

1 Judge Ronald B. Leighton

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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 MAJOR MARGARET WITT)

11 Plaintiff,)

12 v.)

13 UNITED STATES DEPARTMENT OF)
14 THE AIR FORCE, et al.)

15 Defendants.)
16)
17)
18)

No. C06-5195 RBL

**OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL PRODUCTION
OF DOCUMENTS**

ORAL ARGUMENT REQUESTED

19 **INTRODUCTION**

20 Plaintiff seeks the production of documents from the personnel files of individual Air
21 Force Reserve service members relating to alleged disciplinary actions taken against those
22 service members, and alleged relationships in which those members may have engaged. The
23 information plaintiff seeks relates to individuals who are not parties to this case, and who have
24 not consented to disclosure of their personnel records. These personally identifiable personnel
25 records are exactly the type of information that the Privacy Act, 5 U.S.C. § 552a, is designed to
26 protect. The Privacy Act expressly prevents the United States from releasing otherwise protected
27 material without a court order allowing for such production, even in the context of civil
28 discovery. Accordingly, defendants cannot release the information plaintiff seeks without an

1 order directing defendants to do so.

2 **FACTUAL BACKGROUND**

3 Plaintiff has challenged her discharge from the United States Air Force Reserve for
4 violations of the statutory proscription on homosexual conduct by service members. *See* 10
5 U.S.C. § 654. In the course of civil discovery, plaintiff has requested the production of the entire
6 personnel files of four individual Air Force Reserve service members who are not parties to this
7 action. *See* Declaration of Sher Kung (Kung Decl.), Ex. A (Dkt. No. 86). Plaintiff has also
8 requested documents relating to any disciplinary actions taken against some of those service
9 members, and documents relating to relationships in which some of those service members may
10 have engaged. *Id.* Plaintiff subsequently limited her request to documents pertaining to
11 disciplinary action or admonishment as to specific service members, and documents relating to
12 relationships among other service members, including documents reflecting an alleged same-sex
13 relationship. *Id.* at Ex. B; Pl.’s Mot. to Compel at 2-3 (Dkt. No. 84).

14 Defendants responded to plaintiffs original requests by noting that the requests called for
15 “the production of material protected from disclosure by the Privacy Act.” *See* Defs.’ Objections
16 & Responses to Pl.’s Second Set of Requests for Production of Documents & Things 25-27
17 (attached hereto in redacted form as Ex. 1). Defendants also stated their belief that “the actual or
18 purported relationships of other members of Plaintiff’s unit have no bearing on Plaintiff’s effect
19 on unit morale and cohesion, the sole facts at issue in this matter as remanded from the Ninth
20 Circuit.” *Id.* Accordingly, defendants declined to produce documents responsive to plaintiff’s
21 request. *Id.*

22 **ARGUMENT**

23 **The Privacy Act Prohibits the Release of the Requested Information Absent a Court** 24 **Order Authorizing the Production of that Information.**

25 The Privacy Act prohibits any agency of the federal government from releasing “any
26 record which is contained in a system of records by any means of communication to any person,
27 or to another agency, except pursuant to a written request by, or with the prior written consent of,
28 the individual to whom the record pertains, unless” one of the enumerated exceptions apply. 5

1 U.S.C.A. § 552a(b); *St. Michael's Convalescent Hospital v. State of Cal.*, 643 F.2d 1369, 1373
2 (9th Cir. 1981). The only exception potentially applicable to this matter provides for the release
3 of otherwise protected material “pursuant to the order of a court of competent jurisdiction.” 5
4 U.S.C. § 552a(b)(11).

5 Plaintiffs do not dispute that the documents they seek fall within the Privacy Act’s
6 definition of a protected record. The Privacy Act defines a “record” as “any item, collection, or
7 grouping of information about an individual that is maintained by an agency, including, but not
8 limited to, his education, financial transactions, medical history, and criminal or employment
9 history and that contains his name, or the identifying number, symbol, or other identifying
10 particular assigned to the individual, such as a finger or voice print or a photograph.” 5 U.S.C.A.
11 § 552a(a)(4). Where a document “clearly identifies [an individual] by name . . . it unmistakably
12 constitutes a record for Privacy Act purposes.” *Reuber v. United States*, 829 F.2d 133, 142 (D.C.
13 Cir. 1987). The information plaintiff seeks includes documentation of disciplinary actions that
14 may have been taken against certain individuals and documentation of certain relationships in
15 which individual service members may have engaged. Such information would undoubtedly
16 contain identifying information, and would clearly fall within the ambit of the Privacy Act’s
17 provisions.

