

AKERMAN LLP

601 WEST FIFTH STREET, SUITE 300  
LOS ANGELES, CALIFORNIA 90071  
TEL.: (213) 688-9500 – FAX: (213) 627-6342

1 **AKERMAN LLP**  
2 ELLEN S. ROBBINS (SBN 298044)  
3 ALICIA Y. HOU (SBN 254157)  
4 601 West Fifth Street, Suite 300  
5 Los Angeles, California 90071  
6 Telephone: (213) 688-9500  
7 Facsimile: (213) 627-6342  
8 Email: alicia.hou@akerman.com  
9 Email: ellen.robbins@akerman.com

10 LAWRENCE D. SILVERMAN (admitted *pro hac vice*)  
11 98 Southeast Seventh Street, Suite 1100  
12 Miami, FL 33131  
13 Telephone: (305) 374-5600  
14 Facsimile: (305) 374-5095  
15 Email: lawrence.silverman@akerman.com

16 ADRIENNE SCHEFFEY (admitted *pro hac vice*)  
17 1900 Sixteenth Street, Suite 1700  
18 Denver, Colorado 80202  
19 Telephone: (303) 260-7712  
20 Facsimile: (303) 260-7714  
21 Email: colin.barnacle@akerman.com  
22 Email: adrienne.scheffey@akerman.com

23 Attorneys for Defendant  
24 THE GEO GROUP, INC.

25 **UNITED STATES DISTRICT COURT**  
26 **CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**

27 RAUL NOVOA, JAIME CAMPOS  
28 FUENTES, ABDIAZIZ KARIM, and  
RAMON MANCIA, individually and on  
behalf of all others similarly situated

Plaintiff,

vs.

THE GEO GROUP, INC.,

Defendant.

Case No. 5:17-cv-02514-JGB-SHKx

**DEFENDANT THE GEO GROUP,  
INC.’S OPPOSITION TO  
PLAINTIFFS’ MOTION  
REGARDING DISCOVERY  
DISPUTE**

Hearing Date: October 2, 2020  
Time: 2:00 p.m.

1 THE GEO GROUP, INC.,  
 2 Counter-Claimant,  
 3 vs.  
 4 RAUL NOVOA, JAIME CAMPOS  
 5 FUENTES, ABDIAZIZ KARIM, and  
 6 RAMON MANCIA, individually and on  
 behalf of all others similarly situated,  
 Counter-Defendant.

TAC Filed: September 16, 2019  
 SAC Filed: December 24, 2018  
 FAC Filed: July 6, 2018  
 Complaint Filed: December 19, 2017  
 Trial Date: February 2, 2021

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1 Defendant The Geo Group, Inc. (“GEO”) hereby submits its Opposition to  
2 Plaintiffs’ Motion Regarding Discovery Dispute (“**motion**”).<sup>1</sup>

3 **I. INTRODUCTION**

4 Plaintiffs’ motion seeks materials that have been withheld, not by GEO, but by  
5 ICE on the basis of two privileges ICE and only ICE holds – the law enforcement  
6 privilege and the deliberative process privilege. Plaintiffs’ motion fails for several  
7 reasons:

8 First, Plaintiffs move on this issue for the first time now despite the fact GEO  
9 has produced over 30 privilege logs well in advance of the September 14 discovery  
10 cutoff.<sup>2</sup> Within these 30+ privilege logs, ICE asserted the law enforcement and  
11 deliberative process privileges several times over. Plaintiffs could have disputed these  
12 privileges as early as December 2019, but failed. Plaintiffs have waived any right to  
13 argue this issue now.

14 Second, even if the Court does not find that Plaintiffs waived their ability to  
15 raise these issues earlier when the privileges were first asserted by ICE, GEO is  
16 unable to simply waive ICE’s privileges as Plaintiffs continue to demand GEO and  
17 this Court to do. GEO is contractually obligated to provide ICE the opportunity to  
18 review all ICE-related documents that are responsive to Plaintiffs’ requests consistent  
19 with the governing Intergovernmental Services Agreement (“IGSA”). In fact, during  
20 this litigation, ICE has expressly confirmed that GEO must allow ICE the opportunity  
21 to review and assert privileges in connection with ICE-related documents, not just  
22 under the IGSA, but under applicable federal law.

23 Third, Plaintiffs’ assertion that GEO somehow waived ICE’s privileges because  
24 it failed to provide an affidavit or declaration in connection with the ICE privileges is  
25

26 <sup>1</sup> Plaintiffs failed to file the certification that they have engaged in good faith discussions in an attempt to narrow the  
27 outstanding discovery issues as required by Paragraph 3 of the Court’s September 23, 2020 Order. ECF 330.

