UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 1:22-cv-01653-SCJ-JKL**
	)	
TIMOTHY WARD, in his official capacity as COMMISSIONER OF THE GEORGIA DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	

COMMISSIONER WARD'S OBJECTIONS TO THE FINAL REPORT AND RECOMMENDATION

Pursuant to Federal Rule of Civil Procedure 72 and 28 U.S.C. § 636(b)(1), Respondent Timothy Ward ("Commissioner Ward"), in his official capacity as Commissioner of the Georgia Department of Corrections ("GDC"),[1] hereby submits these Objections to the Final Report and Recommendation (doc. 34). In support of his objections, Commissioner Ward states as follows:

INTRODUCTION AND BACKGROUND

As the Report and Recommendation described, this matter involves the United States Department of Justice's ("DOJ") attempt to enforce an administrative

[1] As with GDC's previous filings, these Objections will refer to GDC as the party responsible for responding to the Subpoena.

subpoena (Doc. Nos. 1-4, 1-5; the "Subpoena") it served on GDC pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. §§ 1997 *et seq*., as part of its investigation into the conditions of confinement within GDC's close- and medium-security level facilities (the "Investigation"). (DOJ's Petition to Enforce Subpoena ("Petition"), Doc. No. 1, at 1; see also Doc. No. 1-7 at 1, the "Notice Letter"). DOJ first initiated a limited investigation into the conditions of confinement within GDC's facilities in 2016 (the "2016 Investigation"), informing GDC that it would investigate "whether Georgia adequately protects transgender and gay prisoners in its custody from sexual abuse, sexual harassment and assault by other prisoners and staff." (Doc. No. 1-6 at 1).

DOJ opened the current Investigation on September 14, 2021. (Doc. No. 1-7 at 1). According to the Notice Letter, the current Investigation involves both a "continuation" of the 2016 Investigation (which laid dormant for years), and a new investigation into "whether GDC is engaging in a pattern or practice of violating the constitutional rights of convicted prisoners housed at GDC's close- and medium-security level facilities, by failing to protect them from harm due to violence by other prisoners." (Id.). As GDC explained in its Response to DOJ's Petition to Enforce (Doc. No. 14, "Response"), DOJ's stated intention to "continue" the 2016 Investigation surprised GDC, because DOJ apparently closed or abandoned the 2016

Investigation in 2016. (Ammons Decl. (Ex. 2 to Response), ¶ 9; Atchison Decl. (Ex. 3 to Response), ¶ 3).

DOJ issued its first document requests of the current Investigation on September 24, 2021. (Doc. No. 1-8 at 1). As GDC explained in its Response (Doc. No. 14) and in its Reply in support of its Motion for Protective Order (Doc. No. 18) with supporting evidence (which DOJ never challenged), DOJ's document requests seek highly sensitive information regarding GDC's security practices and operations (Ammons Decl. (Ex. 2 to Response), ¶ 12) and highly sensitive personal information about the offenders in GDC's custody (Atchison Decl. (Ex. 3 to Response), ¶ 5) and about GDC's employees (Hogan Decl. (Ex. 4 to Response), ¶ 9). In light of DOJ's expressed desire to "cooperate" with GDC during the investigation, see, e.g., (Doc. No. 1-7 at 2; Doc. No. 1-21 at 2 (public statement of Assistant Attorney General Kristen Clarke)), GDC requested that DOJ enter into an NDA governing GDC's highly sensitive information. (Rogers Decl. (Ex. 9 to Response), ¶ 11).

GDC never anticipated that its request for an NDA would take DOJ by surprise: DOJ entered an NDA during a CRIPA investigation in Alabama (the "Alabama Investigation") and never expressed any concerns regarding the NDA during the Alabama Investigation. (Rogers Decl. (Ex. 9 to Response), ¶ 12). Although GDC attempted to accommodate some of DOJ's concerns regarding the NDA by accepting some of DOJ's proposed terms (Id., ¶ 22, 23), DOJ unexpectedly

shifted to an adversarial approach while the parties continued to negotiate regarding the NDA and served the Subpoena on GDC on December 14, 2021. (Id., ¶¶ 24, 25; Doc. No. 1-23).

