

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ASHLEY HABER : **No. 03-CV-3376**
 :
 v. :
 :
 MICHAEL K. EVANS et al. :

MEMORANDUM OPINION AND ORDER

Rufe, J.

May 4, 2004

Before the Court is the Motion to Quash Subpoena of Pennsylvania Inspector General Donald L. Patterson pursuant to Fed. R. Civ. P. 45(c)(3). In the subpoena, Plaintiff Ashley Haber seeks any and all documents related to or relied upon in preparing the September 8, 2003 General Investigation Report on Sexual Harassment and Sexual Misconduct at the Pennsylvania State Police. For the following reasons, the Motion is granted, and the Subpoena is quashed.

FACTUAL BACKGROUND

On June 30, 2003, after the disclosure of detailed allegations of sexual harassment and sexual misconduct by Pennsylvania State Police (“PSP”) members, the Office of the Inspector General (“OIG”) of the Commonwealth of Pennsylvania initiated an investigation to establish the groundwork for making operational changes and improvements and to deter and prevent future sexual harassment and misconduct by the PSP.¹ The OIG reviewed Commonwealth executive orders and management directives, PSP Bureau of Professional

¹ Executive Order 1987-7 created the OIG to:
(a) To deter, detect, prevent, and eradicate fraud, waste, misconduct, and abuse in the programs, operations, and contracting of executive agencies; (b) To keep the heads of executive agencies and the Governor fully informed about problems and deficiencies relating to the administration of programs, operations, and contracting in executive agencies; (c) To provide leadership, coordination, and control over satellite Inspector General Offices in designated executive agencies to insure a coordinated and efficient administration of duties and use of staff. . . .
Executive Order, Patterson Mot. to Quash, Ex. C.

Responsibility (“BPR”) complaints of sexual harassment and sexual misconduct from 1995 to 2003, administrative regulations, and pleadings and discovery in Maslow v. Evans, No. 00-CV-3636, a consolidated Section 1983 action involving supervisory liability claims against various PSP officials as a result of the criminal misconduct of former PSP Trooper Michael Evans.² The OIG interviewed PSP personnel, a representative from the Governor’s Office, and subjects, complainants and witnesses in cases where the PSP investigated allegations of sexual harassment or misconduct.³ During the investigation, the OIG generated various reports, flow charts, and memoranda analyzing the information it gathered.⁴

On September 8, 2003, the OIG issued a report criticizing the PSP policies and acknowledging that there was a “voluminous record of unsavory behavior” by some PSP members.⁵ The OIG recommended creating a commission to investigate sexual misconduct in law enforcement as well as numerous policy changes, including but not limited to: (1) requiring all PSP members to report sexual misconduct directly to the BPR; (2) prohibiting supervisors from investigating allegations of direct subordinate misconduct; (3) requiring complete documentation of all BPR investigative interviews; (4) providing information on all prior misconduct cases (regardless of disposition) to new supervisors when members are transferred; and (5) providing improved training to background investigators.

On December 22, 2003, Plaintiff served a Subpoena upon Inspector General

² See Investigative Report on Sexual Harassment and Sexual Misconduct at the Pennsylvania State Police (“Report”) at 6-7 (Sept. 8, 2003).

³ Id. at 7.

⁴ Decl. of Donald L. Patterson at 4-5.

⁵ Report at 8.

Patterson, directing that he produce numerous documents relied upon to prepare the Report.⁶ Inspector General Patterson thereafter timely filed objections to the Subpoena, asserting that the entire investigative file is protected by various privileges, including: (1) the deliberative process privilege; (2) the self-critical analysis privilege; (3) the executive privilege; and (4) the law enforcement-investigative privilege. Inspector General Patterson seeks to protect the OIG's investigative materials, including its flow charts, work plans, methodologies, proposed questions and other analytical documents. Inspector General Patterson notes that the entire Report with findings and recommendations was made public and argues that the Court should not permit Plaintiff to review the mostly subjective evaluative materials and investigative documents. Inspector General Patterson further notes that Plaintiff can obtain all of the information contained in the subpoenaed documents through interviews or depositions of the various PSP employees and sexual harassment victims.

Plaintiff, who alleges in her Complaint that the PSP engaged in a widespread

⁶ The Subpoena demands production of:

Any and all interviews, reports, notes, summaries, etc. for all persons interviewed by the Inspector General's Office including but not limited to victims, complainants, PSP officers, administrators, citizens, etc. who were interviewed for the investigative report on sexual harassment and sexual misconduct within the Pennsylvania State Police dated September 8, 2003, as well as any and all documents provided to you by the Pennsylvania State Police relating to your investigation of sexual harassment and sexual misconduct within the Pennsylvania State Police as set forth in the 'Investigative Report on Sexual Harassments and Sexual Misconduct at the Pennsylvania State Police' dated September 8, 2003.

Any and all documents reviewed by, relied upon, referred to, referenced by, cited to, or otherwise, utilized by the Pennsylvania Office of Inspector General in connection with the preparation of the September 8, 2003 Pennsylvania Inspector General's Investigative Report on Sexual Harassment and Sexual Misconduct at the Pennsylvania State Police including but not limited to: interviews of all persons, documents obtained from, and provided by the Pennsylvania State Police, documents prepared by the office of Inspector General but not included in the official report.