28 <sup>2</sup> In their motion, Plaintiffs attempt to seek shelter in GEO’s production of ten privilege logs “two minutes before the  
close of discovery,” suggesting that GEO’s September 14 production somehow gives Plaintiffs permission to raise issues  
connected to all of the privilege logs produced in this entire litigation at this time. At a minimum, Plaintiffs should be  
entitled only to challenge any entry on the privilege logs served on September 14, 2020.

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1 dangerous and runs afoul of public policy given the sensitivity of the information  
2 sought. Multiple district courts have declined to apply an automatic waiver pertaining  
3 to these privileges where the information sought is highly sensitive. Moreover, to the  
4 extent GEO or ICE was required to submit an affidavit or declaration outlining the  
5 bases for ICE privileges, Plaintiffs should have raised this issue earlier. Plaintiffs  
6 provide zero rationale for its delay.

7 Accordingly, GEO asks this Court to deny Plaintiffs’ motion.

8 **II. LEGAL ARGUMENT**

9 **A. Plaintiffs Have Waived Any Right to Assert Objections to the Law**  
10 **Enforcement and Deliberative Process Privileges**

11 On or about December 2019, GEO provided Plaintiffs with a privilege log  
12 wherein ICE asserted the deliberative process and law enforcement privileges.  
13 (Declaration of Alicia Y. Hou (“**Hou Decl.**”) ¶ 4.) Between December 2019 and prior  
14 to the September 14 discovery cutoff, GEO produced over 30 privilege logs where  
15 ICE asserted the law enforcement and deliberative process privileges several times  
16 over. (Hou Decl. ¶ 5.) Plaintiffs could have moved on these privileges as early as  
17 December 2019, and certainly well before the discovery cutoff in this action.

18 In fact, on May 11, 2020, Plaintiffs raised their purported concerns about these  
19 two privileges. (Hou Decl. ¶ 6.) During the May 20, 2020 discovery hearing in this  
20 action, Plaintiffs again indicated, on the record, that they had concerns over ICE’s  
21 asserted privileges:

22 MR. CHAREST: If I may. This is Daniel Charest, Your Honor.  
23 Just -- I was asked to speak to this issue of the --

24 THE COURT: Sure.

25 MR. CHAREST: -- deliberative privilege because I literally just  
26 argued it last week in a different case. There's a very set-out  
27 procedure that the agency itself is supposed to undertake. The  
28 privilege is supposed to be invoked by the agency head or its  
specific designee after, quote, "personal consideration of the  
documents" --

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THE COURT: Sure. And, Mr. Charest, I've written an extensive order on this when -- on the deliberative privilege in another case. So I know there's this sort of -- and at least in California it emanates from a case out of the Northern District of California issued back in 1988, where it was discussed of -- if you assert this privilege, there's certain steps that you have to do in order to properly assert it. It's that kind of what you're getting at, Mr. Charest?

MR. CHAREST: Yes, sir. Exactly, and you've got it. So I'll stand back down, but yes, sir.

THE COURT: Okay. Understood. So -- and so that's just the deliberative privilege aspect of it, but there is statutory and the privilege type -- at least here that was provided -- Mr. Maya indicates it's "redacted pursuant to statutory and/or regulatory provisions."

MR. MAYA: That's right, Your Honor.

(Hou Decl. ¶ 7.) The issue was not properly before the Court on May 20, 2020, so the Court did not rule on the propriety of ICE’s privileges. (*Id.*) Following the May 20 hearing, Plaintiffs did not choose to further meaningfully confer on the issue with GEO nor did Plaintiffs ever move on the issue. (See Docket for absence of motion.) Plaintiffs have also failed to properly explain in their motion why they chose to wait until after the discovery cutoff to revive what seemed to be an abandoned issue. Plaintiffs have waived any right to argue this issue now.

Courts may deny a motion to compel if it is untimely and/or the information sought was not diligently pursued before the close of discovery. "If the moving party fails to demonstrate diligence, the inquiry should end. A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." *Stone Brewing Co., LLC v. Millercoors LLC*, 2020 WL 1905342, at \*3 (S.D. Cal. Apr. 17, 2020) (internal quotations and citations omitted) (denying motion to compel as untimely where party did not diligently seek compliance with subpoena and failed to obtain the Court's permission to pursue compliance after discovery