DOJ filed its Petition in this Court on March 28, 2022 (Doc. No. 1), and GDC filed its Response (Doc. No. 14) and an Alternative Motion for a Protective Order (Doc. No. 15) on April 26, 2022. The Court then ordered supplemental briefing regarding whether the Court possesses the authority to enforce the Subpoena to the extent it demands documents relating to GDC facilities located outside of the Northern District of Georgia. (Doc. No. 21). GDC filed its Supplemental Brief (Doc. No. 30) on June 7, 2022; the Magistrate Judge held a hearing on DOJ's Petition on June 10, 2022; the Magistrate Judge entered the Report and Recommendation on June 29, 2022; and the parties received service of the Report and Recommendation on June 30, 2022. (Doc. No. 34).

The Report and Recommendation concluded that the Court possesses jurisdiction to enforce the Subpoena in its entirety and granted DOJ's Petition as to all the Subpoena's document requests.[2] (Doc. No. 34 at 6–15; 22–29). The Report and Recommendation also recommended that the Court deny GDC's Alternative Motion for a Protective Order and concluded that CRIPA itself provides adequate

[2] At the June 10 hearing, DOJ abandoned Request No. 26, which sought documents related to the COVID-19 vaccination status of GDC's staff and the offenders in its custody. (Doc. No. 34 at 21).

safeguards for GDC's sensitive information and that GDC "offered no reason or evidence that would lead the [Magistrate Judge] to believe DOJ intends to disclose the information in a manner that risks the security of GDC facilities, employees, or inmates." (Id. at 32).

This Court should reject the Report and Recommendation. Specifically, GDC objects to the Report and Recommendation on the following grounds:

(1) The Report and Recommendation erred in concluding that this Court possesses jurisdiction to enforce the Subpoena to the extent it demands documents relating to GDC facilities located outside of the Northern District of Georgia, because 42 U.S.C. § 1997a-1(b)(2) governs subject-matter jurisdiction, not merely venue;

(2) The Report and Recommendation erred in recommending that the Court enforce the Subpoena in its entirety, because the Subpoena demands irrelevant documents, the production of which would place an undue burden on GDC; and

(3) The Report and Recommendation erred in recommending that the Court deny GDC's Alternative Motion for a Protective Order, because CRIPA alone does not provide sufficient protection for GDC's sensitive information.

Accordingly, this Court should (1) only enforce the Subpoena, if at all, to the extent it demands documents relating to GDC facilities located in the Northern District of Georgia; (2) refuse to enforce the Subpoena to the extent it calls for documents irrelevant to the Investigation and its demands would place an undue burden on

GDC; and (3) grant GDC's Alternative Motion for a Protective Order and enter the proposed protective order attached as **Exhibit 1 to GDC's Response** (Doc. No. 14-1).

LEGAL STANDARD

The Order for Service of Report and Recommendation states that "each party may file written objections … to the Report and Recommendation" pursuant to 28 U.S.C. § 636(b)(1). Under 28 U.S.C. § 636(b)(1), "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." See also Tauber v. Barnhart, 438 F. Supp. 2d 1366, 1373 (N.D. Ga. 2006) (holding that "when a party makes a timely and specific objection to a portion of the Report and Recommendation, the district court is obliged to engage in a *de novo* review of the issues raised in the objection") (citing 28 U.S.C. § 636(b)(1)).

ARGUMENT

I. THE REPORT AND RECOMMENDATION ERRED IN CONCLUDING THAT THIS COURT POSSESSES JURISDICTION TO ENFORCE THE SUBPOENA TO THE EXTENT IT DEMANDS FOREIGN DISTRICT DOCUMENTS.

CRIPA empowers DOJ to "require by subpoena access to … any document … **relating to any institution** that is the subject of an investigation" under CRIPA. 42 U.S.C. § 1997a-1(a) (emphasis added). CRIPA separately defines "institution" as "any facility or institution … which is owned, operated, or managed by, or

provides services on behalf of any State," and is a "jail, prison, or other correctional facility." 42 U.S.C. § 1997(1)(A)–(B)(ii). As GDC explained in its Supplemental Brief (Doc. No. 30), the Subpoena demands three categories of documents: (1) documents that "relate" uniformly to all GDC facilities, including, for example, GDC's systemwide policies governing offender classification (the "Systemwide Documents");[3] (2) documents that GDC maintains in a central location, but that "relate" only to specific facilities, including, for example, lists of staff and offenders broken down by facility and facility incident reports (the "Facility-Specific Documents");[4] and (3) documents that "relate" only to Macon State Prison (the "Macon Documents").[5] CRIPA empowers this Court to enforce the Subpoena only to the extent the Subpoena demands Systemwide Documents and Facility-Specific Documents relating to GDC facilities located within the Northern District of Georgia. In other words, this Court lacks the authority under CRIPA to enforce the Subpoena to the extent the Subpoena demands Macon Documents and Facility-Specific Documents relating to facilities located outside of the Northern District of Georgia (collectively, the "Foreign District Documents").

