Practice Tips

Getting Uncle Sam To Talk: Obtaining Potentially Important Evidence from the FBI For Use in Civil Proceedings

By Joseph L. Sulman

Obtaining information from a non-party for use at trial can lead to frustration and headaches for civil attorneys – particularly if the sought-after information is maintained by the FBI. Not surprisingly, the FBI does not simply turn over documents or provide witnesses for testimony when it receives a subpoena. In fact, if served with only a subpoena, the FBI will reject it as improper. A party seeking such information must follow a certain request procedure, established by case law and regulation. If the FBI still denies the request, the party must initiate a separate action or, in some circumstances, file a motion.

The process for seeking and obtaining records or testimony from the FBI requires navigating through a host of legal issues, including forum selection, standing, the Administrative Procedure Act, and the law enforcement privilege. This article summarizes the request process and guides the practitioner through the issues that may arise. N.B.: The process is the same for obtaining records from any

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agency in the federal Department of Justice (under which the FBI is classified), but for simplicity's sake this article refers to the FBI only.

First, the requesting party must send a written request to the U.S. Attorney's Office of the jurisdiction in which the case is pending. This document is referred to as a "*Touhy* request," named after *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). A subpoena should accompany the request or immediately follow it, so that the party can file a motion to compel if the request is denied. The letter should be clearly marked as a *Touhy* request and should identify both the specific FBI case or file to which it refers and the specific documents or information requested. If possible, it should also identify the FBI agents involved in the creation of the documents or items.

Once the FBI receives the *Touhy* request, it refers to federal regulation 28 C.F.R. § 16.26 to determine if compliance is warranted. The FBI will not disclose records or permit an agent to testify in a civil action if doing so would 1) violate a statute or procedural rule, 2) violate a regulation, 3) reveal classified information (unless such information has been lawfully declassified), 4) reveal a confidential source (unless the investigative agency and source do not object), 5) reveal investigative records compiled for law enforcement purposes, or 6) reveal trade secrets improperly. *Id.*, § 16.26(b). If none of these circumstances apply, the regulation provides that the Deputy or Associate Attorney General will authorize disclosure if doing so is "appropriate under the rules of procedure governing the case or matter [and] under the relevant substantive law concerning privilege." *Id.*, § 16.26(a). In practice, the U.S. Attorney is delegated with making the decision whether to authorize disclosure. This regulation sets forth a procedural rule to guide the FBI in its evaluation of a *Touhy* request; it does not provide the government with an independent privilege or right to withhold information.

As expected, case law demonstrates that the FBI does not easily disclose its records or make its agents available to testify at court proceedings. Consider the case of an Arab-American involved in an employment discrimination lawsuit who sent a *Touhy* request for a file the FBI maintained on him, in order to prove that a co-worker falsely accused him of bomb-making. While the FBI produced the file,

it redacted the name of the informant - the very information the plaintiff needed for his civil suit. The Eighth Circuit affirmed the district court's ruling in favor of the FBI on the plaintiff's motion to compel. *Elnashar v. Speedway Superamerica, LLC*, 484 F.3d 1046 (8th Cir. 2007).

If the FBI denies the *Touhy* request in whole or in part, it will cite one or more of the justifications set forth in 28 C.F.R. § 16.26. At that point, and depending on the jurisdiction, the party seeking the information can do one of two things: it can file a separate action in federal court for violation of the Administrative Procedure Act (APA), or, if the underlying action is already in federal court, it can file a motion to compel. The First Circuit clearly allows a party involved in a federal lawsuit to file a motion to compel to enforce a subpoena to the FBI rather than initiate a separate APA action, but other circuits differ and the practitioner must check the case law for the jurisdiction in question. In all federal circuits, however, the requesting party must bring a separate APA action if the underlying dispute is in state court, since a state court does not have jurisdiction to enforce a subpoena served on a federal agency.

The FBI most often cites the law enforcement privilege (sometimes called the investigatory privilege) as justification for denying a *Touhy* request. This privilege applies to certain information related to law enforcement activities, as explained by the First Circuit:

> The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.

Commonwealth Puerto Rico v. United States, 490 F.3d 50, 64 (1st Cir. 2007).

While the law enforcement privilege is widely recognized, it is qualified and can be overcome by a sufficient showing of need. Courts determine on a case-by-case basis whether the requesting party has demonstrated an authentic necessity, given the particular circumstances, to overcome the qualified privilege. "When the information sought is both relevant and essential to the presentation of the case

on the merits and the need for disclosure outweighs the need for secrecy, the privilege is overcome." *Miller v. Mehltretter*, 478 F. Supp. 2d 415, 424 (W.D.N.Y. 2007). Since the APA dictates the standard of judicial review, the court ultimately examines whether the FBI's assertion of the privilege was arbitrary and capricious. As a practical matter, however, the APA standard does not often have significance. This is because determining whether the FBI acted arbitrarily and capriciously in asserting the privilege first requires an evaluation of whether the privilege applies or has been overcome by a sufficient showing of need in the given case. If the privilege does not apply or is overcome, then disclosure is warranted. The arbitrary and capricious analysis becomes significant when the FBI discloses some, but not all, of the requested information, and the court must evaluate whether the FBI acted arbitrarily and capriciously in determining what to disclose and what not to disclose. *See Cabral v. U.S. Dept. of Justice,* 587 F.3d 13, 23 (1st Cir. 2009).

