

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

Janet Malam,

Petitioner-Plaintiff,

Case No. 20-10829

and

Judith E. Levy

Qaid Alhalmi, *et al.*,

United States District Judge

Plaintiff-Intervenors, Mag. Judge Anthony P. Patti

v.

Rebecca Adducci, *et al.*,

Respondent-Defendants.

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**ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR  
EXPEDITED DISCOVERY [147]**

On July 7, 2020, Plaintiffs filed this motion for expedited discovery in the form of a Rule 30(b)(6) deposition of Defendant United States Immigration and Customs Enforcement. (ECF No. 147.) Defendants filed an opposition to the motion on July 17, 2020 (ECF No. 153), and Plaintiffs replied on July 22, 2020. (ECF No. 156). For the reasons set forth below, Plaintiffs' motion for expedited discovery is granted in part.

## Legal Standard

This case exists as a hybrid civil/habeas action. With respect to civil actions, parties ordinarily “may not seek discovery from any source before the parties have conferred as required by Rule 26(f).” Fed. R. Civ. P. 26(d)(1). However, “pursuant to Federal Rule of Civil Procedure 26(d)(1), parties can begin discovery before their Rule 26(f) conference if a district court authorizes them to do so upon a showing of good cause.” *N. Atl. Operating Co., Inc. v. JingJing Huang*, 194 F. Supp. 3d 634, 637 (E.D. Mich. 2016). “Under this standard, the party seeking discovery must demonstrate the need to deviate from the normal timing of discovery.” *Arab Am. Civil Rights League v. Trump*, No. 17-10310, 2017 WL 5639928, \*2 (E.D. Mich. Mar. 31, 2017).

With regards to habeas cases, Habeas Rule 6(a) similarly allows discovery “for good cause,” which exists where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that they are entitled to relief. *See Harris v. Nelson*, 394 U.S. 286, 300 (1969); *Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991); *Smith v. Woods*, 2009 WL 804239 at \*2 (E.D. Mich. Mar. 25, 2009) (stating that petitioners may establish good cause

by showing “that the requested discovery will develop facts which will enable [them] to demonstrate that [they are] entitled to habeas relief”) (citing *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997)).

## **Analysis**

Plaintiffs seek to depose Defendant ICE on six broad categories of information:

- (1) information about whether and how ICE is complying with its responsibility to supervise Calhoun County Correctional Facility;
- (2) information about how ICE makes custody determinations over immigrant detainees, including those who are at high risk of serious illness or death from COVID-19;
- (3) information about how ICE uses alternatives to detention and how COVID-19 has impacted the use of such alternatives;
- (4) information relating to transfers of detainees by ICE to Calhoun from other facilities;
- (5) information about ICE’s interactions with other public health organizations to develop its policies, protocols, and practices in the face of COVID-19, including adapting to new information and recommendations from the Centers for Disease Control and Prevention (“CDC”); and
- (6) information from ICE about how COVID-19 is affecting removals in light of the break-down in international travel.

(ECF No. 147, PageID.4821.)

Defendants' primary argument in opposition is that Plaintiffs request a "fishing expedition," through which "Plaintiffs merely hope to discover facts on broad inquiries that, in any event, would not entitle them to relief." (ECF No. 153, PageID.4966.) They argue that "Plaintiffs fail to identify specific factual allegations that would be developed by each topic for which they seek a deposition" and that "none of the information they seek, even if Plaintiffs find information that they believe is detrimental to ICE, would entitle Plaintiffs to relief." (ECF No. 153, PageID.4966.) The Court finds that Plaintiffs have shown good cause for a deposition on their first, fourth, fifth, and sixth proposed categories.

#### **I. ICE's supervisory responsibility**

Plaintiffs seek discovery related to "information about whether and how ICE is complying with its responsibility to supervise Calhoun County Correctional Facility." Defendants' claim that "Plaintiffs' request for non-specific information on whether and how ICE supervises Calhoun is irrelevant to whether the conditions at Calhoun adequately address detainees' safety. If detention is constitutionally excessive, it is immaterial whether ICE is supervising Calhoun or not." (ECF No. 153, PageID.4967.) Plaintiffs explain in reply that "the conditions imposed on

detainees are not solely determined by the Calhoun County Sheriff's Department. Rather, conditions are governed by a contract between the Sheriff's Department and ICE pursuant to which the Sheriff's Department must meet ICE's National Detention Standards, creating a responsibility for ICE to appropriately supervise Calhoun." (ECF No. 156, PageID.5023.)

