

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

MICHAEL B. CHLADEK and : CIVIL ACTION
MARIE CHLADEK :
 :
v. :
 :
COMMONWEALTH OF PENNSYLVANIA, et al. : NO. 97-0355

MEMORANDUM AND ORDER

HUTTON, J.

March 18, 1998

Presently before the Court is the Motion by the Office of Inspector General to Quash Plaintiffs' Subpoena or, in the Alternative, for an In Camera Inspection and Protective Order (Docket No. 42). For the reasons listed below, the motion is **GRANTED in part and DENIED in part.**

I. BACKGROUND

Michael and Marie Chladek, the plaintiffs in this civil rights action, claim that state parole agents David Milligan, Donna Henry, David M. Dettinburn, John E. Founds, David M. Knorr, and Thomas J. Micek (collectively referred to as "state parole officers") used excessive force when they arrested plaintiff Michael Chladek at his home on the morning of September 17, 1996, and later refused to provide him with proper medical attention. Moreover, the plaintiffs allege that the state parole officers physically assaulted plaintiff Marie Chladek. Pursuant to § 1983

and pendent state law causes of action, the plaintiffs seek to recover damages from these state parole officers.\¹

During discovery, the plaintiffs served subpoenas to certain employees of the Office of Inspector General ("OIG"), requesting production of the "Inspector General's Report concerning the arrest of Michael Chladek on Sept. 17, 1997 [sic] at 357 Jackson St., Phila., PA." OIG's Mot. ¶ 3. The OIG was created: "[t]o deter, detect, prevent, and eradicate fraud, waste, misconduct, and abuse in the programs, operations, and contracting of executive agencies." Executive Order, OIG's Mot. Ex. B, § 1(a). Pursuant to this purpose, the OIG "is authorized . . . [t]o make such investigations and reports relating to the administration of the programs and operations of an executive

1. In their Amended Complaint, the plaintiffs named the following parties as defendants: (1) the Commonwealth of Pennsylvania; (2) the Pennsylvania Board of Probation and Parole (the "Board"); (3) State Parole Agent David Milligan ("Milligan"); (4) State Parole Agent Donna Henry ("Henry"); (5) State Parole Agent David M. Dettinburn ("Dettinburn"); (6) State Parole Agent John E. Founds ("Founds"); (7) State Parole Agent Thomas J. Micek ("Micek"); (8) two unknown state parole agents; (9) the Pennsylvania Department of Corrections; (10) Prisoner Commissioner Martin Horn ("Horn"); (11) Deputy Prison Commissioner for Central Region Jeffrey Beard ("Beard"); (12) Superintendent Donald Vaughn ("Vaughn"); and (13) four unknown Graterford Prison guards. The plaintiffs alleged that the defendants' conduct violated sections 1983, 1985(3), 1986, and 1988, under the First, Fourth, Eighth and Fourteenth Amendments. Moreover, the plaintiffs asserted claims for Assault and Battery (Count VI), Malicious Abuse of Process (Count VII), False Arrest (Count VIII), False Imprisonment (Count IX), and Intentional Infliction of Emotional Distress (Count X).

On July 21, 1997, this Court granted the Uncontested Motion of Defendants Commonwealth of Pennsylvania, Pennsylvania Department of Corrections, Horn, Beard and Vaughn to Dismiss the Plaintiffs' Amended Complaint. On January 28, 1998, this Court dismissed all claims against Defendant Pennsylvania Board of Probation and Parole. Moreover, the Court dismissed all claims against Defendants Milligan, Henry, Dettinburn, Founds, and Knorr in their official capacities and all claims against Defendants Milligan, Henry, Dettinburn, Founds, and Knorr based on 42 U.S.C. §§ 1985 and 1986.

agency as are, in the judgment of the State Inspector General, necessary or desirable." Id. § 3(a)(1). The OIG investigated the state parole agents' arrest of plaintiff Michael Chladek. Parisi Aff. ¶¶ 7-8.