[3] The following requests in Exhibit A to the Subpoena seek Systemwide Documents: 1, 2, 3, 4, 5, 7, 10, 11, 19, 22, and 27. (Ex. A to Subpoena, Doc. No. 1-5, at 3–7).

[4] The following requests seek Facility-Specific Documents: 6, 8, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 23, 24, 25, and 26. (Id.).

[5] Requests 28–44 seek Macon Documents. (Id.).

In concluding otherwise, the Report and Recommendation departed from CRIPA's plain text and relied on weakened precedent. In short, CRIPA's subpoena enforcement provision, 42 U.S.C. § 1997a-1(b)(2), governs jurisdiction, not merely venue, as the Report and Recommendation erroneously concluded. Moreover, § 1997a-1(b)(2) expressly limits the Court's jurisdiction to enforce the Subpoena **only** to the extent the Subpoena demands documents relating to GDC facilities located within the Northern District of Georgia.

A. CRIPA'S PLAIN TEXT CONTEMPLATES SUBPOENA ENFORCEMENT ON A FACILITY-BY-FACILITY BASIS.

"[I]n every statutory-interpretation case, [the court] must start with the text—and, if [the court] find[s] it clear, [the court must] end there as well." Heyman v. Cooper, 31 F.4th 1315, 1318 (11th Cir. 2022) (quoting Young v. Grand Canyon Univ., Inc., 980 F.3d 814, 818 (11th Cir. 2020)). Here, CRIPA's plain text demands the conclusion that this Court lacks jurisdiction to enforce the Subpoena to the extent the Subpoena demands Foreign District Documents.

CRIPA's Subpoena enforcement provision, 42 U.S.C. § 1997a-1(b)(2), provides that "***the*** United States district court for ***the*** judicial district in which ***the*** **institution** ["that is the subject of" a CRIPA investigation, id. at § 1997a-1(a)] **is located** may issue an order requiring compliance" with a CRIPA subpoena. Id. at § 1997a-1(b)(2) (emphasis added). By using the terms "**the** United States district court

(as opposed to "**a** United States district court); "**the** institution" (as opposed to "**an** institution"); and "**the** judicial district" (as opposed to "**a** judicial district"), CRIPA's plain language establishes a facility-by-facility approach to subpoena enforcement in each judicial district in which a facility targeted by a CRIPA investigation operates. This same language also necessarily contains a negative command: a United States district court for a judicial district other than the district in which the institution is located **may not** issue an order requiring compliance with a CRIPA subpoena. Id. at § 1997a-1(b)(2). In concluding that this Court may enforce the Subpoena in its entirety—even though the Subpoena demands documents relating to facilities located outside of the Northern District of Georgia—the Report and Recommendation rewrote CRIPA to provide that "**a** United States district court for **a** judicial district in which **an** institution is located may issue an order requiring compliance" with a CRIPA Subpoena. See id. Because § 1997a-1(b)(2) provides a jurisdictional requirement rather than merely regulating venue, this conclusion constituted error.

B. SECTION 1997a-1(b)(2) GOVERNS JURISDICTION.

To justify departing from CRIPA's plain text, the Report and Recommendation reasoned that 28 U.S.C. §§ 1331 and 1345 provide the basis for the Court's subject-matter jurisdiction and that "CRIPA's enforcement provision [42 U.S.C. § 1997a-1(b)(2)] speaks to venue, not subject matter jurisdiction." (Doc. No.

34 at 8, 13). The precedent upon which the Report and Recommendation relied cannot support this conclusion.

First, the Report and Recommendation cited United States v. Hill, 694 F.2d 258, 268 (D.C. Cir. 1982), for the proposition that 28 U.S.C. §§ 1331 and 1345 provide the basis of the Court's subject-matter jurisdiction, while CRIPA merely governs venue. (Doc. 34 at 9). In Hill, the D.C. Circuit ruled that § 1345 "provides jurisdiction for judicial enforcement of [Department of Energy] subpoenas." But over twenty years later, the D.C. Circuit clarified Hill's conclusion in U.S. Int'l Trade Comm'n v. ASAT, Inc., 411 F.3d 245, 248 (D.C. Cir. 2005). In ASAT, the U.S. International Trade Commission petitioned the Court to enforce an administrative subpoena that the Commission issued under the Tariff Act. Id. at 246. The Tariff Act contains a subpoena enforcement provision identical to CRIPA's in all relevant respects. Compare 19 U.S.C. § 1333(b) (Tariff Act's subpoena enforcement provision, which provides that "such court within the jurisdiction of which such inquiry is carried on may … issue an order requiring" compliance with a subpoena) with 42 U.S.C. § 1997a-1(b)(2). Critically, the Court in ASAT ruled that, although "[t]he question whether the district court has subject matter jurisdiction over an action is generally distinct from the question whether it was a proper venue in which the action could be filed[,]" "in the context of section 333(b) of the Tariff Act, **the two inquiries merge.**" Id. at 248 (emphasis added). Because

