

For the reasons set forth below, Defendants' Motion is granted in part and denied in part, and Plaintiffs' Motion is denied.

I. Background

A. Factual Background

On October 5, 2000, the U.S. Attorney's Office charged the Plaintiffs in the present action with conspiracy to violate the Trading with the Enemy Act and its implementing regulations. U.S. v. Brodie, Indictment, No. 00-CR-629. Plaintiffs retained Morgan Lewis & Bockius ("Morgan Lewis," "MLB") to serve as their counsel in the criminal trial. Former Assistant U.S. Attorney (AUSA) Joseph Poluka served as lead prosecutor. (Def.'s Mot. at 2). In early March 2002, another AUSA, Kristin Hayes, volunteered to assist Poluka in the prosecution of the Plaintiffs. At all times in this matter, Hayes was married to Thomas Sharbaugh, an attorney who was and is the Managing Partner of Operations at Morgan Lewis. (Compl. Ex. B)

Before joining the prosecution of an MLB client, Hayes sought to confirm with Morgan Lewis that there was no conflict of interest due to her marriage to Sharbaugh. Hayes telephoned her husband to make this inquiry. Although it appears that Plaintiffs objected to Hayes' involvement at the time, Morgan Lewis made an internal decision that Hayes' work on the case and her relationship with Sharbaugh would not be a problem, as Sharbaugh was not involved with the direct representation of Plaintiffs. Sharbaugh relayed this determination to his wife, who then proceeded to join the prosecution team. Id.

After Hayes started to work on the Brodie prosecution, Sharbaugh shared pieces of information with his wife about his firm's representation of these particular clients. According to

both parties in the present case,² Sharbaugh made the following comments to his wife concerning the Brodie case: (1) he believed the Brodie case was going to be a “nasty piece of litigation” between Brodie and the U.S. Attorney’s Office; (2) he feared that Brodie might “seek to blame certain things on Morgan,” and that if convicted, “[Brodie was] thinking about suing Morgan,” and (3) he knew Brodie was involved in a billing dispute with Morgan Lewis. (Compl. Ex. B, 17 - 22, 24, 38-39).

After Hayes relayed her husband’s comments, Judge McLaughlin found that privileged information had been disclosed by Morgan Lewis to the U.S. Attorney’s office, and removed Hayes and other AUSAs who had come into contact with certain information from working on the Brodie case. (Compl. Ex. C, at 22-37, 46-52). Shortly thereafter, and approximately two weeks before the criminal trial began, Morgan Lewis withdrew its appearance on behalf of Brodie.³ Following the trial in federal court, a jury found the plaintiffs guilty of conspiracy to violate the Trading with the Enemy Act and the Cuban Assets Control Regulations.⁴

² In their Complaint and Motions, Plaintiffs and Defendants recite the same version of what information Sharbaugh conveyed to Hayes with respect to the Brodie case. In a hearing in front of the Honorable Mary A. McLaughlin on March 11-12, 2002, Hayes’s testimony contained the same details that both parties have provided this Court. In a deposition taken in the Malpractice Action against Morgan Lewis in January 2007, Sharbaugh denied making some of these statements to his wife. (Compl. Ex. E). For the purpose of the action before this Court, due to the fact that both parties agree as to what happened, Sharbaugh’s inconsistent testimony will not be considered for the purpose of recounting what took place in those conversations.

³ Prior to the commencement of the criminal proceeding, Plaintiffs hired attorneys from Williams & Connolly, Arent Fox and Covington & Burling to represent them. Compl., Ex. D, 7.

⁴ The trial court granted Stefan Brodie’s motion for acquittal, and Don Brodie and Bro-Tech were granted a motion for a new trial. U.S. v. Brodie et al., 268 F. Supp. 2d 420 (E.D. Pa. 2003). The government appealed this decision with respect to Stefan Brodie. The Court of Appeals for the Third Circuit agreed with the government, vacating the trial court’s judgment and reinstating the jury verdict. U.S. v. Brodie, 403 F.3d 123 (3d Cir. 2005). Plaintiffs ultimately

On February 11, 2004, Plaintiffs filed a Malpractice action against Morgan, Lewis & Bockius in the Philadelphia County Court of Common Pleas. (Compl. Ex. A). The action is based on MLB's representation of Plaintiffs from 1993 until 2002.⁵ In a section of their Complaint entitled "Conflict of Interest," Plaintiffs provide a brief description of what took place concerning the Sharbaugh-Hayes communications. (Compl. Ex. A ¶¶ 58 - 64).

