

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CHARLENE PICARD, Individually :
and as Administratrix :
of the Estate of :
TIMOTHY R. PICARD, SR., :
Plaintiff, :
v. : CA 09-318 S
CITY OF WOONSOCKET, by and :
through its Treasurer, Carol :
A. Touzin, et al., :
Defendants. :

MEMORANDUM AND ORDER
DENYING MOTION TO QUASH
BUT MODIFYING SCOPE OF SUBPOENA

Before the Court is The Rhode Island State Police's Motion to Quash Plaintiffs' [sic] Subpoena to Testify at a Deposition in a Civil Action (Docket ("Dkt.") #92) ("Motion to Quash" or "Motion"). By the Motion, the Rhode Island State Police (the "RISP"), a non-party, seeks to quash a subpoena which Plaintiff has issued pursuant to Fed. R. Civ. P. 30(b)(6). The RISP argue that the subpoena is overly broad and that the information sought is protected by the law enforcement privilege. See Memorandum in Support of the Rhode Island State Police's Motion to Quash Plaintiffs' [sic] Subpoena to Testify at a Deposition in a Civil Action ("RISP Mem.") at 2-3. A hearing was held on February 28, 2012. For the reasons stated herein, the Motion to Quash is denied, but the scope of the subpoena is modified.

I. Facts

On or about August 20, 2006, Timothy Picard, Sr. ("Mr. Picard"), died while in the custody of members of the Woonsocket Police Department after having been arrested. See Amended Complaint ¶¶ 18, 29, 49, 57. Three days later, on or about August 23, 2006, Associate Justice Daniel A. Procaccini ("Judge Procaccini") of the Rhode Island Superior Court entered an order which required, among other things, that:

all tangible evidence related to the investigation of this matter¹ be properly preserved by those individuals or entities having possession thereof, including but not limited to the Woonsocket Police Department, **the Rhode Island State Police**, and the Rhode Island State Medical Examiner's Office pending the completion of the investigation and **until further order of the Court.**

Memorandum in Support of Plaintiff's Motion to Compel Compliance with Subpoena Duces Tecum ("Plaintiff's Mem. Re Dkt. #71), Exhibit ("Ex.") 1 (Judge Procaccini's Order of 8/23/06) ¶ 3 (bold added). A copy of Judge Procaccini's Order was served upon the RISP.²

In or around October 2006 Plaintiff issued a subpoena for all documents related to the investigation of the death of Mr. Picard

¹ It is clear from Judge Procaccini's Order that "this matter" refers to the arrest of Timothy R. Picard, Sr., on August 20, 2006, by members of the Woonsocket Police Department and his subsequent death. Memorandum in Support of Plaintiff's Motion to Compel Compliance with Subpoena Duces Tecum ("Plaintiff's Mem. Re Dkt. #71), Exhibit ("Ex.") 1 (Judge Procaccini's Order of 8/23/06).

² Plaintiff's counsel made this representation at the February 28, 2012, hearing on the instant Motion, and it was not disputed by counsel for the RISP.

in the possession of the RISP. Id., Ex. 4 (Letter from Sullivan to Marotti of 3/16/07). The subpoena was the subject of a conference before Judge Procaccini in November of 2006. Id. At the conference, the Rhode Island Department of Attorney General ("RIDAG") objected to turning over the records to Plaintiff until the criminal investigation had been completed. Id. "At the end of the conference, and with the court's approval, the parties agreed to respond to the subpoena upon completion of the criminal investigation." Id.

In January 2007, a representative of the RIDAG met with Plaintiff and her counsel and informed them that the RIDAG had completed its review of the matter and determined that criminal charges were not warranted against any person. See id. On March 16, 2007, the RIDAG sent Plaintiff's counsel two binders containing documents from the RISP's investigation of the circumstances surrounding Mr. Picard's death. Id.; see also Affidavit of David P. Tikoian of 10/24/11 ("Second Tikoian Aff.") ¶ 8. It was represented to Plaintiff (either at that time or subsequently) that the binders constituted the complete record of the investigation.³

