensitive to your, you
25 know, your representation that there are schools where it is

1 only one person, I think that -- it is not covered by FERPA.
2 I don't think it is really personally identifying
3 information but I am sensitive to the issue anyway. So if
4 there is some way to give them a meaningful sample of that,
5 I am inclined to do it. And if there is not, I still may be
6 inclined to order all but I just want to think about it. So
7 what --

8 **MS. ELLSWORTH:** I think I have to confer on
9 whether we can do a meaningful sample. I just don't, I
10 don't have that information. And, again, I do think it
11 would ultimately require us to do a manual review.

12 **THE COURT:** Is this like, I mean, I am
13 envisioning some sort of massive Excel spreadsheet.

14 **MS. ELLSWORTH:** There is, but to determine
15 whether that person is the only person who applied and the
16 only person who admitted, was admitted, again, it may be
17 that this can be all done mechanically.

18 As to other of these fields I am certain that is
19 not the case. As to high school and zip I am just not, I
20 don't have enough facility to be honest with how it might or
21 may not be cut to achieve what Your Honor is trying to
22 achieve in terms of the middle ground.

23 **MR. STRAWBRIDGE:** I don't understand the
24 burden argument. This is a burden that -- there is already
25 protections in place. This burden is entirely self-created

1 and we're trying to sort through this. I think that the
2 easiest and least burdensome way is just to produce the
3 information and trust that the parties are not going to risk
4 an order of contempt.

5 **THE COURT:** I knew that that would be the
6 easiest and the least burdensome but they have some other
7 reservations about that that I am trying to accommodate
8 because they don't seem -- I think what they don't want to
9 produce here seems to me to be the least relevant
10 information to you.

11 I get that it is still relevant and you want it but
12 it seems less useful than some of the other information that
13 we are talking about. I mean, if you have ten applicants
14 from high school, you can figure out which three are getting
15 in and which seven aren't. That's what you want to be
16 looking at; right?

17 **MR. STRAWBRIDGE:** Certainly. I don't disagree
18 that it's particularly persuasive evidence but it is not the
19 only relevant evidence. I guess that's where I am just --

20 **THE COURT:** No, I am not --

21 **MR. STRAWBRIDGE:** -- reservation.

22 **THE COURT:** I am not suggesting that what you
23 are looking for is irrelevant; but the closer we get to
24 being able to identify a student, now or in the future, the
25 more careful I want to be, but I still want to give them

1 enough to work with. And it seems to me that if there is a
2 big group of kids from high school, you should be able to
3 look at that information and figure out who is getting in
4 and who isn't, right?

5 **MR. STRAWBRIDGE:** This is all highly
6 confidential. The attorneys are protected. I don't think
7 the risk of --

8 **THE COURT:** I may give this to you but if they
9 can come up with a way that protects against the interests
10 that they're concerned about and isn't an onerous amount of
11 work, I am inclined to parse it out that way.

12 **MS. ELLSWORTH:** So, Your Honor, what would be
13 the most useful way to proceed from here?

14 **THE COURT:** Why don't you let me know what you
15 can do, right. I mean, and then I will decide what I am
16 going to do about it.

17 **MS. ELLSWORTH:** Okay.

18 **THE COURT:** If you tell me you can't do it, we
19 will make an evaluation of it. But if there is an easy way
20 to do it, I'd like to know that.

21 **MS. ELLSWORTH:** Okay. We will submit a letter
22 in very short order one way or the other.

23 **THE COURT:** Okay. Are you prepared in this
24 format to discuss the UMRP information?

25 **MS. ELLSWORTH:** I am prepared to discuss it

1 but I would ask that the individuals not associated with
2 this case be excused from the courtroom, if Your Honor is
3 willing to do that.

4 **THE COURT:** I am not willing to do that so why
5 don't you submit in writing on that also.

6 **MR. SKWRAO:** I can, Your Honor. I can address
7 at a high level --

8 **THE COURT:** That is fine. Is there personally
9 identifying information in that field?