CRIPA's subpoena enforcement provision contains language nearly identical to the subpoena enforcement provision in the Tariff Act, CRIPA's subpoena enforcement provision governs subject-matter jurisdiction, not merely venue.

Indeed, the Court in ASAT clarified as mere dictum the very language upon which the Report and Recommendation rested its conclusion. 411 F.3d at 248. Specifically, the Court noted that "[t]he court suggested, in dictum, in [Hill], where there was no enforcement provision in the agency statute at issue, that the general jurisdictional grants in 28 U.S.C. §§ 1331 [and] 1345 provide the district court with subject matter jurisdiction over actions to enforce administrative subpoenas." Id. (citing Hill, 694 F.2d at 267). But where the agency statute at issue **explicitly contains** an enforcement provision, like the Tariff Act, the D.C. Circuit expressly rejected 28 U.S.C. §§ 1331 and 1345 as providing the basis for its subject-matter jurisdiction. Id. Because CRIPA, like the Tariff Act, contains an enforcement provision, *CRIPA*—not the general jurisdictional statutes—provides the basis for the Court's subject-matter jurisdiction, and the Court must follow CRIPA's plain text.

In concluding that the venue and subject-matter jurisdiction analyses merged for purposes of the Tariff Act's subpoena enforcement provision, the D.C. Circuit relied on cases applying the same analysis to similar statutes. ASAT, 411 F.3d at 248 (citing Fed. Election Comm'n v. Comm. to Elect Lyndon La Rouche, 613 F.2d 849, 853 (D.C. Cir. 1979), and F.T.C. v. Browning, 435 F.2d 96, 99 (D.C. Cir.

1970)). In Browning, the Court interpreted the Federal Trade Commission Act's subpoena enforcement provision, which similarly provides that "[a]ny of the district courts of the United States within the jurisdiction of which such inquiry is carried on may … issue an order requiring" compliance with a subpoena. 435 F.2d at 98–99 (quoting 15 U.S.C. § 49). The Court decisively concluded that "[t]his language must be interpreted as a **special grant of jurisdiction**, not merely venue to that court … sitting in the district … where the inquiry is being conducted." Id. (emphasis added). And In La Rouche, the D.C. Circuit followed Browning and ruled that the Federal Election Commission's subpoena enforcement provision—which provides that "any United States district court 'within the jurisdiction of which any inquiry is carried on'" may order compliance with an FEC subpoena—governed the court's exercise of subject-matter jurisdiction. 613 F.2d at 853, 858 (quoting 52 U.S.C. § 30107(b)). Similarly here, CRIPA's subpoena enforcement provision constitutes a special grant of jurisdiction, and this Court must follow its plain text.

In its Supplemental Brief, GDC cited N.L.R.B. v. Cooper Tire & Rubber Co., 438 F.3d 1198, 1200 (D.C. Cir. 2006), which held that the National Labor Relations Act's subpoena enforcement language (29 U.S.C. § 161(2), also similar to CRIPA's) governed subject-matter jurisdiction. (Doc. 30 at 7–8). The Report and Recommendation rejected Cooper Tire because it "did not address the interplay between § 1345 and the relevant provisions of the NLRA." (Doc. 34 at 12 n.4). But,

the D.C. Circuit's prior case law explains why Cooper Tire did not address § 1345: the statutory provisions providing for judicial enforcement of administrative subpoenas, and not § 1345, govern an enforcing court's exercise of subject-matter jurisdiction. See 438 F.3d at 1201 (citing Browning, La Rouche, and ASAT). Likewise, the absence of the word "jurisdiction" from CRIPA's subpoena enforcement provision is of no moment; the subpoena enforcement provisions at issue in Browning (15 U.S.C. § 49), La Rouche (52 U.S.C. § 30107(b)), and ASAT (19 U.S.C. § 1333(b)) also lack the word "jurisdiction," and the Court in Cooper Tire relied on all of those cases to support its conclusion. Finally, U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 868 (2d Cir. 1997), upon which the Report and Recommendation relied (doc. no. 34 at 11), interpreted a statutory provision governing civil actions under the False Claims Act, not the enforcement of administrative subpoenas. Id. at 864 (quoting 31 U.S.C. § 3732(a)). For all these reasons, CRIPA's subpoena enforcement provision governs subject-matter jurisdiction, not merely venue; the Report and Recommendation erred in concluding otherwise.

