

Tentative Minute Order re Motion to Compel

Defendant Joseph Roh (“Roh”) moves to compel the Government to produce certain items of discovery. (Docket No. 61.) The Government has filed an opposition. (Docket No. 69.) Roh has replied. (Docket No. 70.)

At the outset, the Court is constrained to note that the Motion and to an even a greater extent the Reply are merits discussions, dealing with why the charging statute is unconstitutionally vague, why the prosecution amounts to an unconstitutional *ex post facto* application of the statute, and why Roh lacks the requisite *mens rea*. None of those issues is before the Court on this discovery motion, and are clearly issues for another day.¹ Obviously, the Court expresses no opinion here on the merits to disputes yet to be brought to the Court.

I. Background.

On October 2, 2014, Roh was indicted for violating the provisions of the Gun Control Act by willfully engaging in the illegal manufacture of firearms. (Docket No. 1.) The statute provides:

It shall be unlawful--

(1) for any person--

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(18 U.S.C. § 922(a)(1)(A).) As the Motion explains, the specific conduct here involved converting 80% receivers for an AR-15 rifle, a semi-automatic weapon, into finished receivers for completed assembly of an AR-15. Roh either performed such work himself or allowed customers to use his equipment at so-called “Build Parties” to make finished weapons. During the period of Roh’s

¹Indeed, Roh expressly signal further pretrial motions practice. (E.g., Reply, pp. 5-6.)

operation of his business, there was uncertainty within the Bureau of Alcohol, Tobacco, and Firearm (“ATF”) as to what constituted manufacturing firearms, as reflected in differing positions take with regard to Roh’s operations. (Motion, pp. 15-23.) In January 2105, the ATF issued a formal ruling AFT Rul. 2015-1. (See Motion, Ex. 12.)

The ATF served a cease-and-desist letter on Roh on December 23, 2013. (Motion, Ex. 9.) The letter instructed him that the Build activities amounted to illegal manufacture of firearms. (Id., p. 1.) He signed a receipt for the notice. (Id., p. 2.)

Roh seeks six categories of documents to support possible pretrial motions, including a challenge of the statute on vagueness grounds, and for use at trial concerning various issues, including the requisite mens rea.²

II. Legal Standard.

The Government’s discovery obligations are governed by Rule 16 of the Federal Rules of Criminal Procedure. Rule 26(a)(1)(E)(i) limits discovery to items “material to preparing the defense.” That term does not include discovery to support pretrial motions. See United States v. Armstrong, 517 U.S. 456, 462 (1996).

III. Discussion.

The requested documents consist of the following:

- Drafts and notes re development of ATF Rul. 2015-1.
- Drafts and notes pertaining to the cease-and-desist letter.
- Correspondence between legal counsel and the ATF regarding Roh, the legality of his activities, and the development of ATF Rul. 2015-

²The Government contends that requests 5 and 6, for reports and video tapes of under cover visits to Roh’s business, are moot because the materials have been produced. (Opposition, p. 25.)

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- Correspondence between legal counsel and ATF agents regarding Roh, the legality of his activities, and the development of ATF Rul. 2015-1.

The Government advances a number of arguments why these documents are not subject to production.

First, the Government contends that it will not rely on the requested documents in its case in chief. (Opposition, p. 16.) The Government will principally base its showing of statutory wilfulness on the December 2013 cease-and-desist letter. (*Id.*, p. 17.) That would render all requests related to ATF Rul. 15-1, which came a more than year later, irrelevant. Certainly, the ruling could not have had a bearing on Roh's decisions.

Second, and of far more sweeping consequences, is the fact that the Government's internal investigative documents are beyond discovery: "this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." (Fed. R. Crim. P. 26(a)(2).) While there are exceptions, none is applicable here.

Third, Government counsel are entitled to work product protection even in criminal cases. Unites States v. Nobles, 422 U.S. 225, 238 (1975); United Kingdom v. United States, 238 F.3d 1312, 1321 (9th Cir. 2001). This would plainly extend to ATF counsel's analysis of Roh activities, the legality of his activities, and the development of ATF Rul. 15-1.

Fourth, documents which underlay the deliberative process in the formulation of governmental policies are privileged. United States v. Fernandez, 231 F.3d 1240, 1246 (9th Cir. 2000). That this the focus of Roh's request for documents leading to ATF Rul. 15-1.

Fifth, the attorney-client privilege protects communications here between counsel and ATF agents. Brennan Center for Justice at New York University School of Law v. U.S. Dept. of Justice, 697 F.3d 184, 207 (2d Cir.

2012).

When one filters Roh's requests through relevance and the privileges discussed above, nothing remains.³

It is significant that in his lengthy, Roh address none of the legal impediments to production which the Government advances. The factual recitation in the Motion and Reply may well have their day, but they do not support the relief sought here.

IV. Conclusion.

For all of the foregoing reasons, the Motion is denied.

³It is difficult to see how the requested documents could constitute Brady material, but the Government represents that it has and will continue to meet its Brady obligations. (Opposition, p. 22.) With regard to any Jencks material related to ATF counsel Paul Ware, the Government correctly points out that Jencks material need be produced for Government witnesses, not defense witnesses. United States v. Baxter, 492 F.2d 150, 175 (9th Cir. 1973).