

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03204-RBJ-NRN

LORI FRANK,

Plaintiff,

vs.

CITY OF FORT COLLINS, a municipality; and
JEROME SCHIAGER, former Deputy Chief of Police, in his individual capacity,

Defendant.

**DEFENDANT CITY OF FORT COLLINS' MOTION FOR PROTECTIVE ORDER RE:
SUBPOENAS *DUCES TECUM* TO EMPLOYERS COUNCIL AND
EMPLOYMENT MATTERS LLC/
EMFIG INVESTIGATIONS**

Defendant City of Fort Collins, by and through its attorneys Cathy Havener Greer and Kathryn A. Starnella, of Wells, Anderson & Race, LLC, and Jenny Lopez Filkins, Senior Assistant Attorney, City of Fort Collins, and pursuant to Fed. R. Civ. P. 26(c)(1) and D.C.Colo.LCivR 30.2, respectfully submit the following Motion for Protective Order.

CERTIFICATE OF CONFERRAL

Pursuant to D.C.Colo.LCiv R 7.1(A), undersigned counsel conferred with Plaintiff's counsel about the breadth and scope of the subpoenas *duces tecum* and the requested relief. The parties are unable to resolve their differences and Court intervention is needed. Plaintiff opposes this Motion.

INTRODUCTION

This Motion concerns overly broad subpoenas *duces tecum* Lori Frank issued to Employers Council¹ and Employment Matters LLC, Flynn Investigations Group, which the City retained between 2016 and 2018. The requested investigations are not limited to those conducted in Police Services, the situs of Plaintiff Frank’s alleged events, but also include investigations in other City service areas. A service area is defined in the Home Rule Charter of the City of Fort Collins as a major city administrative unit.

As for the Police Services-related investigations, the subpoena encompasses 19 investigations conducted in 2017, a majority of which do not concern or relate to the bases of Plaintiff Lori Frank’s lawsuit, *i.e.* gender discrimination or pay inequity, and one of which falls outside the complaint’s operative time period. These investigations are protected by the attorney-client privilege and the attorney work-product doctrine. Those privileges and protections cannot be overcome by Plaintiff Frank’s supposed need for this information. Plaintiff Frank’s lawsuit concerns alleged gender discrimination and pay inequity from 2015 to the present. Therefore, she has no compelling need for irrelevant documents and information that *do not* concern gender discrimination or pay inequity or that fall outside this period of time.

Additionally, these Police Services-related investigations—a majority of which concerned unsubstantiated claims—contain sensitive, personal information about and unsubstantiated allegations against non-parties to this suit. The production and release of this information would serve no purpose beyond annoyance and embarrassment of the City, Defendant Schiager, and non-parties.

¹ The subpoena *duces tecum* identifies Employers Council as “Workplace Investigations.”

Also, two of these investigations are confidential pursuant to the terms of a confidentiality agreement between the City and a third-party and cannot be released without a court order.

Finally, these subpoenas *duces tecum* improperly demand production of draft investigation reports and other investigation-related notes. Production of these materials, however, would reveal the mental impressions, conclusions, opinions, and legal theories of the retained investigators and the City's attorneys. Thus, the Court must block these materials' disclosure pursuant to Fed. R. Civ. P. 26(b)(3).

Alternatively, the City requests that the Court conduct *in camera* review of the requested materials before it rules on this Motion.

BACKGROUND

I. Nature of Claims

This case concerns claims of gender discrimination and pay inequity. Plaintiff Lori Frank is a Crime Analyst for the City of Fort Collins Police Services. *See* Complaint, Doc. # 2, at ¶ 37. As a Crime Analyst, Ms. Frank was required and expected to collect and analyze extensive data and to produce reports to assist Police Services mitigate spikes in crime and allocate resources. *Id.* at ¶ 54. For approximately 14 years, she allegedly received high praise for the quality of her work. *Id.* at ¶ 37. When she was assigned to a different supervisor, Defendant Jerome Schiager, in November 2015, however, she received constructive criticism to improve the quality and accuracy of her work. *Id.* at ¶ 82. Defendant Schiager eventually placed Plaintiff Frank on a performance improvement plan in November 2016 because of her consistent errors and lack of analysis. *See id.* at ¶¶ 107, 117-19, 123, 124.

Ms. Frank speculatively attributes Defendant Schiager's constructive criticism to gender discrimination and retaliation for a complaint she made about him two years prior. *Id.* at ¶¶ 70-74; *see also* ¶¶ 235, 242-43. She theorizes that a culture of gender discrimination and pay inequity pervades the City's Police Services.