10 **MS. ELLSWORTH:** Is this the
11 "Visitass_Student_Host" table that Your Honor is looking at
12 on page five of the February 10th letter?

13 **THE COURT:** It is -- which letter are you --

14 **MS. ELLSWORTH:** It's the February 10 -- I'm
15 sorry, I don't have the docket number, Your Honor.

16 **THE COURT:** What page?

17 **MS. ELLSWORTH:** Page five of the letter.

18 There is a table called "Visitass_Student_Host." It contains
19 a variety of fields relating to the Undergraduate Minority
20 Recruitment Programs.

21 **THE COURT:** Yes.

22 **MS. ELLSWORTH:** So this, these are about host,
23 students who host admitted students in their dorm rooms for
24 Visitass Students weekend. The personally identifying, it's
25 not names. It's, as you see, gender and then there is other

1 information.

2 **THE COURT:** These are the hosts?

3 **MR. SKWRAO:** The hosts, the admitted -- excuse
4 me. Yes, the admitted students, those that are considering
5 whether or not to accept the offer of admission, the
6 information that is sort of parallel to this has been
7 produced to SFFA. This is just about the current students
8 who are opening their dorm rooms.

9 **THE COURT:** Is that -- I didn't understand
10 that that is what that information was. Why are you
11 thinking this is --

12 **MR. STRAWBRIDGE:** I mean, Harvard has assigned
13 these hosts UMRP strength, UMRP deficiency -- I'm sorry, I
14 don't mean to, I apologize -- but if you look at the content
15 here, none of it is identifying information and all of it is
16 directly related to the UMRP, so that's the issue.

17 **MS. ELLSWORTH:** But, again, as Your Honor, as
18 we've said in our letter, we fail to see the relevancy of
19 this, these database fields to any statistical analysis that
20 SFFA might want to conduct.

21 **THE COURT:** I am inclined to agree with that.
22 What is the --

23 **MR. STRAWBRIDGE:** I mean, I don't want to
24 be -- I want to be sensitive to the privacy concerns but I
25 think that there is a very practical argument here that this

1 is an essential element of their recruitment of
2 undergraduates. The fields that we are looking for are very
3 specific really to only the information about the host that
4 relates to the recruitment and the use of race. None of it
5 is identifying information.

6 If Harvard thinks that all, that these ratings are
7 important enough to assign to the hosts, then it seems like
8 it might be relevant to our analysis as to how they're
9 matching these students up, what they're doing, what is the
10 significance of some of these particular categories. It's
11 specific only to the UMRP recruitment so we think it's
12 relevant.

13 **THE COURT:** I am not going to order that that
14 go over now. It just doesn't seem important enough to put
15 over before *Fisher*.

16 Let me make sure I haven't missed anything else in
17 this letter while I am here.

18 So I am deferring on the zip code and the high
19 school till I hear from you all.

20 You have withdrawn -- I'm on page five -- you have
21 withdrawn 5B. I am not going to order production of the
22 UMRP information on page five.

23 You have withdrawn alumni interviewer fields. I am
24 not going to require production at this point of the
25 categories identified on page 6, Section D.

1 The two categories that, there are two categories
2 that --

3 **MR. STRAWBRIDGE:** Your Honor, if I just may
4 interrupt?

5 **THE COURT:** Yes.

6 **MR. STRAWBRIDGE:** I just want to clarify one
7 point and that is I understand your ruling with respect to
8 all these fields, it is specific to the pre *Fisher* period?

9 **THE COURT:** Yes. Then there are two
10 categories that I understand that you are still asking for.
11 I am trying to find it in these documents so I can refer
12 you.

13 One of them is -- I have these in my notes, I know
14 you asking for them but I can't find where it was.

15 I will come back to that. I'm sure it will jump
16 out at me in the next letter.

17 If you can look at the letter, it's docket 133, the
18 February 8th letter, Appendix D.

19 **MS. ELLSWORTH:** D as in dog, Your Honor?

