

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

#19 (7/13 HRG OFF)

**CIVIL MINUTES - GENERAL**

Case No. CV 15-2573 PSG (JPRx) Date July 10, 2015

Title Human Rights Watch v. Drug Enforcement Administration, *et al.*

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez

Not Reported

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

**Proceedings (In Chambers): Order DENYING Plaintiff's Motion for Expedited Discovery**

Before the Court is Plaintiff Human Rights Watch's ("Plaintiff") motion for leave to conduct expedited discovery. Dkt. # 19. Defendants Drug Enforcement Administration ("DEA" or "Defendant DEA"), Michele Leonhart in her official capacity as Administrator of DEA, Federal Bureau of Investigation ("FBI"), James Comey in his official capacity as Director of the FBI, Department of Justice ("DOJ"), Eric Holder in his official capacity as Attorney General, Department of Homeland Security ("DHS"), Jeh Johnson in his official capacity as Secretary of the DHS, and the United States of America (collectively, "Defendants") oppose this motion. Dkt. # 25. The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the arguments in the moving, opposing, and reply papers, the Court DENIES the motion.

I. Background

Plaintiff challenges the constitutionality of Defendants' Mass Surveillance Program ("the Program"). *See generally* *Compl.* Specifically, Plaintiff alleges that the Program violates the First and Fourth Amendments to the Constitution. *Compl.* ¶ 6. Plaintiff asserts that the Program collects and maintains information about millions of calls made by Americans, including Plaintiff, who communicate by telephone with certain specified foreign countries that have a "demonstrated nexus to international drug trafficking and related criminal activities." *Id.* ¶ 3; *id.*, Ex. A ["Patterson Decl."] ¶ 2.<sup>1</sup> Though the Program does not record actual conversations, it compiles bulk telephony metadata about the calls into databases which are then "searched by officers and employees of various federal agencies, including DEA, DHS and FBI." *Id.* ¶ 35.

<sup>1</sup> Plaintiff alleges that the Declaration of Robert Patterson, a document filed in January 2015 in a criminal proceeding, first disclosed the existence of the Program to the public. *See Compl.* ¶¶ 26-27. The declaration also indicates that the Program's database "was suspended in September 2013[]" and that "information is no longer being collected in bulk[.]" *Id.*, *Patterson Decl.* ¶ 6.

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Plaintiff seeks to enjoin the alleged collection and use by Defendants of this bulk telephony metadata. *Id.* ¶ 3. Plaintiff is one of the world’s leading human rights organizations. *Id.* ¶ 39. Its fact-finding and human rights abuse investigations often bring it into contact with countries with drug trafficking or production problems. *Id.* ¶ 44, 45. These communications, “including the mere fact that a communication has occurred, are often extraordinarily sensitive” and Plaintiff considers the records of its calls to be “private.” *Id.* ¶ 44, 45; *Mot.* 3:17. Plaintiff alleges that Defendants’ bulk collection of telephony metadata conducted through the Program “substantially burdens [its] ability to effectively communicate with people in the Designated Countries” and “hinders [its] ability to effectively engage in its advocacy for global human rights.” *Id.* ¶ 50.

Plaintiff explains that “because the Program was carried out in secret for many years, some contours of the Program’s operation remain unclear.” *Mot.* 1:5-6. Thus, Plaintiff seeks limited expedited discovery from a single Defendant, the DEA, at the outset of this case to “inform its decision to seek a preliminary injunction, to ensure that all defendants are properly named, and to ultimately hasten the resolution of this case.” *Id.* 1:7-8.

## II. Legal Standard

Federal Rule of Civil Procedure 26(d)(1) provides: “A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.” Fed. R. Civ. P. 26(d)(1). Though “[e]xpedited discovery is not the norm[,]” district courts within the Ninth Circuit have permitted expedited discovery prior to the Rule 26(f) conference upon a showing of “good cause.” *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009) (internal quotations and citations omitted). “Good cause exists ‘where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.’” *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008) (quoting *Semitool, Inc. v. Tokyo Electron Am. Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002)). An evaluation of good cause must be performed in light of “the entirety of the record . . . and the reasonableness of the request in light of all the surrounding circumstances.” *Semitool*, 208 F.R.D. at 275 (internal quotations omitted) (emphasis removed); *see Am. Legalnet*, 673 F. Supp. 2d at 1067. In determining the reasonableness of a request, courts examine: “(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made.” *Id.* at 1067 (internal quotation and citation omitted). The “party seeking expedited discovery in advance of [the] Rule 26(f) conference has

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the burden of showing good cause for the requested departure from usual discovery procedures.” *Id.* at 1066 (internal quotation and citation omitted).

