

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA**

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	No. 17 CR 16-DHL
v.)	
)	MOTION TO COMPEL
RED FAWN FALLIS,)	DISCOVERY AND
Defendant.)	SUPPORTING MEMORANDUM¹

Comes now the defendant, Red Fawn Fallis, by her counsel, and moves the Court to enter an Order compelling the government to comply with its discovery obligations forthwith or, in the alternative, to grant other relief. In support of her request, Ms. Fallis states the following:

1. The Court’s Pre-Trial Order of January 9, 2017 [Dkt. 29] provides that

“The following discovery rules shall apply:

a) Rule 16 discovery shall be accomplished by the parties without the necessity of Court intervention unless there is a dispute as to whether the matter is discoverable or there is a request for a protective order pursuant to Rule 16(d)(1). The parties are strongly encouraged to informally resolve all discovery disputes.

b) Upon the request of the Defendant (which request shall not be filed with the Court), the Government shall comply with Rule 16(a)(1)(A-G) and its “standard discovery policy . . .”

2. In addition to the requirements imposed upon the government by Rule 16 of the Federal Rules of Criminal Procedure, the government has an obligation to comply with the constitutional requirements imposed by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is

¹ Defendant recognizes the provision in D.N.D. Crim. L.R. 47.1 referring to a motion and memorandum in support. Given the relatively sparse amount of case law cited in this Memorandum, defense counsel has combined the two.

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution); *Giglio v. United States*, 405 U.S. 150 (1972) (both impeachment evidence and exculpatory evidence fall within the *Brady* rule, including *any* understanding regarding consideration given or promised for a witness' testimony); *United States v. Bagley*, 473 U.S. 667 (1985) (regardless of request, favorable evidence is material and constitutional error may result from the government's failure to disclose it); and *Kyles v. Whitley*, 514 U.S. 419 (1995) (the prosecutor's responsibility under *Brady* extends to evidence known to police investigators but not disclosed to the prosecutor because "procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant [*Brady*] information on each case to every lawyer who deals with it.").

3. The defense has made informal discovery requests of the government by sending Discovery Letters 1 through 8, including letters dated January 31, 2017 (requesting general information and examinations and tests) [Exhibit Disc-16]², February 1, 2017 (requesting preliminary hearing materials), April 13, 2017 (requesting discovery of impeaching information), June 9, 2017 and September 5, 2017 (requesting recordings), September 14, 2017 (requesting information regarding named and unnamed informants), November 13, 2017 (requesting disclosure of private security materials), and November 22, 2017 (requesting information material to the matters to be litigated at the hearing on Ms. Fallis' Motion to Suppress). The government has not objected to disclosure of any of the items referenced in the discovery requests, but has not complied with those requests.

² Discovery-related exhibits presented to the Court during the recent Suppression hearing have been filed contemporaneously with this Motion to Compel and are marked under a separate heading in Defendant's Motion to Compel Exhibit List.

4. In a further and final attempt to accomplish discovery informally, on November 20, 2017, the defense sent to the government a summary of those outstanding discovery requests with which the government has failed to comply [Exhibit Disc-15]. The summary does not include those items requested in Discovery Letter 7 dated November 13, 2017 [Exhibit A] and Discovery Letter 8 dated November 22, 2017 [Exhibit B].³

5. The government failed to respond directly to the discovery requests, failed to file an objection to any of the requests, has taken the position that it does not have the items requested in its possession and, apparently, contends—contrary to the dictates of *Kyles v. Whitley*—that it is not under an obligation to inquire of the police agencies present during the DAPL protests whether or not they are in possession of the requested items, all of which are material to the defense. *See also United States v. Tyndall*, 521 F.3d 877, 882 (8th Cir. 2008) (“A prosecutor has a duty to disclose evidence known by police officers, even if not known by the prosecutor, because a prosecutor has a duty to learn of such information”) (citing *Strickler v. Greene*, 527 U.S. 263, 280-81) (1999)); *Cvijanovich v. United States*, No. 3:07-cr-55, 2011 U.S. Dist. LEXIS 74000, at *11 (D.N.D. July 8, 2011) (“under an application of general agency principles, prosecutors can even be held responsible for the knowledge of police officers of purposes of the *Brady* rule”).

