

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

JOSEPH M. RIEGER,

Plaintiff,

Case No.: 3:13-cv-402

vs.

GENERAL DYNAMICS INFORMATION  
TECHNOLOGY, INC.,

Judge Walter H. Rice  
Magistrate Judge Michael J. Newman

Defendant.

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**ORDER: (1) GRANTING PLAINTIFF'S MOTION FOR A PROTECTIVE  
ORDER FORBIDDING THE DISCLOSURE OF HIS SEALED STATE CRIMINAL  
CONVICTION (DOC. 37); AND (2) DENYING AS MOOT PLAINTIFF'S MOTION TO  
POSTPONE HIS APRIL 29, 2014 DEPOSITION (DOC. 45)**

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Now before the Court is *pro se* Plaintiff's motion (doc. 37) for the Court to determine whether he must disclose in discovery a state court criminal conviction that was sealed and expunged pursuant to Ohio law. Doc. 37. The Court has liberally construed this request as a motion for a Protective Order pursuant to Fed. R. Civ. P. 26(c). *Accord El Bey v. Roop*, 530 F.3d 407, 413 (6th Cir. 2008). Defendant has filed a memorandum in opposition (doc. 38) and Plaintiff submitted a reply (doc. 44). Plaintiff also filed a document that was styled as a motion for the Court to consider additional evidence when ruling on his motion for a Protective Order (doc. 40), to which Defendant filed a memorandum in opposition (doc. 41). The Court re-docketed these filings as additional documentation relating to Plaintiff's underlying motion for a Protective Order. Doc. 42. Finally, Plaintiff filed a motion to postpone his April 29, 2014 deposition pending the Court's ruling on his motion for a Protective Order. Doc. 45.

**I.**

The instant motion arises from one or more of Defendant's discovery requests concerning Plaintiff's prior involvement in the civil or criminal justice system. *See* doc. 36 at PageID 130; doc. 39 at PageID 169. The Court addressed these discovery requests and Plaintiff's objections

thereto during a telephone conference on March 7, 2014. *See* doc. 30. Defendant modified the requests to only seek relevant information since January 1, 2005, and the Court ordered Plaintiff to respond accordingly. *See id.* During another telephone conference on March 25, 2014, Defendant advised the Court that Plaintiff's responses remained outstanding. Doc. 39 at PageID 169. Plaintiff subsequently filed the instant motion on March 31, 2014. Doc. 37. The Court ordered Plaintiff to produce all responsive information and documents that he sought to protect from disclosure for an *in camera* review. Doc. 39 at PageID 170. Plaintiff thereafter submitted additional documents to the Court, presumably also for an *in camera* review, that pertain to a non-party as referenced in Plaintiff's additional filing on the matter.<sup>1</sup> Doc. 40.

As construed by the Court, Plaintiff moves for a Protective Order forbidding the disclosure of a state court conviction that was sealed and expunged pursuant to Ohio Rev. Code Ann. § 2953.32. Doc. 37 at PageID 160. The documentation produced by Plaintiff for *in camera* review reveals that on January 28, 2014, the Kettering Municipal Court issued an Order sealing and expunging the conviction record pursuant to Ohio Rev. Code Ann. § 2953.32 of a case that culminated in a August 31, 2005 criminal conviction.

Among other considerations, the Court ruling on the application to seal and expunge must determine “whether criminal proceedings are pending against the applicant” and “whether the applicant has been rehabilitated to the satisfaction of the [C]ourt.” Ohio Rev. Code Ann. § 2953.32(C)(1). Pursuant to Ohio law, if the applicant is successful “[t]he proceedings in the case shall be considered not to have occurred and the conviction or bail forfeiture of the person who is the subject of the proceedings shall be sealed.” *Id.* § 2953.32(C)(2). Further, “[i]n any application for employment, license, or other right or privilege, any appearance as a witness, or any other inquiry . . . a person may be questioned only with respect to convictions not sealed . . .

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<sup>1</sup> Having reviewed these documents, the Court finds they are not relevant to the instant issue and they were not considered in issuing this ruling.

unless the question bears a direct and substantial relationship to the position for which the person is being considered.”<sup>2</sup> *Id.* § 2953.33(B)(1).

In support of his motion to exclude the conviction from disclosure, Plaintiff points to Federal Rule of Evidence 609(c)(1). Doc. 37 at PageID 160-61. This evidentiary rule excludes otherwise admissible evidence of a criminal conviction for impeachment purposes if “the conviction has been the subject of a . . . certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or imprisonment for more than one year.” Fed. R. Evid. 609(c)(1).