Finally, other Courts of Appeal join the D.C. Circuit in holding that statutory provisions allowing the judicial enforcement of administrative subpoenas govern subject-matter jurisdiction. In N.L.R.B. v. Line, 50 F.3d 311, 314 (5th Cir. 1995), the Fifth Circuit held, like the D.C. Circuit in Cooper Tire, that the NLRA's

subpoena enforcement provision, 29 U.S.C. § 161(2), governed subject-matter jurisdiction. In fact, the Court pointed out that "[e]very court that has addressed the subpoena enforcement provision for other federal agencies with statues worded similarly to [the NLRA] has concluded that **venue and jurisdiction are synonymous for these statutes.**" Id. (emphasis added) (citing FTC v. Cockrell, 431 F. Supp. 558, 560 (D.D.C. 1977) (following Browning, *supra*)). Because CRIPA's subpoena enforcement language governs jurisdiction, not merely venue, this Court possesses jurisdiction to enforce the Subpoena **only** to the extent it demands Systemwide Documents and Facility-Specific Documents relating to facilities located in the Northern District of Georgia.

II. THE REPORT AND RECOMMENDATION ERRED IN RECOMMENDING THAT THIS COURT ENFORCE THE SUBPOENA IN ITS ENTIRETY.

The Report and Recommendation rejected GDC's arguments that the Subpoena requests irrelevant documents and that the production of these irrelevant documents will place an undue burden on GDC. (Doc. No. 14 at 35–41). The Report and Recommendation grounded this conclusion in the unfeasible solution that GDC "simply [provide] DOJ with access to the records." (Doc. No. 34 at 26). GDC, however, cannot "simply" provide DOJ access to the "records." The suggestion in the Report and Recommendation demonstrates a fundamental misunderstanding about the nature of physical and electronic "records" sought by DOJ—they are not confined to a filing cabinet in a facility, and they are not accessible by a single

computer (as GDC painstakingly explained through numerous declarants). See, e.g., (Ivester Decl. (Ex. 7 to Response), ¶ 10); (Hogan Decl. (Ex. 4 to Response), ¶¶ 6–7) (Ammons Decl. (Ex. 2 to Response), ¶¶ 28–30). Because this inexplicable "solution" will not alleviate the burden on GDC of producing irrelevant records, the Report and Recommendation erred in recommending that the Court enforce all the Subpoena's requests.

In the Eleventh Circuit, an agency seeking the enforcement of an administrative subpoena must show that "the evidence sought is material and relevant to a lawful purpose of the agency." United States v. Fla. Azalea Specialists, 19 F.3d 620, 623 (11th Cir. 1994) (quoting EEOC v. Kloster Cruise Ltd., 939 F.2d 920, 922 (11th Cir. 1991)). In other words, "an administrative subpoena should be enforced if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." Id. (quoting Fed. Elec. Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281, 1284 (11th Cir. 1982)).[6] But the Court must take care not to apply a standard so broad "that the relevancy requirement is rendered a nullity." E.E.O.C. v. Royal Caribbean Cruises, Ltd., 771 F.3d 757, 760 (11th Cir. 2014) (quoting EEOC v. Shell Oil Co., 466 U.S.

[6] Because DOJ agreed not to demand re-production of documents already in its possession (Doc. No. 34 at 20 n.7), GDC does not object to the standard applied in the Report and Recommendation.

54, 68–69 (1984)). In conducting its analysis, "[a] district court also may weigh such equitable criteria as reasonableness and oppressiveness in issuing a subpoena for documents." Id. (quoting EEOC v. Packard Elec. Div., Gen. Motors Corp., 569 F.2d 315, 318 (5th Cir.1978)). The Report and Recommendation failed to properly apply these standards in recommending that the Court enforce the Subpoena in its entirety.