6. Several “Intel Threads” obtained through Open Records Requests reveal ongoing communications regarding the DAPL protests between Intelligence Specialist Terry Van Horn of the United States Attorney’s Office and numerous law enforcement

³ For brevity’s sake, Discovery Letters 2-6, which are summarized in the November 20 letter, are not attached as exhibits. Defense counsel will happily provide the Court with a complete copy of any and all Discovery Letters upon request.

officers representing agencies including the Federal Bureau of Investigation, Bureau of Indian Affairs, United States Marshal Service, North Dakota National Guard, North Dakota State and Local Intelligence Center, Cass County Sheriff's Department (Tonya Jahner), Morton County Sherriff's Department, and Bismarck Police Department around the time of both Ms. Fallis' arrest and the initiation of the federal prosecution against her.⁴ In particular, the Intel Thread from October 12 reveals mutual real-time intelligence exchanges between the United States Attorney's Office and a myriad of local and state law enforcement agencies, as well as the United States Attorney's Office's access to DAPL helicopter live feeds. *See* Exhibit C. Any knowledge and materials relevant to Ms. Fallis and/or the events of October 27, and held by cooperating law enforcement agencies including but not limited to those listed above and all others cooperative in the arrest, investigation, and prosecution of Ms. Fallis, fall within the scope of *Brady* and Rule 16. "[O]ne office within a single federal agency must know what another of the same agency is doing or has done regarding the accused." *United States v. Barket*, 530 F.2d 189, 195 (8th Cir. 1976); *see also Cvijanovich*, 2011 U.S. Dist. LEXIS 74000, at *12 (imputing knowledge from another Assistant United States Attorney to the prosecuting attorney for *Brady* purposes).

7. Examples of items that are material to the defense, in the possession of the government and/or its agents and employees, requested by the defense and not produced by the government include, but are not limited to:

⁴ *See* Exhibits C-F ("Intel Threads" including U.S. Attorney's Office Intelligence Specialist Terry Van Horn and numerous law enforcement officers dated 10/12, 10/17, 10/22, and 11/20, all 2016). On information and belief, Intelligence Specialist Van Horn at times requested that individuals and agencies on these email chains perform intelligence research.

a. A detailed request⁵ for documents and other information relevant to the government's use of a paid FBI informant who infiltrated the Water Protector camps, established an intimate relationship with the defendant herein, and provided contemporaneous information to the government. This informant was an eyewitness to Ms. Fallis' arrest and the discharge of a firearm. The relevance of this information is further established by the fact that government's Hearing Exhibit 10, the revolver that was allegedly seized from Ms. Fallis at the time of her arrest, belonged to the government's informant.

b. A detailed request⁶ for documents and other information relevant to additional informants utilized by the government, the State of North Dakota, police agencies involved and/or DAPL and/or its agents. While the government has to date failed to disclose the existence of other informants, Deputy Thadius Schmit's testimony at the hearing on the Motion to Suppress revealed that at least one additional informant (or undercover law enforcement officer) spoke to law enforcement officers on or about October 27, 2016 about his infiltration of the Water Protector camps.

Additionally, the defense is entitled to discover all evidence that the violent acts used as predicates for the 'civil disorder' alleged in Counts 1 and 2 were influenced, encouraged, facilitated, or otherwise promoted by persons employed or recruited by federal, state and/or local law enforcement agencies, by private security firms and by their agents and employees. *See United States v. Giron*, 1:17-CR-00031-DLH, Dkt. 81, pp. 9-11 [attached hereto as Exhibit G]; *see also* Supporting Exhibits A-F at Dkt. 81.

⁵ Dated September 14, 2017 and November 20, 2017.

⁶ Dated September 14, 2017 November 13, 2017 and November 20, 2017.

c. Detailed requests for GoPro recordings, cell phone recordings and/or other audio and video information relevant to the activities on October 27, 2016⁷. Only three days prior to the hearing on December 8, 2017, the government finally disclosed to the defense cell phone recordings of Officer Schmit, after first inquiring about the existence of such videos on November 16, 2017 – more than a year subsequent to Ms. Fallis’ arrest. No disclosure⁸ has yet been made of GoPro and cell phone video recordings made by officers in the Youtube and Bystander videos who are depicted wearing recording devices, or otherwise known to be wearing recording devices, in close proximity to Ms. Fallis’ arrest – including Grand Forks Police Officer No. 644⁹. No disclosure has yet been made of footage from:

- North Dakota Highway Patrol Sgt. Darce Aberle¹⁰ [pictured in Exhibit Disc-3 with visible body camera; identified by Highway Patrol Captain Bryan Niewind];
- North Dakota Highway Patrol Officer Charles Kelly [pictured in Exhibit Disc-10 with visible cell phone camera; identified by Highway Patrol Captain Bryan Niewind];
- Eleven as-of-yet unidentified officers including officers from the Morton County Sheriff’s Department and Bismarck Police Department with visible body and cell phone cameras [Exhibits Disc-1 to -2, Disc-4 to -7, Disc-11 to -12].¹¹

⁷ Dated September 5, 2017, November 20, 2017 and November 22, 2017.

