UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILEY GILL, et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants.

Case No. 14-cv-03120-RS

ORDER DENYING MOTION FOR LEAVE TO CONDUCT DISCOVERY

At the initial Case Management Conference in this action brought under the Administrative Procedures Act, a question arose as to whether it was appropriate to allow plaintiffs to take certain discovery at this juncture, or whether the matter should proceed solely as a review on the administrative record, unless and until circumstances warranted discovery at some future point in the proceedings. Plaintiffs were invited to present the issue by noticed motion, which they have done. Pursuant to Civil Local Rule 7-1(b), that motion is suitable for disposition without oral argument and the hearing set for August 20, 2015 is vacated. The further Case Management Conference is hereby continued to August 27, 2015 at 10:00 a.m. No further Case Management Conference statement need be filed unless the parties wish to provide further information in light of this ruling on the discovery issue.

Plaintiff's complaint sets out four numbered claims for relief. Two of them seek relief relating to a standard adopted by defendant the Program Manager-Information Sharing Environment ("PM-ISE"). That standard is identified as "Information Sharing Environment (ISE)

–Functional Standard (FS) – Suspicious Activity Reporting (SAR) Version 1.5." (hereinafter "Functional Standard 1.5").[1] The two claims for relief respectively seek declarations that (1) Functional Standard 1.5 violates the APA's requirement that the public be provided a notice and comment period prior to adoption of "legislative rules," and, (2) it is invalid as "arbitrary and capricious," in light of an alleged conflict with a Department of Justice ("DOJ") regulation appearing at 28 C.F.R. Part 23. Defendants have produced an administrative record relating to the adoption of Functional Standard 1.5, and neither that standard nor those two claims for relief are at issue in the present motion.

The other two claims for relief seek parallel declarations with respect to a purported standard adopted by the DOJ. Although some of the wording in the complaint vaguely suggests there may be multiple DOJ "standards" and/or more than one document reflecting the standard(s), the only specific allegation is that the DOJ "standard" is embodied in a document known as the FBI's 2008 eGuardian Privacy Impact Assessment ("the PIA"). Defendants deny that the PIA is an independently adopted "standard" at all, or that DOJ has any standard separate and apart from Functional Standard 1.5. Defendants explain that the PIA is a document produced pursuant to section 208 of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002), which, DOJ contends, requires federal agencies to create a privacy impact assessment when developing or procuring certain information technology systems or initiating a new collection of information. DOJ argues plaintiffs have failed to allege any facts plausibly suggesting that the PIA represents a separate standard subject to independent challenge. Thus, DOJ, contends, there is no "administrative record" for it to prepare, and the two separately-set out claims for relief should be dismissed.[2]

[1] Plaintiffs have asserted an intent to supplement their complaint to reach the more recently-adopted version of this standard.

[2] Plaintiffs are correct that to the extent defendants are actually seeking dismissal of the claims for relief at this juncture, their opposition to plaintiff's motion is not an appropriate vehicle for seeking reconsideration of the prior order denying the motion to dismiss.

The parties were disputing the existence of a separate DOJ standard at the time of the motion to dismiss. The order on that motion, however, concluded that for purposes of deciding whether plaintiffs had stated viable claims, neither side had shown there to be any significance to the dispute. Accordingly, the order treated Functional Standard 1.5 and the PIA collectively under the label "Defendants' Standards."

Contrary to how plaintiffs now read that order, nothing in it was intended adjudicate the issue of whether the complaint adequately alleged the existence of an independent DOJ standard, which would be subject to separate review. While none of the four numbered claims for relief were dismissed, the order was not intended to suggest that the claims relating to the purported DOJ standard would be anything other than surplusage, in the event no separate standard exists. At that point in time, the pleading issue appeared to be more one of labeling, than of substance. The claims could have been combined into a single count (or one pair of counts) even if the DOJ's standard is truly separate from Functional Standard 1.5. If not, then the separate counts would be redundant, but each one standing alone would state a claim, because claims relating to the supposed DOJ standard would also be read as challenges to Functional Standard 1.5. As matters stand, therefore, there has been no adjudication of whether the PIA represents an independent standard subject to separate review under the APA.

Against this backdrop, plaintiffs have not made a showing that permitting discovery at this juncture would be appropriate. Whether or not the PIA actually is an independent "standard" adopted by DOJ such that it is subject to separate review, this remains an APA action. Defendants have explained what they contend the PIA is, why it was promulgated, and the authority under which they contend it was produced. They have also explained why they contend it is fully consistent with Functional Standard 1.5, and how they believe the wording differences to which plaintiffs point are merely the result of the Functional Standard having been amended over time.

Given their position as to the nature of the PIA, defendants understandably contend there is no separate "administrative record" to produce. There is no impediment, however, to proceeding in the usual fashion for APA actions of presenting the issues on cross-motions for summary

judgment, without prior discovery. If in the course of such motion practice, the need for targeted discovery on particular issues, generally consistent with APA proceedings, becomes manifest, the question of permitting discovery can be revisited. Accordingly, the plaintiff's present motion for leave to take discovery is denied.

IT IS SO ORDERED.

Dated: August 14, 2015

RICHARD SEEBORG
United States District Judge