II. The Subpoenas *Duces Tecum*

In an attempt to substantiate her theory, Ms. Frank issued subpoenas *duces tecum* to Employers Council and Employment Matters/Flynn Investigations. The subpoenas *duces tecum* command the production of the following documents by September 13, 2019, at 11:00 a.m.:

All documents related to or regarding any investigation conducted by you for or on behalf of City of Fort Collins (including Police Services) from January 1, 2016[,] through December 31, 2018.

See Exhibits A and B, Pre-Served Courtesy Copies of the Subpoenas *Duces Tecum*.

III. Nature of the Underlying Investigations

In August 2016, Police Services encouraged employees to come forward with any complaints of alleged department policy violations. The City retained Employers Council and Employment Matters/Flynn Investigations to investigate these complaints. The complaints—several of which were unsubstantiated—concerned wide-ranging issues unrelated to the two drivers of Ms. Frank's lawsuit: gender discrimination or pay inequity.

Upon information and belief, 19 Police Services investigations fall within the subpoenas' scope. The investigations breakdown, as follows:

Employers Council

- Investigated two gender discrimination or retaliation complaints: (1) Lori Frank's complaints; and (2) a female non-party complaint regarding alleged discriminatory and retaliatory decisions concerning special assignments.
- **The City produced final reports and witness statements from both investigations in response to Plaintiff's discovery requests.**

Employment Matters/Flynn Investigations

- Investigated 17 complaints.
- One investigation concerned Lori Frank's complaints. **The City produced final reports and witness statements from both investigations in response to Plaintiff's discovery requests.**
- Another investigation concerned a pregnant employee's complaint about available accommodations during the promotion process. **The City produced final reports and witness statements from both investigations in response to Plaintiff's discovery requests.**
- Another investigation concerned other employees' complaints about Defendant Jerry Schiager. None of these complaints concerned gender discrimination or retaliation or pay inequity. Many of these complaints were based on secondhand, vague, uncorroborated, spurious, or contradicted information. Most of the alleged

events occurred in the distant past and some of the investigations delved into prurient claims.

- Another 11 of the 17 complaints did not concern any allegations of gender discrimination or pay inequity.
- Another investigation concerned a non-party's conduct from 15 years ago, which falls outside the operative time period in Ms. Frank's complaint: 2015 to the present.
- Another two of the 17 investigations concern claims of sexual harassment and retaliation. **In response to Plaintiff's discovery requests, the City produced a lightly redacted version of the final report for the retaliation-related investigation.** Redactions were made pursuant to the terms of a confidentiality agreement with a non-party. The City cannot produce the other investigation without a court order because of the same confidentiality agreement.

STANDARD OF REVIEW

“A subpoena served on a third party . . . is considered discovery[.]” *Frapplied v. Affinity Gaming Black Hawk, LLC*, No. 17-cv-01294, 2018 U.S. Dist. LEXIS 66925, at *10 (D. Colo. Apr. 20, 2018) (unpublished) (citing *Rice v. United States*, 164 F.R.D. 556, 556-57 (N.D. Okla. 1995)). Therefore, “to be enforceable, a subpoena must seek information that is relevant to a party's claims or defenses and proportional to the needs of the case.” *Id.*; *see also* FED. R. CIV. P. 26(b)(1) (listing proportionality factors).

To challenge a subpoena issued to a non-party, “a party must seek a [R]ule 26(c) protective order or a discovery sanction from the same court that issued the subpoena.” *Clower v. Geico Ins.*,

No. CIV 12-0472, 2013 U.S. Dist. LEXIS 65036, at *17 (D.N.M. Apr. 16, 2013) (unpublished). Generally, however, “a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege [or privacy interest] relating to the documents being sought[.]” *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997); *see also Thane v. GEICO Cas. Co.*, No. 16-cv-02940, 2017 U.S. Dist. LEXIS 115949, at *11 (D. Colo. July 25, 2017) (unpublished). The movant must make a specific showing of a privilege or a privacy interest. *Windsor*, 175 F.R.D. at 668. “Objections unrelated to a claim of privilege or privacy interest are not proper bases upon which a party may quash a subpoena.” *Thane*, 2017 U.S. Dist. LEXIS 115949, at ** 11-12 (finding that movant had standing to seek protection from the subpoena based on attorney-client privilege and the work-product doctrine).

“[A]bsent a claim of privilege” or infringement upon the movant’s legitimate interests, “a party has no standing to challenge a subpoena to a nonparty.” *Clower*, 2013 U.S. Dist. LEXIS 65036, at *15.

