

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KIFAH MUSTAPHA,)	
)	
Plaintiff,)	
)	
v.)	No. 10 C 5473
)	
JONATHAN E. MONKEN, individually and)	Judge Guzman
in his official capacity as Acting Director of)	
Illinois State Police; PATRICK E KEEN,)	Magistrate Keys
individually and in his official capacity as)	
Deputy Director of Illinois State Police; and)	
ILLINOIS STATE POLICE,)	
)	
Defendants.)	

**FEDERAL BUREAU OF INVESTIGATION'S
MOTION FOR ENTRY OF A PROTECTIVE ORDER**

Respondent Federal Bureau of Investigation, by and through Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, moves for entry of a protective order precluding disclosure of two documents and testimony from three conversations that are protected by the law enforcement privilege. In support of this motion, the FBI states as follows:

1. According to the complaint in this case, plaintiff Kifah Mustapha, an Arab Muslim of Middle-Eastern origin, and seven others who were neither Arab, Muslim, nor of Middle-Eastern origin, applied in 2009 for positions as chaplains with the Illinois State Police (“ISP”), and all were initially accepted. Compl. ¶¶ 3-4. Before assuming their chaplain duties, an article was published in January 2010, linking Mustapha to several Islamic organizations and characterizing him as a security threat to the United States. *Id.* at ¶¶ 16-17. Mustapha alleges that as a result of the article, the ISP conducted a second background check in June 2010 and, based on the results, denied Mustapha the chaplain appointment. *Id.* at ¶¶ 29-31.

2. Based on these allegations, Mustapha brought Title VII and First Amendment claims against the ISP and its two top officers for refusing to appoint him to the chaplain position. Mustapha claims that defendants' decision was based upon his race, national origin, religion, and association with Islamic organizations, not because ISP believed he was a security threat to the United States.

3. The parties have engaged in written discovery, but have not yet taken depositions.¹ As part of his document request to ISP, Mustapha seeks all documents relating to ISP's background check of Mustapha. ISP has identified two documents on its privilege log that it refused to produce: (1) Criminal History Report for Kifah A. Mustapha (Bates 285-291); and (2) Intelligence Contribution Report for Kifah A. Mustapha (Bates 491-499).² In its written response objecting to production of these two documents, ISP stated that the documents:

[c]ontain information obtained from databases maintained by the federal and state governments. Disclosure of such criminal history information would violate an agreement with federal agencies that maintain the databases and could result in the Illinois State Police's loss of access to the database. *See* 28 C.F.R. 20.33(b). Unauthorized disclosure of such information also may subject the individual making the disclosure to civil or criminal penalty. *See* 28 C.F.R. 20.21(c)(2); 28 C.F.R. 20.25; 20 ILCS 2630/7.

¹ Mustapha has also issued a subpoena to the FBI seeking documents relating to an FBI background investigation of Mustapha done prior to his acceptance onto the FBI's Citizens' Academy in 2010. The FBI objected to disclosure of certain responsive documents based on the law enforcement privilege, and Mustapha moved to compel. This motion is fully brief, awaiting disposition.

² The information in this motion is limited to that which has been publicly disclosed or may be reasonably inferred by the public from such disclosures. This memorandum should be read in conjunction with the FBI's separate, *ex parte*, under-seal declaration, filed contemporaneously herewith. The Criminal History Report and the Intelligence Contribution Report are attached to this declaration as Exhibits A and B, respectively.

4. ISP counsel has also identified several law enforcement conversations between ISP officials and Chicago FBI Special Agent in Charge (“SAC”) Robert Grant that occurred in connection with ISP’s background check of Mustapha. Specifically, when deciding whether to appoint Mustapha as Chaplain, ISP officials Patrick Keen, Jonathan Monken, and Luis Tigera separately sought advice from SAC Grant. In each conversation, SAC Grant stated that Mustapha would not pass an FBI background check if he applied for an FBI chaplain position and then proceeded to explain the basis for his opinion. ISP counsel anticipates that some or all of these ISP officials may be deposed in this matter and questioned about these conversations.

5. “The federal law enforcement privilege is a qualified privilege designed to prevent disclosure of information that would be contrary to the public interest in the effective functioning of law enforcement.” *Tuite v. Henry*, 181 F.R.D. 175, 176-77 (D.D.C. 1998). “The purpose of [the] 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.” *Department of Investigation v. Myerson*, 856 F.2d 481, 484 (2d Cir. 1988). After all, “[l]aw enforcement operations have little hope of being effective if conducted in full public view.” *Doe v. Hudgins*, 175 F.R.D. 511, 514 (N.D. Ill. 1997).

6. As the Seventh Circuit has recognized, “there ought to be a pretty strong presumption against lifting the privilege.” *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997). The reason for this presumption is that otherwise, “courts will be thrust too deeply into the criminal investigative process,” which our system of government places in the control of the

executive branch, subject to “such limited judicial intervention as may be necessary to secure” the rights of criminal suspects and defendants. *Id.* Ordinarily, third parties, such as Mustapha, “have no definitive legal right to the fruits of the FBI’s investigative endeavors conducted in confidence” *Id.*

7. While courts may consider a variety of factors in evaluating the law enforcement privilege, as a general matter, a court must balance the public interest in nondisclosure against the needs of the litigant for access to the information. *United States v. Cito*, 818 F.2d 980, 1002 (1st Cir. 1987). 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. Mehlretter*, 478 F.Supp.2d 415 (W.D. N.Y. 2007).

8. As described in the FBI’s *ex parte*, under-seal declaration, the two documents withheld by ISP as well as the basis for SAC Grant’s opinion that Mustapha would not pass an FBI background check are subject to the law enforcement privilege, because release of such information would disclose investigative techniques and procedures, the effectiveness of which would be impaired.

9. And although the information relates to the ISP’s nondiscriminatory reason for its decision and is therefore relevant, Mustapha cannot explain why this information is essential to prove his case. There is no reason to suspect that the privileged material contained in these documents and conversations will advance Mustapha’s claim that ISP’s decision was motivated by discriminatory reasons. Indeed, SAC Grant’s advice to ISP that Mustapha would not pass an FBI background check if he applied for an FBI chaplain position strongly suggests just the opposite.

Accordingly, Mustapha's need for this information in no way outweighs the public interest in nondisclosure.

WHEREFORE, the FBI moves this court for entry of a protective order finding that the redacted portions of the attached documents as well as the above-described portions of conversations with SAC Grant are subject to the law enforcement privilege and shall remain sealed and undisclosed.

Respectfully submitted,

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