⁸ For the two body camera films that have been disclosed that display footage close in proximity to the Defendant’s arrest – both of which begin shortly following Defendant’s alleged discharge of a firearm and which do not include any inculpatory statements made by the Defendant despite their apparently close proximity to the area of her arrest – no identifying information has been provided following discovery requests for said identification sent on September 5, 2017, November 20, 2017, and November 22, 2017.

⁹ See Exhibit (Grand Forks police report provided by United States in discovery indicating relevant footage taken by Officer No. 644).

¹⁰ Sgt. Aberle’s incident report, which contains no mention of his wearing a body camera, indicates that he was “approximately 5 to 6 feet away from [Ms. Fallis] when [he] heard gun shots.” [Exhibit I, Bates No. 00155]

Nor has the government produced the recording made by Cass County Officer Tonya Jahner who is depicted in the Bystander video holding a camera pointed directly at the defendant while she is being restrained by law enforcement officers [Exhibits Disc 7 to - 8]. Finally, no disclosure has been made of the recordings, if any, of the camera mounted on the Bear Cat vehicle and depicted in the Youtube and Bystander videos¹² [Exhibits Disc-13 to -14].

d. Detailed requests for department policies and metadata and chain of custody information regarding audio and video footage thus far provided. This information is crucial to defense investigation regarding the completeness and integrity of audio-visual recordings thus far provided.¹³ The materiality of these requests is exemplified by the puzzling discrepancies in audio-visual content contained within North Dakota Highway Patrol Trooper Joshua Anderson's dash cam video footage, provided by the United States in discovery. [Exhibit J]. For an example of just one segment demonstrating the possibility that the original footage has been altered—unintentionally or otherwise—see Exhibit J at 6:32:06 (time stamp 19:40:53) through 6:34:17 (time stamp 19:43:04).¹⁴

¹¹ Defense counsel recognizes that one of the officers identified in Disc-12, Cass County Sheriff's Detective Joe Gress, has informed the United States that he was not filming at the time of Ms. Fallis' arrest.

¹² Because of its proximity to the seizure of Ms. Fallis, any recordings – audio and/or video - would be highly relevant.

¹³ Dated September 5, 2017 and November 20, 2017, and November 22, 2017.

¹⁴ Although static noise throughout the recording makes some chatter impossible to decipher, this audio portion of the recording includes several references to the arrests of Ms. Fallis as well as, apparently, DAPL security contractor Kyle Thompson ("BIA has individual in custody" at 19:41:15). Both of these arrests occurred around 6:00 P.M. when it was still clearly light out, and the audio sounds as if it is occurring in close proximity to the events described within (e.g., at 19:42:57: "we just had a deputy shot here, it just grazed his leg but he's 10-4"). The time stamp, indicating that it close to

e. Detailed requests for all information in the possession of the government and/or the State of North Dakota regarding Ms. Fallis and her activities, including but not limited to the North Dakota State and Local Intelligence Center.¹⁵ North Dakota law enforcement created and maintained “link charts” on individual protesters believed to be “leaders in the movement” [Exhibit K]. *See also* 9/1/2016 SLIC Operations Email [Exhibit L] (assigning task of “[c]reating link charts on leaders of the movement”). This information is critically important as Ms. Fallis was identified by law enforcement as a “leader” in the protests¹⁶ and such information is highly relevant to law enforcement’s decision to infiltrate the group surrounding Ms. Fallis and to law enforcement’s motive to seize and prosecute her. *See, e.g.,* Affidavit of Trooper Bryan J. Niewind [Exhibit M, p. 4] (indicating law enforcement practice of targeting “[p]rotest leaders and agitators for arrest” during mass arrest five days prior to Ms. Fallis’ arrest).

f. Detailed requests for all relevant statements and reports.¹⁷ The government has yet to provide statements or reports from individuals including but not limited to:

- The unnamed Hennepin County officer who allegedly told Ms. Fallis to move back and utilized his baton to push her back on October 27, 2016, immediately prior to her seizure by law enforcement;
- Pennington County Sheriff’s Deputies Myron Canales and Scott Sites (phonetic spelling), identified by Deputy Thadius Schmit as being present on October 27, 2016 during the circumstances leading up to and including the Defendant’s seizure; and

8:00 P.M., and the dark lighting contained at this point in the video, together strongly suggest that audio and visual recordings in this footage occurred at different times. This footage also contains an unexplained and extended period of audio silence from 4:08:48 [time stamp 17:17:34] to 4:26:34 [time stamp 17:35:20].