ARGUMENT

I. The subpoenas must be quashed because they seek irrelevant, privileged and work-product material.

Plaintiff Frank demands production of all investigations, including draft reports and notes, that Employers Council and Employment Matters/Flynn Investigations conducted for the City of its departments and services from January 1, 2016, through December 31, 2018. *See* Exs. A and B, Subpoenas *Duces Tecum*. Only a portion, *i.e.*, 19, of these investigations pertained to the City’s Police Services department. Of those 19 investigations, 13 have no relation to gender discrimination or pay inequity, the themes of Plaintiff Frank’s lawsuit.

These investigations were conducted at the request of the City Attorney's Office to provide Police Services with legal advice and in anticipation of litigation. Thus, these investigations, including draft reports and notes, are protected by the attorney-client privilege and the work-product doctrine. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (extending attorney-client privilege to materials and employee communications from attorney-directed internal investigation); *see also Collardey v. All. for Sustainable Energy, LLC*, No. 18-cv-00486, 2019 U.S. Dist. LEXIS 135426, at **7-8 (D. Colo. Aug. 12, 2019) (unpublished) (extending attorney-client privilege and work-product protection to retained outside investigator's files); *Hale v. Emporia State Univ.*, No. 16-cv-4182, 2018 U.S. Dist. LEXIS 26562, at **21-22 (D. Kan. Feb. 20, 2018) (unpublished) (blocking production of draft investigative reports because they would contain mental impressions of defendant's general counsel). "[T]he fact that [the investigators] conducted the interviews in [their] capacity as [] third-party investigator[s] does not render the attorney-client privilege inapplicable" because the interviews were conducted "to assist . . . counsel in providing legal advice." *Collardey*, 2019 U.S. Dist. LEXIS 135426, at *7. Plaintiff cannot overcome this privilege.

Similarly, Plaintiff Frank cannot overcome the work-product doctrine's protections. To overcome the work product doctrine's protections, Plaintiff Frank must satisfy two criteria. First, she must demonstrate that the material is "otherwise discoverable under Rule 26(b)(1)." FED. R. CIV. P. 26(b)(3)(A)(i). Second, she must demonstrate that she "has a substantial need for the materials to prepare [her] case and cannot, without undue hardship, obtain their substantial equivalent by other means." FED. R. CIV. P. 26(b)(3)(A)(ii). Ms. Frank can satisfy neither criteria.

First, none of the non-Police Services investigations are “otherwise discoverable under Rule 26(b)(1).” Similarly, none of the investigations unrelated to claims of gender discrimination or pay inequity are “otherwise discoverable.”

Rule 26(b)(1) limits discovery to “any *nonprivileged* matter that is *relevant* to any party’s claim or defense and *proportional* to the needs of the case.” (emphasis added). Plaintiff Frank cannot legitimately argue that attorney-directed investigations of (a) other City departments or (b) issues in Police Services that are unrelated to gender discrimination and pay inequity are relevant to her lawsuit or proportional to the needs of this case. Plaintiff Frank filed suit because she believes she is the victim of gender-discrimination and pay-inequity as a Police Services employee. She claims that Police Services “has failed to address and remedy its discriminatory practices[.]” Doc. # 2, Complaint, at ¶ 14. And she claims that Police Services “has allowed a systemic culture of discrimination against women to continue and flourish[.]” *Id.* at ¶ 17. Investigations of non-Police Services departments or of issues unrelated to gender discrimination or pay are not relevant to her claims.

Second, Plaintiff Frank cannot demonstrate that denial of production “would unduly prejudice the preparation of [her] case or cause [her] any hardship or injustice.” *Adams v. Gateway, Inc.*, No. 2:02-cv-106, 2003 U.S. Dist. LEXIS 28559, at *21 (D. Utah Dec. 30, 2003) (unpublished). Plaintiff would be hard-pressed to demonstrate undue prejudice from the inability to access irrelevant material. Even if the information was relevant, Plaintiff has other means of discovery—such as through depositions of the complainants and investigation interviewees—to obtain the desired information.

II. The subpoenas must be quashed to protect the City, Defendant Schiager, and non-parties from annoyance and embarrassment.

While a party's standing to quash a subpoena served upon a third party is generally limited to privilege or privacy interests,² Fed. R. Civ. P. 26(c)(1) expressly permits courts to forbid disclosure or discovery or inquiry into certain matters "to protect a party or person from annoyance [or] embarrassment."