The parties have failed to cite, and the Court has been unable to find, any published federal cases that examine whether a sealed and expunged record of conviction under Ohio Rev. Code Ann. § 2953.32 qualifies for the rehabilitation exception of Fed. R. Evid. 609(c)(1). Because such a determination is premature at this stage in the litigation and is an issue ultimately reserved to the trial judge, the Court expresses no opinion on this evidentiary issue.

## II.

Defendant opposes the motion and argues that Plaintiff’s conviction is discoverable notwithstanding the Ohio court’s Order sealing and expunging the conviction record. Doc. 38. Defendant argues that such evidence may be relevant for an after-acquired evidence defense. *Id.* at PageID 165-66. Specifically, Defendant submits that the evidence is relevant to determine whether Plaintiff was truthful on his employment application. *Id.*; see *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360-63 (1995). Defendant also argues that the criminal conviction is discoverable under an exception in the statute itself; namely, that “[i]n any application for employment . . . a person may be questioned only with respect to convictions not

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<sup>2</sup> The omitted portions contain exceptions and provisions that are not relevant here.

sealed . . . unless the question bears a direct and substantial relationship to the position for which the person is being considered.” § 2953.33(B)(1). Finally, Defendant argues that Plaintiff would receive an unjustifiable benefit if he is permitted to lie on his employment application about a conviction, subsequently seal and expunge the conviction to prevent his employer from later discovering this during his term of employment, and prevent its disclosure in a lawsuit premised on his employment. Doc. 38 at PageID 166.

Plaintiff’s reply brief raises several additional arguments. First, Plaintiff argues that the discovery request at issue was served by Defendant’s counsel on January 29, 2014, which is after the record was sealed and expunged. Doc. 44 at PageID 178. Plaintiff is correct in this assertion, but fails to mention that the record was sealed and expunged literally the day before, on January 28, 2014.

The Sixth Circuit addressed these concerns in *Boyd v. Bressler*, 18 F. App’x 360 (6th Cir. 2001). The plaintiff in *Boyd* had a conviction sealed pursuant to § 2953.32, but evidence of this conviction was introduced in a briefing filed as part of a separate trademark litigation filed against Boyd in a New York federal court. *Id.* at 363. Boyd raised no objections the inclusion of his sealed conviction in the New York court, and the case ultimately resulted in a default judgment against him. *Id.* Boyd then brought suit in an Ohio federal court against the opposing parties and their counsel premised on the reference to his sealed conviction in the trademark litigation. *Id.* The Sixth Circuit observed that, “[b]ased on §§ 2953.32(B)(2) and 2953.33(B), Boyd could have protected his right to conceal his . . . conviction by petitioning the district court in New York to strike the information from [defendants’] motion and any other submissions in the trademark case.” *Id.* at 368.

The proper inquiry here is whether the information that Plaintiff seeks to prevent from disclosure is “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R.

Civ. P. 26(b)(1). Notwithstanding that Defendant seeks relevant information, the Court determines that disclosure of Plaintiff's sealed and expunged criminal record is not proper in this case. *See* Fed. R. Civ. P. 26(c). Based on principles of comity to Ohio law and the Sixth Circuit's discussion in *Boyd*, the Court finds that Plaintiff need not disclose information related to his sealed and expunged criminal conviction stemming from a date of conviction of August 31, 2005. The Court stresses the narrow scope of its ruling. Plaintiff is advised that this ruling does not apply to any other civil or criminal cases in which he may have been involved and which were not the subject of the Court's *in camera* review. Defendant may consult the Court if it believes in good faith that Plaintiff is withholding any responsive documents or information not subject to this Order. Plaintiff is further advised that the Court may issue sanctions against him pursuant to Fed. R. Civ. P. 37 if it concludes that he has so withheld any responsive information.

### III.

For the reasons stated herein, Plaintiff's motion, which the Court has construed as a motion for a Protective Order (doc. 37), is **GRANTED**. Plaintiff need not disclose information related to his sealed and expunged criminal conviction stemming from an August 31, 2005 date of conviction. Plaintiff's motion to postpone his April 29, 2014 deposition pending the resolution of this motion (doc. 45), therefore, is **DENIED AS MOOT**. The deposition of Joseph Rieger will proceed as previously ordered on April 29, 2014. *See* doc. 31. The Clerk shall promptly return to Plaintiff the originals of all documents reviewed by the Court *in camera*.

**IT IS SO ORDERED.**

April 25, 2014

s/ **Michael J. Newman**  
United States Magistrate Judge