As GDC pointed out in its Response, the Subpoena demands a large volume of entirely irrelevant documents. First, the Subpoena demands documents relating to "all" GDC facilities, regardless of security level.[7] (Doc. No. 14 at 36–37). The documents relating to "all" GDC facilities bear at best a dubious relation to the Investigation, because DOJ limited the current investigation by its terms to GDC's close- and medium-security facilities. (Notice Letter, Doc. No. 1-7 at 1). The Report and Recommendation recommended that the Court enforce these Requests because "the scope of [the 2016 Investigation] is not limited to close and medium security facilities," and because "[t]he measure of relevance used in subpoena enforcement actions is quite broad." (Doc. No. 34 at 23–24) (quoting Fla. Azalea, 19 F.3d at 624). But as GDC pointed out in its Response, the 2016 Investigation involved a narrow category of offenders, a limited number of facilities, and narrow categories of documentation. (Ammons Decl. (Ex. 2 to Response), ¶ 21). Likewise, DOJ let

[7] See Subpoena, Doc. No. 1-5, at ¶¶ 8, 9, 16, 17, 18.

the 2016 Investigation lie dormant for so long that DOJ's "continuation" of the 2016 Investigation caught GDC by surprise. (Ammons Decl. (Ex. 2 to Response), ¶ 9; Atchison Decl. (Ex. 3 to Response), ¶ 3). As further explained below, the burden on GDC of producing these dubiously relevant documents outweighs any benefit DOJ could obtain from the documents.

Similarly, the Report and Recommendation recommended that the Court enforce the Subpoena's requests for ***all*** posters, notices, handouts, or brochures provided to offenders, regardless of their nature or content. (Doc. No. 34 at 27–28; Subpoena, Doc. No. 1-5, at ¶ 4). The vast majority of documents provided to offenders relate to day-to-day activities, and not to the topics of the Investigation. DOJ failed to identify any possible relevance of documents regarding meals, offender account purchases, or other routine daily activities. Finally, and most egregiously, the Report and Recommendation recommended that the Court order GDC to produce a list of all "security, medical, mental health, or supervisory Staff who have left employment with GDC in the past year" (Subpoena, Doc. No. 1-5, at ¶ 9), as well as all systemwide reports from SCRIBE, GDC's electronic record-keeping database, from September 1, 2019 to the present (Subpoena, Doc. No. 1-5, at ¶ 10). As GDC pointed out in its Response, the vast majority of its employee terminations bear no possible relation to the Investigation (Doc. No. 14 at 40); nor do the vast majority of the reports in SCRIBE, which deal with such unremarkable

matters as offenders' meals and dietary restrictions, commissary purchases, and medical, mental-health, and dental care. (Ivester Decl. (Ex. 7 to Response), ¶ 10). In ordering GDC to produce these documents, the Report and Recommendation noted "the broad contours of relevance at play" and noted that "GDC's concerns as to the burden of sifting through and compiling SCRIBE records are alleviated if DOJ is permitted to simply have access to the information." (Doc. No. 34 at 26). But this "solution" constitutes no such thing, and fails to alleviate the burden on GDC of producing documents responsive to these requests in light of their utter lack of relevance to the Investigation.

Specifically, the Deputy Director of GDC's Office of Information Technology reasonably estimates that GDC would require approximately 2,000 hours just to retrieve, download, and produce the SCRIBE reports requested by DOJ. (Ivester Decl. (Ex. 7 to Response), ¶ 10). Similarly, GDC would spend between 200 and 1,000 hours searching for the largely-irrelevant information regarding employment terminations. (Hogan Decl. (Ex. 4 to Response), ¶ 7). In light of this overwhelming burden, the Report and Recommendation's conclusion that the Court enforce these requests renders the relevancy requirement attendant to the enforcement of administrative subpoenas "a nullity." Royal Caribbean Cruises, Ltd., 771 F.3d at 760. And the Report and Recommendation's "solution," that GDC simply grant DOJ access to the records, fails to alleviate the burden on GDC. Obviously, GDC

would need to dedicate personnel to oversee DOJ's retrieval of the records, taking those GDC employees away from their taxpayer-funded work. In practice, GDC's simply "granting access" to the records to DOJ would likely consist of GDC personnel spending **the same** thousands of hours retrieving the records, while DOJ personnel look on. Further, simply granting DOJ access to these records in the absence of meaningful confidentiality protections will also present its own security risks. The Report and Recommendation's "solution" will prove unworkable, and provides no justification for enforcing the Subpoena in its entirety. Simply put, DOJ provided no basis for receiving access to this vast universe of irrelevant documents.