20 **THE COURT:** D as in dog.

21 **MS. ELLSWORTH:** Thank you.

22 **THE COURT:** The first --

23 **MS. ELLSWORTH:** Your Honor, I don't -- I
24 apologize. I don't believe that -- Mr. Strawbridge can
25 correct me -- but I don't believe that Numbers one and two

1 are being requested anymore on the February 10th letter.

2 **THE COURT:** I'm on the February 8th letter.

3 **MR. STRAWBRIDGE:** The February 10th, the list
4 in the February 10th letter is our list for the time being,
5 subject to revisiting after *Fisher*.

6 **MS. ELLSWORTH:** Yes.

7 **THE COURT:** The list in the February 10th
8 letter.

9 **MS. ELLSWORTH:** It begins I believe on page
10 four and goes through to six, interspersed with text.

11 **MR. STRAWBRIDGE:** We took their appendixes
12 from the February 8th letter and dropped some of our
13 requests so what's in the February 10th letter is what we're
14 seeking --

15 **THE COURT:** That is why I couldn't find it in
16 that letter.

17 So if they produce zip code and high school, does
18 that functionally cover what you are looking for?

19 **MR. STRAWBRIDGE:** Well, there is a number of
20 fields that kind of fall into that category so I don't know
21 if we need to be more specific. I mean, the first column on
22 page four, for example, is all high school information.

23 Most of what's in the second column is zip code or
24 postal code information, city information. There is a few
25 other exceptions.

1 I mean, I won't, I don't know the best way to do
2 this with the courtroom being open at this time, although I
3 know that we have an objection to labeling these fields in
4 particular as highly confidential information. But if it's
5 easier to just take five minutes in chambers to somehow
6 address them specifically, we can defer to whatever Your
7 Honor wants to do.

8 **THE COURT:** Can we do that, can they take a
9 look at what they can easy produce on high school and zip
10 code and then whatever remains after that just put in a
11 letter, another letter?

12 **MR. STRAWBRIDGE:** Okay. Do we have a time?

13 **MS. ELLSWORTH:** We can probably, we can get a
14 letter out, what we can do, high schools I'll say -- what's
15 today? Thursday -- I'll say Monday to not over promise.

16 **THE COURT:** We will get an order out in the
17 meantime. We will just leave some loose ends on it. We
18 will get that out I hope today or tomorrow.

19 **MR. STRAWBRIDGE:** We're also happy to do
20 compromises if they'd like to.

21 **THE COURT:** Well, I mean, if there is some way
22 to cut that so that they get what they are looking for and
23 some significant percentage of applicants, I would be
24 content with that till after *Fisher*. If there is not, there
25 is not. I'm happy to make a decision on it but I'm inclined

1 to give them that information. It would be great if you can
2 figure out if there is any way to do it.

3 **MS. ELLSWORTH:** In talking about high school
4 and zip code and fields that relate to that, Your Honor,
5 correct?

6 **THE COURT:** Yes. I mean, I can't actually
7 figure out what all of these --

8 **MS. ELLSWORTH:** Yes, Mr. Strawbridge is
9 largely correct. Many of them relate to high school, zip
10 codes or others relating to military status and there is a
11 set of fields relating to honors and extra curriculums.
12 There are a few other outliers here but those are the three,
13 big buckets I think right now.

14 **THE COURT:** I think we've already, the honors
15 and extracurricular you sort of already resolved; right? We
16 took care of that the last time you were here.

17 **MR. STRAWBRIDGE:** I did not understand that to
18 be the case, Your Honor. This is the name of the actual
19 fields. My understanding is they're still refusing to
20 produce any of the honors fields.

21 **THE COURT:** Okay. I thought we had resolved
22 that. I mean -- all right.

23 **MS. ELLSWORTH:** If I could just, whether this
24 helps or not I don't know, but as to the honors fields and
25 the extracurricular related fields that are in this

1 February 10th letter, these are narrative entries so they do
2 contain the types of examples Your Honor provided at the
3 last hearing --

4 **THE COURT:** I am not inclined to, I am not
5 inclined to -- I thought we resolved that. I am not
6 inclined to have you, require you to disclose those now.

