IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	
	)	**Case No. 3:19cr130**
	)	
OKELLO T. CHATRIE,	)	
Defendant	)	

DEFENDANT OKELLO CHATRIE'S RESPONSE IN OPPOSITION TO MOTION TO QUASH SUBPOENA FOR STATE MAGISTRATE RECORDS

Okello Chatrie, through counsel, responds as follows in opposition to Mr. Bishop's Motion to Quash Subpoena for State Magistrate Records filed on July 31, 2020:

I. Mr. Bishop's arguments about the strength of the Fourth Amendment claim in the geofence warrant and about the subpoena's relevancy are beyond the scope of a motion to quash under Federal Rule of Criminal Procedure 17(c)(2).

Federal Rule of Criminal Procedure 17(c)(2) provides that the recipient of a subpoena *duces tecum* may promptly move the Court to "quash or modify the subpoena if compliance would be unreasonable or oppressive." "A subpoena for documents may be quashed if their production would be 'unreasonable or oppressive,' but not otherwise." *United States v. Nixon*, 418 U.S. 683, 698 (1974). While a party in applying for the subpoena must show the relevancy, admissibility, and specificity of the information sought, *id.* at 700, the recipient of a subpoena not otherwise a party to the litigation is limited to arguing only that the subpoena is unreasonable or oppressive, *see Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 n.5 ("We also find in the same rule, under (c), a provision for the production of documentary evidence or objects—the familiar subpoena duces tecum—and if the person upon whom the subpoena is served thinks it is broad or unreasonable or oppressive he may apply to the court to quash the subpoena.").

As Mr. Chatrie explained in his application for this subpoena, *see* ECF No. 136, and the supplement on the question of the magistrate's qualifications that the Court directed the parties to discuss, *see* ECF No. 135, the information sought in the subpoena is relevant to the Fourth Amendment issue; it would be admissible at the evidentiary hearing to be scheduled in this case—*see* Fed. R. Evid. 1101(d)(1) and *United States v. Raddatz*, 447 U.S. 667, 669 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial."); and the records sought are specific to Mr. Bishop's training on geofence warrants, his qualifications to be a magistrate, and the dates of benchmarks in his magistrate career that relate to his qualifications and experience leading up to the issuance of the geofence warrant in this case. As Mr. Chatrie set forth in detail in his supplement on these questions, *see* ECF No. 135, there is a legitimate question about whether Mr. Bishop was a "detached and neutral magistrate" under the Fourth Amendment and under Virginia law. Thus, as the Court found in its order issuing the subpoena for these records, *see* ECF No. 137, Mr. Chatrie has already satisfied the threshold requirements that Rule 17(c) requires for issuance of the subpoena.

Mr. Bishop's attempts to argue the merits of the legal questions before the Court relating to the geofence warrant are a) well beyond the scope of a motion to quash, and b) only serve to underscore the importance of obtaining the information sought. Undersigned counsel are unaware of a case that finds that a third-party's self-serving assertion that essentially "there is nothing to see here" can overcome a criminal defendant's Sixth Amendment right to compulsory service of process to investigate issues legitimately raised in ongoing litigation. *See, e.g.*, *Bowman*, 341 U.S. at 220 (observing that the plain language of Rule 17(c) is carry out the purpose of establishing a

more liberal policy for the production, inspection and use of materials"). Mr. Bishop has not met his burden to show that the subpoena is "unreasonable or oppressive."

II. Mr. Bishop has not shown that he has a privacy interest in the records sought that outweighs Mr. Chatrie's right to compulsory process.

As set forth above, under Rule 17(c)(2), Mr. Bishop bears the burden of showing that the records sought are "unreasonable or oppressive." He makes a general assertion that he has a privacy interest in his "academic and professional records." Mtn. to Quash at 14. He then cites *Whalen v. Roe*, 429 U.S. 589 (1977), which dealt with whether the State of New York could collect the names and addresses of all individuals who had been prescribed certain drugs by a doctor. *Whalen* and its progeny, however, do not help Mr. Bishop.