In preparation for trial, Morgan Lewis requested permission to depose multiple AUSAs, including Kristin Hayes. (Compl. Ex. F). In its response, the U.S. Attorney's Office referred Morgan Lewis to the unsealed record of the hearing before Judge McLaughlin. U.S. Attorney Patrick Meehan suggested that Morgan first review the record for the requested information. The U.S. Attorney's Office also reviewed its own records and provided Morgan Lewis with the relevant documents which were not subject to privilege. (Compl. Ex. G). Brodie later joined Morgan Lewis' discovery request, seeking testimony concerning "the circumstances surrounding [] Hayes' participation in the prosecution of plaintiffs." (Compl. Ex. H). U.S. Attorney Meehan once again referred Brodie to the public record of the hearing before Judge McLaughlin, and provided the non-privileged, relevant documents to Plaintiffs. His letter concluded by asking Plaintiffs to provide a detailed explanation of precisely what was needed beyond that contained in the public record or the provided documents. (Compl. Ex. I).

pled guilty to one count each of violating the Trading with the Enemy Act.

⁵ In their Malpractice Action, Plaintiffs allege they received advice from Morgan Lewis, their long-time counsel, concerning the legality of trade activity by the Company's foreign subsidiaries with entities affiliated with Cuba. Plaintiffs allege Morgan Lewis mistakenly advised Plaintiffs that such trade was legal. The majority of the counts in the Malpractice Action arise from alleged malpractice and other misconduct by Morgan Lewis which "directly led to [P]laintiffs' criminal indictment and their conviction." (Compl. Ex. A).

In December 2006, Plaintiffs served Hayes with a subpoena to testify at a deposition in the Malpractice Action. (Compl. Ex. J). Over the course of a two-day period at the end of January 2007, Plaintiffs' counsel exchanged numerous e-mails with AUSA Mary Catherine Frye, discussing whether the DOJ would make Hayes available for a deposition in the Malpractice Action. (Compl. Ex. K, L, M, N and O). Plaintiffs explained they intended to ask Hayes to confirm the substance of her testimony before Judge McLaughlin, and that they would have further questions for her only if she disputed any of her prior testimony. (Compl. Ex. K, M). Plaintiffs stated they intended to call Hayes as a witness at trial, and her deposition was necessary in the event that she became unavailable to testify. (Compl. Ex. O).

On February 7, 2007, U.S. Attorney Patrick Meehan sent a letter containing the DOJ's final decision with respect to Hayes' testimony. (Compl. Ex. P). In determining that the authorization of Hayes' testimony was unwarranted, Meehan explained that her deposition testimony was irrelevant to the Malpractice Action. He went on to state that an authorization of Hayes' deposition testimony and testimony at trial would be burdensome to the DOJ, as the DOJ would provide counsel for Hayes during both forms of testimony and thus continue to expend the government's limited resources on private litigation. Id.

On March 27, 2007, Plaintiffs filed this civil action. The Complaint sets forth two counts. Under 5 U.S.C. § 706(1), Plaintiffs seek injunctive relief in the form of an Order compelling Defendants to produce Hayes for a deposition and to testify at the trial in the Malpractice Action. (Compl. ¶ 6, 46). Under 5 U.S.C. § 706(2), Plaintiffs seek a declaration that defendants' refusal to produce Hayes for deposition is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, is contrary to constitutional right, power, privilege,

and immunity, is in excess of the DOJ's statutory jurisdiction, authority, and limitations, and is short of the DOJ's statutory right. (Compl. ¶¶ 6, 36-46).

