

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

**ABU AGILA MOHAMMAD
MAS'UD KHEIR AL-MARIMI,**

Defendant.

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Case No. 22-cr-392 (DLF)

**GOVERNMENT'S REPLY IN SUPPORT OF SUPPLEMENT REGARDING FOREIGN
RECORDS AND MOTION TO RECONSIDER**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this reply in support of its supplement regarding foreign records and motion to reconsider, ECF 574. For the reasons that follow, the defense overreads the case law and the concerns of treatise authors. Where, as here, the government offers public records that contain no narrative of an investigation and were not based on law enforcement observations – in other words where they create records akin to the business records of a government agency – those records are admissible under either Rule 803(6) (and, by analogy, 18 U.S.C. § 3505 for foreign records) *or* under Rule 803(8). The two means of admission are not mutually exclusive in those circumstances. The government's motion should be granted.¹

ARGUMENT

The defendant's opposition overreads Second and Ninth Circuit precedent, while ignoring in-circuit precedent, regarding the applicability of the business records exception to records that meet that exception's terms but were produced by a governmental entity. Beginning with in-circuit

¹ The arguments in the government's motion should cover the Czech and Swiss visa records at issue in ECF 490, as well as the air-traffic control records at issue in the defendant's motion *in limine* regarding exhibits. *See* ECF 507 at 17, ECF 531-1 at 1-2; Ex. 229-c.

precedent, in *United States v. Cicero*, 22 F.3d 1156, 1163 (D.C. Cir. 1994), the D.C. Circuit upheld admission of records of the Pretrial Services Administration (PSA), introduced by the government against a criminal defendant, under Fed. R. Evid. 803(6). There, the D.C. Circuit found that because it was the regular practice of PSA to record phone numbers given by defendants, the government was permitted to introduce the phone numbers provided by two defendants to PSA under Rule 803(6). *Id.* In *United States v. Smith*, 521 F.2d 951, 963-64 (D.C. Cir. 1975), the D.C. Circuit held that portions of police reports are admissible as business records if they meet that exemption's definition and are made in the regular course of police work.² Accordingly, in this circuit, if a record created by a public entity meets the terms of the regularly-conducted-activity exception, it is admissible under that exception.

Although the government agrees with the defense that it does not appear that the D.C. Circuit has addressed this question with respect to 18 U.S.C. § 3505 specifically, the analysis is the same. Rule 803(6) exempts records if they were “kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit.” Rule 803(6)(B). Section 3505 applies to “records kept in the course of a regularly conducted business activity,” with the term “business” defined to include a “business, institution, association, profession, occupation, and *calling of every kind*, whether or not conducted for profit” (emphasis added). 18 U.S.C. § 3505(a)(1)(B) & (c)(3).³ If phone numbers taken by the domestic PSA qualify

² *Smith* limited its holding in criminal cases, as it pertains to police reports, to the use by a criminal defendant and specifically declined to allow the prosecution to use the records as business records. 521 F.2d at 965. The records at issue here, however, are not police reports but other (foreign) government records. As such, *Smith*'s rationale applies to the records at issue here regardless of which side seeks to introduce them. The government's reading of *Smith* in this regard is confirmed by *Cicero*, cited *supra*, which permitted the government to introduce records of the Pretrial Services Agency under the business records exception.

³ Indeed, the Congressional history indicates that breadth of § 3505 should be close to coterminous with that of Rule 803(6). “Subsection 3505(a)(1) ‘should be interpreted in the same

as records kept in the course of a regularly conducted activity of an organization, occupation, or calling, then records from a foreign analogue would certainly also qualify as records kept by an institution, association, profession, occupation, or calling of any kind, as would records of a visa office.

This is demonstrated by case law applying Section 3505 to non-business records. The government noted one such case in its opening brief, out of the Ninth Circuit, that applied to school records. *See United States v. Jawara*, 474 F.3d 565 (9th Cir. 2007). The government cited that case for the proposition that Section 3505 applies beyond the strict commercial context that the Court's ruling implied was controlling. At least one circuit has also confirmed that Section 3505 provides a path to admission for government records. *See United States v. Garland*, 991 F.2d 328, 333-35 (6th Cir. 1993) (finding that a Ghanaian court judgment could be admissible under 18 U.S.C. § 3505 or Rule 803(8)). *Cf. also United States v. Ross*, 33 F.3d 1507, 1515 & n.4 (5th Cir. 1994) (admitting, over Confrontation Clause challenge, "Aruban immigration records, Spanish and Italian hotel records, and Canadian passport applications, currency exchange records, car registration records, and phone tolls," under § 3505).⁴

The cases cited by the defendant, purportedly holding the opposite, are unavailing. The Second Circuit in *United States v. Pluta* was not asked to rule on the question presented here, *i.e.*, whether § 3505 can be used to admit government records. In that case, the defendant argued that physical passports could not be admitted, in part because the government had *not* offered either a

manner as the comparable language in Rule 803(6) is interpreted." H.R. Rep. No. 907, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3578, 3581.