³ Counsel for the RISP has not disputed that this representation was made. Indeed, the memorandum filed by the RISP relative to the instant Motion appears to make a related representation. See Memorandum in Support of the Rhode Island State Police's Motion to Quash Plaintiffs' [sic] Subpoena to Testify at a Deposition in a Civil Action ("RISP Mem.") at 1 ("At the conclusion of said investigation [by the RISP], the entire case, including witness statements, was forwarded to the Department of Attorney General for a determination as to any liability on the part of the Woonsocket Police Department or its members in Mr. Picard's death."). However, in the same memorandum the RISP acknowledge that, after being

On or about June 28, 2011, Plaintiff served a subpoena on the RISP for the production of all physical evidence seized as a result of their investigation of the death of Timothy Picard on August 20, 2006, including, but not limited to:

(a) Pepper spray cans as identified in State Police Incident Report #06RIX1-561-OF as Sabre Red Spray Can (Officer Antaya) and Sabre Red Spray Can (Officer Glode);

(b) Handcuffs used on Timothy Picard on August 20, 2006;

(c) Broken Key as identified in State Police Incident Report #06RIXI-561-OF;

...

Plaintiff's Mem. Re Dkt. #71, Ex. 5 (Subpoena), Att. 1 (Exhibit "1"); see also Affidavit of David P. Tikoian (Dkt. #63) ("First Tikoian Aff."). In response, an affidavit signed by RISP Captain David P. Tikoian was filed in this action on July 27, 2011. See Dkt. Among other statements contained in the affidavit, Captain Tikoian stated that the pepper spray cans and broken key sought by the subpoena had been "destroyed by Lt. Michelle Kershaw of the [RISP] on September 9, 2009." First Tikoian Aff. ¶¶ 6, 8.

On or about September 9, 2011, Plaintiff deposed Dennis E. Pincince, a retired RISP lieutenant who had been in charge of the bureau of criminal identification and assigned to the in custody death investigation of Mr. Picard. See Plaintiff's Memorandum in

served with subpoenas in July and August 2011 for various documents and evidence relating to Mr. Picard's death, additional documents were "discovered in the closed case file." Id. at 2.

Support of Her Objection to Rhode Island State Police's Motion to Quash Subpoena Duces Tecum ("Plaintiff's Mem. Re Dkt. #93) at 8. Mr. Pincince testified that he had made notes during the investigation and repeatedly indicated that if he were able to review his notes it would assist him in answering the questions posed by Plaintiff's counsel. See id. at 9-10. It can be reasonably inferred that these notes were not included in the binders which the RIDAG had forwarded to Plaintiff in March 2007. Relatedly, Plaintiff also deposed Lieutenant Marc Turcotte of the Woonsocket Police Department's Internal Affairs Division. See id. at 10-16. He testified that he prepared a report of his investigation into whether the Woonsocket police officers who had contact with Mr. Picard had violated the Woonsocket Police Department's policies and procedures. See id. at 13. Lt. Turcotte further testified that his job was to "liaise with the State Police whose job it was to determine what went on." Id. at 12 (quoting Turcotte Dep.). Plaintiff's efforts to obtain a copy of Lt. Turcotte's report from the Woonsocket Police Department have been unsuccessful.

On October 24, 2011, Captain Tikoian executed a second affidavit in response to a subpoena to produce documents which had been served upon the RISP on August 11, 2011. See Second Tikoian Aff. ¶ 5. In an attached privilege log, Captain Tikoian identified six items sought by the August 2011 subpoena which were being

withheld on grounds of privilege. See id., Att. (Privilege Log). Among the documents being withheld were approximately twenty pages of notes by Detective John Alfred and two documents by an unknown author. Id.

Plaintiff has represented that Mr. Pincince's notes, Lt. Turcotte's notes, Detective Alford's notes, and other items of evidence that were part of the RISP's investigation into the death of Mr. Picard were not included in the materials transmitted to Plaintiff by Assistant Attorney General John E. Sullivan, III ("AAG Sullivan"), in March 2007.⁴ See Plaintiff's Mem. Re Dkt. #93 at 3 n.1; see also id. at 17 ("Despite numerous requests by Plaintiff's counsel, documents and tangible items related to the crime scene investigation at the Woonsocket Police Department after Timothy Picard's death have not been produced, nor ha[s] there been any reasonable explanation as to the whereabouts of these documents and tangible items and what has become of them.").