B. Procedural Background

Plaintiffs filed their Complaint on March 27, 2007 (Doc. No. 1). Defendants filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alternative a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(b) (Doc. No. 3), contending the U.S. Attorney's decision was consistent with Department of Justice regulations and neither arbitrary nor capricious, nor an abuse of discretion. Both parties stipulated that Defendants' Motion would be treated as a Motion for Summary Judgment, as the only issue to be decided in this action is a legal issue, there are no factual disputes and no discovery is required (Doc. No. 4). Plaintiffs filed a Response and a Cross-Motion for Summary Judgment (Doc. No. 6). Defendants filed a Response to Plaintiffs' Cross-Motion for Summary Judgment (Doc. No. 7). Plaintiffs filed a Reply in support of their Cross-Motion for Summary Judgment (Doc. No. 8).

II. Contentions of the Parties

Plaintiffs contend that under the Administrative Procedures Act (APA), 5 U.S.C. § 701, et seq., Defendants' final decision not to allow Hayes to testify in the Malpractice Action in state court is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law, is contrary to constitutional right, power, privilege, and immunity, is in excess of the DOJ's statutory jurisdiction, authority, and limitations, and is short of the DOJ's statutory right. (Compl. ¶¶ 36-46). Plaintiffs seek declaratory and injunctive relief pursuant to 5 U.S.C. § 706.

Defendants contend that the U.S. Attorney's final decision is consistent with Department

of Justice regulations and neither arbitrary nor capricious, nor an abuse of discretion. (Def.'s Mot.).

III. Legal Standard

A. Jurisdiction

This Court has federal question jurisdiction over Plaintiff's APA claim under 28 U.S.C. § 1331.

B. Standard of Review

Under 5 U.S.C. § 301,⁶ a government agency is authorized to promulgate regulations granting that agency discretion and authority to govern its internal affairs. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951); Davis Enterprises v. United States Environmental Protection Agency, 877 F.2d 1181, 1184 (3d Cir. 1989). Pursuant to this statutory provision, the Department of Justice has promulgated regulations governing the testimony of its employees in private suits. These regulations can be found at 28 C.F.R. § 16.21, et seq. Claims arising from the Department's decisions under these regulations are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq.

The APA provides in relevant part that agency actions, findings, and conclusions can be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A), (E). This is a very narrow and highly deferential

⁶ Section 301 states in full:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

standard under which an agency's action is presumed valid. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). Even if a reviewing court would not have made the same decision as the agency, a reviewing court is “not empowered to substitute its judgment for the agency's.” Id. at 416. Instead, the court's inquiry is limited to determining whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Baltimore Gas & Elec. Co. v. National Res. Def. Council, Inc., 462 U.S. 87, 105 (1983). Thus, this Court is only free to determine whether the agency followed its own guidelines or committed a clear error of judgment. See Overton Park, supra, at 416; Davis Enterprises, supra, at 1186.

The scope of the DOJ guidelines includes the disclosure of “any information acquired by any person while such person was an employee of the Department [of Justice] as a part of the performance of that person's official duties or because of that person's official status in all federal and state proceedings in which the United States is a party.” 28 C.F.R. § 16.21(a)(1). The purpose of these regulations is “only to provide guidance for the internal operations of the Department of Justice.” 28 C.F.R. § 16.21(d). Under Section 16.22(a):

[N]o employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

28 C.F.R. § 16.22(a). The responsible department official in this case would be the U.S Attorney for the district. 28 C.F.R. § 16.22(b). If the oral testimony of an agency employee is sought, the party seeking the testimony must provide the responsible U.S. Attorney with an affidavit or

statement “setting forth a summary of the testimony sought and its relevance to the proceeding.”
28 C.F.R. § 16.22(c).

Among the factors the U.S. Attorney should consider in determining whether to grant a request for a disclosure are (1) whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and (2) whether disclosure is appropriate under the relevant substantive law concerning privilege. 28 C.F.R. § 16.26(a)(1)-(2). The DOJ regulations state that disclosure will not be made if disclosure would violate a statute, a rule of procedure, or a specific regulation, if disclosure would reveal classified information or a confidential source, if disclosure would reveal investigatory records and would interfere with enforcement proceedings or disclose investigative techniques, or if disclosure would improperly reveal trade secrets. 28 C.F.R. § 16.26(b)(1)-(6). Under 28 C.F.R. § 16.26(c), in all cases not involving considerations specified in paragraphs (b)(1) through (b)(6) under 28 C.F.R. § 16.22(b), disclosure will be authorized unless the responsible official finds that “disclosure is unwarranted.”

