

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

RUTHELLE FRANK, et al., on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

SCOTT WALKER, in his official capacity as
Governor of the State of Wisconsin, et al.,

Defendants.

Civil Action No. 2:11-cv-01128 (LA)

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' CIVIL L.R. 7(h)
EXPEDITED NON-DISPOSITIVE MOTION TO COMPEL THE PRODUCTION OF
UN-REDACTED SURVEY DATA**

Defendants' motion seeks the disclosure of personal identifying information for 1,973 individuals who participated in a confidential survey analyzed by Plaintiffs' expert, Professor Matt Barreto. Disclosing this sensitive information would not only be a violation of professional codes of ethics for those routinely involved in survey research, it would be pointless. None of this identifying information was *even available* to Professor Barreto, and Defendants seek to use this confidential information to support an argument that is ultimately a red herring.

Professor Barreto's analysis and expert opinion shows that minorities are significantly more likely than whites to lack the limited types of photo identification that are required for voting under the voter ID law, as well as the documents necessary to obtain accepted photo ID. His analysis relied on a survey by a well-respected market research firm, Pacific Market Research, which conducted a randomized telephone survey of 1,973 individuals, who reported their race and whether they possessed the relevant forms of ID or documents. (*See* Dkt. # 62-10 at 1-5.) Importantly, Pacific Market Research provided Professor Barreto with the survey responses but *not* the respondents' identifying information, which were kept strictly confidential. (Decl. of Matthew A. Barreto ¶ 2.) The survey results showed that racial minorities were approximately 200% more likely than whites to lack ID. (*See* Dkt. #62-10 at 18.)

Defendants now demand that the identities of the 1,973 survey respondents be disclosed pursuant to Fed. R. Civ. P. 26(a)(2)(B)(ii). That Rule requires the disclosure of "facts or data considered by the [expert] in forming" his opinion, and its purpose is to provide the opposing party "documents that would be helpful to an understanding of [the] expert testimony." *Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005); *see also Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 840 F. Supp. 2d 1072, 1080 (N.D. Ill.

2012) (“considered” refers to information that an expert “actively reviews and contemplates”). As explained above, however, none of the names or the randomly-dialed telephone numbers of the 1,973 survey respondents were even *shown* to Professor Barreto, much less “actively reviewe[d]” or “contemplate[d]” by him. Rather, his focus was on the race and the document possession responses given by the survey respondents. (Barreto Decl. ¶ 2.) It is therefore difficult to fathom how mere names and telephone numbers, which Professor Barreto never saw, might be “helpful to an understanding” of his opinion.

More critically, disclosure would force Professor Barreto and Pacific Market Research to violate industry ethical norms (*see* Barreto Decl. ¶ 3), a serious problem that none of the cases cited by Defendants addresses. As the Federal Judicial Center’s (“FJC”) Reference Guide on Survey Research explains, “[b]ecause failure to extend confidentiality may bias both the willingness of potential respondents to participate in a survey and their responses, the professional standards for survey researchers generally prohibit disclosure of respondents’ identities.” (Decl. of Sean J. Young Ex. A at 417.) Indeed, the American Association of Public Opinion Researchers Code of Professional Ethics and Practices specifically provides that “the use of our research results in a legal proceeding does not relieve us of our ethical obligation to keep confidential all respondent-identifying information.” (Young Decl. Ex. B at I.A.6.) The FJC guide states that “[c]opies of all questionnaires should be made available upon request so that the opposing party has an opportunity to evaluate the raw data. *All identifying information, such as the respondent’s name, address, and telephone number, should be removed to ensure respondent confidentiality.*” (Young Decl. Ex. A at 418 (emphasis added).) Such questionnaires have been given to Defendants, and they are welcome to evaluate the survey’s methodology.

They are not, however, entitled to the respondents' identifying information. *See Applera Corp. v. MJ Research Inc.*, 389 F. Supp. 2d 344, 350 (D. Conn. 2005). None of the survey respondents agreed to have the state use their identifying information to troll through government files.

Even if there were circumstances that might justify breaching the confidentiality of 1,973 survey participants, Defendants have failed to demonstrate a compelling need to do so. *See Lampshire v. Procter & Gamble Co.*, 94 F.R.D. 58, 60 (N.D. Ga. 1982). Defendants want this identifying information so they can check which of the survey participants later obtained ID. But the mere fact that some of the respondents may have obtained an ID after the survey does not affect Professor Barreto's overall estimate of the *percentage* of whites and minorities without ID. Just as some people may have obtained an ID after the survey was conducted, others may have later lost ID or their IDs may have expired, and still others may later enter the voter-eligible population without ID—after all, people move into the state on a regular basis, and people turn 18 every day. (*See* Barreto Decl. ¶ 4.)

Furthermore, if Defendants are permitted to find out which survey respondents later obtained ID to make some separate point about the availability of IDs, Plaintiffs may then be required to explore how difficult it was for those individuals to obtain ID, whether minority survey respondents faced greater burdens than white survey respondents, and whether some respondents who had ID last year no longer have it. This destroys anonymity and potentially introduces a host of new witnesses for trial, when “one of the advantages of a survey is that it avoids a repetitious and unrepresentative parade of witnesses.” (Young Decl. Ex. A at 417.) The Court should not permit Defendants to open this door. Instead, Defendants' motion should be denied.

Dated this 25th day of September, 2013.

Respectfully submitted,

/s/ Sean J. Young

DALE E. HO

SEAN YOUNG

American Civil Liberties Union Foundation,
Inc.

125 Broad St.

New York, NY 10004

Phone: (212) 549-2693

Fax: (212) 549-2651

dale.ho@aclu.org

syoung@aclu.org

M. LAUGHLIN MCDONALD

American Civil Liberties Union Foundation,
Inc.

230 Peachtree Street, Suite 1440

Atlanta, GA 30303

Phone: (404) 523-2721

Fax: (404) 653-0331

lmcdonald@aclu.org

KARYN L. ROTKER

State Bar No. 1007719

LAURENCE J. DUPUIS

State Bar No. 1029261

American Civil Liberties Union of
Wisconsin Foundation

207 East Buffalo Street, Suite 325

Milwaukee, WI 53202

Phone: (414) 272-4032

Fax: (414) 272-0182 (fax)

krotker@aclu-wi.org

ldupuis@aclu-wi.org

JEREMY ROSEN

National Law Center on Homelessness &
Poverty

2000 M Street NW, Ste. 210

Washington, DC 20036

Phone: (202) 347-3124

Fax: (202) 628-2737

jrosen@nlchp.org

NEIL STEINER
DIANE PRINC
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036-6797
Phone: (212) 698-3822
Fax: (212) 698-3599
neil.steiner@dechert.com
diane.princ@dechert.com

CRAIG FALLS
Dechert LLP
1900 K St. NW
Washington, DC 20006
Phone: (202) 261-3373
Fax: (202) 261-3333
craig.falls@dechert.com

ANGELA LIU
Dechert LLP
77 West Wacker Drive
Suite 3200
Chicago, IL 60601
Phone: (312) 646-5816
Fax: (312) 646-5858
angela.liu@dechert.com

Attorneys for Plaintiffs.