⁴ The records admitted in *Ross* were clearly a mix of commercial business records and government records. The challenge on appeal was to whether their admission without a witness violated the Confrontation Clause, rather than whether governmental records could qualify for admission under § 3505. The government cites *Ross* simply for its example of a court admitting government records under § 3505.

§ 3505 certificate or a Rule 902(3) certificate. *See* 176 F.3d 43, 50 (2d Cir. 1999). The Second Circuit’s ultimate holding was that the passports were authenticated under Rule 901. *Id.* The government neither sought admission under § 3505 in that case, nor did the Second Circuit hold that it would have been inappropriate for it to do so. The question presented there was whether the passports at issue were authenticated in some other way, and they were, so any other treatment of that section by the Second Circuit was dicta.

The defense also cites to a Ninth Circuit case holding that government-created records must be admitted under Rule 803(8), rather than 803(6). *See* ECF 596 at 3, *citing United States v. Weiland*, 420 F.3d 1062, 1074 (9th Cir. 2005). The rule the defense would have the Court extrapolate from *Weiland*, however, does not even hold across the Ninth Circuit, which has in other cases upheld the admission of government records under Rule 803(6). *See United States v. Childs*, 5 F.3d 1328, 1332-33 (9th Cir. 1993) (upholding admission of records of the Department of Motor Vehicles of a Canadian province under Rule 803(6));⁵ *United States v. Fuchs*, 218 F.3d 957, 965 (9th Cir. 2000) (upholding admission of an audit report prepared by the United States Department of Agriculture – Office of the Inspector General under Rule 803(6)). *Weiland* and other similar cases in the Ninth Circuit generally cite back to *United States v. Orozco*, 590 F.2d 789, 793 (9th Cir. 1979). But *Orozco* gives the matter only cursory attention. The *Orozco* court noted, without further analysis, that “[w]hile governmental functions *could be included* within the broad definition of ‘business’ in rule 803(6), such a result is obviated by rule 803(8), which is the ‘business records’ exception for public records such as those in issue here” (emphasis added).

⁵ In this case, the records were created by a private club with authorization to use the DMV’s systems, but that does not affect the analysis. The Ninth Circuit held, “[f]or the purpose of issuing license plates, the private auto club and the DMV were essentially acting as one business entity.” *Childs*, 5 F.3d at 1333.

Whatever precedential value that statement may have in the Ninth Circuit, cases like *Childs* and *Fuchs* demonstrate that it does not universally bar admission of government-created records under Rule 803(6), even in the that circuit.

Other circuits are in accord. In addition to the D.C. and Ninth Circuit cases cited above, the government has located at least one case from every Circuit (other than the First) upholding the admission of records created by a governmental body under Rule 803(6). *See, e.g., United States v. Lynn*, 180 F. 4th 1208, 1215-16 (10th Cir. 2026) (admitting under Rule 803(6) a record of the Choctaw Nation of Oklahoma, which included reference to a Certificate of Degree of Indian Blood issued by the Bureau of Indian Affairs); *United States v. Lundstrom*, 880 F.3d 423, 441 (8th Cir. 2018) (admitting records of a federal agency under Rule 803(6) and specifically rejecting defendant's claim that the records must be admitted under Rule 803(8) because they were created by a government agency); *United States v. Smith*, 804 F.3d 724, 729 (5th Cir. 2015) (admitting city revenue ledger under Rule 803(6)); *United States v. McNeal*, 591 Fed. Appx. 760, 765 (11th Cir. 2014) (unpub.) (upholding admission of a police property receipt, which included a chain of custody log, under Rule 803(6)); *United States v. Medrano*, 356 Fed. Appx. 102, 108 (10th Cir. 2009) (unpub.) (upholding admission of ICE A-file contents under Rule 803(6)); *United States v. Farah*, 475 Fed. Appx. 1, 8-9 (4th Cir. 2007) (unpub.) (upholding admission of immigration records under Rule 803(6)); *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (upholding admission of autopsy records kept by the Office of the Chief Medical Examiner of New York under both Rules 803(6) and 803(8))⁶; *United States v. McDonald*, 66 Fed. Appx. 411, 413-14 (3d Cir. 2003) (unpub.) (upholding admission of certificate of mailing from the Treasury Department,

⁶ Notably, this decision was issued by the Second Circuit after *Pluta* – the case on which the defendant relies – which strengthens the government's contention that the *Pluta* court did not in fact decide that records issued by a governmental agency could not qualify as business records.

along with records from the Pacer system and records on Department of Treasury forms under both Rules 803(6) and 803(8)); *United States v. King*, 613 F.2d 670, 673 (7th Cir. 1980).