IV. Discussion

A. The Deposition

This Court finds the case of Davis Enterprises v. United States, *supra*, to be an instructive precedent concerning the sought-after deposition. Davis Enterprises was a defendant in a private civil litigation arising from an underground oil spill. The Defendant sought to compel the Environmental Protection Agency (EPA) to allow an EPA employee to testify regarding the results of an oil pollution test that he had performed on the property in question. Judge Bechtel of this Court granted the EPA’s Motion for Summary Judgment, deciding that the EPA’s

determination was not subject to judicial review, and even if it were, the EPA's decision to forbid the employee from testifying was not arbitrary, capricious, or an abuse of discretion. Davis Enterprises, supra, at 1182-83.

The Court of Appeals for the Third Circuit disagreed in part, finding that the EPA's decision was indeed subject to judicial review, but affirmed the District Court's judgment stating that the EPA's decision was not arbitrary, capricious or an abuse of discretion. In reviewing the record, the Court found that the EPA had recognized and considered the factors set forth in its own regulations governing such requests for employee testimony. The EPA was concerned that such deposition testimony by an employee would make it appear that the agency was taking sides in private litigation, would constitute a drain on EPA resources, and was not in the EPA's interests. The Court of Appeals reasoned that while "it is certainly arguable that permitting [the employee to give a deposition] would not create the appearance of taking sides, the EPA's conclusion to the contrary is not capricious." Davis Enterprises, supra, at 1186-87. The Court stressed that while "it is not likely that we would have interpreted the EPA's interests as narrowly as it has done here, we cannot say that it abused its discretion in deciding that its interest in having the time of its employees . . . spent on agency business outweighed the interests of Appellants" Id. at 1188. The Court thus concluded that the agency's decision fell within the parameters of the agency's discretion as set forth in the applicable statute and regulations. Id.

In his final decision, pursuant to 28 C.F.R. § 16.21, et seq., U.S. Attorney Meehan explained that his staff had carefully reviewed Plaintiffs' request, the complaint in the pending civil case, and the transcript of Hayes' testimony before Judge McLaughlin. (Compl. Ex. P). The U.S. Attorney found that the Plaintiffs' attorneys during the hearing had "ample opportunity

to explore the details of the Sharbaugh-Hayes communications, as well as [Hayes'] communications, or lack thereof, with other prosecutors.” Id. As Hayes was removed from the case before the jury was empaneled and none of the information obtained from MLB reached AUSA Poluka, the U.S. Attorney concluded that “the testimony sought has no relevance to the claims of legal malpractice” asserted by Plaintiffs and that authorization of Hayes’ testimony was “unwarranted.” Id. He further reasoned that if Hayes were to be called as a witness in the Malpractice Action, the U.S. Attorney’s office would be required to assign another AUSA to represent her. This representation could be lengthy, as there was no stipulation between the parties limiting the scope of possible cross-examination. The U.S. Attorney concluded that it was not appropriate for “the United States to continue to expend its limited resources to assist private parties in private litigation.” Id.

While this Court may have not made the same decision as the U.S. Attorney, I am not free to substitute my judgment for that of the agency on this issue. See Overton Park, supra, at 416; Davis Enterprises, supra, at 1186. Although it is certainly arguable that Hayes’ deposition testimony would be relevant in the Malpractice Action, especially considering her husband disputed portions of her testimony in his deposition, the DOJ’s conclusion to the contrary is neither arbitrary nor capricious. Plaintiffs have access to the record of Hayes’ testimony before Judge McLaughlin, in which the circumstances surrounding her participation in the prosecution of Plaintiffs were explored. Plaintiffs’ counsel explained to the U.S. Attorney’s Office that Plaintiffs sought to call Hayes simply to “read excerpts from her testimony, and ask her if she was answering truthfully and accurately.” (Compl. Ex. M). It is reasonable that the U.S. Attorney concluded Hayes’ potential testimony, simply stating her prior testimony was truthful,

would be irrelevant.

