

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDREW BIGBEE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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ORDER

05-C-66-C

This is a Federal Tort Claims Act lawsuit in which plaintiff, an inmate at FCI-Oxford, is suing the government for the loss and apparent destruction of some of his personal property. Before the court is plaintiff's motion to compel discovery. *See* dkt. 12. The government never filed a response, but this court still must consider the merits of plaintiff's motion rather than grant it under a waiver theory.

Plaintiff wants the government to disclose "any and all investigative reports made by the investigation of plaintiff's Tort Claim filed with [the Bureau of Prisons]." The government objected to this request, claiming that any such reports were privileged because they had been prepared in anticipation of defending this lawsuit.

Contrary to plaintiff's assertion, this is a privilege recognized by F.R.Civ.Pro. 26(b)(3), which provides that plaintiff may obtain discovery of the government's post-lawsuit internal investigative reports only upon showing that he has a substantial need for the materials to prepare his case and he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

That said, Rule 26(b)(5) requires that when a party withholds information on the basis of Rule 26(b)(3), it must describe the nature of the withheld documents in a manner that will enable the other party to assess the applicability of the asserted privilege. The government has not done this, perhaps believing that it was unnecessary: after all, investigative reports prompted by the requestor's tort claim almost by definition are prepared in anticipation of litigation. But the government has not even confirmed whether any such reports exist.

So, I will stay action on plaintiff's motion until I receive the following information:

1) Not later than October 31, 2005, the government shall report whether any responsive documents actually exist. If not, then plaintiff's motion will be denied as moot. If so, then the government shall provide additional background information that will allow the court to determine the applicability of the trial preparation privilege.

2) Not later than November 10, 2005, plaintiff may file and serve his showing of substantial need as required by Rule 26(b)(3). Plaintiff's motion to compel then will be under advisal to the court.

Entered this 21<sup>st</sup> day of October, 2005.

BY THE COURT:  
/s/  
STEPHEN L. CROCKER  
Magistrate Judge