

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

CISSY THUNDERHAWK; WAŠTÉ WIN
YOUNG; REVEREND JOHN FLOBERG;
and JOSÉ ZHAGÑAY on behalf of
themselves and all similarly-situated persons,

Plaintiffs,

vs.

Civil No.: 1:18-cv-00212

COUNTY OF MORTON, NORTH
DAKOTA; SHERIFF KYLE KIRCHMEIER;
GOVERNOR DOUG BURGUM; FORMER
GOVERNOR JACK DALRYMPLE;
DIRECTOR GRANT LEVI;
SUPERINTENDENT MICHAEL GERHART
JR; TIGERSWAN LLC; and DOES 1 to 100,

Defendants.

**ORDER GRANTING, IN PART, AN DENYING, IN PART
PLAINTIFFS' MOTION TO COMPEL**

[¶1] THIS MATTER comes before the Court on the Plaintiffs'¹ Motion to Compel filed on September 7, 2021. Doc. No. 149. Defendant TigerSwan ("TigerSwan") filed a Response in Opposition to the Motion to Compel on September 21, 2021. Doc. No. 150. The Plaintiffs filed a Reply in Support of the Motion on September 28, 2021. Doc. No. 152. For the reasons explained below, the Plaintiffs' Motion to Compel is granted, in part, and denied, in part.

¹ The term "Plaintiffs" refers collectively to Cissy Thunderhawk, Wašté Win Young, Reverend John Floberg, and José Zhagñay.

A. FACTUAL BACKGROUND

[¶2] Plaintiffs commenced this lawsuit against multiple Defendants, including TigerSwan, on October 18, 2018. Doc. No. 1. TigerSwan’s involvement in this lawsuit stems from its work as a security consultant for Energy Transfer Partners (“ETP”) during the on-going Dakota Access Pipeline (“DAPL”) protests in 2016 and 2017. TigerSwan and ETP entered into a Professional Services Agreement (“PSA”) for TigerSwan’s services, which contained a number of confidentiality provisions. The PSA specifically discusses what is considered confidential information:

Confidential Information. Contractor acknowledges that all information, including but not limited to, data, drawings, recordings, tracings, specifications, calculations, diaries, memoranda, manuals, correspondence, documentation, computer software, plans, programs, plants, processes, products, costs, equipment, routes, vendors, personnel, operations, customers, reports, studies, designs, know how, trade secrets, communications written or oral, of any form or media, related to the Company whether received from or on behalf of the Company, whether marked or not, is proprietary and confidential to the Company ("Confidential Information"). Confidential Information shall not include information which:

- (i) at the time of disclosure or thereafter becomes a part of the public domain through no wrongful act or omission or noncompliance with this Section 11 by Contractor;
- (ii) is subsequently disclosed to Contractor by a third party, and which the third party did not acquire under an obligation of confidentiality;
- (iii) was in the possession of Contractor prior to entering into this Agreement and which was not previously disclosed to Contractor as Confidential Information of Company; or
- (iv) is required to be disclosed by law, rule, regulation, legal process or order of any court or government body having jurisdiction over the same.

Doc. No. 149-7, p. 14.

[¶3] The PSA also required TigerSwan to return ETP’s confidential information under certain circumstances as follows:

Return of Information: Contractor shall deliver to Company all Company Confidential Information provided or disclosed to or used or acquired by

Contractor, including all information developed, derived, or created therefrom, or portions thereof, upon the earlier of:

- (A) Cessation of the need for the information for performance of Services; or
- (B) Company's request; or
- (C) Completion of the Services for which it was provided, disclosed, used or acquired; or
- (D) Termination, suspension, or expiration of this Agreement.

Doc. No. 149-7, p. 16.