II. Discussion

A. Should the Subpoena be Quashed Entirely?

To the extent that the Motion seeks to quash the subpoena entirely, the Court has little difficulty concluding that the

⁴ The Court recognizes that a copy of Lt. Turcotte's report for the Woonsocket Police Department may not have found its way into the files of the RISP. However, given that his job was to "liaise with the State Police . . .," Plaintiff's Mem. Re Dkt. #93 at 12 (quoting Turcotte Dep.), it is not beyond the realm of possibility that this could have occurred. Indeed, the privilege log attached to the Second Tikoian Aff. lists an email from Lt. Marc Turcotte. See Second Tikoian Aff., Attachment ("Att.") (Privilege Log).

Motion should be denied. The above facts establish that: (1) Judge Procaccini entered an order which required that all tangible evidence relating to the investigation into Mr. Picard's death be preserved; (2) a copy of Judge Procaccini's Order was served on the RISP; and (3) a member of the RISP subsequently destroyed evidence within the scope of that order. The above facts also establish that: (a) the RISP, represented by the RIDAG, agreed at the 2006 conference before Judge Procaccini that it would respond to the subpoena which Plaintiff had served upon the RISP upon completion of the criminal investigation; (b) in accordance with that agreement AAG Sullivan forwarded the materials from the RISP's investigation to Plaintiff's counsel on March 16, 2007; (c) it was represented to Plaintiff's counsel that the materials forwarded constituted the complete record of the RISP's investigation; and (d) the materials forwarded did not constitute the complete record of the RISP's investigation.

These facts are sufficient to warrant denial of the Motion and to allow Plaintiff to conduct a Rule 30(b)(6) deposition of the RISP. Plaintiff is entitled to inquire into the circumstances surrounding: (a) the representation that the complete record of the RISP investigation had been provided to Plaintiff, (b) the destruction of evidence notwithstanding Judge Procaccini's Order, and (c) the RISP's compliance with Plaintiff's subpoenas.

B. Does the Law Enforcement Privilege Bar the Subpoena?

The RISP argue that the subpoena should be quashed based on the law enforcement privilege. See RISP Mem. at 2-3. The law enforcement privilege is a qualified privilege which is subject to balancing the government's interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party's interest in disclosure. Commonwealth of Puerto Rico v. United States, 490 F.3d 50, 64 (1st Cir. 2007). The privilege has been recognized to extend to "documents containing 'information about ongoing criminal investigations—including investigative leads, law enforcement methods and techniques, internal investigative memoranda, and identifying information relating to witnesses and law enforcement personnel, including undercover operatives.'" Id. at 63 (quoting In re U.S. Dep't of Homeland Sec., 459 F.3d 565, 569 (5th Cir. 2006)). The proponent of the law enforcement privilege bears the ultimate burden of demonstrating its applicability. FTC v. Timeshare Mega Media & Mktg. Grp., Inc., No. 10-62000-CIV, 2011 WL 6102676, at *4 (S.D. Fla. Dec. 7, 2011) (citing In re City of New York, 607 F.3d 923, 945 n.23 (2nd Cir. 2010) (citing Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984))).

The RISP note that the privilege is based on the "public interest in minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or sources"

RISP Mem. at 2 (quoting Black v. Sheraton Corp. of Am., 564 F.2d 531, 545 (D.C. Cir. 1977)). The RISP also note that public interest in non-disclosure cannot not be disregarded simply because the investigation at issue has concluded. Id. at 3 (citing Black, 564 F.2d at 546). However, the RISP do not offer any particularized argument which identifies any specific harm that may result from disclosure of the information sought here. To the extent that there is concern that allowing the deposition to proceed would reveal law enforcement investigative techniques, that concern can be adequately addressed by limiting the use and dissemination of the information obtained by Plaintiff to Plaintiff's counsel and this case, and the Court will impose this limitation.

While the fact that the RISP concluded their investigation into Mr. Picard's death more than five years ago does not render the privilege inapplicable, see Black, 564 F.2d at 546, whether the investigation has been concluded is one of the factors which courts usually consider in balancing the interest of the government and Plaintiff, see FTC, 2011 WL 6102676, at *7 n.7 (noting that some courts have applied what is referred to as the Frankenhauser test, named for Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D.Pa. 1973)).⁵ Indeed, of the ten factors identified in Frankenhauser v.