The OIG created an investigative report ("report") resulting from its investigation. The report contains:

- a. Synopsis of findings of fact and conclusions regarding this investigation. The synopsis contains opinions and analyses
- b. Relevant policies of the Commonwealth and Board of Probation and Parole.
- c. Factual summaries of parolee Chladek's September 17, 1996, arrest, incarceration, and medical treatment.
- d. Conclusions reached based on the findings. The conclusions contain opinions and analyses
- e. A recommendation to the Board of Probation and Parole. The recommendation is the result of opinions and analyses

Parisi Aff. ¶ 8.

In the present motion, the OIG has moved to quash the plaintiffs' subpoena, claiming that the report is protected by the executive privilege. The plaintiffs argue that the report does not fall within the scope of the executive privilege.

II. DISCUSSION

A. Scope of Discovery

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” Fed. R. Civ. P.

26(b)(1). Given the plaintiffs’ claims, the factual findings within the report are clearly relevant to the instant case.²

Accordingly, “the only question is whether the [factual] information [contained in the report] is protected from disclosure by a privilege recognized in federal court.” Torres v. Kuzniasz, 936 F. Supp. 1201, 1207 (D.N.J. 1996).

This Court cannot reach the same conclusion with regard to the evaluative information, policy findings and recommendations found in the report. Only the plaintiffs’ claims against the state parole officers in their individual capacities remain viable. The policy findings, evaluative information, and recommendations to the Pennsylvania Board of Probation and Parole are no longer relevant to the plaintiffs’ claims, nor are they discoverable. Chladek v. Pennsylvania, No. 97 Civ. 0355, at 7

2. To successfully sue under § 1983 for the state parole officers’ failure to provide plaintiff Michael Chladek proper medical attention, the plaintiffs must demonstrate that the failure resulted from the defendants’ deliberate indifference and intentional actions. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1081 (3d Cir. 1976). Moreover, in order to prove that the defendants used excessive force, the plaintiffs must show that the state parole officers used unreasonable force when they arrested plaintiff Michael Chladek. Nibbs v. Roberts, No.CIV.A.91-029, 1995 WL 78295, at *6 (D.V.I. Feb. 8, 1995).

(E.D. Pa. Mar. 9, 1998). Thus, this Court grants the OIG's Motion with regard to that information, without deciding whether the executive privilege applies in that respect.

B. Executive Privilege

The governmental privilege, sometimes referred to as the deliberative process, executive, or law enforcement privilege, protects documents whose disclosure would "seriously hamper the function of government." Siegfried v. City of Easton, 146 F.R.D. 98, 101-02 (E.D. Pa. 1992); 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). The governmental privilege is a qualified privilege, which must be evaluated on a case-by-case basis. United States v. O'Neill, 619 F.2d 222, 230-31 (3d Cir. 1980); Frankenhauser, 59 F.R.D. at 342. In each case that the privilege is claimed, the court is required to balance the public interest in having the information remain secret against the litigants' need to obtain discovery. Id.; Clark, 124 F.R.D. at 93 ("[T]he privilege is not absolute, and should be upheld only if the damage to the executive department or the public interest outweighs the harm to plaintiffs from nondisclosure"). In an action brought under 42 U.S.C. § 1983, a claim that relevant evidence is privileged under the governmental privilege "must be so meritorious as to overcome the fundamental importance of a law meant to insure each citizen from

unconstitutional . . . action.'" Clark, 124 F.R.D. at 93 (quoting Wood v. Breier, 54 F.R.D. 7, 13 (E.D. Wis. 1972)); see also Crawford v. Dominic, 469 F. Supp. 260, 262 (E.D. Pa. 1979); Frankenhauser, 59 F.R.D. at 342.

In balancing whether the privilege should be upheld the Court must consider a myriad of factors which were thoughtfully outlined in Frankenhauser. There, the court explained:

In the context of discovery of police investigation files in a civil rights case . . . at least the following considerations should be examined, (1) the extent to which the 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 governmental 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 in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

Frankenhauser, 59 F.R.D. at 344; see also Coughlin v. Lee, 946 F.2d 1152, 1160 (5th Cir. 1991) (utilizing Frankhauser test); In

re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988) (same); Clark, 124 F.R.D. at 92 (same).

To support a claim for the governmental privilege, at least three requirements must be fulfilled. O'Neill, 619 F.2d at 225. "The head of the agency claiming the privilege must personally review the material, there must be 'a specific designation and description of the documents claimed to be privileged,' and there must be 'precise and certain reasons for preserving' the confidentiality of the communications. Usually such claims must be made by affidavit." Id. at 226 (quoting Smith v. Federal Trade Comm'n, 403 F. Supp. 1000, 1016 (D. Del 1975)).