Plaintiffs may seek discovery on this issue. Both parties agree that the Calhoun County Correctional Facility has a contractual responsibility to enforce precautionary measures established by ICE. Plaintiffs have alleged individual and systemic failures by correctional officers and the facility writ large to implement and enforce ICE's policies. (*See* ECF No. 98-3, PageID.3414–3419 (expert declaration reviewing declarations of named Plaintiffs and identifying individual and facility-wide failures regarding implementation and enforcement of precautionary measures, ability of detainees to practice social distancing, and availability of hygiene products and protective equipment).) Whether and how Defendant ICE exercises supervisory authority over the implementation and enforcement of its own precautionary measures—including whether it receives and responds to reports of noncompliance—

bears directly on both the conditions experienced by Plaintiffs at the Calhoun County Correctional Facility and whether those conditions are tantamount to punishment. Accordingly, Plaintiffs may seek discovery on their first proposed category, encompassing Topics 1 and 11. However, the Court finds that how precautionary measures at the Calhoun County Correctional Facility compare to other ICE detention facilities is not relevant to Plaintiffs' claims. Accordingly, Plaintiffs may not seek discovery on Topic 12.<sup>1</sup>

## **II. ICE's Custody Determinations**

Plaintiffs seek discovery related to “information about how ICE makes custody determinations over immigrant detainees, including those who are at high risk of serious illness or death from COVID-19.” Defendants argue that because “[t]he constitutional violation claimed is not that ICE should have voluntarily released the Plaintiffs under its internal review procedure,” . . . “[i]nformation about how ICE makes individual custody determinations is wholly irrelevant to whether the conditions at Calhoun establish a constitutional violation.” (ECF No.

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<sup>1</sup> As noted below, Plaintiffs may seek discovery related to the transfer of detainees from other facilities to the Calhoun Correctional Facility.

1513, PageID.4968.) Plaintiffs do not address this argument directly in their reply but claim in an attached exhibit that ICE's refusal to release medically vulnerable detainees "would tend to demonstrate unreasonable detention and/or deliberate indifference to Plaintiffs' safety by failure to engage in options short of detention," "ICE's policies around high risk Detainees are relevant to defining the Subclass, as well as to determining appropriate relief," and "[i]nformation about whether ICE is otherwise releasing Detainees subject to so-called "mandatory detention" (e.g. 8 U.S.C. §§ 1225, 1226(c)), is relevant to ICE's arguments that such individuals cannot be released." (ECF No. 156-2, PageID.5032.)

Plaintiffs have not shown good cause for discovery on the reasoning underlying ICE's custody determinations. Plaintiffs challenge their current conditions of confinement at the Calhoun County Correctional Facility. The reasons why ICE released or did not release a specific noncitizen from detention does not bear on those conditions. Additionally, as the Court set forth in its most recent opinion granting preliminary injunctive relief, the application of the *Bell* punishment standard to Plaintiffs' claim does not require a subjective analysis. (ECF No. 127, PageID.4220.) Therefore, Defendant ICE's reasons for continuing

Plaintiffs' detention is also not relevant to whether current conditions are punitive. Plaintiffs may not seek discovery on their second proposed category, encompassing Topics 5 and 6.

### **III. Alternatives to detention**

Plaintiffs seek "information about how ICE uses alternatives to detention and how COVID-19 has impacted the use of such alternatives." Defendants claim that "[n]on-specific information about how ICE uses alternatives to detention is not relevant to whether Plaintiffs have successfully rebutted the presumption that ICE's response to the pandemic at Calhoun is correct." (ECF No. 153, PageID.4969.) Plaintiffs reply that "the usage of alternatives to detention impact[s] the number of detainees at Calhoun, which impacts the conditions and the level of risk detainees face in Calhoun." (ECF No. 156, PageID.5023.) Plaintiffs additionally argue that "If ICE were to fail to consider alternatives to detention when making custody determinations, that would demonstrate unreasonable detention and/or deliberate indifference for the reasons described above." (ECF No. 156-2, PageID.5032.)