Considering the irrelevance of many the documents requested, coupled with the overwhelming burden the production of those documents will place on GDC, the Report and Recommendation failed to properly "weigh such equitable criteria as reasonableness and oppressiveness in issuing a subpoena for documents." Id.; see also id. at 762 (holding that the enforcement of an administrative subpoena would be unduly burdensome, "[e]ven if the information sought ha[d] some tenuous relevance" to the subject of the subpoena). The Court should refuse to enforce, or should substantially narrow, Subpoena Request numbers 4, 8, 9, 10, 16, 17, and 18, and the Report and Recommendation erred in recommending otherwise.

III. THE REPORT AND RECOMMENDATION ERRED IN RECOMMENDING THAT THE COURT DENY GDC'S MOTION FOR A PROTECTIVE ORDER.

Finally, the Report and Recommendation erred in recommending denial of GDC's Alternative Motion for a Protective Order. (Doc. No. 34 at 29–39). According to the Report and Recommendation, CRIPA provides sufficient safeguards for GDC's sensitive security information (id. at 32); GDC expresses merely "hypothetical" security concerns (id.); GDC's cited case law is distinguishable (id. at 32–34); and neither GDC nor the Court should presume that an unauthorized disclosure of information will occur. (Id. at 35). None of these grounds supports the denial of GDC's Motion for a Protective Order.

As the Report and Recommendation correctly pointed out, "[d]istrict courts have discretion to enter a protective order in conjunction with enforcing an administrative subpoena." Nat'l Lab. Rel. Bd. v. Lear Corp. EEDS and Interiors, Case No. 16-00061-WS-N, 2016 WL 11397056, at *5 (S.D. Ala. May 10, 2016). The party seeking a protective order must demonstrate good cause to justify the court's entry of the order. E.g., In re: Chiquita Brands Int'l, Inc., 965 F.3d 1238, 1249 (11th Cir. 2020) (citing Fed. R. Civ. P. 26(c), which "allows a court to enter a protective order upon a finding of good cause"). In determining whether good cause for a protective order exists, courts consider "[1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order[.]" Id. at

1251 (quoting In re Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987) (per curiam)). As GDC demonstrated in its Response and throughout this proceeding, the severity and the likelihood of the harm that it faces should a disclosure take place weigh heavily in favor of the entry of a protective order, as does the (un)availability of a less onerous alternative.

The Subpoena seeks highly sensitive information, including "facility diagrams, staffing patterns, post orders, policies, and training materials containing information regarding GDC's security procedures and operations." (Ammons Decl. (Ex. 2 to Response), ¶ 12). Likewise, the Subpoena seeks virtually all conceivable information related to GDC's security policies and practices, including policies and procedures relating to "offender transportation, lockdown procedures, contraband searches, procedures for responding to emergencies," and procedures for "responding to incidents of violence and gang-related incidents," as well as information regarding "special operations, including CERT Teams and Tactical Squads[.]" (Holt Decl. (Ex. 5), ¶ 6). Should DOJ even ***inadvertently*** disclose any of these materials during the course of the Investigation, "offenders or members of the public could use the information to bypass or overcome GDC's security procedures." (Ammons Decl. (Ex. 2 to Response), ¶ 12). Finally, the Subpoena also requests sensitive information regarding offenders in GDC's custody (Atchison Decl. (Ex. 3 to Response), ¶ 5) and GDC staff (Hogan Decl. (Ex. 4 to Response), ¶

9). The Report and Recommendation's conclusion that this Court deny GDC's Motion for a Protective Order ignores the undisputed evidence presented by GDC and fails to consider the grave danger attendant to producing this information to DOJ in the absence of a protective order.

First, the Report and Recommendation concluded that CRIPA provides sufficient safeguards for GDC's confidential information. In reaching this conclusion, the Report and Recommendation relied on 42 U.S.C. § 1997a-1(c)(1)–(2), which prohibits DOJ from using the information it obtains in its Investigation for any purpose other than to protect the rights of offenders in GDC custody. (Doc. No. 34 at 32). But as GDC pointed out in both its Response and in its Reply (Doc. No. 18), DOJ could reveal sensitive security information to offenders during offender interviews while still acting in compliance with CRIPA's requirement that DOJ only use the information to protect the rights of the offenders in GDC custody. (Doc. No. 18 at 9–10). Similarly, and most concerningly, the Report and Recommendation failed to address GDC's concerns regarding DOJ's stated intention to issue a **public** findings letter. (Doc. No. 34 at 29–39) (neglecting to mention DOJ's intention to issue a public findings letter). Indeed, CRIPA requires DOJ to issue a findings letter, 42 U.S.C. § 1997b. While GDC recognizes that DOJ may not intentionally release information that would pose a security risk in a public findings letter, the point remains that DOJ could release sensitive security

information or other sensitive information in a statutorily-authorized findings letter without violating CIRPA's confidentiality requirements. In such a circumstance, no remedy would exist for GDC.

