

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

LORI FRANK,

Plaintiff,

v.

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

Defendants.

PLAINTIFF'S SUBMISSION ON ATTORNEY/CLIENT PRIVILEGE

Pursuant to the Court's Order of November 4, 2019 the undersigned hereby submits her argument related to the applicability of the attorney-client privilege to protect from disclosure the Executive Summary of Investigation Law Group's Police Services-related investigations, ("Executive Summary").

At issue in this dispute is whether the Executive Summary of the investigation related to the complaints of Francis Gonzalez that the City has been ordered to submit for *in camera* review is protected by the attorney-client privilege. Rather than reinvent the wheel, the undersigned submits for review the Opinion of Chief Judge Marcia Krieger in *Crews v. School District No. 1, et. al*, 13-cv-02912-MSK-MEH, (D. Colo. Dec. 3, 2015), finding that an investigative report similar to the report at issue in this case was not privileged. (Ex. 1.) The Court's analysis of the attorney-client privilege at pages 4-6 of the Order is incorporated herein by reference. In that case, (like the Defendant here), the defendant hired a law firm/ attorney to

conduct an investigation into the plaintiff's claims of discrimination. After the investigation was concluded the attorney compiled an investigative report that was provided to the defendant's in-house attorneys. In finding that the report was not protected by the attorney client privilege Judge Krieger held as follows:

2. The Investigative Report

Next, Mr. Crews seeks to compel disclosure of Ms. Ortiz's investigative report, identified as Document No. 20 on the privilege log. The Defendants contend that the report is protected by the attorney-client privilege.

First, the Court observes that the investigative report was prepared by Ms. Ortiz, acting in her capacity as legal advisor to the District, as discussed above. The report is based on Ms. Ortiz's interviews with District employees and a review of pertinent documents. To a significant degree, the report both directly and indirectly reveals the substance of the interviews with employees. In accordance with federal common law principles, these communications from District employees to Ms. Ortiz could potentially fall within the attorney-client privilege.

Nevertheless, the Court finds that the investigative report is not privileged. There is nothing in the report, Ms. Ortiz's affidavit, or elsewhere in the record to establish that the communications revealed in the report were made in confidence. There is no evidence about the manner in which the interviews with employees were conducted or any other attendant circumstances. For example, there is no indication that the employees were advised by supervisors that their discussions with Ms. Ortiz were for the purpose of gaining legal advice and were confidential or that there were no third-parties present. This stands in stark contrast to the communications made in *Upjohn*, where employees were instructed to treat the investigation as highly confidential and not to discuss it with anyone outside the company, and the responses to the questionnaires were maintained as confidential material. *See Upjohn*, 449 U.S. at 395 & n.5. Further, there is nothing to establish that the report has been kept confidential by the District and CSDSIP and has not been distributed to anyone else. On the current record, the Court cannot find that the communications revealed in the report were made in confidence or that they were intended to be kept secret. Because the Defendants have failed to meet their burden on an essential element of the privilege, the Court

finds that the investigative report is not privileged and must be disclosed to Mr. Crews.

Although the Court relies on different reasoning, the Court sees no clear error in the Magistrate Judge's order that the Defendant must disclose the investigative report to Mr. Crews. The Defendants' Objections with regard to the report are overruled.

Order at 8-9.

In addition, a conclusion that the investigative report is not protected by the attorney-client privilege is further supported by the City's disclosure of similar investigative reports. For example, the investigative report into Ms. Franks' complaints has been produced even where the report itself indicates that it was "Attorney-Client and Work Product Privileged". (Ex. 2.) Similarly, investigative reports of the complaints of Michelle Leschinsky (Ex. 3.), Carrie Ripsam, (Ex. 4) and Kelly French, (Ex. 5) have all been produced in this case.¹ All of these reports are from attorney investigators hired to conduct investigations into employee complaints and all were originally sent to Jenny Lopez Filkins, Esq., Assistant City Attorney, City of Fort Collins. Had the City intended any of the investigative reports to be **actually** protected by the attorney-client privilege the City could have submitted them for in camera review. In the case of the investigative report into Ms. Franks' complaint, the City voluntarily produced that report as part of its initial 26(a)(1) disclosures months ago. Moreover, there can be no argument by the City that these investigative reports were inadvertently disclosed because at least one was used as

¹ Out of an abundance of caution, all reports are submitted as restricted until the court rules otherwise since even though not attorney-client privileged the reports may still retain their confidentiality status..

an exhibit at a recent deposition with no objection from defendants. For these reasons, the investigative report is not protected by the attorney-client privilege.

Finally, it may also be helpful to briefly discuss the relevancy of the investigative report at issue in this case. Defendant has argued that this report is not relevant because it relates to a claim of race discrimination. However, this report is highly relevant because it was this report and complaint of discrimination that actually led to the letter from Chief Hutto indicating that there might be people within the Department who had experienced discrimination, retaliation, or been targeted in some way and that these actions “have had an adverse effect on their careers” and to find a way to make their voices heard. In addition, as part of the resolution of Mr. Gonzalez’s complaint the City was ordered, among other things, to hire investigators to look into other complaints and to conduct implicit bias training within the department. Moreover, this report is consistent with Ms. Frank’s theory of the case of a culture of discriminatory and retaliatory conduct. Finally, since the discovery hearing the undersigned has had the opportunity to depose the City’s Human Resources Director, who testified as to the significance of the problems within the department and the lawsuit filed by Mr. Gonzalez related to this report. Accordingly, Plaintiff requests that the Court order that the investigative report be produced in its original unredacted form.

Submitted this 8th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, , 2019 a copy of the foregoing was served electronically on the following via the Court's electronic filing system as follows:

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