As with all privilege claims, evaluating an assertion of the law enforcement privilege depends largely on specific facts; however, the case law provides some general guidelines. The Fifth Circuit has noted that "the law enforcement privilege is bounded by relevance and time constraints," and, "[t]herefore the privilege lapses either at the close of an investigation or a reasonable time thereafter." *In re Dept. of Homeland Sec*., 459 F.3d 565, 571 (5th Cir. 2006). This statement may be overbroad, however: the case law does not reveal a *per se* rule that a closed investigation nullifies the privilege. Still, the privilege is certainly strongest when an investigation is open; other key factors supporting the privilege include when the request seeks confidential sources and other highly sensitive law enforcement information and the relevance of the requested information to the pending case is weak. *See Cabral,* 587 F.3d at 23 (upholding assertion of privilege where requests were overly broad and not directly relevant to the primary issue at hand); *Borchers v. Commercial Union Ins., Co.*, 874 F. Supp. 78, 80 (S.D.N.Y. 1995) (upholding assertion of privilege where requests sought identity of and information provided by confidential informants, since informants expected confidentiality to remain indefinite and disclosure would discourage future informants from providing assistance); *Commonwealth of Puerto Rico*, 490

F.3d at 68 (1st Cir. 2007) (upholding assertion of privilege where disclosure would reveal "the number and types of personnel used by the FBI to conduct operations" at issue, including agents names).

On the other hand, the requesting party may show that the privilege does not apply or that it is overcome by a sufficient showing of need. Instances where the privilege has been found inapplicable include where a city asserted the privilege to refuse to reveal whether it supplied undercover officers at a certain demonstration which was the focus of a complaint against the police, *Kunstler v. City of New York*, 439 F.Supp.2d 327, 328 (S.D.N.Y. 2006), and where the claim for privilege, even if strong, was not properly presented before the district court, *Friedman v. Bache Halsey Stuart Shields, Inc*., 738 F.2d 1336 (D.C. Cir. 1984). Instances where the privilege, once established, has been overcome include where the investigative materials and witness statements constitute the best evidence of possible malicious prosecution, *Vidrine v. U.S.,* 2009 WL 1844476, *3 (W.D. La. June 22, 2009), and where the requested testimony from an FBI agent did not seek information about contacts with law enforcement officials or seek disclosure of confidential sources or vulnerable witnesses, *Mehltretter*, 478 F. Supp. 2d at 424. *See also Kitevski v. City of New York*, 2006 WL 680527, *4 (S.D.N.Y. March 16, 2006) (ruling that city police department failed to provide sufficient facts to justify privilege); *Schiller v. City of New York*, 2007 WL 136149, 14 (S.D.N.Y. Jan. 19, 2007) (rejecting claim of law enforcement privilege where city only offered conclusory assertions of harm in disclosure).

Some courts have applied a multi-factored analysis to evaluate an assertion of the law enforcement privilege. These factors are:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely

to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996). It should be noted that most published decisions on the law enforcement privilege do not apply these factors. The First Circuit has also not applied this particular analysis to date.

A recent example may illuminate how the District of Massachusetts addresses an assertion of the law enforcement privilege by the FBI. In this case, *Aiello v. Manzi*, C.A. 08-10635, D. Mass., the plaintiff (represented by this writer) asked the FBI to produce a wire-tapped recording of a conversation between himself and the Defendant. The plaintiff had helped the FBI record the conversation as part of an unrelated investigation. Despite the fact that the plaintiff was the only informant whose interests were at stake, and despite the fact that the FBI investigation had already been made public through media reports and a related proceeding, the FBI refused to produce the recording based on the law enforcement privilege.

After the plaintiff moved to compel, the Court (Magistrate Judge Robert Collings) reserved ruling on the motion until trial, when it determined, based on conflicting testimony concerning the conversation, that the privilege had been overcome by a sufficient showing of need.

In summary, while there is a standard process for requesting FBI records or testimony, the case law does not provide a well-defined rule for when a Court will compel the FBI to comply with a proper request. Generally, however, a party can overcome the law enforcement privilege only by showing that the requested information contains, beyond a speculative level, relevant and material evidence that is essential to the party's claim or defense. ■