

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

UNITED STATES OF AMERICA

v.

LEONARD P. LUCHKO
MARK C. EISTER

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: CRIMINAL ACTION
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: NO. 06-319
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Memorandum and Order

YOHN, J.

October __, 2006

The United States brings the instant motion for a protective order over discovery materials, pursuant to Federal Rule of Criminal Procedure 16(d)(1). Since the initial filing of this motion, the government has significantly altered and narrowed the scope of the proposed protective order. The defendants have agreed to the amended proposed order. The government, defendants, and Philadelphia Newspapers, LLC (“Philadelphia Newspapers”), intervenor in this matter, have not yet addressed this modified proposed order. For the following reasons, I will order them to file briefs in support of or in opposition to the modified proposed order.

I. BACKGROUND

On June 27, 2006, the grand jury returned a 34-count indictment against Leonard P. Luchko and Mark C. Eister, charging them with conspiracy, corruptly persuading other persons to obstruct an official proceeding by destroying evidence, corruptly destroying evidence to obstruct an official proceeding and destroying evidence to obstruct a federal investigation. On

July 18, 2006, this court designated the case as unusual and complex based upon, *inter alia*, the nature of the illegal activity charged and the voluminous quantity of discovery materials, including more than 40,000 pages of e-mail communications and other electronic data files, thousands of pages of grand jury transcripts, and hundreds of pages of agent interview reports. Also on July 18, 2006, this court scheduled trial for January 8, 2007. On August 10, 2006, the government filed a motion for a protective order, requesting that the court limit defendants' use of all discovery materials to trial preparation only.¹ The government reported that it had not yet produced to defendants the documents that are the subject of the motion. Defendants initially opposed the government's motion for a protective order. Although at the time not yet a formal intervener in the matter, Philadelphia Newspapers submitted a letter opposing the government's motion.

The court heard oral argument from the parties and Philadelphia Newspapers on September 27, 2006. At the outset, all parties agreed that the framework for granting a protective order discussed by the Third Circuit in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994), is applicable to the instant motion. At the hearing, the government significantly clarified and narrowed the scope of the protective order it seeks. The government requested the protective order only cover nine grand jury transcripts, fifteen interview reports prepared by federal investigators, and the two search warrant affidavits for 1208 Tasker Street and Voicenet, all of which are not at this time subject to any public right of access. The government explained

¹The government's initial proposed order stated, "Any counsel, defendant, or other person to whom disclosure is made...may not use the discovery materials for any purpose other than preparation for or use at trial, and may not disclose the discovery materials to any third party, except as required to prepare for trial or for use at trial." Further, defense counsel would be required to "maintain a log of every person to whom disclosure of the discovery materials is made," and obtain from those people a written statement affirming their compliance with the court's order.

that it had two main concerns: 1) the privacy interests of grand jury witnesses and uncharged individuals and 2) the ability of the grand jury to complete its ongoing investigation.

Attorneys for the defendants also clarified their opposition to the motion, expressing concerns about their ability to adequately prepare for trial in the face of such restrictions. Defense counsel noted specifically that the affidavit the government proposed for all recipients of the materials to sign would inhibit the defense counsels' ability to secure cooperation from other parties. Further, they evinced a fear that the government would use the protective order to bring motions against them for violation of that order, which would further hamper their trial preparation efforts.

Counsel for Philadelphia Newspapers also presented argument at the hearing, opposing the government's proposed protective order. Counsel noted that under *Pansy* the court is required to find good cause justifying any protective order. In the case of embarrassment, this means that the embarrassment must be particularly strong, rising to the level of intensified pain. With respect to interference with the grand jury investigation, he argued that the government is required to show that disclosure of materials would actually harm the grand jury's ability to complete its investigation. He averred that the court is required to review the materials for good cause on a document-by-document basis. Counsel for Philadelphia Newspapers further noted that Federal Rule of Criminal Procedure Rule 6(e) states that no obligation of secrecy may be imposed over persons not listed in that rule, including defense counsel. He further stated that the issues involved in this case revolve around public officials and public business, about which the public has a strong interest in learning.

After the hearing, on September 28, 2006, counsel for the defendants and the government

proposed a significantly modified and more narrowly tailored order for the court to consider. The government also prepared and delivered to the court a collection of over 800 pages of documents—a portion of those over which it seeks a protective order—for the court’s in camera review. The new protective order would apply only to the materials enumerated at the hearing, and would not require defense counsel to keep a log of everyone with whom the materials are shared. Instead, only those to whom copies of the protected materials are provided would be required to sign the written statement. The government alleges that the documents only discuss uncharged matters currently under consideration by the grand jury. The stated reasons for the order are as follows: 1) the materials reference matters presently under investigation by a federal grand jury, regarding which charges have not yet been brought and may never be brought; 2) there is no public right of access to the discovery materials; 3) public disclosure of the protected materials at this time could jeopardize the ability of the grand jury to complete its work; and 4) public disclosure would offend privacy interests of third parties named in the materials who have not been charged with an offense.