Plaintiffs have not shown that the U.S. Attorney's decision that the proposed deposition would expend the United States' limited resources on private litigation is arbitrary. While Plaintiffs contend that they only seek to verify the accuracy of Hayes' prior testimony, the U.S. Attorney's concern about cross-examination at a deposition is a valid one. In response to the Appellant's argument in Davis Enterprises that the proposed deposition would only take a minimal amount of time, the Court of Appeals reasoned that "there is no guarantee that cross-examination would not be lengthy." Davis Enterprises, supra, at 1187. Similarly, that guarantee is lacking in the present case. Morgan Lewis did not stipulate to limiting its cross-examination at deposition in time or scope. Thus, a deposition of Hayes would divert the AUSA and other office supervisors from their work and may result in collateral litigation. In addition, a deposition would be unsupervised by a judge. There would be nothing to prevent either party from asking Hayes questions about internal communications or strategy of the U.S. Attorney's Office. Neither party to the Malpractice Action has a need for or a right to such information. It was neither arbitrary nor capricious for the U.S. Attorney to conclude that the sought-after deposition would expend government resources on private litigation.

Moreover, in Davis Enterprises, the Court of Appeals found that it was "important to note" that the EPA had not withheld relevant information, but had turned over written documents to Davis Enterprises and had offered to provide the employee's testimony in the form of an affidavit. Davis Enterprises, supra, at 1187. In communications between the Plaintiffs and Defendants in the present case, the U.S. Attorney's Office informed Plaintiffs that much of what they were seeking was available in the public record. (Compl. Ex. I). Moreover, the U.S.

Attorney's Office searched its own files for documents that were not subject to privilege or other prohibition on disclosure and provided those documents to Plaintiffs. (Compl. Ex. G, I). Finally, Plaintiffs already have the record of Hayes' testimony before Judge McLaughlin. Since the U.S. Attorney's Office has provided Plaintiffs with documents and is not withholding relevant information, the U.S. Attorney is not abusing his discretion in deciding to deny Plaintiffs only the opportunity to have Hayes confirm her prior testimony in a deposition.

B. Testimony at Trial

In his final decision letter addressed to Plaintiffs, U.S. Attorney Meehan references authorizing Hayes to testify "at deposition and at trial," and concludes he cannot give such authorization due to the government's limited resources. (Compl. Ex. P). As discussed supra, there would be the inherent risk in authorizing a deposition of Hayes that, outside the presence of a judge, she would be asked probing questions concerning internal communications or strategy of the U.S. Attorney's Office. Pursuant to 28 C.F.R. § 16.21, et seq., the U.S. Attorney's decision was therefore neither arbitrary or capricious.

It is not clear to this Court, however, that the U.S. Attorney can prohibit Hayes from testifying at the state court trial. The same concern that this Court has with regards to a deposition may not be present when considering Hayes' potential testimony at trial. A judge oversees all courtroom testimony during trial and could ensure the rules of evidence are followed, and that Hayes would not be asked to answer any unnecessary, irrelevant or intrusive questions about her work. The state court may conclude that it is necessary for either party to call Hayes to the stand as a witness or as a rebuttal witness. There may be fundamental issues that can only be clarified by Hayes' testimony at trial, and at least some questions may not be at

all intrusive to the U.S. Attorney's work practices. This Court cannot presently say that the U.S. Attorney has the ability to prevent completely any such testimony. The issue of calling Hayes to testify at trial must await a further conference with counsel.

V. Conclusion

As the Court has stated, it is not clear that the Court would have found Hayes' proposed deposition testimony to be irrelevant or too great an expenditure of government resources. Yet under 28 C.F.R. § 16.21, the decision was within the U.S. Attorney's discretion. This Court cannot conclude that the U.S. Attorney abused this discretion in deciding that the U.S. Attorney's Office's interest in not expending the resources of Hayes and other attorneys on a private litigation matter outweighed the interests of Plaintiffs in deposing Hayes about the accuracy of her former testimony. In evaluating Plaintiffs' request and making a final decision, Defendants followed their own agency guidelines and committed no clear error of judgment. Plaintiffs have failed to show this decision to be arbitrary or capricious.

With respect to Hayes' proposed testimony at trial, this Court will schedule a telephone conference with both parties to discuss the matter further.

