

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

LORI FRANK,

Plaintiff,

v.

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

Defendants.

**DEFENDANT CITY OF FORT COLLINS' STATEMENT REGARDING PRIVILEGED
AND PROTECTED NATURE OF ILG'S EXECUTIVE SUMMARY
(DATED DECEMBER 3, 2016) AND ILG REPORT (DATED NOVEMBER 2016)**

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, submits the following statement regarding the attorney-client privilege and work product protected nature of the Investigations Law Group LLC's (ILG's) Executive Summary dated December 3, 2016, and an ILG Report dated November 2016. The City submits this statement pursuant to the Court's Order, Doc. # 54 at 2.

BACKGROUND REGARDING THE ILG EXECUTIVE SUMMARY'S CREATION

On April 29, 2016, Kennyberg Araujo and Francis Gonzales sued the City, Donald Vagge, as former Deputy Chief of Police, and Gary Shaklee, a Police Sergeant for alleged race discrimination. This lawsuit was filed more than 2 ½ years before Plaintiff Lori Frank's lawsuit, and it contained no claims of gender discrimination or gender discrimination-related retaliation. In

September 2016, the City, through its City Attorney and on the advice of outside counsel, retained ILG to conduct a third-party investigation of discrimination complaints against the Fort Collins Police Department, in response to Messrs. Araujo's and Gonzales's race discrimination lawsuit.

During the course of the investigation, witnesses participated with the understanding that confidentiality of the information they shared would be maintained. ILG completed its investigation and, on November 21, 2016, ILG issued a confidential Investigation Report. The Report was authored by two attorney-investigators at ILG, Elizabeth Rita and Kevin Paul, and is labeled "CONFIDENTIAL WORK PRODUCT." On December 3, 2016, ILG issued an Executive Summary, which summarized the Investigation Report's findings. That report was also written by Ms. Rita and Mr. Paul. The Investigation Report itself has not been shared with any City employee except two attorneys in the City Attorney's Office involved in addressing the litigation. Since the Executive Summary's creation, the Executive Summary was shared in a hard copy version with the City Manager, the Chief Human Resources Officer and the Chief of Police during the course of a meeting. These senior staff members returned the hard copy versions of the executive summary to the two attorneys at the conclusion of the meeting.

WHY THE ILG REPORT AND EXECUTIVE SUMMARY ARE AT-ISSUE

On September 16, 2019, Judge R. Brooke Jackson held a discovery hearing. The hearing concerned Plaintiff Lori Frank's attempts to obtain 19 City of Fort Collins workplace investigations that outside investigation firms conducted in 2017 *after* settlement of the *Araujo/Gonzales* case. ILG did not conduct any of the 2017 investigations. A majority of those investigations do not concern or relate to the bases of Plaintiff Frank's lawsuit, *i.e.*, gender discrimination or pay inequity. At the hearing's conclusion, Judge Jackson ordered the City to

produce six categories of documents with the “Attorneys’ Eyes Only” designation. One category is: any complaint of discrimination on bases *other than* gender discrimination if sustained. Portions of the ILG Report and ILG Executive Summary, which concern some substantiated claims of *race discrimination* fall into this category. Because the City has steadfastly maintained the ILG Report’s and the ILG Executive Summary’s attorney work product and attorney-client privileged protections, it seeks the Court’s intervention to prohibit production.

**THE REPORT AND EXECUTIVE SUMMARY ARE ATTORNEY-CLIENT
PRIVILEGED AND ATTORNEY WORK PRODUCT**

The Report and Executive Summary were conducted at the request of the City Attorney to provide City Council and City executive staff members including the Police Chief with legal advice in connection with active *Araujo/Gonzales* litigation 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. Privilege applies even where the investigators are “completely neutral and free from any interference or influence by the legal and human resources departments[.]” *Austin v. City & Cty. of Denver ex rel. Bd. of Water Comm’rs*, No. 05-cv-01313, 2006 U.S. Dist. LEXIS 32048, at *17 (D. Colo May 19, 2006) (unpublished). 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, neither the ILG Report nor the ILG Executive Summary are “otherwise discoverable under Rule 26(b)(1).” ILG investigated race discrimination claims that were or could have been raised in Messrs. Araujo’s and Gonzales’s lawsuit. Therefore, the ILG Report and the ILG Executive Summary are unrelated to Plaintiff’s 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-requested investigations that are unrelated to gender discrimination and pay inequity are relevant to her lawsuit or proportional to the needs of this case.

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 cannot demonstrate undue prejudice from the inability to access irrelevant material.

For all these reasons, the Court should prohibit production of the ILG Report and ILG Executive Summary.

Dated this 9th day of November 2019.

Respectfully submitted,

S/ Kathryn A. Starnella

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 8, 2019, a true and correct copy of the above and foregoing **DEFENDANT CITY OF FORT COLLINS' STATEMENT REGARDING PRIVILEGED AND PROTECTED NATURE OF ILG'S EXECUTIVE SUMMARY (DATED DECEMBER 3, 2016) AND ILG REPORT (DATED NOVEMBER 2016)** 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:

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