In the instant case, the OIG has fulfilled these requirements. The OIG offers the affidavit of Nicolette Parisi, the Inspector General of the Commonwealth of Pennsylvania ("Parisi"). OIG's Mot. Ex. C. Parisi personally reviewed the report, and, in his affidavit, generally describes its contents. Parisi Aff. ¶ 8. According to Parisi, the report contains a "synopsis of findings of facts and conclusions," "[r]elevant policies of the Commonwealth and Board of Probation and Parole," a "[f]actual summary" of the plaintiff's "arrest, incarceration, and medical treatment," a conclusion based on these findings, and a "recommendation to the Board of Probation and Parole." Parisi Aff. ¶ 8. Further, Parisi states that:

Disclosure of the OIG's investigative report would make investigations more

difficult because individuals who provide information to the OIG reasonably believe that their identities will remain confidential. Employees of the Board of Probation and Parole and the Department of Corrections may suffer reprisals or notoriety because they cooperated with the OIG. Allowing the unnecessary disclosure of the sources of OIG information would impair future investigations because it could potentially discourage individuals from providing information.

Id. ¶ 11. Moreover, the OIG claims that disclosure of the report would inhibit future attempts at self-evaluation and self-improvement by the state. OIG's Mem. at 5-6. Thus, the OIG has properly asserted the privilege. The Court must therefore balance the respective interests to determine whether the privilege applies.

The OIG's "broad speculations of harm potentially flowing to the officers involved in generating the withheld documents are simply insufficient to support a finding of privilege under the strict standards described above." Torres, 936 F. Supp. at 1211 (refusing to apply privilege where police officers provided information to Internal Affairs division with expectation that their identities would remain confidential, even where officers argued that "production . . . would have a 'devastating impact on this Department's ability to ferret out those who violate the public trust'" and disclosure would destroy "'the integrity of the investigative process so necessary to fulfill . . . obligation[s] to the community.'"). Moreover, the

OIG's claim that future investigations would be impeded is not persuasive, given the test courts apply prior to divulging such a report. Frankenhauser, 59 F.R.D. at 344 ("[W]e do not believe that rare instances of disclosure pursuant to a court order made after application of a balancing test comprising detailed standards such as those enumerated here would deter citizens [or officers] from revealing information"); Crawford, 469 F. Supp. at 264 ("I do not accept the general proposition that citizens or fellow police officers will be less likely to give information concerning a police officer's conduct because in a few instances that information may be used in a later lawsuit.").

Furthermore, while this Court "intimate[s] no view whatever as to the merits of plaintiffs' cause of action, a reading of the complaint reveals that its allegations are substantial and that it was apparently brought in good faith." Frankenhauser, 59 F.R.D. at 345. Such information is obviously important to the plaintiffs' case and cannot be obtained in such unimpeded detail from any other source but the report. See Frankenhauser, 59 F.R.D. at 344 (recognizing that "investigation was conducted promptly after the incident occurred and certainly should be comprehensive and reliable."); see also Crawford, 469 F. Supp at 263 (concluding that the factor concerned with importance of the information to plaintiff's case is the weightiest Frankenhauser factor). Finally, the OIG does not

argue that criminal charges will be brought against any of the defendants, or that the Parole Board will take any interdepartmental action. Accordingly, this Court finds that the Frankenhauser balancing test weighs in favor of disclosing the report's factual contents. Thus, the OIG's Motion is denied as it relates to the OIG's factual findings.

An appropriate Order follows.

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O R D E R

AND NOW, this 18th day of March, 1998, upon consideration of the Motion by the Office of Inspector General to Quash Plaintiffs' Subpoena or, in the Alternative, for an In Camera Inspection and Protective Order (Docket No. 42), IT IS HEREBY ORDERED that the motion is **GRANTED in part and DENIED in part.**

IS FURTHER ORDERED that the Office of Inspector General **SHALL** produce the factual contents of its report to the plaintiff within fifteen (15) days from the date of this Order.

BY THE COURT:

HERBERT J. HUTTON, J.