⁵ In Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D.Pa. 1973), the court set forth ten factors for consideration in determining whether the law enforcement privilege applies;

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government

Rizzo, almost all weigh in favor of disclosure here.

Disclosure will not discourage citizens from giving the government information to any appreciable extent. See FTC, 2011 WL 6102676, at *7 n.7. The RISP have not suggested that the disclosure of the identities of persons who have given the government information is a reason for concern in this case. See id. While it is conceivable that government self-evaluation and consequent program improvement could be somewhat chilled by disclosure, it is not probable that this will be the result. See id. Although the information sought is both factual data and evaluative summary, the disclosure of evaluative information in the circumstances here is unlikely to cause appreciable harm, and it can be minimized by restricting the use and dissemination of the information to this case and Plaintiff and her counsel. See id. Plaintiff is not an actual or potential defendant in any criminal proceeding. See id.

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 other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D.Pa. 1973).

As already noted, the investigation has been completed. See id. The Court has not been made aware of any intradepartmental disciplinary proceedings which arose from the investigation, and the possibility of such proceedings arising now seems remote. See id. Plaintiff's suit is non-frivolous and brought in good faith. See id. The information sought is not available through other discovery or sources. See id. Lastly, the information sought is clearly important to Plaintiff's case. See id.

The Court concludes that the balance here clearly weighs in favor of disclosure. Accordingly, the RISP's invocation of the law enforcement privilege is rejected. However, Plaintiff is ordered to use the information obtained at the deposition solely for the purpose of this case and not to disseminate it to any other person without permission from this Court.

C. Should the Subpoena be Narrowed?

The RISP contend that the subpoena is overly broad, and the Court is compelled to agree. For example, Paragraph 4 of the Notice to Take Video 30(b)(6) Deposition ("Notice") attached to the subpoena seeks in part:

Any and all policies, procedures, manuals, general orders, memorandum, directives or the like in effect in August 2006 governing the conduct of members of the [RISP] regarding the investigation of criminal matters, including, but not limited to_[,] in custody deaths_[.]

Notice at 3. Given that a primary function of the RISP is to investigate crimes, the above directive would require the production

of a huge volume of documents. Accordingly, the Notice should be narrowed, and the Court does so below.

1. Records

To the extent that the subpoena seeks to have the deponent(s) bring any of the records listed in the numbered paragraphs on pages 2-3 of the Notice, the paragraphs which correspond to the numbers below are modified as follows:

1. The deponent(s) need not bring any document which has been previously produced to Plaintiff.⁶
2. No modification.
3. No modification.
4. The deponent(s) need bring only documents which pertain to: (a) the investigation of "in custody deaths" and (b) policies and procedures applicable to such deaths.⁷

2. Testimony

To the extent that the subpoena seeks to have the deponent(s) testify regarding the numbered topics listed on pages 4-7 of the Notice, the topics which correspond to the numbers below are modified as follows:

⁶ This modification applies to all paragraphs of the Notice to Take Video 30(b)(6) Deposition ("Notice").

⁷ This limitation also applies to subparagraphs a. through g. of paragraph 4. See Notice at 3. However, a policy or procedure need not explicitly refer to "in custody deaths" to be within the scope of this Order. For example, if a policy regarding the destruction of evidence existed and the policy applied to evidence from the investigation of an "in custody death," the policy must be produced even though the policy itself is not limited to evidence from such investigations.

1. through 8. The word "documents" as used in these paragraphs means documents already produced to Plaintiff by the RISP and those documents required to be produced pursuant to the Notice as narrowed by this Order.

9. through 32. No modification.

III. Conclusion

For the reasons stated above, the Motion to Quash is DENIED. However, the subpoena is narrowed as stated in Section II. C. of this Memorandum and Order. In addition, Plaintiff and her attorneys may use the information obtained as a result of the deposition only for this case, and they shall not disseminate the information to any other person or entity without further permission from this Court.

So ordered.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
March 8, 2012