On October 11, 2006, the court granted Philadelphia Newspapers’ motion to intervene for the limited purpose of opposing the government’s proposed protective order.

II. STANDARD FOR GRANTING A PROTECTIVE ORDER

Federal Rule of Criminal Procedure 16(d)(1) (“Rule 16(d)(1)”) provides that “the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” Fed. R. Crim. P. 16(d)(1). The Supreme Court has sanctioned the use of protective orders, directing that “the trial court can and should, where appropriate, place a defendant and his

counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect.” *Alderman v. United States*, 394 U.S. 165, 185 (1969). However, the Third Circuit has cautioned that “simply because courts have the power to grant orders of confidentiality does not mean that such orders may be granted arbitrarily.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994). The court further noted, “[d]isturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders.” *Id.*

A. The *Pansy* Analysis

Good cause must exist for the court to grant a protective order. Fed. R. Crim. P. 16(d)(1); *Pansy*, 23 F.3d at 786 (stating that “whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order”). This is true even where parties consent to a stipulated protective order. *See Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 481 (3d Cir. 1995) (stating that the *Pansy* decision “signaled a shift from the previous practice of judicial endorsement of such stipulations”); *Sprinturf, Inc. v. Sw. Rec. Indus.*, 216 F.R.D. 320, 323 (E.D. Pa. 2003) (“Stipulated protective orders must still meet the requirements of Rule 26(c), which requires demonstrating the existence of confidential information and good cause as to why such information should not be disclosed.”). The Third Circuit has made clear that “[g]ood cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure.” *Pansy*, 23 F.3d at 786 (internal citations omitted). The moving party

must show the “injury...with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.” *Id.* “The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order.” *Id.* at 786-87. In *Pansy*, the Third Circuit continued by specifying a list of non-exhaustive factors a court should consider in determining whether “good cause” exists for issuance of a protective order.² 23 F.3d at 787-790. Those factors are:

- 1) whether disclosure will violate any privacy interests;
- 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- 3) whether disclosure of the information will cause a party embarrassment;
- 4) whether confidentiality is being sought over information important to public health and safety;
- 5) whether the sharing of information among litigants will promote fairness and efficiency;
- 6) whether a party benefitting from the order of confidentiality is a public entity or

² The *Pansy* case dealt with the request for a protective order in civil proceedings. The protective order in that case was not pursuant to Fed. R. Civ. P. 26(c), which governs protective orders for materials exchanged in civil discovery, but the court’s equitable power to grant confidentiality orders. *Pansy*, 23 F.3d at 785. The *Pansy* factors are applicable to the determination of good cause pursuant to Rule 16(d)(1). *See United States v. White*, 2004 U.S. Dist. LEXIS 21342, at *13 (E.D. Pa. Sept. 22, 2004) (stating that “*Pansy*, although involving civil proceedings, is applicable to the present issue”). No other case in the Third Circuit or otherwise suggests a different “good cause” standard would apply in the context of Rule 16(d)(1) and all parties here agree the Third Circuit’s *Pansy* factors apply to the present dispute.

official; and

7) whether the case involves issues important to the public.

Glenmede Trust Co., 56 F.3d at 483 (citing *Pansy*, 23 F.3d at 787-91). Further, the Third Circuit has directed the district court to “determine whether there is good cause by balancing the interests of the public and the parties and further indicated that the court should explain the reasoning behind its balancing conclusion.” *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005); *Pansy*, 23 F.3d at 789 (stating that “[t]o facilitate appellate review of a district court decision of whether to grant or modify an order of protection or confidentiality, a district court should articulate on the record findings supporting its judgment”).

B. Grand jury materials

The protective order currently sought would include grand jury materials for which Federal Rule Criminal Procedure 6(e)(2)(A) clearly states that “no obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).” The court in *United States v. White*, 2004 U.S. Dist. LEXIS 21342, at *13 (E.D. Pa. Sept. 22, 2004), acknowledged the potential conflict between this mandatory language in Rule 6(e)(2)(A) and the court’s power to issue a protective order under Rule 16(d)(1). The *White* court noted that although there was no controlling Third Circuit precedent, the Eighth Circuit had prohibited a grand jury witness from disclosing information related to a grand jury subpoena even though Rule 6(e)(2)(A) explicitly prohibited the imposition of a secrecy obligation on such a witness. *Id.* at **11-13. The *White* court also recognized the possibility of segregating the discovery materials and entering a

