

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.

ORDER

05-C-66-C

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Plaintiff's motion to compel discovery, dkt. 12, now is ripe. Pursuant to F.R. Civ. Pro. 26(b)(5), the government has submitted a privilege log listing three memoranda and an investigation report prepared by institution staff and for which the government is claiming the trial preparation privilege of F.R.Civ.Pro. 26(b)(3).<sup>1</sup> Because these documents clearly were prepared in anticipation of plaintiff's lawsuit, it is plaintiff's burden to show 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.

Plaintiff has not done this. Although he has provided a logical tactical reason for seeking access to the reports, it is a non sequitur; more importantly, plaintiff has not shown that he cannot obtain this same information through the use of interrogatories. (Depositions are another theoretical option, but I presume plaintiff cannot afford them).

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<sup>1</sup> The government explains that initially it did not file a response because it was waiting for the court to set a briefing schedule. The preliminary pretrial conference order states at p. 10 that "if your opponent files a discovery motion, you only have five calendar days to file and to serve your written response." Automatic five day responses to discovery motions have been required by this court for at least a decade.

Plaintiff is not entitled to a free ride off of the government's investigation: although the facts uncovered by the government during its investigation are not independently or inherently confidential, the compilation of those facts in a trial prep report makes the *report* confidential. As long as plaintiff has the ability to uncover these facts on his own, he must do so, even though this obviously will be more difficult than just reviewing the government's investigative reports.

Apart from this, the adequacy of the government's post-claim investigation is not directly at issue here, so plaintiff is not entitled to these otherwise-confidential materials if his claimed need for them is to impeach the government's witnesses.

Entered this 28<sup>th</sup> day of November, 2005.

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