IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America,	)	
	)	
Plaintiff,	)	**ORDER REGARDING DEFENDANT'S MOTION TO COMPEL DISCOVERY**
	)	
vs.	)	
	)	
Redfawn Fallis,	)	Case No. 1:17-cr-16
	)	
Defendant.	)	

Before the Court is the Defendant's "Motion to Compel Discovery" filed on December 13, 2017. See Docket No. 135. The Defendant requests the Court order the Government to comply with various discovery requests. The Government filed a response on December 20, 2017. See Docket No. 143. On December 29, 2017, the Defendant filed a reply. See Docket No. 164.

a. FBI Informant

In the Defendant's motion to compel, defense counsel specifically requests information relevant to a particular FBI informant. See Docket No. 135, p. 5. The Government's response notes it previously provided such information in discovery disclosures made on May 5, 2017. See Docket No. 143, pp. 1, 11. The Defendant in her reply does not deny the Government previously provided such information in discovery; rather, she complains the documents the Government disclosed are "only sparse summaries of the informant debriefings," and "it is clear detailed reports would likely be produced based on information provided." See Docket No. 164, p. 9. The Defendant's displeasure in the "sparse summaries" contained in the previously-disclosed discovery responses, and her speculation that more "detailed reports" must exist is not sufficient. See United States v. Van Brocklin, 115 F.3d 587, 594 (8th Cir. 1997) (Mere speculation that materials may contain exculpatory evidence is not sufficient to sustain a *Brady* claim). Based on

the Government's response, the Court finds the Defendant's request for information regarding the FBI informant is moot, and no court action is required.

b. Additional Informants

Defense counsel also requests documents and other information pertaining to additional informants. See Docket No. 135, p. 5. The Government's response notes that none are known regarding the relevant activity on October 26-27, 2016. See Docket No. 143, pp. 1, 11. The Court cannot order the Government to provide documents and reports which do not exist. Based on the Government's response, the Court finds the Defendant's request for information regarding additional informants is moot, and no court action is required.

c. GoPro, Cell Phone, and Other Audio and/or Visual Recordings

Defense counsel requests GoPro recordings, cell phone recordings, and any other audio and/or visual recordings relevant to the activities on October 27, 2016. See Docket No. 135, p. 6. The Government's response notes that it addressed the images in Defendant's exhibits Disc-1 through Disc-14 in its previous response (Docket No. 137) to Defendant's Discovery Group Exhibit. See Docket Nos. 137 and 143. Based on the Government's responses (Docket Nos. 137 and 143), the Court finds the Defendant's request for additional information regarding GoPro recordings, cell phone recordings, and any other audio and/or visual recordings relevant to the activities on October 27, 2016, is moot, and no court action is required.

d. Department Policies, Metadata, and Chain of Custody Information Regarding Already Provided Audio and Video Footage

Defense counsel requests department policies and metadata and chain of custody information regarding the audio and visual footage that has been provided to date. See Docket No. 135, p. 7. The Government's response notes the officers with cameras were to turn them over to a custodian of video, the video was downloaded, and a master copy was given to the Morton County State's Attorney's Office. See Docket No. 143, p. 2. The Government states that it

obtained a copy of all such material and has previously disclosed it to defense counsel. See Docket No. 143, p. 2. Based on the Government's response, the Court finds the Defendant's request for department policies, metadata, and chain of custody information regarding audio and visual footage is moot. In the absence of a further showing by the Defendant, no court action is required.

e. Information Regarding Fallis and her Activities

Defense counsel requests all information in the possession of the Government and/or the State of North Dakota regarding the Defendant and her activities. See Docket No. 135, p. 8. The Government's response states it is "attempting to gather additional information to respond to this inquiry" and notes that it "has and will continue to comply with the relevant rules and discovery order of the Court." See Docket No. 143, pp. 3, 11. *Brady* places an affirmative obligation on prosecutors "to learn of any favorable evidence known to the others acting on the government's behalf in the case." Kyles v. Whitley, 514 U.S. 419, 437 (1995). The Court orders the Government to disclose all relevant information in its possession relevant to this discovery request and pursuant to *Brady*, *Giglio*, and their progeny.

f. Relevant Statements and Reports

Defense counsel requests all relevant statements and reports, and notes the Government has yet to provide statements from an unnamed Hennepin County officer; Pennington County Sheriff's Deputies Myron Canales and Scott Sites; and North Dakota Bureau of Criminal Investigations Special Agent Casey Miller. See Docket No. 135, pp. 8-9. The Government's response states that the unnamed Hennepin County officer remains unknown; the Pennington County Sheriff's Office indicated there are no additional reports from those deputies; and Special Agent Casey Miller did not prepare a written report regarding the search of the Defendant as he did not participate in the search on October 27, 2016. See Docket No. 143, p. 3. As stated previously, the Court cannot order the Government to provide documents and reports which do not exist. Based on the

Government's response, the Court finds the Defendant's request for information regarding relevant statements and reports is moot, and no court action is required.

g. Private Security Agencies

The Defendant objects to the Government's position that it is under no obligation to ferret out and produce any information regarding the activities of private security agencies operating in the area of the anti-DAPL protests in October of 2016. See Docket No. 135, p. 9. In response, the Government contends much of the Defendant's overbroad discovery requests are "fishing expeditions," and it does not have possession of records of any private security contractors. See Docket No. 143, pp. 4, 10. The Government argues the private security contractors did not participate in the criminal investigation of this matter, nor were they under control of the prosecution team; additionally, the Government contends that providing independently-generated intelligence reports to law enforcement does not make a private security contractor part of the prosecution team. See Docket No. 143, p. 6.

With respect to the possession, custody, or control requirement, courts "have typically required the prosecution to disclose under Rule 16 documents and material to the defense that: (1) it has actually reviewed, or (2) are in the possession, custody, or control of a government agency so closely aligned with the prosecution so as to be considered part of the prosecution team." United States v. Finnerty, 411 F. Supp. 2d 428, 432-33 (S.D.N.Y. 2006) (collecting cases). In determining whether an agency is so closely aligned so as to be part of the prosecution team, courts examine whether the investigation and prosecution of the alleged offenses was a jointly-undertaken endeavor between the prosecution and the entity at issue. See United States v. Brodnik, 710 F. Supp. 2d 526, 544-45 (S.D. W. Va. Apr. 29, 2010); United States v. Finnerty, 411 F. Supp. 2d 428, 432-33 (S.D.N.Y. 2006). It is clear that merely providing independently-generated intelligence reports to law enforcement agents does not make a private security contractor part of the

prosecution team. See Finnerty, 411 F. Supp. 2d at 433; United States v. Pelullo, 399 F.3d 197, 210 (3d Cir. 2005); United States v. Merlino, 349 F.3d 144, 155 (3d Cir. 2003); Brodnik, 710 F. Supp. 2d at 545.

The Court finds the Government's argument persuasive. The Defendant has failed to adequately demonstrate that the requested information is material for Rule 16 or *Brady* purposes, nor has it provided any case law or legal arguments as to why the Government is required to provide such information. The Court denies the Defendant's request for information regarding the private security agencies/contractors.

No court action is required with respect the remainder of the requests subject to the caveat that the Government is expected to fully comply with its obligations under Fed. R. Crim. P. 16(a)(1), the Jencks Act, and *Brady/Giglio* with respect to any information that may subsequently come into its possession or is subject to its control.

IT IS SO ORDERED.

Dated this 10th day of January, 2018.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court