7 **MR. STRAWBRIDGE:** Well, just to clarify, Your
8 Honor, my understanding was you had, I thought that your
9 guidance from the last one was that if there were
10 nonspecific identifying information in the field
11 notwithstanding the fact that it's an entering (ph.) field,
12 they should produce it. Their response was that it is too
13 hard to figure out so we don't want to produce anything. I
14 don't, I am not surprised by that response from them but,
15 again, this is another example where they're imposing a
16 burden on themselves to try to restrict what they have to
17 disclose that is then being used as the basis to restrict
18 all of it.

19 **THE COURT:** Well, I am sensitive to the issue
20 that if you say you have a high school class and there is a
21 class president, that you can fairly identify who that
22 student is, right? There is only one class president and --

23 **MR. STRAWBRIDGE:** If we're willing to violate
24 the protective order and the risk of contempt from Your
25 Honor, yes, we could, but we're not willing to do that.

1 **MS. ELLSWORTH:** Your Honor, our position is
2 not that it's too difficult to figure out how to provide
3 only in a non-identifying version the honors and
4 extracurriculars, our position is that, particularly in this
5 posture of the case, it is incredibly burdensome to do so.
6 Over 70,000 fields on a cell-by-cell basis to determine
7 whether it simply says theater major or it says, you know,
8 Pippin in Pippin.

9 **MR. STRAWBRIDGE:** I think they should produce
10 Pippin in Pippin. We're not going to -- we don't know who
11 was Pippin at the high school. We are not going to, we're
12 not allowed to go figure it out. This is, I mean, with
13 all -- and there is no indication in their letter as to how
14 many of these fields specifically say this.

15 The non-burdensome -- it's obviously relevant
16 information. Their expert identified this information as
17 information that would be useful to our expert. It's just,
18 the protective order covers this.

19 **THE COURT:** I mean, I take your point and I am
20 trying to accommodate you in some way; but my initial
21 thought was that pre *Fisher* we do sort of structural
22 completely non-identifying information like a creative
23 framework that would allow discovery to happen once *Fisher*
24 was resolved. I have already myself slipped significantly
25 beyond that and I am pretty well reaching a limit where I am

1 not going to slip any further on it.

2 So only because I think that the more we do, the
3 more there is going to have to go back and be redone after
4 *Fisher* and that's what I am seeking to avoid. I don't want
5 a complete stay because the stuff that doesn't need to be
6 redone I want to keep going forward which is sort of
7 framework stuff but you've already pushed me sort of back
8 beyond where I intended to go and I am not going much
9 further, if any further.

10 All right. So that's -- so we will get an order
11 out. I'm going to hold off on these fields until I
12 understand from Harvard what they can do. And then I want
13 to think about that because I may just have talked myself
14 out of giving the high school and zip code information too
15 in terms of thinking about where I started and where I am
16 likely to end up.

17 **MR. STRAWBRIDGE:** Just, I mean --

18 **THE COURT:** Hold on. Someone more important
19 than you wants to talk to me.

20 (Laughter.)

21 (Whereupon, the Court and the Law Clerk conferred.)

22 **THE COURT:** So what Jonathan is suggesting is,
23 he is wondering if there is some way that you can identify
24 these five people went to the same high school but without
25 identifying the zip code or the high school?

1 **MS. ELLSWORTH:** Meaning like a code inside of
2 a high school name, is that the question?

3 **THE COURT:** Well, just some of way saying so
4 that, you know which people are grouped together, right.
5 So, I happened to go to Newton North so say Newton North.
6 You have 50 kids from Newton North and what Jonathan is
7 suggesting is to say that these 50 kids went to the same
8 high school but they don't identify the high school or the
9 zip code so you know they're similarly situated but you
10 don't know where they're similarly situated.