Plaintiffs have not shown good cause for discovery on their third proposed category. Whether and how Defendant ICE utilizes alternatives

to detention is not relevant to Plaintiffs' current conditions of confinement. And noted above, the legal standard does not require subjective analysis; Defendant ICE's failure to consider alternatives to detention therefore does not bear on whether current conditions are punitive. Accordingly, Plaintiffs may not seek discovery on their third category, encompassing Topic 4.

#### **IV. Transfers to Calhoun**

Plaintiffs seek "information relating to transfers of detainees by ICE to Calhoun from other facilities." Defendants argue that such information is irrelevant and that "[i]nasmuch as precautions related to COVID-19 taken during transfer of detainees to Calhoun is relevant to reduction of the risk of exposure; that information is already in the record." (ECF No. 153, PageID.4970.) Plaintiffs reply that "ICE's policies regarding arrest, transport, transfer of detainees to and from Calhoun . . . impacts the conditions and the level of risk detainees face in Calhoun." (ECF No. 156, PageID.5023.)

Plaintiffs have shown good cause for discovery on ICE's policies and practices of transferring detainees into the Calhoun

County Correctional Facility. The frequency with which detainees are transferred and the precautionary measures employed at all stages of transfer relate directly to the magnitude of the risk of COVID-19 exposure at the Calhoun County Correctional Facility. Although some information relating to these issues may already be in the record, Plaintiffs are entitled to supplement the record with a deposition of Defendant ICE. Plaintiffs may pursue discovery on their fourth proposed category, encompassing Topic 2.

#### **V. ICE's Interactions with Public Health Organizations**

Plaintiffs seek discovery on “ICE’s interactions with other public health organizations to develop its policies, protocols, and practices.” Defendants argue that “non-specific information about how ICE interacts with other executive agencies is irrelevant and has no bearing on whether the conditions at Calhoun are constitutionally excessive despite the precautions taken. Such information would also be protected by the deliberative process privilege, which applies to both inter-agency and intra-agency deliberation.” (ECF No. 153, PageID.4970.) Plaintiffs reply that ICE’s failure to consider public health guidance “would tend to

demonstrate punitive conditions and/or deliberate indifference to Plaintiffs' health and safety." (ECF No. 156-2, PageID.5033.) Additionally, Plaintiffs argue that "[i]nformation related to testing, communication about Detainees' diagnoses, the use of segregation/solitary confinement, and retaliatory tactics are also all directly relevant to the conditions at Calhoun and reasonableness of ICE's COVID-19 protocols." (*Id.* at PageID.156-2, PageID.5033.)

Plaintiffs may seek discovery related to their fifth proposed category. Although a *Bell* analysis does not include a subjective component, *Bell* does recognize that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to . . . maintain institutional security." (ECF No. 127, PageID.4224 (citing *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).) Additionally, the Court has previously recognized that "[i]n determining whether the State has met its obligations [with respect to reasonable care and safety], decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type— often,

unfortunately, overcrowded and understaffed—to continue to function.” (*Id.* (citing *Youngberg v. Romero*, 457 U.S. 307, 324 (1982)).) To fully adjudicate whether such deference is warranted, the Court requires some evidence about Defendants’ process in crafting precautionary measures—specifically, whether decisions were made by “the appropriate professional” or were judged necessary “to maintain institutional security.” Accordingly, “information regarding [Defendant ICE’s] communication with national public health authorities” is relevant to the application of the *Bell* standard to Plaintiffs’ claims. (ECF No. 156-2, PageID.5033 (Topic 13).)

The deliberative process privilege does not impose a blanket prohibition on this discovery but may protect some testimony. “The deliberative process privilege protects documents from discovery—it is not a shield to prevent the depositions of witnesses who may otherwise be deposed.” *See Horne v. City of Detroit*, No. 10-15073, 2012 WL 12930442, at \*1 (E.D. Mich. Mar. 23, 2012). Defendants may invoke the deliberative process privilege regarding specific testimony at the deposition should Plaintiffs’ seek “inter-agency or

intra-agency” communications “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). As in the course of regular litigation, the Court will adjudicate those disputes as they arise should the parties be unable to come to a resolution.