¹⁵ Dated November 13, 2017.

¹⁶ *See* Exhibits K, L.

¹⁷ Dated June 6, 2017 and November 20, 2017.

- North Dakota Bureau of Criminal Investigations Special Agent Casey Miller, identified as being present at the search of Defendant by North Dakota Parole and Probation Officer Dan Heidbreder.

g. The government has also taken the position that it has no knowledge of the activities and involvement of the private security agencies that were operating in the area of the anti-DAPL protests in October of 2016 and that it is under no obligation to ferret out and produce the information regarding the activities of those agencies requested by the defense¹⁸. The government's position is untenable and contradicted by documents establishing a cooperative relationship between TigerSwan and various North Dakota law enforcement agencies.

Leaked documents¹⁹ establish clear links between law enforcement and operatives of private security contractor TigerSwan, including the sharing of daily intelligence updates between TigerSwan and law enforcement, meetings between TigerSwan operatives and the North Dakota BCI regarding video and still photo evidence collected for prosecution, coordination of intelligence gathering with law enforcement and conversations between private security operatives and numerous law enforcement agencies including but not limited to the Morton County, Mercer County, and Stutsman County Sheriff's Departments. *See generally*, Exhibit G.

The North Dakota Attorney General's Office, as counsel for the N.D. Private Investigative and Security Board, has asserted that TigerSwan not only provided private intelligence to its employers, Energy Transfer Partners, but shared that intelligence with law enforcement. [*N.D. Private Investigative and Security Board v. TigerSwan, LLC*

¹⁸ Requests dated November 13, 2017 and November 20, 2017.

¹⁹ *See, e.g.*, <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>

and James Patrick Reese, Burleigh County District Court No. 08-2017-CV-01873, attached hereto as Exhibit N].

According to the allegations set forth in the Attorney General's Complaint, the "private intelligence" included fly-over photography of protest sites, providing intelligence on protester activity and on the activities of Standing Rock Sioux Tribe members, placing or attempting to place undercover private security agents in the protest group, monitoring protester vehicles in the area and then reporting its findings to Energy Transfer Partners, local law enforcement and others. [Exhibit N, p. 3]. For additional documentation of the relationship between law enforcement and DAPL-contracted security *see, generally*, Exhibit G; *see also* Exhibit C [indicating United States Attorney's Office access to live feed from DAPL helicopter]; Exhibit O [law enforcement report documenting joint law enforcement/DAPL private security arrest enacted on October 27 and accompanying screenshots from arrest video]; Exhibit P [Video of October 27 Joint Private Security/Law Enforcement Arrest].

To the extent that the government disputes the existence of an agency relationship and symbiosis between law enforcement and DAPL-contracted private security firms, the defense requests oral argument, an evidentiary hearing, and an opportunity to present additional exhibits that may further illuminate this matter for the Court.

6. Due to the government's failure to respond to the numerous discovery requests provided by the defense and to the proximity of the trial date—now less than fifty (50) days away—the Court's intervention is necessary. This motion outlines some of the most pressing and crucial outstanding discovery matters but cannot fully convey

to this Court the extent of the numerous longstanding and often repeated requests that have been largely ignored by the government.

7. The government should be required to respond, in writing, to each of Ms. Fallis' discovery requests contained within the summary Discovery Letter (November 20, 2017), Discovery Letter 7 (November 13, 2017), and Discovery Letter 8 (November 22, 2017) forthwith. To the extent that the government claims lack of knowledge or possession, or that it has already complied fully with an outstanding request,²⁰ it should be required to list each agency or person of whom it inquired in its search for the requested information.

WHEREFORE, Ms. Fallis requests an order compelling the government's immediate compliance with the defense discovery requests based on the government's failure to provide discovery that is relevant, material and essential for the effective defense of the indictment, and such further relief as may be just and proper in the premises.

Dated: December 13, 2017

Respectfully Submitted,

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²⁰ The government has repeatedly asserted that it has provided all discovery materials in its possession.

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CERTIFICATE OF SERVICE

The undersigned Counsel of Record for the defendant hereby certifies that a true and accurate copy of the above and foregoing document has been served on the Office of the United States Attorney this 13th day of December 2017. Parties may access this filing through the Court's system.

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s/ Molly Armour
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