

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

TARGETED JUSTICE, INC.;
a 501(c)(3) Texas Corporation, et al.

Plaintiffs,
vs.

MERRICK GARLAND et al.

Defendants.

Case No. H-23-cv-1013

**PLAINTIFFS' SURRE[PLY TO "OFFICIAL CAPACITY DEFENDANTS'
RESPONSE IN OPPOSITION TO PLAINTIFFS MOTION TO COMPEL DISCOVERY"**

TO THE HONORABLE COURT:

NOW COME the Plaintiffs, through their undersigned counsel, and respectfully allege and pray:

1. Defendants filed a belated opposition to Plaintiffs' limited discovery request regarding their Terrorist Screening Database (TSDB) status as non-investigative subjects (NIS), and we request it be stricken from the record, because the court did not grant their extension of time. In the alternative, Plaintiffs request that the Court deny Defendants' request for the application of the law enforcement privilege to avoid producing fundamentally relevant information essential to the adjudication of the Second Amended Complaint's claims for relief.

2. The Statements, inaccuracies or misrepresentations contained in the motion and Samuel P. Robinson's statement under penalty of perjury compelled the need to file this motion.

A. Salient Facts/Rebuttals

3. The limited discovery request of the TSDB status of eighteen persons is not a "fishing expedition," as Defendants misrepresent to the Court.

4. Plaintiffs are part of the 97% of people on the TSDB that travel without additional screening or interrogation, because they are non-investigative subjects that do not represent a terrorist threat.

5. None of the Plaintiffs could have been placed on the TSDB for the illicit purpose of immigration or State Department screening because seventeen of the eighteen Plaintiffs are American citizens, and one is a legal resident. (Second Amended Complaint, ¶ 26).

6. The information sought would dispose of half of Defendants' Motion to Dismiss as it would settle the threshold jurisdictional standing issue, since Plaintiffs have a right as non-investigative subjects to challenge their inclusion in the TSDB and be removed from it.

7. Defendants incorrectly state that Plaintiffs' TSDB status is "*among the ultimate relief sought in this case.*"¹ The contrary is the case. The relief sought is not to discover what Plaintiffs alleged in the complaint—that they were illegally included on the TSDB. The relief sought – *inter alia* – is to have Plaintiffs' names removed from the TSDB and the non-investigative subject Handling codes 3 and 4 sections of the TSDB declared unconstitutional, and a guarantee that their names will not be included in any other list.

B. Samuel P. Robinson's Declaration

8. Mr. Samuel Robinson, promoted to Associate Deputy Director of the FBI's Terrorist Screening Center on the day that Defendants' motion was due, asserts under oath that the purpose of his statement is to "*support a claim of law enforcement privilege*" over the information Plaintiffs seek².

9. Mr. Robinson's statements range from the clearly erroneous to outright unconstitutional.

¹ Motion, page 1.

² Statement Under Penalty of Perjury, page 7, ¶ 16.

10. In his statement, Mr. Robinson admits that people are included in the TSDB as an exception to the “reasonable suspicion standard” but that he cannot state the criteria for such inclusion because:

“...[D]etails regarding the method by which individuals are identified for Watchlisting exceptions must not be disclosed and are properly categorized as law enforcement sensitive.”³

11. In contrast, the criteria for including an actual terrorist in the No-Fly list component of the TSDB are public. Kovac v. Wray,

12. Mr. Robinson invokes the “law enforcement privilege” not only to avoid disclosing Plaintiffs’ TSDB status, but also to evade citing the criteria, regulation, or standard operating procedures by means of which non-terrorists are placed in a terrorist database.

13. It is contrary to law for the government to include non-terrorists on a terrorist database. This represents an atrocious violation of substantive due process rights of non-investigative subjects whose names linger indefinitely in the Terrorist Screening Database.

14. It is also contrary to law to include non-investigative subjects in a terrorist database whose legal authority did not contemplate such use. Homeland Security Presidential Directive-6 specifically limited the scope of the Terrorist Screening Database to the inclusion of known and suspected terrorist on the list.

15. It is even more contrary to law for Mr. Robinson to assert that the criteria for placing non-terrorists on a terrorist list indefinitely is secret and cannot be revealed under the law enforcement privilege. Any Watchlisting procedures must be publicly available in government sources. Such regulations must exist in writing, adopted pursuant to the Administrative Procedures Act, and duly publicized. Particularly when it entails the placing of innocent people on a watchlist.

³ Statement, p. 4, ¶ 8.

16. Plaintiffs' well-pleaded facts establish that they do not undergo additional screening or inconveniences when going through TSA checkpoints in US airports. Therefore, Defendant FBI knows that Plaintiffs are not the object of its criminal investigations nor suspected terrorists.

17. Executive Order 13526 provides that secrecy cannot be invoked to cover up for an agency's negligence or criminal acts. ("[I]n no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to conceal violations of law, inefficiency, or administrative error.")

18. Defendants improperly concocted this "secret" method allegedly protected under an inapplicable "law enforcement privilege" to conceal agency misdeeds of including non-terrorists on a terrorist database. Defendants cannot erect a wall of confidentiality to cover up their blatantly illegal, unconstitutional and/or criminal conduct. (Complaint, ¶ 12).

19. Defendant's assert that Plaintiffs do not have a right to even *an in camera* review of the TSDB, despite prior Courts granting plaintiffs' attorneys the right to do so. See *Elhady v. Kable*, 391 F.Supp.3d 562 (E.D.VA 2019).