18 As mentioned above, defendants believe that information concerning disciplinary action
19 that may have been taken against individual service members, or information concerning the
20 actual or purported relationships of other members of plaintiff’s unit have no bearing on
21 plaintiff’s effect on unit morale and cohesion. Thus, the information plaintiff seeks is not
22 relevant to plaintiff’s claims, nor is it likely to lead to the discovery of relevant information.
23 Accordingly, that information does not fall within the scope of discovery defined by Rule 26(b).
24 Additionally, disclosure of any responsive information has the potential to cause undue
25 annoyance or embarrassment to the service members about whom that information is sought.
26 Thus, in accordance with Rule 26(c), the Court should deny plaintiff’s attempt to obtain
27 discovery of the requested information. *See Gay-Straight Alliance of Okeechobee High Sch. v.*
28 *Sch. Bd. of Okeechobee County*, 242 F.R.D. 644, 645 (S.D. Fla. 2007) (issuing a protective order

1 to prevent inquiry into sexual orientation of members in plaintiff organization).

2 Should this Court determine that the requested information is relevant, however, entry of
3 an order requiring the disclosure of the information is necessary to allow the defendants to
4 overcome the statutory prohibitions contained in the Privacy Act. Plaintiff's contention that the
5 Privacy Act provides "no bar to the disclosure of information in discovery during the course of
6 litigation," Pl.'s Mot. to Compel at 6, is misleading; the very precedent upon which plaintiff
7 relies clearly demonstrates that the Privacy Act bars disclosure of protected information absent a
8 court order, and that parties seeking such information in the course of civil discovery are
9 routinely required to move for an order from the court authorizing production of that information.
10 In *Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987), the D.C. Circuit recognized that the
11 plain language of the statute permits disclosure of Privacy Act protected information "*pursuant*
12 *to the order of a court of competent jurisdiction.*" *Id.* (internal quotations omitted) (emphasis
13 added); *see also Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) ("[A] court order is . .
14 . one of the conditions of disclosure.") (internal quotations omitted); *Hassan v. United States*,
15 No. C05-1066, 2006 WL 681038, at *2 (W.D. Wash. March 15, 2006) ("[I]nformation falling
16 under the ambit of the Privacy Act may be disclosed *pursuant to the order of a court of*
17 *competent jurisdiction.*") (internal quotations omitted) (emphasis added).¹ *Laxalt* further held
18 that, while statutory bans on publication—like the one contained in the Privacy Act—do not serve
19 as a complete bar to the disclosure of otherwise discoverable material, "the applicability of the
20 Privacy Act to the material requested is a relevant factor for the District Court to consider in
21 determining the appropriate scope and manner of discovery in a given case." 809 F.2d at 889.
22 Thus, to give weight to the interests protected by the Privacy Act, "[t]he courts can limit, and in
23 actual practice do limit, the persons having access to information, their freedom to discuss the

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25 ¹ Indeed, because defendants are statutorily prohibited from releasing the information plaintiff seeks
26 absent a court order, the Court should reject plaintiff's request for attorney's fees to cover the costs of
27 obtaining such an order. *See* Pl.'s Mot. to Compel at 1. Plaintiff provides no support for her contention
28 that she is entitled to attorney's fees, nor could she, as that contention is simply without merit.

1 information to which they are given access, and the uses to which the information may be put.”

2 *Id.* (quoting *Freeman v. Seligson*, 405 F.2d 1326, 1350 (D.C. Cir. 1968)).

3 In sum, the parties disagree about two points: (i) the relevance of the requested materials
4 and (ii) the need for a protective order. As explained above, the requested materials are not
5 relevant under the standards for relevance in civil discovery. If the materials were relevant, then
6 a protective order would still be necessary for the documents to be released because the requested
7 information is protected under the Privacy Act.

8 **CONCLUSION**

9 For the forgoing reasons, the Court should deny Plaintiff’s motion to compel.

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11 Dated: May 24, 2010

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010, I electronically filed the foregoing Defendants' Opposition to Plaintiff's Motion to Compel with the Clerk of the Court using the CM/ECF system which I understand will send notification of such filing to the following persons:

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