11 **MS. ELLSWORTH:** I don't believe there is a
12 field that allows you to do that. I mean, there is, as one
13 of the high school related fields, one is name, one is the
14 town of the high school, one is what's called a CBC code
15 which is the College Board Code for that high school. So
16 one could take that information to then assign a number,
17 assign some sort of grouping to everybody who came from that
18 high school but I don't think that exists. That's sort of a
19 standalone field. That's a sorting process.

20 **THE COURT:** That's interesting. I haven't
21 thought it through. He just sprung it on me this second
22 but, you know, that might be an interesting way to approach
23 it, right, because then you can give information like class
24 president and it's completely non-identifying. Right?

25 **MS. ELLSWORTH:** I think it could be. I mean,

1 their state information has already gone over, there is
2 other information, a lot of information has been produced.
3 We're talking about a pretty small number of database fields
4 that we're left discussing here, at least at this juncture
5 of the case, so.

6 **THE COURT:** It is something to think about.
7 It is an interesting idea.

8 **MR. STRAWBRIDGE:** A counterpoint would be is
9 that there is some significant inefficiencies in dribbling
10 out this information over small periods of time. If we're
11 going to deal with making progress during the case, this is
12 among the most essential information in the entire database.
13 Given the other protections in place, I think we should just
14 dispense with imposing burdens and we may just want to
15 produce this information now.

16 **THE COURT:** Let me know, Ms. Ellsworth, if you
17 take a look at the data that you can easily offer. And if
18 you want to stick to your position that you want it withheld
19 until after *Fisher*, I really haven't made up my mind but I
20 take his point that it is important information to him and
21 that, you know, it is important information to him and it
22 doesn't really implicate specific privacy interests. But
23 why don't you take a look at it and let me know what you can
24 do and we will get an order out by -- so I'd like to get it
25 out today or tomorrow but Kelly who is the law clerk who is

1 working on this is out until Monday so we may not get it out
2 until Monday. I may hold it off for her to take a look at
3 it but we will get out as much of an order as we can no
4 later than Monday.

5 And you all can, you'll send a letter.
6 Mr. Strawbridge, you will no doubt send a letter back and
7 we'll resolve the remaining issues.

8 **MS. ELLSWORTH:** Thank you, Your Honor.

9 **THE COURT:** What am I --

10 **MR. STRAWBRIDGE:** Perhaps, I have seen this
11 work in other cases, we're willing to try something new.
12 Perhaps we could meet and confer on this issue and submit a
13 joint letter, just to expedite the process.

14 **THE COURT:** However you all --

15 **MS. ELLSWORTH:** Yes, I have some homework to
16 do to figure out our technical capabilities.

17 **THE COURT:** All right. Anything else today?

18 **MS. ELLSWORTH:** Nothing from --

19 **THE COURT:** Do you want to set a date for our
20 next status conference?

21 **MS. ELLSWORTH:** I think we would like
22 another date.

23 **MR. STRAWBRIDGE:** I think that's a good idea.

24 **THE COURT:** So six weeks, a month, what are
25 you looking for?

1 **MS. ELLSWORTH:** Four or five weeks is fine.

2 **THE CLERK:** How about Wednesday, March 30th,
3 at ten a.m.?

4 **MS. ELLSWORTH:** That's fine for me, Your
5 Honor.

6 **MR. STRAWBRIDGE:** I think that's fine with me.

7 **THE COURT:** If it is not, just let us know and
8 we can easily move it.

9 **MR. STRAWBRIDGE:** Sure.

10 **THE COURT:** The exact date is of little
11 consequence.

12 All right. Thanks, everybody.

13 **MS. ELLSWORTH:** Thank you very much, Your
14 Honor.

15 **MR. STRAWBRIDGE:** Thank you, Your Honor.

16 **THE CLERK:** All rise. Court is adjourned.

17

18 (WHEREUPON, the proceedings were recessed at 12:20
19 p.m.)

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C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

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DATE: March 3, 2015