[¶4] In October of 2018, the North Dakota Private Investigative and Security Board ("Board") commenced an enforcement proceeding against TigerSwan related to whether TigerSwan had or needed to hold a North Dakota license to perform its work for ETP in North Dakota. In June of 2020, TigerSwan, through the discovery process, produced to the Board documentation related to its work for ETP, which included approximately 16,000 documents. After learning of the disclosure, ETP attempted to intervene in this enforcement proceeding to compel the Board to return the disclosed documents to ETP and to issue a protective order precluding the Board from releasing the documents to anyone, including the public. However, ETP's petition to intervene was not granted, and the proceeding was closed. ETP appealed the decision to the district court, which affirmed the administrative decision. See Case No. 08-2020-CV-03049, Burleigh County District Court, North Dakota. ETP has appealed the district court's decision to the North Dakota Supreme Court, which remains pending. See Case No. 20210244, North Dakota Supreme Court.

[¶5] In October of 2020, ETP commenced a lawsuit in Burleigh County District Court directly against the Board and TigerSwan over the released documents. See Case No. 08-2020-CV-02788, Burleigh County District Court, North Dakota. ETP lodged a claim against TigerSwan for breach of the PSA by releasing the documents to the Board. Id. ETP also asserted claims of conversion and delivery of property against the Board, arguing the Board's refusal to return ETP's documents

and the Board's disclosure of ETP's documentation to the public pursuant to public records requests caused and is causing it harm. Id. In the Complaint, ETP demanded TigerSwan return all its documents. This state litigation remains pending.

[¶6] On October 29, 2020, TigerSwan's previous counsel returned to ETP all documents it had in its possession related to its work under the PSA. Doc. No. 151-2. The letter addressed to ETP Head of Litigation reads:

Please find enclosed the return of the proprietary information and documents held by TigerSwan in conjunction with work previously done for ETP in relation to DAPL. Now that the Board action is closed we are in a position to return the items to you. This information is ETP's exclusive property and is being returned per our contractual obligation, Para. 11. The information has been transferred onto the enclosed hard drive. We confirm that we no longer maintain any proprietary information owned by ETP.

Doc. No. 151-2.

[¶7] The only documents TigerSwan kept were the PSA itself and documents related to its billing and expense reimbursements, which was allowable under 11.4 of the PSA. On November 2, 2020, TigerSwan notified Plaintiffs these documents had been returned to ETP through its initial disclosures and again in March 2021 in response to Plaintiffs' Discovery. Doc. No. 151-3; 149-2.

[¶8] On July 27, 2021, Magistrate Charles S. Miller held a telephonic status conference with the Plaintiffs and TigerSwan to discuss ongoing discovery disputes. In particular, the dispute discussed at the status conference centered on TigerSwan's responses to certain requests for production of documents the Plaintiffs served on it in January of 2021. Doc. No. 145, p. 1. TigerSwan acknowledged at the conference it did not produce certain documents related to its work with ETP due to the confidentiality provisions of the PSA. Doc. No. 145, pp. 1-2. TigerSwan represented to the Court that it was working with ETP to determine which documents it could produce. Doc. No. 145, p. 2. At the conclusion of the hearing, Judge Miller ordered:

TigerSwan must make a complete and full response to all of plaintiffs' document requests on or before August 6, 2021. The response must be either production of the documents or grounds stated for non-production [which must not be a generalized list]. The court **FURTHER ORDERS** that, if one of the grounds for non-production is a claim of privilege, plaintiffs must simultaneously with its response on or before August 6, 2021, provide plaintiffs with a privilege log identifying with particularity each document being withheld and the privilege being asserted. Failure to do so will likely result in any claims of privilege being denied. Finally, the court **FURTHER ORDERS** that, if plaintiffs are not satisfied with TigerSwan's response, it may then file a motion to compel without first having to seek another conference call with a magistrate judge.

Doc. No. 145, p. 2.