Nor does the evidence treatise cited by the defense, ECF 596 at 3, compel a different conclusion. As another treatise often cited by the defense has concluded, “[t]he records of virtually any entity can qualify” as records a regularly conducted activity under Rule 803(6). Wright & Miller, Fed. Prac. & Proc. § 6862. The Mueller & Kirkpatrick treatise cited by the defense – which, it should go without saying, is not even judicial authority, let alone binding judicial authority – cited in the defense’s reply is critical of the potential for the use of Rule 803(6) to skirt the use restrictions found in Rule 803(8), specifically the use of police investigative reports by the prosecution in criminal cases.⁷ See 4 Mueller & Kirkpatrick, Federal Evidence §§ 8:84 & 8:90 (4th ed.). In the case of public records of the type at issue here, which are not police investigative documents, Mueller & Kirkpatrick note that “many public records could satisfy the criteria of the business records exception, and would probably satisfy the criteria of the public records exception as well, and in such cases it matters very little that a court resorts to one rather than the other.” *Id.*, § 8:84. If the government were trying to admit witness statements taken by a foreign law-enforcement agency under § 3505, the defense might have a point (and those reports would likely

⁷ The law-enforcement carveout “is not quite as broad as its wording suggests.” *United States v. Fryberg*, 854 F.3d 1126, 1132 (9th Cir. 2017). The purpose of the carveout is “to exclude observations made by officials at the scene of the crime or apprehension, because observations made in an adversarial setting are less reliable than observations made by public officials in other situations.” *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980). See also *United States v. Enterline*, 894 F.2d 287, 290 (8th Cir. 1990) Consistent with that purpose, courts have ruled the law enforcement carveout inapplicable to “largely ministerial task[s]” that involve “objective” observations, as opposed to the type of “‘subjective observation [], summar[y], opinion[,] [or] conclusion[] of law enforcement personnel’ that Congress intended to exclude from the scope of the public records exception.” *Fryberg*, 854 F.3d at 1133.

not satisfy § 3505 in any event). But the government is not, and the defense pushes a distinction without a difference on the facts of the documents at issue here.⁸

The government's reading of the reliability of introducing government-created documents that meet the requirements of Rules 803(6) is supported by the Advisory Committee's Notes that explain why documents admitted under Rules 803(8)(A)(i) & (ii) are reliable by referring to the reliability factors underpinning Rule 803(6). *See* Fed. R. Evid. 803(6), Advisory Committee Notes for Exception 8 ("further support [for Rules 803(8)(A)(i) & (ii)] is found in the reliability factors underlying records of regularly conducted activities generally. *See* Exception [paragraph] (6), *supra*") (brackets in original).⁹ Each of the records at issue was supplied by the governmental office at issue to Scottish law enforcement in 1988-91. Each relates to records created either before or, in the case of the air traffic control records, during the attack on Pan Am Flight 103. None were created as part of a police investigation or with an eye towards litigation. They bear all the hallmarks of reliability and come with certificates that satisfy 18 U.S.C. § 3505. They are thus all admissible.

⁸ The defense quotes the treatise as stating, [T]he only conceivable reason to invoke the business records exception in preference to the public records exception . . . is a plainly improper reason, namely avoiding the use restrictions found in Rule 803(8)." ECF 596 at 3. But the cases the treatise cites are largely cases where the courts deciding the issue found that the records proffered by the government did not meet the requirements of Rule 803(8) *or* 803(6). *See Abascal v. Fleckenstein*, 820 F.3d 561, 565-67 (2d Cir. 2016) (record met neither exception); *United States v. Foreman*, 84 F. 4th 615, 619-20 (5th Cir. 2023) (same). The remaining federal cases are either from the Ninth Circuit, whose confused jurisprudence on this topic is covered *supra*, or a *contra* cite to an 8th Circuit case, also cited *supra*, which found documents created by a governmental agency admissible under Rule 803(6). *See* Mueller & Kirkpatrick § 8:84 n.3. Regardless, the defense makes no claim – nor could they – that the government is attempting to introduce the records at issue to avoid the use restrictions found in Rule 803(8), as the visa and air-traffic-control records that the government has sought to introduce under 18 U.S.C. § 3505 are self-evidently not law enforcement investigative reports.

⁹ Notably absent from that cross-reference is Rule 803(8)(A)(iii), which excepts from the rule against hearsay "A record or statement of a public official if sets out in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation."

CONCLUSION

For the above reasons, the Court should reconsider its ruling and apply 18 U.S.C. § 3505 to government-created documents if those documents otherwise satisfy § 3505's requirements.

Respectfully submitted,

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