### III. Discussion

#### A. Existence of a Pending Preliminary Injunction

Courts may, though they do not automatically, find good cause when the party seeking expedited discovery has a pending motion for a preliminary injunction. *See Am. Legalnet*, 673 F. Supp. 2d at 1066 (denying Plaintiff’s motion for expedited discovery and noting that “expedited discovery is not automatically granted merely because a party seeks a preliminary injunction[.]”); *TGI Friday’s, Inc. v. Stripes Rests., Inc.*, No. 1:15-CV-00592-AWI, 2015 WL 2341991, at \*2 (E.D. Cal. May 13, 2015). Here, Plaintiff has not yet filed a preliminary injunction. Plaintiff argues that expedited discovery would reveal information about Defendants’ surveillance Program, which would then allow it to decide whether to file a preliminary injunction. *Mot.* 7:6-10. However, “while courts often find good cause when confronted with a pending motion for preliminary injunction, [.]they usually do not when presented with a party’s mere inclination to file such a motion.” *Facebook, Inc. v. Various, Inc.*, C-11-01805-SBA DMR, 2011 WL 2437433, at \*3 (N.D. Cal. June 17, 2011) (citations omitted). Thus, because Plaintiff has not yet filed a preliminary injunction, the first *American LegalNet* factor weighs against permitting expedited discovery.

#### B. Timing of the Request

A party seeking expedited discovery should not do so too far in advance of the start of formal discovery. *See Am. LegalNet*, 673 F. Supp. 2d at 1067. This case is in its early stages, having just been filed three months ago, on April 7, 2015. *See* Dkt. # 1. Plaintiff concedes that its expedited discovery request is early by acknowledging that this factor “arguably weighs against granting [its] motion[.]” *Mot.* 10:21-22. Thus, the timing factor also does not support granting expedited discovery.

#### C. Purpose for Requesting Expedited Discovery

A party’s purpose for requesting expedited discovery must “outweigh[.] the prejudice” such early discovery causes “the responding party.” *In re Countrywide*, 542 F. Supp. 2d at 1179. Here, Plaintiff asserts that its purpose is twofold: (1) to identify unnamed defendants so they can be served within 120 days in compliance with this Court’s standing order; and (2) to determine whether to move for a preliminary injunction. *Mot.* 1:7-8.

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“Courts in [the Ninth] Circuit permit expedited discovery to identify unknown defendants usually when the plaintiff simultaneously can identify no defendants and legitimately fears that information leading to their whereabouts faces imminent destruction.” *Facebook*, 2011 WL 2437433, at \*3 (citing *UMG Recordings, Inc. v. Doe*, No. C 08-1193 SBA, 2008 WL 4104214, at \*4 (N.D. Cal. Sept. 3, 2008); *Arista Records LLC v. Does 1-43*, No. 07CV2357 LABPOR, 2007 WL 4538697, at \*1 (S.D. Cal. Dec. 20, 2007); *Capitol Records, Inc. v. Doe*, No. CIV. 07CV1570JMPOR, 2007 WL 2429830, at \*1 (S.D. Cal. Aug. 24, 2007)). However, Plaintiff faces neither situation in this case. Unlike the plaintiffs in the above cited cases, Plaintiff is able, and in fact has, commenced suit against specifically identified defendants – four federal agencies, their administrators, and the federal government – after identifying their appropriate names and contact information. *See Generally Compl.* Plaintiff asserts that expedited discovery will reveal additional “names of government agencies with access to Program data” which it can then serve in its suit. *Mot.* 9:13-14. However, Plaintiff has not identified with specificity any additional Doe defendants that it hopes to discover, or explained why this information could not be obtained in the regular course of discovery. *Opp.* 2:1-7. Because Plaintiff has already identified multiple defendants and has not proven why discovery cannot proceed in its normal course, this Court does not conclude that Plaintiff’s purpose of identifying additional unknown defendants supports its showing of good cause.

Regarding Plaintiff’s second purpose, the Court is unable at this time to evaluate if the purpose behind Plaintiff’s anticipated preliminary injunction petition weighs in favor of expedited discovery because Plaintiff has not filed it yet. Without Plaintiff’s petition pending before it, the Court is unable to determine what relief Plaintiff requests. Moreover, it is not clear from Plaintiff’s motion what it intends to include in its hypothetical preliminary injunction. *See generally Mot.* Plaintiff’s motion for expedited discovery informs the Court only that it plans to request a preliminary injunction, not what it will eventually request in the injunction itself. Without such guidance from Plaintiff, the Court can only speculate about the type and scope of expedited discovery that would be necessary to seek a preliminary injunction. *See TGI Friday’s*, 2015 WL 2341991, at \*3 (denying defendants’ request for expedited discovery when it appeared “based on the speculative hope that their requests uncover something that may be relevant to the motion for preliminary injunction.”). Thus, the third *American LegalNet* factor also does not support granting expedited discovery.