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1 ended). See *In re Novatel Wireless Sec. Litig.*, 2010 WL 11470157, at \*5 (S.D. Cal.  
2 Dec. 23, 2010) (finding plaintiff's motion to compel untimely where documents  
3 withheld from production were identified prior to plaintiff's motion filing, and stating  
4 that Plaintiffs failed to show they should be given relief for failing to file their motion  
5 within thirty days of receiving defendant's privilege log.) See also *Farier v. City of*  
6 *Mesa*, 384 F. App'x 683, 684 (9th Cir. 2010) (denying motion to compel where it was  
7 untimely by more than six months); *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622  
8 (D. Nev. 1999) (motion to compel further responses denied as untimely when filed  
9 136 days after receipt of allegedly deficient responses, and 76 days after close of  
10 discovery, and no showing that delay caused by matters outside moving party's  
11 control). Because plaintiffs were well aware that ICE asserted the law enforcement  
12 and deliberative process privileges months before the discovery cutoff and failed to  
13 properly raise any challenge, they should not be permitted to do so at this late date.

14 **B. GEO Cannot Waive ICE’s Privileges**

15 Even if the Court does not find that Plaintiffs waived their ability to raise these  
16 issues, GEO is unable to waive ICE’s privileges as Plaintiffs continue to demand GEO  
17 to do. GEO is contractually obligated to provide ICE the opportunity to review all  
18 ICE-related documents that are responsive to Plaintiffs’ requests consistent with the  
19 governing Intergovernmental Services Agreement (“IGSA”). The IGSA states in  
20 relevant part,

21 Notification and Public Disclosure. Information obtained or  
22 developed as a result of this IGSA is under the control of ICE  
23 and shall be subject to public disclosure only pursuant to the  
24 provisions of applicable federal laws, regulations, and executive  
25 orders or as ordered by a court. Insofar as any documents  
26 created by the Service Provider [GEO] contain information  
27 developed or obtained as a result of this IGSA, such documents  
28 shall be subject to public disclosure only pursuant to the  
provisions of applicable federal laws, regulations, and executive  
orders or as ordered by a court. To the extent the Service  
Provider intends to release to IGSA or any information relating

1 to, or exchanged under, this IGSA, the Service Provider agrees  
2 to coordinate with the ICE Contracting Officer prior to such  
3 release. The Service Provider may, at its discretion,  
4 communicate the substance of this IGSA when requested. ICE  
5 understands that this IGSA will become a public document  
when presented to the Service Providers' governing body for  
approval.

6 (Hou Decl. ¶ 8.)<sup>3</sup> In fact, during this litigation, ICE has expressly confirmed that GEO  
7 must allow ICE the opportunity to review and assert privileges in connection with  
8 ICE-related documents, not just under the IGSA, but under applicable federal law. In  
9 an e-mail to GEO's counsel, ICE stated:

10 As has been discussed at length with the parties in all of these  
11 matters several categories of documents may contain  
12 information the disclosure of which is prohibited without an  
13 exception pursuant to statute and/or regulation. The most  
prevalent statutes and/or regulations are as follows:

- 14 8 U.S.C. § 1367 (VAWA, T Visa, U Visa)
- 15 8 C.F.R. 208.6 (asylum)
- 16 8 U.S.C. § 1254a(c)(6) and 8 C.F.R. § 244.16 (TPS)
- 17 8 U.S.C. § 1255a(c)(5) (seasonal agricultural workers)

18 These categories of information cannot be produced even with a  
19 protective order in place. Consequences for unauthorized  
20 disclosure may include criminal and civil penalties. Thus, in  
21 order to ensure compliance with these statutory and/or  
22 regulatory provisions, ICE must conduct a review of any  
23 documents which may contain this type of information so that  
24 appropriate and necessary redactions and withholdings can be  
25 applied. ICE's experience in reviewing these types of grievance  
26 forms in both the VWP matters, as well as in other unrelated  
27 litigations is that very often detainees will reference and ask  
questions about their asylum cases. Additionally, detainees  
A#'s need to be run prior to production to see whether they  
have petitioned for relief under 1367. In that case all of the  
information pertaining to that detainee must be redacted and not

28 <sup>3</sup> GEO's subsequent contract with ICE also contains similar limitations. See GEO-Novoa\_00041203 and  
GEO-Novoa 0041204 to 00041205

1 simply any reference to VAWA, T and U itself. Thus, ICE will  
2 need to review these records.

3 (Hou Decl. ¶ 9.) To be sure, both privileges Plaintiffs take issue with – the  
4 deliberative process privilege and the law enforcement privilege – are not those  
5 asserted by GEO. ICE is the privilege holder. GEO is bound by the relevant statutes,  
6 contract provisions, and regulations that require GEO to withhold documents pending  
7 ICE approval.

