IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WIKIMEDIA FOUNDATION,

Plaintiff,

v.

NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE, *et al.*,

Defendants.

Hon. T. S. Ellis, III

Civil Action No. 15-cv-00662-TSE

PLAINTIFF'S SUPPLEMENT TO ITS MOTION TO COMPEL

On March 26, 2018, Plaintiff Wikimedia Foundation ("Wikimedia") moved to compel Defendants to respond to certain interrogatories, requests for admission, and requests for production propounded on Defendants. Pl. Mot. to Compel (ECF No. 125-2). Plaintiff also moved to compel Rule 30(b)(6) deposition testimony from the National Security Agency ("NSA"). *See id.* At the time Plaintiff filed its motion, the Rule 30(b)(6) deposition of the NSA had been noticed but had not yet taken place. Nonetheless, based on the NSA's objections to the Rule 30(b)(6) notice, Wikimedia anticipated that the NSA would seek to limit its testimony in response to at least some of Plaintiff's deposition questions on the basis of the state secrets privilege and purported statutory privileges, 50 U.S.C. § 3024(i) and 50 U.S.C. § 3605(a). *See* NSA Dep. Objs. (Toomey Decl., Ex. 24) (ECF No. 125-27). In order to consolidate the discovery issues for resolution by the Court, and in keeping with the expeditious briefing schedule jointly proposed by the parties, Wikimedia moved to compel deposition testimony over the NSA's stated objections. In particular, Wikimedia's motion to compel argued that the Court should apply the Foreign Intelligence Surveillance Act's in camera discovery procedures—set out in 50

U.S.C. § 1806(f)—to any information that Defendants withheld in response to deposition questions. Pl. Mot. to Compel 10–11, 33–34.

The Rule 30(b)(6) deposition of the NSA took place two days ago, on April 16, 2018, and the NSA did in fact refuse to respond to numerous questions at the deposition on the basis of the state secrets privilege, 50 U.S.C. § 3024(i), and 50 U.S.C. § 3605(a). The NSA also objected numerous times claiming that the questioning was outside the scope of the Rule 30(b)(6) notice.[1] Finally, for a number of questions that were plainly within the scope of the Rule 30(b)(6) notice, the NSA's witness was inadequately prepared and lacked sufficient knowledge to fully answer the questions posed.

In an abundance of caution, Wikimedia files this supplemental memorandum to more specifically identify its challenge to each of those refusals by the NSA to respond to Wikimedia's deposition questions. Wikimedia moves to compel answers to those questions where the NSA's counsel objected on the grounds of the state secrets and claimed statutory privileges, *including* those questions where the NSA's counsel also objected that the question was outside the scope of the Rule 30(b)(6) notice. It is Wikimedia's position that the questions asked of the NSA's designated witness were within the scope of its Rule 30(b)(6) notice; but, regardless, the witness was not entitled to withhold responsive information on the basis of the claimed privileges, even if answering in an individual capacity. *See, e.g.*, *Green v. Wing Enterprises, Inc.*, No. 14-CV-01913, 2015 WL 506194, at *8 (D. Md. Feb. 5, 2015). In addition, Wikimedia moves to compel the NSA to submit to a supplemental deposition—at least during the Court's in camera review of deposition testimony pursuant to 50 U.S.C. § 1806(f), if not also

[1] Through their meet-and-confers, the parties agreed to limit the Rule 30(b)(6) topics to those identified as Topics 2, 3, 4(a), 4(d), and 6 in Plaintiff's Deposition Notice (Toomey Decl., Ex. 23) (ECF No. 125-26).

by Wikimedia's counsel—on topics where the witness was not sufficiently prepared and was therefore unable to fully answer the questions posed.

Significantly, the NSA has not yet formally invoked the state secrets privilege in the manner the Supreme Court requires as to any of the information sought during the deposition, because the NSA has not yet made a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953); *see Abilt v. CIA*, 848 F.3d 305, 311 (4th Cir. 2017); Pl. Mot. to Compel at 20. To the extent the NSA seeks to invoke the privilege with respect to deposition testimony in its opposition to Plaintiff's motion to compel due April 27, 2018—as is the NSA's burden—Wikimedia will respond to those arguments in its reply brief due May 18, 2018. *See* Order dated April 6, 2018 (ECF No. 132).

Finally, Wikimedia notes that it does not yet have access to the transcript of the NSA deposition, because the government has insisted that the NSA have an opportunity to review the transcript in order to redact any testimony the NSA retroactively deems classified, before providing a copy of the transcript to Plaintiff. *See* NSA Dep. Objs. (Toomey Decl., Ex. 24). It appears likely that the transcript will be released to Wikimedia next week. Plaintiff is filing this supplement now to identify all challenges to the NSA deposition as quickly as possible, and in advance of the filing of Defendants' opposition brief on April 27, 2018. As set forth in Plaintiff's motion to compel, the principal question is whether FISA's in camera review procedures apply to the discovery sought in this case, or whether any of Defendants' claimed privileges properly apply. Pl. Mot. to Compel at 33–34; *see id.* at 1–2, 11–27. Should the Court issue an order agreeing with Plaintiff that FISA's procedures apply, 50 U.S.C. § 1806(f), Wikimedia will within two weeks of the Court's order file a supplemental motion that identifies from the deposition

transcript those questions for which the government should be required to provide complete responses to the Court in camera. *See id.* at 33–34; Pl. Proposed Order (ECF No. 125-34).

Dated: April 18, 2018

Respectfully submitted,

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