Inspector General Patterson's Mot. to Quash, Ex. A.

pattern of tolerating sexual misconduct, counters that the investigative documents relied upon in preparing the report are not absolutely privileged and that she can overcome the qualified privileges asserted by Inspector General Patterson.⁷ Plaintiff asserts that discovery is particularly important in this case because it concerns the conduct of public officials. She submits that the OIG investigative file is clearly relevant, cites cases where courts have required the production of similar documents despite the assertion of identical privileges,⁸ and argues that without the file, it will be extremely difficult for her to prove that the PSP policymaking Defendants had knowledge of instances of sexual misconduct, leading to a practice of condoning said misconduct. Plaintiff asserts that Judge Stewart Dalzell rejected a similar privilege asserted by the defendants in Maslow.⁹ Finally, Plaintiff suggests that because the OIG investigation was conducted at the taxpayers' expense, all of the investigative files should be disclosed.

DISCUSSION

The Federal Rules of Civil Procedure allow parties to obtain discovery regarding any matter, not privileged, that is relevant to any claim or defense.¹⁰ A subpoena is a method that

⁷ The Complaint in the above-captioned case alleges that on April 16, 1998, Defendant Evans, while on duty, made improper sexual advances upon Plaintiff, a minor, as his hands were at his crotch and he was touching himself. Pl.'s Compl. ¶¶ 73-76

⁸ See, e.g., Cameron v. City of Philadelphia, No. 90-CV-2928, 1990 U.S. Dist. LEXIS 13245, 1990 WL 151770 (E.D. Pa. Oct. 4, 1990) (requiring production of Philadelphia Police Board of Inquiry investigation documents).

⁹ See Maslow v. Evans, No. 01-CV-3636, Order (July 18, 2001) at 7, n.5 [Doc. No. 16] (“even assuming either the work product doctrine or deliberative process privilege applied, we believe that Plaintiffs have demonstrated need sufficient to overcome the privileges in this instance. . . . These files are highly relevant to the issue of supervisory liability, and Plaintiffs do not have equal access to the same information. Although Evanko claims that Plaintiffs have the names of every witness and could readily interview and/or depose them all, we believe that requiring Plaintiffs to do so would be unduly burdensome (especially in light of the discrepancy in the economic resources of the parties.”).

¹⁰ Fed. R. Civ. P. 26(b)(1).

a party may use to obtain discovery.¹¹ However, on a timely motion, a court may quash or modify subpoenas requiring disclosure of privileged or other protected matter when no exception or waiver applies.¹²

The executive privilege serves an important government policy by preventing the disclosure of certain information that would be “contrary to the public’s interest.”¹³ The privilege protects “internal communications offering opinions and recommendations” in order to “safeguard free expression in giving intragovernmental advice by eliminating the possibility of outside examination as an inhibiting factor.”¹⁴ However, the privilege is not absolute, and should be upheld only if damage to the executive department or the public interest outweighs the harm to the plaintiff from non-disclosure.¹⁵

On behalf of the chief executive of the state, the Inspector General conducts investigations for and recommends policy changes to the executive branch. Confidentiality is crucial to the OIG because it serves to protect government sources and “enhances the effectiveness of investigative techniques and procedures.”¹⁶ To claim executive privilege at least three requirements must be fulfilled: (1) the head of the agency claiming privilege must personally review the material; (2) there must be a specific designation of the documents claimed to be privileged; and (3) there must be precise and certain reasons for preserving the claims of

¹¹ Fed. R. Civ. P. 45.

¹² See id. (c)(3)(A)(iii).

¹³ Clark v. Township of Falls, 124 F.R.D. 91, 92 (E.D. Pa. 1988); Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1973).

¹⁴ United States v. O’Neill, 619 F.2d 222, 230 (3d Cir. 1980).

¹⁵ Clark, 124 F.R.D. at 93.

¹⁶ Hayes v. Reed, No. 96-CV-4941, 1997 U.S. Dist. LEXIS 2992, at *30 (E.D. Pa. Mar. 13, 1997).

privilege.¹⁷ In the case at bar, Inspector General Patterson attached a declaration in which he describes the contents of the investigative materials. He attests that the documents requested include pre-decisional, executive deliberative and evaluative information and opinions, analyses, and interview summaries that should not be disclosed.¹⁸ Because the executive privilege has been properly asserted by Inspector General Patterson, the burden shifts to Plaintiff to demonstrate the need for the requested information. The Court must balance the public interest in the confidentiality of governmental information against the needs of the litigant to obtain data.¹⁹ Specifically, the Court must consider:

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;
- (2) the impact upon persons who have given information of having their identities disclosed;
- (3) the degree to which government self-evaluation and consequent program improvement will be chilled by disclosure;
- (4) whether the information sought is factual data or evaluative summary;
- (5) whether the party seeking the discovery is an actual or potential defendant to any criminal proceeding either pending or reasonably likely to follow from the incident in question;
- (6) whether the investigation has been completed;
- (7) whether the intra-departmental disciplinary proceedings have arisen or may arise from the investigation;
- (8) whether plaintiff's suit is non-frivolous and brought in good faith;
- (9) whether the information sought is available through other discovery or from other sources; and

¹⁷ O'Neill, 619 F.2d at 226.