[¶9] Judge Miller further forewarned TigerSwan the Court would look unfavorably on TigerSwan's non-production based solely on a third-party confidentiality agreement. Doc. No. 145, p. 2. TigerSwan was on notice "[i]f such a response is made and later becomes the subject of a motion to compel, TigerSwan has been so warned and the court may consider that in deciding whether costs or other sanctions (e.g. requiring disclosure of the documents without the benefit of protective confidentiality order) are appropriate." Doc. No. 145, p. 3. Judge Miller told TigerSwan it should convey to ETP the Court was standing firm on TigerSwan's August 6, 2021 deadline to get the documents to Plaintiffs. Doc. No. 145, p. 4. Judge Miller noted "[i]t is clear that the ETP has been aware of the document requests for months and has a sufficient opportunity to work with plaintiffs through TigerSwan to come up with a negotiated resolution." Doc. No. 145, p. 4.

[¶10] On August 6, 2021, TigerSwan produced over 10,000 pages of documents to Plaintiffs, which consisted of invoices and receipts, the only documentation TigerSwan kept after returning the remaining documents to ETP. On August 16, 2021, counsel for Plaintiffs reached out to TigerSwan to discuss TigerSwan's answers or lack thereof to the document requests. Doc. No. 149-5. Counsel for Plaintiffs noted "[w]e are not satisfied with your response to #2, which asserts TigerSwan will not be producing any documents because it returned them to ETP pursuant to a

contractual obligation, and wanted to confirm with you that TigerSwan maintains its position that it will not be producing any of these documents.” Doc. No. 149-5. Counsel further stated “[w]e also wanted to confirm that you are not intending to provide any additional documents responsive to #4, nor any further specification of your basis for withholding other responsive documents or identification of the documents being withheld.” Doc. No. 149-5. Plaintiffs did not receive a response from TigerSwan and filed this Motion shortly thereafter.

[¶11] Plaintiffs contend in this Motion to Compel that TigerSwan failed to produce documents related to:

- a. Document Request 2 - All documents or communications created or received by TigerSwan concerning the construction of the Dakota Access Pipeline, the NoDAPL movement or any individual associated with it, or the police or private security response to the construction of the Pipeline or the NoDAPL movement, specifically including but not limited to notes, emails, text messages, chats (e.g. WhatsApp), memos, reports, situation reports, intelligence updates, photographs, videos, and PowerPoint or similar presentations.
- b. Document Request 4 - All personnel records of TigerSwan employees or contractors relating to work associated with the Dakota Access Pipeline, the NoDAPL movement, or the police or private security response to the construction of the Pipeline or the NoDAPL movement, including for Energy Transfer Partners or any of its subsidiaries, or for public officers or agencies, including law enforcement, including but not limited to job advertisements, job descriptions, specified qualifications, anticipated duties, selection and hiring of candidates, contractual or other agreements with employees or contractors, employee or contractor assignment, time actually worked (e.g. timecards), tasks or duties actually performed, and evaluation of employee or contractor performance.

Doc. No. 149-4.

[¶12] TigerSwan has asserted it cannot produce the requested documents because they are not physically in its possession, as they have been returned to ETP.

B. LAW AND ANALYSIS

[¶13] It is undisputed this Motion comes down to which party should bear the responsibility and cost to attempt to acquire and/or subpoena ETP for the documents Plaintiffs are seeking.

Plaintiffs contend TigerSwan should be responsible for obtaining the documents from ETP on the basis TigerSwan failed to comply with discovery obligations in this case, in that it failed to preserve evidence by returning the documents to ETP. TigerSwan contends because it no longer has the documents and is unlikely to be successful in obtaining them from ETP considering the litigation still ensuing over the release of the documents, Plaintiffs, who have been on notice ETP has had the documents since November of 2020, should be required to subpoena them.