Here, the at-issue investigations—a majority of which concerned unsubstantiated claims—contain sensitive, personal information about, and unsubstantiated allegations against, Defendant Schiager and non-parties to this suit. These investigations concerned personnel matters, *i.e.*, individuals' job performance and/or interactions with co-workers. Police Services employees have a privacy right in these personnel investigations in the same way that employees have a privacy right in their personnel records sufficient to warrant quashing of a subpoena. *See Pub. Serv. Co. v. A Plus, Inc.*, No. CIV-10-651-D, 2011 U.S. Dist. LEXIS 16087, at *7 (W.D. Okla. Feb. 16, 2011) (unpublished) (noting employees' privacy interests in personnel files to protect them from production in response to a subpoena); *see also Martinelli v Dist. Ct. of Denver*, 612 P.2d 1083, 1091-93 (Colo. 1980) (discussing right to confidentiality of personnel files). Production of these irrelevant materials would undermine employees' trust in the confidentiality of workplace investigations and it would chill employees from coming forward with complaints.

Further, the production and release of this information would serve no purpose beyond annoyance and embarrassment of the City, Defendant Schiager, and non-parties, and it would likely interfere with Police Services' daily business and smooth operations. The disclosure of the

² *See Windsor*, 175 F.R.D. at 668; *see also* Fed. R. Civ. P. 26(b)(1) (permitting discovery on "nonprivileged matter").

highly personal and sensitive information contained in these files “would be offensive and objectionable to a reasonable person of ordinary sensibilities.” *Martinelli*, 612 P.2d at 1091. Ms. Frank remains a Police Services employee. She interacts with the subjects of these investigations on a daily basis. Discovery has revealed that Ms. Frank takes detailed notes on information she observes and learns about her co-workers. She has used that information to perpetuate workplace discord and undermine workplace efficiencies in the past. Production of irrelevant investigations that contain sensitive, personal information, and unsubstantiated allegations will likely drive workplace tensions and undermine Police Services’ ability to serve its constituents. These are situations that Rule 26(c)(1) serves to avoid. Accordingly, protection from the unwarranted disclosure of this information is needed.

CONCLUSION

For the foregoing reasons, the City of Fort Collins respectfully requests that its Motion for a Protective Order in connection with the subpoenas *duces tecum* that Plaintiff Frank issued to Employers Council and Employment Matters LLC/EMFIG Investigations be granted. The subpoenas must be quashed because they seek irrelevant, privileged and work-product material. The subpoenas must also be quashed to protect the City, Defendant Schiager, and non-parties from annoyance and embarrassment. Alternatively, the City requests that the Court conduct *in camera* review of the requested materials before it rules on this Motion.

Dated this 13th day of September 2019.

Respectfully submitted,

S/ Kathryn A. Starnella

Cathy Havener Greer

Kathryn A. Starnella

Wells, Anderson & Race, LLC

1700 Broadway, Suite 1020

Denver, CO 80290

Telephone: (303) 830-1212

Email: cgreer@warllc.com; kstarnella@warllc.com

Attorneys for Defendant City of Fort Collins

S/ Jenny Lopez Filkins

Jenny Lopez Filkins

Senior Assistant City Attorney

City of Fort Collins

300 LaPorte Avenue

Fort Collins, CO 80521

Telephone: (970) 221-6520

Email: jlopezfilkins@fcgov.com

Attorney for Defendant City of Fort Collins

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 13, 2019, a true and correct copy of the above and foregoing **DEFENDANT CITY OF FORT COLLINS' MOTION FOR PROTECTIVE ORDER RE: SUBPOENAS DUCES TECUM TO EMPLOYERS COUNCIL AND EMPLOYMENT MATTERS LLC/EMFIG INVESTIGATIONS** was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

Jennifer Robinson, Esq.
Robinson & Associates Law Offices, LLC
7900 E. Union Avenue, Suite 1100
Denver, CO 80237
Email: jrobinson@raemployment.com
Attorneys for Plaintiff

Robert M. Liechty, Esq.
Robert M. Liechty PC
1800 Gaylord St
Denver, CO 80206
Email: rliechty@crossliechty.com
Attorney for Plaintiff

David R. DeMuro, Esq.
Vaughan & DeMuro
720 South Colorado Boulevard
Penthouse, North Tower
Denver, CO 80246
Email: ddemuro@vaughandemuro.com
Attorneys for Defendant Schiager

Sara L. Cook, Esq.
Vaughan & DeMuro
111 South Tejon, Suite 545
Colorado Springs, CO 80903
T: 719-578-5500
Email: scook@vaughandemuro.com
Attorneys for Defendant Schiager

S/ Barbara McCall
Barbara McCall
Email: bmccall@warllc.com