Most of the remaining topics encompassed by Plaintiffs’ fifth proposed category relate to the implementation of existing public health guidance rather than its consultation and are directly relevant to the conditions of confinement at the Calhoun County Correctional Facility. Information about “about monitoring of symptoms of COVID-19, medical care of Detainees at Calhoun with confirmed cases or symptoms of COVID-19, and hospitalizations of Detainees with confirmed cases or symptoms of COVID-19 at Calhoun,” (ECF No. 156-2, PageID.5033 (Topic 7)), and “about the use of segregation, and/or solitary confinement of Detainees who are at high risk of serious illness or death from COVID-19, or with confirmed or suspected cases of COVID-19,” (*Id.* (Topic 10)), is

relevant to the risk of COVID-19 exposure for all detainees. Information about “COVID-19 testing of Detainees, inmates, staff and contractors, and reporting of those test results that has been or will be conducted at Calhoun” similarly relates to the scope and efficacy of precautionary measures. (*Id.* (Topic 8).) However, given that in-person visitation is prohibited during the pandemic, information about “the communication of Detainees’ medical information to their counsel or families where Detainees have suspected or confirmed COVID-19 diagnoses” does not bear on the Plaintiffs’ conditions of confinement or risk from COVID-19. (*Id.* (Topic 9).)

Therefore, Plaintiffs may seek discovery on their fifth proposed category, encompassing Topics 7, 8, 10, and 13.

## **VI. International Removals**

Finally, Plaintiffs’ seek “information from ICE about how COVID-19 is affecting removals in light of the break-down in international travel.” Defendants argue that “[i]nquiry into how admission and custody decisions are being made is protected by the deliberative process privilege,” and that “law enforcement privilege

may apply to the extent Plaintiffs seek information related to arrangements with foreign countries concerning effecting removal.” (ECF No. 153, PageID.4972.) Plaintiffs reply that to adjudicate their third claim, “Plaintiffs and the Court require information about which countries are still accepting deportees; if the deportees are subject to specific requirements, such as testing; and whether ICE is considering alternatives when removal is unlikely.” (ECF No. 156, PageID.5024.) Plaintiffs requested discovery regarding ICE’s ability to effectuate removals due to obstacles posed by COVID-19 involves facts that, if fully developed, may demonstrate that Plaintiffs are entitled to relief on their *Zadvydas* claim. However, discovery pertaining to custody determinations made because of those obstacles does not relate to Plaintiffs’ claim. Accordingly, the Court grants partial discovery on Plaintiffs’ sixth category of discovery, encompassing Topic 14. Plaintiffs may depose Defendant ICE on “[t]he impact that COVID-19 has had on ICE’s ability to remove non-citizens from the United States” but not on “ICE’s policies, procedures, protocols, practices, and other relevant information regarding how admission and custody decisions are

being made in light of the obstacles COVID-19 presents for removal” or on “any action taken to assess the ongoing detention of Detainees at Calhoun in light of those obstacles to removal.” (ECF No. 156-2, PageID.5034.)

Finally, as Plaintiffs note, to assert the law enforcement privilege, Defendants must make a formal claim of privilege based on actual personal consideration by the head of the department identifying the information for which the privilege is claimed. *See Hamama v. Adducci*, No. 17-cv-11910, 2018 WL 2445042, at \*1 (E.D. Mich. May 31, 2018) (citing *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988).) Defendants’ assertion that the law enforcement privilege may apply is therefore not a claim of that privilege.

## **VII. Protective Order**

Defendants request that if the Court grants Plaintiffs’ motion, they be permitted to move for a protective order. (ECF No. 153, PageID.4973.) The Court grants Defendants’ request. Upon receiving service of the notice, Defendants may move for a protective order on an expedited basis.

## **Conclusion**

For the reasons stated above, Plaintiffs have shown good cause for discovery in the form of a Rule 30(b)(6) deposition of U.S. Immigration and Customs Enforcement. As enumerated in Plaintiffs' reply brief (ECF No. 156-2), Topics 1, 2, 7, 8, 10, 11, 13, and 14 are relevant to Plaintiffs' claims and proportional to the needs of the case. The Court therefore GRANTS Plaintiffs' motion in part.

IT IS SO ORDERED.

Dated: August 4, 2020  
Ann Arbor, Michigan

s/Judith E. Levy  
JUDITH E. LEVY  
United States District Judge

## **CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on August 4, 2020.

s/William Barkholz  
WILLIAM BARKHOLZ  
Case Manager