[¶14] Rule 34 of the Federal Rules of Civil Procedure requires a party to produce documents and other tangible objects that are within the party's possession, custody, or control. Fed. R. Civ. P. 34. "Under Rule 34, and by extension under Rule 45, documents are within a person's 'possession, custody or control' if he 'has the legal right to obtain the document, even though in fact [he] has no copy' actually in his possession." United States v. Three Bank Accts. Described as: £Bank Acct. #£9142908 at First Bank & Tr., Brookings, S. Dakota, No. CIV. 05-4145-KES, 2008 WL 915199, at *7 (D.S.D. Apr. 2, 2008) (citing 8A Wright, Miller & Marcus, *Fed. Practice & Procedure*, § 2210 at 397). "Control, as that word is used in Rule 34, 'does not require that the party have legal ownership or actual physical possession of the documents [and other tangible objects] at issue; rather, documents [and other tangible objects] are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents [and other tangible objects] from a non-party to the action.'" Shim-Larkin v. City of New York, No. 16CV6099AJNKNF, 2019 WL 5198792, at *9 (S.D.N.Y. Sept. 16, 2019).

[¶15] A party also has a discovery obligation to preserve evidence. "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." Best Buy Stores, L.P. v. Devs. Diversified Realty Corp., 247 F.R.D. 567, 570 (D. Minn. 2007). "This obligation does

not require the preservation of all potential evidence or ‘every single scrap of paper’ in a business.” Id. Rather, “a party must preserve evidence that it has notice is reasonably likely to be the subject of a discovery request even before a request is actually received.” Id.

[¶16] “Spoliation of evidence occurs when one party destroys evidence relevant to an issue in the case.” Linden v. CNH Am. LLC, No. 309CV00019JEGCFB, 2011 WL 13165201, at *1 (S.D. Iowa Mar. 4, 2011). “To establish spoliation, the moving party must show that the adverse party destroyed potential evidence, that the evidence was discoverable, and that the loss of evidence prejudiced the moving party.” The Valspar Corp. v. Millennium Inorganic Chemicals, Inc., No. 13-CV-3214(ADM/LIB), 2016 WL 6902459, at *3 (D. Minn. Jan. 20, 2016). “If destruction of relevant information occurs before any litigation has begun, in order to justify sanctions, the requesting party must show that the destruction was the result of bad faith.” E*Trade Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582, 588 (D. Minn. 2005). “If, however, the destruction of evidence occurs after litigation is imminent or has begun, no bad faith need be shown by the moving party.” Id. “In either case, the moving party must show that it was prejudiced by the destruction before sanctions are warranted.” The Valspar Corp. v. Millennium Inorganic Chemicals, Inc., No. 13-CV-3214(ADM/LIB), 2016 WL 6902459, at *3 (D. Minn. Jan. 20, 2016).

[¶17] “The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis.” Ewald v. Royal Norwegian Embassy, No. 11-CV-2116 SRN/SER, 2014 WL 1309095, at *2 (D. Minn. Apr. 1, 2014). “Sanctions against an offending party for spoliation include entry of default judgment, an adverse inference jury instruction, exclusion of evidence, and the imposition of the prejudiced party’s attorneys’ fees or other monetary sanction.” Am. Builders & Contractors Supply Co. v. Roofers Mart, Inc., No. 1:11-CV-19 CEJ, 2012 WL 2992627, at *3 (E.D. Mo. July 20, 2012).

[¶18] “Before sanctions can be imposed for spoliation of evidence, the party requesting the sanction must make a showing of prejudice.” Est. of Seaman ex rel. Seaman v. Hacker Hauling, 840 F. Supp. 2d 1106, 1111 (N.D. Iowa 2011) (citing Rattray v. Woodbury County, Iowa, 761 F.Supp.2d 836, 845 (N.D.Iowa 2010 and Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 748 (8th Cir.2004)). “Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present ‘evidence essential to its underlying claim.’” The Valspar Corp. v. Millennium Inorganic Chemicals, Inc., No. 13-CV-3214(ADM/LIB), 2016 WL 6902459, at *6 (D. Minn. Jan. 20, 2016). “The party moving for sanctions bears the burden of demonstrating prejudice, although the burden placed on the moving party to show that lost evidence would have been favorable to it ought not to be too onerous, lest the spoliator be permitted to profit from its destruction.” Id. (quoting Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010)).

