

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

GENEVIEVE BRAY, Individually  
and as administratrix of the ESTATE OF  
THOMAS BRAY, DECEASED

v.

UNITED STATES OF AMERICA and  
CITY OF PHILADELPHIA

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CIVIL ACTION  
NO. 03-5150

O'Neill, J.

March 14, 2005

**MEMORANDUM**

This is a case in admiralty arising out of the death of Philadelphia Police Marine Unit diver Thomas Bray, decedent of plaintiff Genevieve Bray. At the time of his death, Officer Bray was conducting an underwater “grid search” for a sunken U.S. Coast Guard buoy and its concrete sinker in an area of the Delaware River. Plaintiff now moves to require defendant United States of America to produce documents including the Coast Guard Mishap Analysis Board investigation report, the administrative investigation report, the personnel files of Coast Guard personnel involved in Officer Bray’s dive and written materials, videotapes and other instructional materials used by the Coast Guard for SCUBA training.

**A. Coast Guard Mishap Board Investigation Report**

The Coast Guard convened a Mishap Board to review the incident involving Officer Bray “to determine whether any systemic or programmatic changes should be affected to make future operations safer.” The Mishap Board collected statements from Coast Guard personnel, interviewed witnesses and drafted a report regarding the incident. Defendant asserts that the

Coast Guard personnel who gave statements to the Mishap Board were not given any promise of confidentiality and that their statements have been provided to plaintiff.

Pursuant to Federal Rule of Civil Procedure 26(b), a party may discover any relevant matter which is “not privileged.” Defendant argues that the report of the Mishap Board is privileged as it “reflects the Board members’ deliberations and recommendations as to policies that should be pursued.” Defendant asserts the report is protected by the Machin privilege, established in Machin v. Zuckert, 316 F.2d 336, 338 (D.C. Cir. 1963), a civil lawsuit brought by the sole surviving member of a crashed Air Force B-25 bomber against an aircraft company. In Machin, the Secretary of the Air Force asserted a claim of privilege over certain Air Force reports and the Court of Appeals for the D.C. Circuit held that

when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program . . . the reports should be privileged. . . . The privilege extends to any conclusions that might be based in any fashion on such privileged information. Also, a recognized privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued.

Id. at 339.

Plaintiff asserts that the Machin privilege is a form of the executive or deliberative process privilege. For the deliberative process privilege to apply: 1) “the head of the agency that has control over the requested document must assert the privilege after personal consideration;” 2) “the head of the agency must state with particularity what information is subject to the privilege;” and 3) “the agency must supply the court with ‘precise and certain reasons’ for maintaining the confidentiality of the requested document.” Walsky Constr. Co. v. United States, 20 Cl. Ct. 317, 320 (1990), citing Mobil Oil Corp. v. Department of Energy, 102 F.R.D.

1, 5 (N.D.N.Y. 1983). See also Scott Paper Co. v. United States, 943 F. Supp. 501, 502 (E.D. Pa. 1996) (“the deliberative process, or executive, privilege may only be invoked by the head of the agency or department”); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 714 (E.D. Pa. 1968) (“a claim of executive privilege is validly made only by the head of the executive department or administrative agency involved, after actual personal consideration by that officer”).

Defendant argues that “the Machin privilege does not derive from the separation of powers in our government, but rather from the public policy of protecting the deliberations of those charged with making military evolutions safer from improper considerations” and that the requirements for the assertion of the executive privilege do not apply. I disagree and find that the Machin privilege falls within the executive or deliberative process privilege. In United States v. Weber Aircraft Corp., 465 U.S. 792 (1984), the Supreme Court explained, “[t]he claim of privilege sustained in Machin was denominated as one of executive privilege.” See Machin, 316 F.2d at 338 (citing the “Secretary’s ‘Claim of Executive Privilege’”). Indeed, the claim of privilege in Machin was made by the Secretary of the Air Force himself, and thus the Court did not need to consider whether the “head of agency” requirement for the executive privilege was met before it considered the applicability of the privilege to the reports at issue. See also Cooper v. Department of the Navy of the United States, 558 F.2d 274, 277 (5th Cir. 1977) (referring to Machin as “the seminal case on executive privilege for” statements made during the course of an Aircraft Accident Safety Investigation); Cooney, 288 F. Supp. at 714 (discussing Machin in the context of a motion claiming executive privilege for a report prepared by OSHA after an accident at defendant’s drydock). Because defendant does not assert that the Commandant of the Coast

Guard has personally considered the Mishap Board Report and asserted the privilege, it has not properly invoked the deliberative process privilege and the Mishap Board Report cannot be protected from discovery under the Machin privilege. Therefore I will order defendant to produce a copy of the investigative report prepared by the United States Coast Guard Mishap Board.