20. The cases that Defendants cite in support of their argument to deny the access to the TSDB are inapplicable to the case at bar since they only involved controversies regarding the "Suspected terrorist"/ Selectee/Handling Code 2 categories. None of those cases cited entail challenges by innocent, non-terrorist, NIS illegally included in a terrorist database.

21. Defendants' self-serving intent of denying plaintiffs access to their TSDB status is a unilateral attempt to deprive them of essential evidence to prove their constitutional and damages claims.

C. The Law Enforcement Privilege

22. The Fifth Circuit has interpreted the law enforcement privilege to apply in the context of an ongoing criminal investigation. *In re: United States Department of Homeland*

Security, 459 F.3d 569-570 (5th Cir. 2006). **Since all of the Plaintiffs are NIS and are not the subject of a criminal investigation, the law enforcement privilege is not applicable to the information about them requested.**

23. “[T]he law enforcement privilege is bounded by relevance and time constraints...The privilege “lapses after a reasonable period of time.” *Id.* at 571. **This is particularly relevant since most Plaintiffs have been listed as NIS on the TSDB for at least 9 years.**

24. In *Homeland Security, supra*, 459 F.3d at 571, The Fifth Circuit further expressed that under the law enforcement privilege:

“Several types of information probably would not be protected, including documents pertaining to: (1) people who have been investigated in the past but are no longer under investigation, (2) people who merely are suspected of a violation without being part of an ongoing criminal investigation and (3) people who may have violated only civil provisions...”

25. There is a significant public interest behind uncovering an agency’s illegal act of including NIS in a terrorist database, and it justifies the production of the information sought.

Carnaby v. City of Houston, No. 4:08-cv-1366, 2008 WL 4546606, at *2 (S.D. Tex. Oct. 10, 2008)

26. “The federal courts “overwhelmingly treat” this privilege as a qualified one, which is subject to a balancing process that may lead to court-ordered disclosure of privileged materials, and which may be subject to waiver by the privilege holder, although the law is not well established on the question of waiver in this context.” 26A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5692 at pp. 243-44, 274 (West 1992) (hereinafter “Wright & Graham”).

27. The parties resisting discovery bear the burden of demonstrating the existence of any privilege in the materials. *United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002).

28. Inasmuch as privileges constitute an exception to the demand for relevant evidence and derogations from the search for the truth, they are strictly construed. *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980));

29. In the context of civil rights violations cases like the case at bar, “there is a ‘special danger’ in permitting state governments to define the scope of their own privilege when the misconduct of their agents is alleged.” *American Civil Liberties Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1344 (5th Cir. 1981)

30. In light of the above, the law enforcement privilege does not extend to the information concerning civil investigations or concluded criminal investigations. Whatever the “secret” criteria to place people on the NIS category of the TSDB, it is certainly not covered by the law enforcement privilege.

31. A list distributed among over 74,000 private corporations and law enforcement agencies could hardly be considered “sensitive”.⁴ Millions of people that work for the recipients of the list have access to the TSDB that includes Plaintiffs’ names despite the absence of reasonable suspicion linking any of them to acts of terrorism..

32. Defendants are asking this Court to apply a different standard than the one previous Courts have applied regarding the access to the TSDB. In previous cases challenging

⁴ Although the evidence in the *Elhady v. Kable*, 391 F.Supp.3d 562 (E.D.VA 2019) revealed that the TSDB is distributed among 18,000 law enforcement agencies and at least 1440 corporations, recent references place the distribution of the TSDB through the National Crime Information Center (NCIC) amount at 74,000.

“The National Crime Information Center (NCIC) database, used by more than 80,000 law enforcement agencies every hour of every day, contains information about 15 million active criminal records. Access to the database, created in 1967, is tightly controlled – you’ll have to be an employee of a law enforcement agency. The database is broken into 19 categories, seven dealing with property crimes, such as lost or stolen items. The remaining dozen categories are associated with fugitives, sex offenders and others with criminal records.”

<https://legalbeagle.com/7643538-access-ncic-database.html>

“The NCIC data system provides the nation’s 74,000 law enforcement agencies with up-to-the-minute, 24-hour information on stolen property, fugitives, criminal history, missing persons and other recorded facts.”

<https://www.rcrwireless.com/19940919/archived-articles/data-radio-product-used-by-national-crime-center>

the Selectee list of the TSDB (Handling Code 2) such as *Elhady v. Kable*, 391 F.Supp.3d 562 (E.D.VA 2019), the courts have granted the parties in camera review of the list. Defendants thus once again mislead the court into believing that the law enforcement privilege shields them from the production of the limited discovery Plaintiffs seek.

WHEREFORE, Plaintiffs respectfully request that this Court GRANT this motion and consequently:

- a) Strike from the record “Official Capacity Defendants’ Response in Opposition to Plaintiffs’ Motion to Compel Limited Discovery” (Dkt 54); or
- b) DENY Defendants’ request for the application of the law enforcement privilege to prevent the production of the highly relevant limited discovery Plaintiffs seek, fundamental to Plaintiffs’ constitutional and civil rights claims and consequently
- c) ORDER the production of the TSDB lists for in camera review by Plaintiffs’ attorney.
- d) Schedule an oral argument if the Court deems it necessary to clarify any aspect of the controversy.

Respectfully submitted,

I CERTIFY: That I have filed this motion by means of the Court’s CM/ECF platform that notifies all attorneys of record.

ANA LUISA TOLEDO

/s/Aنا Luisa Toledo
Southern District of Texas No. 3825092
Attorney for Plaintiffs
PO Box 15990
Houston, TX 77220-1590
Tel. 832-247-3046; 340-626-4381

DATED this 11th day of May, 2023