**D. Breadth of the Discovery Requests**

A party’s expedited discovery requests should be “narrowly tailored” so as to discover only the “minimum amount of information needed” to achieve its stated purpose. *AF Holdings*, 2012 WL 974933, at \*3. Plaintiff asserts that it seeks limited expedited discovery of three categories of information: (1) copies of all Program subpoenas requiring production of records

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of Americans' calls to twelve specified countries from 1992 to the present; (2) names of all governmental agencies that have accessed information collected through the Program; and (3) information regarding Defendant DEA's ongoing access to data collected through the Program. *Mot.* 4:8-19. Plaintiff maintains that its "one request for production, one interrogatory, and one request for admission" are sufficient to allow it to discover the information it needs to identify the remaining unknown defendants and to determine if a preliminary injunction is necessary. *See id.* 4:9-10. Thus, Plaintiff contends, each of its requests is "limited and 'narrowly tailored' to the goal of expediting resolution of this case." *Id.* 8:4-5.

Defendant DEA counters that Plaintiff's request for discovery is overly broad and largely irrelevant. For example, Defendant DEA maintains that Plaintiff has provided no explanation as to why the administrative subpoenas served over twenty years ago that Plaintiff seeks "could possibly be relevant to Plaintiff's claims for prospective relief." *Opp.* 2:12-13. Rather than a targeted search for only currently offending conduct, Plaintiff's requests represent a more general fact-finding inquiry about the historical and current scope of the Program and its players. *See Palermo v. Underground Solutions, Inc.*, No. 12CV1223-WQH BLM, 2012 WL 2106228, at \*3 (S.D. Cal. June 11, 2012) (internal quotation omitted) (denying plaintiff's "excessively broad" expedited discovery request when permitting expedited discovery in such situations could "lead to [ . . . ] parties conducting nearly all discovery in an expedited fashion under the premise of preparing for a preliminary injunction hearing, which is not the purpose of expedited discovery[.]").

Moreover, as analyzed in above, Plaintiff has not informed the Court of the specific purpose for which it seeks this discovery because Plaintiff has not filed its preliminary injunction request. Without the contours of Plaintiff's intended use for the discovery before it, the Court cannot determine whether Plaintiff's requests are narrowly tailored to discover the minimum amount of information that it needs to accomplish its purpose. Thus, without a pending preliminary injunction petition, the Court concludes that this factor also does not support granting expedited discovery.

E. Defendant's Burden of Complying with Expedited Discovery

A party is not unduly burdened by an expedited discovery request when "the administration of justice[ ] outweighs the prejudice to the responding party." *In re Countrywide*, 542 F. Supp. 2d at 1179 (quoting *Semitool* 208 F.R.D. at 276). Plaintiff maintains that its discovery requests impose a "minimal burden" on Defendant DEA *Mot.* 10:2. It asserts that its proposed expedited discovery is limited to a single request for production, a single interrogatory and a single request for admission, all of which would eventually be produced in the normal course of discovery. *Id.* 10:4-9. Thus, Plaintiff contends, expedited discovery will not increase



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Defendant DEA's overall discovery burden; it only means that Defendant DEA must "respond sooner, rather than later" to Plaintiff's discovery requests. *Id.* 10:10-11.

Defendant DEA counters that Plaintiff's proposed expedited discovery requests are "in fact extremely broad" and that "the burden of responding to them would be substantial." *Opp.* 13:21-22. Plaintiff's proposed interrogatory could potentially require the DEA to track down each entity that has ever had access to a single telephony metadata record. *Id.* 13:22-23. Moreover, Plaintiff's request for production would require Defendant DEA to search files over a twenty-year time span – "a time-consuming effort" that would require it to examine its archives. *Id.* 14:4.

The parties' arguments indicate that while Plaintiff's requests are somewhat limited, they would still impose a burden Defendant DEA. The Court finds that the burden factor does not tip strongly in either Plaintiff or Defendant DEA's favor.

F. On Balance, Plaintiff has not Demonstrated Good Cause Sufficient to Warrant Granting its Request for Expedited Discovery

Because Plaintiff has not yet petitioned the Court for a preliminary injunction, the discovery request is early, Plaintiff's purpose for the discovery is vaguely defined, and the Court is unable to fully evaluate the appropriateness of the breadth of the discovery, Plaintiff has not demonstrated good cause. Thus, on balance, the *American LegalNet* factors do not support granting Plaintiff's request for expedited discovery.

G. Jurisdictional Discovery

In its reply brief, Plaintiff adds that Defendants' factual attack on the Court's subject matter jurisdiction over this case "independently" and "further establishes" good cause for the expedited discovery requested in this motion. *See Reply* 5:8-7:5, 9:1-10:3. The Court did not address subject matter jurisdiction in this order and that issue is currently pending before the Court in a separate motion. *See Dkt. # 24.* The instant motion is a request for expedited discovery for the stated purposes of identifying unknown defendants and determining whether to petition the Court for a preliminary injunction. The proposed discovery requests were purportedly directed toward those purposes. If Plaintiff's position is that it is entitled to discovery in order to defend itself against Defendants' attacks on subject matter jurisdiction in their pending motion to dismiss, Plaintiff should request such discovery in connection with that motion and tailor its request to jurisdictional issues accordingly.

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IV. Conclusion

For the foregoing reasons, the Court DENIES Plaintiff's motion for leave to conduct expedited discovery.

**IT IS SO ORDERED.**