Although *Whalen* recognized a privacy interest in avoiding disclosure of personal matters, *id.* at 599, it did so in the context of a government demand for otherwise private information that belonged to individuals. *Whalen* did not concern the government's dissemination of information already in its possession. On the contrary, the *Whalen* Court upheld the collection of prescription information due in large part to the existence of statutory safeguards against unwarranted public disclosure from information the government collects. *Id.* at 601-02. Furthermore, the Court approved of an exception in this statutory framework for disclosure of stored data when necessary for evidentiary use in a judicial proceeding. *Id.* at 600-01. *Whalen* is therefore inapposite here.

However, even if *Whalen* were applicable to this Court's subpoena, Mr. Bishop fails to demonstrate that he has a privacy interest the "academic and professional records" at issue. There is also no record that he objected to their collection by the Commonwealth of Virginia when he applied to become a magistrate. Indeed, the Supreme Court has never found a government regulation or action that violated the privacy right recognized in *Whalen*. It did not find one for the prescription records in *Whalen*. It did not find one for the presidential papers and tape

recordings in *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977). And most recently, it did not find one for the background check information at issue in *National Aeronautics & Space Administration* v. *Nelson*, 562 U.S. 134, 151-52 (2011). Likewise, the Fourth Circuit has found no privacy violation where police employees were required to disclose certain personal and financial information. *See Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990). Mr. Bishop, however, does not even attempt to describe why he believes he has a "significant" privacy interest in his "academic and professional records," let alone argue why basic information about his education and state-provided training is more private than prescription records or background check information.

Moreover, as in *Whalen*, *Nixon*, *Nelson*, and *Walls*, any privacy interest Mr. Bishop may have in his "academic and professional" records is adequately protected against unwarranted public disclosure under Virginia law. First, the Virginia Freedom of Information Act protects such personnel and test information from disclosure to the general public. *See* Va. Code § 2.2-3705.1; *see also Daily Press, LLC v. Office of Executive Secretary of Supreme Court*, 800 S.E.2d 822, 824, 293 Va. 551, 557 (Va., 2017) ("It is undisputed that the Executive Secretary is a 'public body' as that term is defined by VFOIA."). Additionally, the rules of the Virginia Supreme Court prohibit the Executive Secretary from making certain administrative records publicly accessible. *See* Va. R. Sup. Ct. 11:4. But both *Whalen* and Virginia law recognize that a subpoena issued by a federal judge is not the same thing as a records request from a member of the public. In *Whalen*, the Supreme Court recognized that the "stored data may be offered in evidence in a judicial proceeding" and was confident that such judicial supervision would provide adequate privacy protections. 429 U.S. at 600. Virginia law also explicitly provides that restrictions on public access shall not have "any bearing upon disclosure required to be made pursuant to any court order

or subpoena." Va. Code § 2.2-3703.1. Thus, Mr. Bishop has not met his burden to demonstrate why any privacy interest he may have in the records sought outweighs Mr. Chatrie's Sixth Amendment right to compulsory process.[1]

CONCLUSION

As set forth above, Mr. Bishop has not shown that the subpoena the Court issued in ECF No. 137 is "unreasonable or oppressive." Thus, the Court should deny the motion to quash Mr. Bishop filed on July 31, 2020.

Respectfully submitted,
OKELLO T. CHATRIE

By: _____/s/_____
Michael W. Price
NY Bar No. 4771697 (*pro hac vice*)
NACDL, Fourth Amendment Center
1660 L St. NW, 12th Floor
Washington, D.C. 20036
Ph. (202) 465-7615
Fax (202) 872-8690
mprice@nacdl.org

_____/s/_____
Laura Koenig
Va. Bar No. 86840
Office of the Federal Public Defender
701 E Broad Street, Suite 3600
Richmond, VA 23219-1884
Ph. (804) 565-0881
Fax (804) 648-5033
laura_koenig@fd.org

[1] Mr. Chatrie does not object to the Executive Secretary redacting any personal address and contact information included in the information provided in response to the subpoena.