### **B. Administrative Investigation Report**

Defendant argues that the investigative report of the Coast Guard's Administrative Board "was specifically undertaken in contemplation of litigation and to assist attorneys" and thus it is shielded from discovery under Federal Rule of Civil Procedure 26(b)(3). Rule 26(b)(3) provides that "documents and tangible things . . . prepared in anticipation of litigation" are discoverable "only upon a showing that the party seeking discovery has need of the materials in the preparation of the party's case and the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Plaintiff argues that the administrative investigation was not specifically undertaken in contemplation of litigation and thus the administrative investigation report cannot be shielded from discovery under the work-product doctrine.

The general rule for determining whether a document was prepared in anticipation of litigation is whether "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979). Rule 26(b)(3) does not require that a suit be filed before materials may be prepared in anticipation of litigation. See Raso v. CMC Equip. Rental, 154 F.R.D. 126, 127 (E.D. Pa. 1994). Thus it is not

dispositive that the Coast Guard's administrative investigation was undertaken in January 2002 before this suit was instituted. Not is it necessary that the report have been prepared by lawyers. Maertin v. Armstrong World Industries, Inc., 172 F.R.D. 143, 151 ("Rule 26(b)(3) of the Federal Rules of Civil Procedure defines a 'representative' expansively, permitting a 'consultant, surety, indemnitor, insurer, or agent' to assert the privilege."). Instead, defendant must show that there existed "an identifiable specific claim or impending litigation when the materials were prepared" in order to establish that its anticipation of litigation was objectively reasonable. Leonen v. Johns-Manville, 135 F.R.D. 94, 97 (D.N.J. 1990). Given the serious nature of the incident involving Officer Bray, defendant was on notice of "an identifiable specific claim" when the report was drafted.

Defendant "must show that the document was prepared or obtained because of the prospect of litigation, not in the regular course of business, and [defendant] can rely on the nature of the document and the facts of the case in order to meet its burden." Raso, 154 F.R.D. at 127-28. Plaintiff argues that the administrative investigation may have been convened for purposes other than anticipation of litigation, such as to determine whether there was misconduct by a member of the Coast Guard or whether disciplinary measures should be imposed. If this is the case, plaintiff asserts that the report cannot be shielded by the work-product privilege because documents prepared in the regular course of business are not protected under Rule 26(b)(3). In support of its assertion that the report was prepared in contemplation of litigation, defendant cites a February 25, 2002 letter from LTJG Mark Kuperman to Commander, Fifth Coast Guard District which states that "[t]his investigation is being conducted and this report is being prepared in contemplation of litigation and to assist attorneys, acting on behalf of the Chief Counsel,

representing interest [sic] of the United States in this matter.”

I have not been provided with a copy of the report in question for in camera review and without more information from defendant about the report’s contents and the purpose of the investigation I cannot decide whether the report in question was in fact prepared in anticipation of litigation. Therefore I will order defendant to produce a copy of the administrative investigation report to the Court for review in camera. If I determine that the report was indeed prepared in anticipation of litigation, I will then proceed to consider whether plaintiff has established a “substantial need of the materials . . . and [her inability] without undue hardship to obtain the substantial equivalent of the materials by other means” such that disclosure of the report is required. Fed. R. Civ. P. 26(b)(3).