8 Pursuant to *Touhy*,<sup>4</sup> GEO is not allowed to “produce any document or any  
9 material acquired as part of the performance of that employee's duties or by virtue of  
10 that employee's official status, unless authorized to do so by the Office of the General  
11 Counsel . . . .” *See* 6 C.F.R. § 5.44(b). Federal law also explicitly prohibits GEO,  
12 acting on its own volition, from disclosing detainee information. *See* 8 C.F.R. § 236.6  
13 (“No person, including . . . any privately operated detention facility, that houses,  
14 maintains, provides services to, or otherwise holds any detainee . . . shall disclose or  
15 otherwise permit to be made public the name of, or other information relating to, such  
16 detainee.”).

17 Instead, GEO must submit the documents for DHS/ICE review, which is  
18 memorialized both in DHS/ICE guidance and the terms of the IGSA. Courts have  
19 found *Touhy* regulations are a “clear assertion” of an agency’s authority to regulate  
20 disclosure of documents. *Stevens v. F.D.I.C.*, No. EDCV 11-00841-MMM, 2011 WL  
21 3925087, at \*5 (C.D. Cal. Aug. 25, 2011) (FDIC’s regulations under *Touhy* “appear to  
22 be a clear assertion of the lines of FDIC's authority to determine whether to disclose  
23 information.”). GEO is thus unable to simply waive ICE’s privileges.

24 **C. GEO Has Not Waived Any Privileges**

25 Plaintiffs’ assertion that GEO waived ICE’s privileges because it failed to  
26 provide an affidavit in connection with the ICE privileges runs afoul of public policy  
27 given the sensitivity of the information sought. Although failure to provide a requisite  
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<sup>4</sup> *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467–70 (1951).



1 declaration in connection with either the law enforcement privilege or deliberative  
 2 process privilege can result in waiver (*see e.g. Bernat v. City of California City*, 2010  
 3 WL 4008361, at \*3 (E.D. Cal. Oct. 12, 2010)), **multiple courts have declined to**  
 4 **apply an automatic waiver given the policy concerns implicated by the**  
 5 **information sought**. *See e.g. Noble v. City of Fresno*, 2018 WL 1381945, at \*6 (E.D.  
 6 Cal. Mar. 19, 2018) ("the invocation of the official information and deliberative  
 7 process privileges appears to be untimely given that Defendant did not submit a  
 8 supporting affidavit until the filing of the Opposition to the motion to compel . . . [but]  
 9 given the policy concerns implicated here, the Court will consider the merits of  
 10 Defendant's privilege objections even though these objections are supported by an  
 11 untimely affidavit."); *Macias v. City of Clovis*, 2015 WL 7282841, at \*4 (E.D. Cal.  
 12 Nov. 18, 2015) ("Given the facts of this case, the privacy rights and officer safety  
 13 factors are important considerations to determine on the merits. Therefore, this Court  
 14 will consider Defendants' objections based on the official information privilege even  
 15 though the objections were raised subsequent to the initial responses to the discovery  
 16 requests."); *Maria Del Socorro Quintero Perez, CY v. United States*, 2016 WL  
 17 362508, at \*3 (S.D. Cal. Jan. 29, 2016) ("Defendants failure to provide Plaintiffs with  
 18 a declaration in support of the law enforcement privilege at the same time they  
 19 provided the privilege log did not result in an automatic waiver of the privilege.")

20 Here, the information Plaintiffs seek is highly sensitive. It includes, but is not  
 21 limited to, names of detainees who are subject to confidential asylum requests,  
 22 detainee medical information, identity of ICE personnel, and information affecting the  
 23 application of facility security and protocol. (Hou Decl. ¶ 10.) Automatic waiver of  
 24 these privileges would directly jeopardize the safety of the detainees and ICE  
 25 personnel.

26 Moreover, to the extent GEO or ICE was required to submit an affidavit or  
 27 declaration outlining the bases for ICE privileges, Plaintiffs should have raised this  
 28 issue earlier (at a minimum before the September 14 discovery cutoff), as discussed

1 above. They failed to do so and cannot now argue GEO has waived these significant  
2 privileges.<sup>5</sup>

3 **III. CONCLUSION**

4 In light of the foregoing, this Court should deny Plaintiffs’ Motion Regarding  
5 Discovery Dispute.

7 Dated: October 1, 2020

**AKERMAN LLP**

8 By: /s/ Ellen S. Robbins  
9 Ellen S. Robbins  
10 Alicia Y. Hou  
11 Adrienne Scheffey  
12 Attorneys for Defendant  
13 THE GEO GROUP, INC.

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<sup>5</sup> Indeed, if the Court finds this is the appropriate course of action it should provide ICE with a short window to provide such an affidavit to avoid any prejudice ICE would suffer as a result of Plaintiffs not raising this issue earlier in the litigation, despite numerous opportunities to do so.