[¶19] The Court finds little discussion need go to whether TigerSwan had a duty to preserve evidence in this case. The Plaintiffs allege in their Amended Complaint, which was filed on February 1, 2019, that TigerSwan was hired by ETP to perform security services and intelligence operations during the DAPL protests. Plaintiffs further allege through these services TigerSwan was also providing intelligence and coordination efforts with law enforcement, thus transforming them into state actors subject to liability for their constitutional claims. Clearly, information related to TigerSwan and its hiring agency, ETP, including personnel records and communications, would be relevant and discoverable in this matter. TigerSwan had a duty to preserve these documents.

[¶20] As to the question of spoliation, TigerSwan asserts the documents in question have not been destroyed and are intact, so therefore no spoliation has occurred. Counsel for TigerSwan assured the Plaintiffs in a September 14, 2021 letter that they have “conferred with counsel for

Energy Transfer and understand that the documents have been fully and completely preserved and remain in possession of Energy Transfer.” Doc. No. 151-4. The Plaintiffs point out they have no way of knowing what documents were provided back to ETP, if some are missing, or if any have been destroyed. TigerSwan contends Plaintiffs have known since November 2020 the documents in question are in ETP’s possession and have failed to subpoena or otherwise attempt to acquire those documents directly from ETP. On this basis, TigerSwan argues it should not be sanctioned.

[¶21] It is curious why Plaintiffs have failed to take any steps to acquire the documents when they were informed TigerSwan physically could not comply with their document requests. Certainly, they have known for over a year where the documents are located and how to acquire them. In fact, Plaintiffs acknowledge they “will likely eventually subpoena ETP in this case[.]” Doc. No. 152, p. 77; see also Gallagher v. Magner, 619 F.3d 823, 844 (8th Cir. 2010) (“In evaluating prejudice, courts have looked to whether an allegedly harmed party took other available means to obtain the requested information.”); In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig., 299 F.R.D. 502, 523 (S.D.W. Va. 2014) (noting that prejudice is less acute when the requesting party may obtain some of the allegedly spoliated evidence from other sources).

[¶22] Nonetheless, the normal discovery process should have afforded the Plaintiffs the opportunity to seek the documents they are looking for directly from TigerSwan. The Court appreciates TigerSwan was in legal dilemma between complying with its discovery obligations in this case and facing liability from ETP for not returning the documents pursuant to their contractual agreement; however, TigerSwan’s actions of turning over the documents to ETP without preserving them for Plaintiffs certainly caused the predicament facing the parties today. Unfortunately, it may be impractical for TigerSwan to obtain those documents back from ETP at this point, as ETP is currently suing TigerSwan for disclosing the documents in the first place. As

a result, the Court finds the most practical solution to this problem is to have the Plaintiffs subpoena or otherwise attempt to acquire the documents directly from ETP, with TigerSwan being responsible for the costs associated with the subpoena and retention efforts.

[¶23] Therefore, it is **ORDERED**:

- a. Plaintiffs shall be responsible for subpoenaing ETP for the documents they seek;
and
- b. TigerSwan shall reimburse Plaintiffs for the costs associated with the subpoena efforts, not to exceed \$2500.00.

C. CONCLUSION

[¶24] Based on the foregoing, the Plaintiffs' Motion to Compel [Doc. No. 149], is **GRANTED, PART, AND DENIED, IN PART.**

[¶25] **IT IS SO ORDERED.**

DATED January 3, 2022.

A handwritten signature in black ink, appearing to read 'D. Traynor', written over a horizontal line.

Daniel M. Traynor, District Judge
United States District Court