**C. Personnel files of Kathryn Dunbar, Michael Davis and Robert Scott Pugh**

Plaintiff seeks to compel production of the personnel records of all U.S. Coast Guard personnel involved in the dive<sup>1</sup> pursuant to Federal Rule of Civil Procedure 37. Such records are governed by the Privacy Act which permits disclosure of records maintained on individuals by agencies of the U.S. government pursuant to the order of a court of competent jurisdiction. 5 U.S.C. §552a(b)(11). “[A] party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards, and the test of discoverability is the relevance standard of FRCP 26(b)(1).” Forrest v. United States, No. 95-3889, 1996 U.S. Dist. LEXIS 4589, at \* 4 (E.D. Pa. Apr. 11, 1996). Federal Rule of Civil

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<sup>1</sup>In her brief, plaintiff specifically refers to the personnel records for Kathryn Dunbar, Robert Pugh, Shawn Barnes and Marshall Miller. On January 20, 2005, plaintiff’s counsel sent the Court a letter which requested that defendant produce the personnel files of Kathryn Dunbar, Michael Davis and Robert Scott Pugh.

Procedure 26(b)(1) provides that:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

“[S]ince the precise boundaries of the Rule 26 relevance standard will depend on the context of the particular action, the determination of relevance is within the district court’s discretion.”

Forrest, 1996 U.S. Dist. LEXIS 4589, at \*4, citing Huang v. Dalton, Sect’y of Navy, No. 93-3143, 1994 U.S. Dist. LEXIS 9025 (E.D. Pa. Jun. 30, 1994).

Defendant argues that no information that might be obtained from the crew’s service records would be relevant to this lawsuit and that production of the Coast Guard personnel’s Service records would be an unwarranted invasion of privacy. I agree with defendant that it is unlikely that data such as marital status, dependents, religion, next of kin, insurance beneficiaries, tax deductions, and basic medical history will lead to the discovery of admissible evidence. This portion of the personnel records will be barred from discovery.

Plaintiff argues that she does not seek personal information about the crew but information pertaining to the training, experience, credentials and any disciplinary infractions for all persons involved in the dive. She argues this information is relevant to her case as it may address the crew’s experience with buoy retrievals and their overall competency. She also argues that previous disciplinary measures taken may be relevant to determining defendant’s liability in this instance. Defendant counters that because plaintiff has alleged no fault in the Coast Guard’s

shiphandling, buoy retrieval or rescue procedures and because plaintiff has not raised any issue of training in these areas, the information plaintiff seeks is not relevant. Defendant further argues that any military discipline imposed upon a member of the crew for an unrelated infraction is irrelevant.

Because the information plaintiff seeks appears to be reasonably calculated to lead to the discovery of admissible evidence, I will allow plaintiff to discover only those documents in the personnel files of Kathryn Dunbar, Michael Davis and Robert Scott Pugh that address their experience with buoy retrievals and rescue procedures and any disciplinary records pertaining to similar incidents. Discovery of disciplinary records for matters unrelated to buoy retrievals or rescue procedures or of any other documents will not be permitted.

**D. Written Materials, Videotapes and Other Instructional Materials Used by the Coast Guard for SCUBA Training**

Under Federal Rule of Evidence 401, relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Defendant argues that the evidence plaintiff seeks regarding written materials, videotapes and other instructional materials used by the Coast Guard for SCUBA training is irrelevant because none of the Coast Guard personnel present at the time of the incident involving Officer Bray had received SCUBA training. Plaintiff argues the materials sought are relevant as they may establish the standards and precautions that should be followed during dive operations. As noted above, discovery is not limited to relevant evidence, but to matters “reasonably calculated to lead to discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). Because I agree with plaintiff that discovery of materials pertaining to

Coast Guard SCUBA training could reasonably lead to the discovery of admissible evidence regarding standards and safety precautions for SCUBA operations in which the Coast Guard participates, I will order defendant to produce any written materials, videotapes and other instructional materials used by the Coast Guard for the purpose of training its personnel for SCUBA operations.



GRANTED as to only those documents in the personnel files of Kathryn Dunbar, Michael Davis and Robert Scott Pugh that address their experience with buoy retrievals and rescue procedures and any disciplinary records pertaining to similar incidents. Discovery of disciplinary records for matters unrelated to buoy retrievals or rescue procedures or of any other documents is not permitted.

4. Plaintiff's motion to compel production of written materials, videotapes and other instructional materials used by the Coast Guard for SCUBA training is GRANTED.

s/Thomas N. O'Neill, Jr.

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THOMAS N. O'NEILL, JR., J.