protective order only as to non-grand jury materials, thereby avoiding the Rule 6(e) legal issue. *Id.* at *20. However, the court opted not to take that course as it “would require a great deal of effort by the defense counsel” because the government had already produced the materials in a non-segregated fashion. *Id.* at *20. Ultimately, the *White* court did not have to address the potential conflict between Rule 16(d) and Rule 6(e) because it found that the government was not entitled to a protective order at all. *Id.* at **17-20. The *White* court cautioned specifically that because the language of Rule 6(e)(2)(B) contains no deference to a protective order under Rule 16, an obligation of non-disclosure against defense counsel should not be granted in the absence of compelling circumstances. *White*, 2004 U.S. Dist. LEXIS 21342, at **19.

C. Process for the Court in Crafting an Order

Although the burden remains on the party seeking the protective order to justify the need for protection for all documents, the court may enter an umbrella protective order in suitable situations. *Pearson v. Miller*, 211 F.3d 57, 73 (3d Cir. 2000) (“[I]n appropriate circumstances, a district court is empowered to issue umbrella protective orders protecting classes of documents after a threshold showing by the party seeking protection.”). These situations include where an action is complex or involves large-scale discovery and, potentially, where there is a stronger showing of good cause. *See Shingara*, 420 F.3d at 308 (“Given that this action is neither complex nor involves large-scale discovery and given that the district court should have realized that the good cause it found for entry of the protective order was weak at best (in actuality, nonexistent), the district court erred in adopting the sweeping umbrella approach in this case.”).

Once the moving party makes a threshold showing of good cause, the court may enter an umbrella protective order. Subsequently, “[a]fter delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be confidential, and the party seeking to maintain the seal would have the burden of proof with respect to those documents.” *Pansy*, 23 F.3d at 787 (citing *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986)). “Nevertheless...there may be cases in which the document-by-document approach will be preferable.” *Shingara*, 420 F.3d at 308 (quoting *Cipollone*, 785 F.2d at 1123). Thus, the court has flexibility in analyzing good cause with respect to the various discovery documents and in crafting an appropriate order. *See Pansy*, 23 F.3d at 791 (discussing the possibility of the court issuing a conditional order so as not to interfere with freedom of information laws and stating that “[c]ourts have discretion to fashion orders according to the needs and circumstances of each case”); *see also McKenna v. Philadelphia*, 2000 U.S. Dist. LEXIS 15735, at **5-20 (E.D. Pa. Sept. 29, 2000) (discussing *Pansy* factors with respect to each class of documents sought); *Constand v. Cosby*, 232 F.R.D. 486, 489 (E.D. Pa. 2006) (crafting an interim sealing order for the filing of motions and responses so that the court can later protect the information contained in the filings if warranted).

It is appropriate for the court to conduct an in camera review of materials submitted by the moving party in order to make a determination of good cause. Rule 16(d)(1) specifies that “[t]he court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party’s statement under seal.” Fed. R. Crim. P. 16(d)(1). The Advisory Committee Notes on the 1966 Amendments state:

In some cases it would defeat the purpose of the protective order if the government were required to make its showing in open court...Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

Fed. R. Crim. P. Rule 16 advisory committee's notes. Therefore, the government cannot be required to make particularized allegations in its pleadings because that would defeat the purpose of the motion for a protective order, but still bears the burden of demonstrating good cause.

III. CONCLUSION

Given that the defendants and the government have now agreed to a significantly altered protective order and that Philadelphia Newspapers has now been granted formal intervention, the court will allot an additional opportunity to brief on these issues. Specifically, the government should address 1) how the materials over which it seeks an order warrant protection as per the factors articulated in the *Pansy* decision as to each document, class of documents, individual mentioned or class of individuals mentioned, and whether redaction of documents is a feasible alternative; 2) the potential conflict between Rules 6(e) and 16(d); and 3) the justifications for granting a broad order, rather than taking a document-by-document approach. Philadelphia Newspapers will respond to the government's brief. An appropriate order follows.

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CRIMINAL ACTION

NO. 06-319

Order

YOHN, J

And now, this ____ day of October 2006, upon consideration of the government's motion for a protective order, the defendants' answer, the government's reply to that answer, and Philadelphia Newspapers' letter in opposition, and after hearing, IT IS HEREBY ORDERED that:

- (1) The government shall forward a copy of the modified proposed protective order to counsel for the intervenor, Philadelphia Newspapers, LLC, forthwith;
- (2) The government shall file a brief in support of the modified proposed protective order within ten (10) business days of this order;
- (3) The defendants may file a support brief, if they desire to do so; and

(4) Philadelphia Newspapers, LCC, may file a response within ten (10) business days of the government's submission.

William H. Yohn, Jr., Judge