The same rationale applies to the Report and Recommendation's observation that neither the Court nor GDC should presume that DOJ will release GDC's sensitive information, even inadvertently. (Doc. No. 34 at 35) (quoting U.S. Dep't of Educ. v. Nat'l Collegiate Athletic Ass'n, No. 106CV-01333-JDT-TAB, 2006 WL 3198822, at *8 (S.D. Ind. Sept. 8, 2006)) (holding that "administrative agencies are entitled to the presumption "that they will act properly and according to law") (quoting FCC v. Schreiber, 381 U.S. 279, 296 (1965)). Again, DOJ could act "properly and according to law" and still release GDC's sensitive information in an offender interview or a public findings letter, for example, because the use of the information in both offender interviews and in a public findings letter would arguably constitute a use of the information to protect the rights of offenders in GDC custody. 42 U.S.C. § 1997a-1(c)(1)–(2). Indeed, DOJ itself implicitly acknowledged the insufficiency of CRIPA's confidentiality provisions by entering an NDA in the Alabama Investigation. (Rogers Decl. (Ex. 9 to Response), ¶ 12). The Court should estop DOJ from arguing that CRIPA contains sufficient protections for GDC's sensitive information.

Next, in concluding that GDC "has offered no reason or evidence that would lead the [Magistrate Judge] to believe DOJ intends to disclose the information in a manner that" presents security or safety risks; and in reasoning that "the examples [of harmful disclosures] it gives are hypothetical," the Report and Recommendation failed to acknowledge the concrete examples of past security leaks that GDC provided in its briefing. (Doc. No. 34 at 32). First, GDC never argued that "DOJ intends to disclose the information in a manner that" presents security or safety risks; GDC centered its concerns on *inadvertent* disclosures of sensitive information. And GDC provided numerous examples of past instances in which third parties inadvertently compromised its security information. See, e.g., (Nix Decl. (Ex. 8 to Response), ¶ 12) (listing five (5) examples of when third parties have compromised GDC security information in the past, including situations in which offenders obtained the information from attorneys and from leaked discovery materials); (Atchison Decl. (Ex. 3 to Response), ¶ 11) (explaining prior inadvertent disclosure by DOJ-certified Prison Rape Elimination Act ("PREA") auditor, which required GDC to expend substantial resources to remove the leaked information from the public domain). This reasoning also defeats the purpose of protective orders, which courts enter *ex ante* to *prevent* the disclosure of sensitive information.

As GDC pointed out, courts routinely enter protective orders to protect information regarding prison and inmate security. See, e.g., In re Sec'y, Fla. Dept.

of Corr., No. 20-10650-J, 2020 WL 1933170, at *1 (11th Cir. Mar. 30, 2020); Avery v. Wellpath, LLC, No. 2:20-cv-00428-NT, 2021 WL 5500479, at *1 (D. Me. Nov. 21, 2021); Saleh v. Pfister, No. 18 C 1812, 2020 WL 6827984, at *1 (N.D. Ill. Nov. 20, 2020). Even the FBOP—which operates under DOJ—requests protective orders governing its sensitive information. E.g., Smith v. Shartle, No. CV-18-00323-TUC-RCC, 2020 WL 6781608, at *1 (D. Ariz. Nov. 18, 2020). The Report and Recommendation distinguished these cases on the grounds that those cases involved private, incarcerated litigants; and that, unlike information gathered pursuant to a CRIPA subpoena, no guardrails for the information would exist absent a protective order. (Doc. No. 34 at 32–34). But as explained above, even if DOJ acts wholly in compliance with CRIPA's confidentiality provisions, GDC's information will still become accessible to offenders through DOJ's offender interviews and through DOJ's public findings letter, a reality that undermines both of the Report and Recommendation's points of distinction. Accordingly, GDC requests that the Court reject the Report and Recommendation and enter the proposed protective order contained in **Exhibit 1 to GDC's Response** (Doc. No. 14-1).

CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court reject the Report and Recommendation.

Dated: July 14, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all attorneys of record in this matter by filing the same on the Court's CM/ECF system on this 14th day of July, 2022.

/s/ William R. Lunsford
Of Counsel