¹⁸ Inspector General Patterson Decl. at 5-6.

¹⁹ Frankenhauser, 59 F.R.D. at 344.

(10) the importance of the information sought to plaintiff's case.²⁰

The Court concludes that the first three Frankenhauser factors weigh in favor of non-disclosure. The OIG collected and analyzed data from numerous outside sources. The witnesses included victims of the sexual harassment and sexual misconduct who voluntarily provided their subjective opinions concerning perceived deficiencies in PSP policies and practices. During interviews, these witnesses provided candid analyses and opinions for improving the system. Disclosure of these statements would discourage future cooperation and would stifle the OIG's internal deliberative process.

The fourth Frankenhauser factor also weighs in favor of non-disclosure because the information sought by the Subpoena is primarily evaluative summaries. Moreover, the 84-page Report with detailed factual findings and numerous recommendations is a public document. The fifth Frankenhauser factor also weighs in favor of non-disclosure because Plaintiff is not an actual or potential defendant in any criminal proceeding either pending or likely to follow from the matter investigated.

The sixth and seventh Frankenhauser factors are neutral. While many of the BPR records involve closed cases, others involve cases that remain open. The release of documents from open cases could prejudice intra-departmental proceedings.

The eighth Frankenhauser factor weighs in favor of disclosure because, without commenting significantly on the merits of the claims in the above-captioned matter, it appears from the related Maslow litigation that this case is non-frivolous and brought in good faith.

The ninth Frankenhauser factor focuses on whether the subpoenaed information is

²⁰ Id.

available through other means. There is no indication that any of the OIG's witnesses are deceased or unavailable or that any of the information contained in the investigative files and evaluative summaries is not otherwise available to Plaintiff. Moreover, requiring Plaintiff to obtain PSP records, including personnel files, directly from the PSP gives the PSP records custodian the opportunity to object to the release of files containing confidential information.

Finally, the tenth Frankenhauser factor relates to the importance of the subpoenaed information. While the investigative materials in the OIG file may assist Plaintiff in proving her case, the Subpoena is essentially an attempt to use the Inspector General as her own liability expert. Although the investigation was funded with taxpayer dollars, the OIG undertook the investigation to improve PSP policies and programs that serve the general public, even though individual lawsuits are pending. Moreover, Plaintiff seeks monetary damages only in this case. She has not requested any injunctive relief against the PSP, and she should not be permitted to prosecute this civil action at the taxpayers' expense.

In balancing all of the Frankenhauser factors, the Court concludes that the executive privilege protects the OIG investigative files and evaluative materials in this case. Confidentiality is vital to OIG investigations because it protects government sources, encourages candor, and enhances the effectiveness of investigative techniques and procedures.²¹ The executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the Governor, which are discharged most effectively with privacy and security.²²

²¹ See Hayes, 1997 U.S. Dist. LEXIS 2992 at *31-32.

²² Plaintiff's reliance upon Chladek v. Commonwealth of Pennsylvania, No. 97-CV-355, 1998 U.S. Dist. LEXIS 2992 (E.D. Pa. Mar. 18, 1998) and Clark v. Township of Falls, 124 F.R.D. 91 (E.D. Pa. 1988) is misplaced because each of those cases involved an attempt to subpoena an OIG report that had not been made public, not the investigative files generated in conjunction with producing the reports. While the Chladek and Clark courts required

Due to the voluminous records already in Plaintiff's possession as well as her ability to question each of the high-ranking PSP officials under oath through the discovery process, the Court quashes the Subpoena on the basis of executive privilege.²³ In light of this ruling, it is unnecessary to address Inspector General Patterson's remaining arguments.

CONCLUSION

For the foregoing reasons, Inspector General Patterson's Motion to Quash Subpoena is granted. An appropriate Order follows.

production of the reports (in the Chladek case a redacted report), they did not require the production of the files generated in creating the reports.

²³ The ruling today is consistent with Judge Dalzell's order requiring production of the BPR General Investigation Reports. First, the OIG, not the PSP (Evans' employer), compiled the data at issue in the Motion to Quash. Second, as a result of Judge Dalzell's ruling, Plaintiff's counsel obtained the identities of the names of the various victims and wrongdoers. Thus, Plaintiff can conduct her own investigation regarding the knowledge of various PSP officials.

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ORDER

AND NOW, this 4th day of May, 2004, upon consideration of the Motion to Quash Subpoena of Inspector General David L. Patterson [Doc. No. 64] and Plaintiff Ashley Haber's response thereto, it is hereby ORDERED and DECREED that the Motion is GRANTED. The Subpoena is hereby QUASHED.

BY THE COURT:

CYNTHIA M. RUFÉ, J.