

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

LORI FRANK,

Plaintiff,

v.

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

Defendants.

ORDER ON DISCOVERY DISPUTE AFTER IN CAMERA REVIEW

Upon referral by Judge R. Brooke Jackson (Dkt. #52), the Court held a discovery hearing on November 4, 2019 by telephone. At the conclusion of that hearing, the Court issued certain rulings, and also asked that the Defendants submit certain of the disputed materials in unredacted form for *in camera* review. See Dkt. #54 (Courtroom Minutes of 11/04/2019 proceedings). The documents that I asked be submitted in unredacted form for *in camera* review included FC-SEP16ORDER 000408-000535, and the executive summary of an investigation by outside counsel (Investigations Law Group LLC) into alleged race discrimination in the Fort Collins Police Department (“Executive Summary”). I also asked that the parties submit supplemental briefs on the question of the applicability of the attorney-client privilege to the executive summary.

The Defendants did as requested and on November 8, 2019, submitted via the Court's electronic filing system two documents as "Restricted – Level 3," meaning that the documents may only be reviewed by the Court and not the opposing party or the public. See Dkt. ##56 and 58. Defendants submitted a brief explanation of unredacted documents Bates labeled FC-SEP16ORDER 000408-000535, and the basis for the original redactions. See Dkt. #55. As requested, both parties submitted additional briefing on the issue of attorney client privilege as applied to the Executive Summary. See Dkt. #59 (Plaintiff's Submission on Attorney/Client Privilege) and Dkt. #57 (Defendant City of Fort Collins' Statement Regarding Privileged and Protected Nature of ILG's Executive Summary and ILG Report).

Having reviewed the submissions by the Parties, the relevant authorities, and conducted an *in camera* review of the submitted discovery materials, I come to the following conclusions:

1. ILG's Executive Summary and Report

In April 2016, Kennyberg Araujo and Francis Gonzales sued the City of Fort Collins, the former Deputy Chief of Police, and a Police Sergeant for alleged race discrimination. The lawsuit 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 Investigations Law Group LLC ("ILG") to conduct a third-party investigation of race discrimination complaints against the Fort Collins Police Department.

ILG completed its investigation and, on November 21, 2016, 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 was 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.

The City maintains that the ILG Report and ILG Executive Summary are work product and attorney-client privileged documents. Based on these assertions of privilege and the work-product doctrine, the City argues they are entitled to withhold these documents, even though the documents address certain limited substantiated claims of race discrimination and therefore arguably fall within the categories that Judge Jackson said should be produced. The City cites *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) for the proposition that the attorney-client privilege and work-product protection extend to a retained outside investigator’s files. The City also cites *Collardey v. Alliance for Sustainable Energy, LLC*, Civil Action No. 18-cv-00486-PAB-SKC, 2019 WL 3778298, (D. Colo. 2019), where Judge Brimmer recently affirmed Magistrate Judge Crews’ decision holding that similar documents, created by an outside investigator in anticipation of litigation under the supervision of counsel, were protected from disclosure.

Plaintiff, for her part, cites the opinion of Judge Krieger in *Crews v. School District No. 1, et al.*, 13-cv-029120MSK-MEH (D. Colo. Dec, 3, 2015). The *Crews* case was race discrimination case against a school district that involved a legal advisor who had conducted interviews with district employees in order to prepare an investigative report. Judge Krieger there found that there were insufficient indicia to support a conclusion that the interviews were conducted with the intent that they remain confidential and under the shroud of the attorney-client privilege. Absent that essential element of the attorney client privilege, Judge Krieger ordered the production of the investigation report. Oddly, perhaps because the parties did not raise it, there was no mention of the work-product doctrine in the *Crews* case.

I have personally reviewed *in camera* the Executive Summary. I have not reviewed the report (which was not submitted for *in camera* review), but I am working under the assumption that the Executive Summary adequately summarizes the contents of the report itself. I find that the Executive Summary and the Report are covered by both the attorney-client and work product privileges. The Executive Summary contains the thoughts and impressions of counsel and draws conclusions about allegations of race discrimination based on an investigation.

Under federal common law, the attorney-client privilege generally applies to “communications made in confidence by a client and a client’s employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice.” *Sandra T.E. v. South Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2010) (citing *Upjohn*, 449 U.S. at 394-99). See also *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (stating that a “critical component of the [attorney-client] privilege is whether

the communication between the client and the attorney is made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence” (internal quotation marks omitted). “[T]he mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege.” *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir. 2010) (internal quotation marks and bracket omitted). On the other hand, courts have extended the privilege to communications between a client and a third-party where the “communication was made in confidence for the purpose of obtaining legal advice from the lawyer.” *Roe v. Catholic Health Initiatives Colorado*, 281 F.R.D. 632, 637 (D. Colo. 2012); see also *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995) (recognizing that the attorney-client privilege can extend to communications with non-attorneys “when the purpose of the communication is to assist the attorney in rendering advice to the client”).

Here, the Executive Summary and the ILG Report were prepared in confidence, by lawyers or their investigators, conducting an investigation to be delivered to counsel for the purpose of giving and receiving legal advice. They are privileged documents. They were intended to be kept confidential, and based on representations of the City’s counsel, received only very limited distribution. The reasoning in *Collardey* is applicable here. The *Crews* case does not apply because, unlike in *Crews*, I find these documents were always intended to be confidential and were prepared for the purpose of allowing counsel for the City to give legal advice.

In addition to the attorney-client privilege, the documents are attorney work-product, reflecting, as they do, the thoughts and impressions of counsel. *Martin v.*

Monfort, Inc., 150 F.R.D. 172 (D. Colo. 1993) lays out a sequential step approach to determining whether documents fall under the protection of the work product doctrine:

First, the party seeking discovery must show that the subject documents or tangible things are relevant to the subject matter involved in the pending litigation and are not privileged. Once such a showing has been made, the burden shifts to the party seeking protection to show that the requested materials were prepared in anticipation of litigation or for trial by or for the party or the party's attorney, consultant, surety, indemnitor, insurer or agent. . . . If the Court concludes that the items were prepared in anticipation of litigation, the burden shifts back to the requesting party to show: (a) a substantial need for the materials in the preparation of the party's case; and (b) the inability without undue hardship of obtaining the substantial equivalent of the materials by other means.

150 F.R.D. at 172-73 (internal citations omitted).

Here, there is no dispute that the Executive Summary and the Report were prepared in anticipation of litigation. On its face the Executive Summary recites that the "investigation was conducted solely for the purposes of responding to pending claims and preparing for threatened and potential future claims against the City of Fort Collins." I am not convinced that there is a substantial need on the part of the plaintiff for the materials in the preparation of the party's case. This investigation in question involved race discrimination, not gender discrimination. It addresses events that happened prior to April 2016. Similarly, I am not convinced of the inability of the Plaintiff to obtain the substantial equivalent of the non-attorney-client privileged materials by other means. To whatever limited extent the materials are not covered by attorney-client privilege, there is no showing that the Plaintiff (through depositions or interviews of her own counsel) cannot obtain similar factual material. The City need not produce the ILG Report or the Executive Summary.

**2. Partly-Redacted Documents:
Bates-Labeled FC-SEP16ORDER 000408-000535**

These documents were produced to Plaintiff by the Defendants as part of a larger production in response to Judge Jackson's September 16, 2019 discovery order, Dkt. #45. That order required that documents falling under one of six categories of be produced; documents falling outside these six categories were not ordered to be produced:

1. Any document that contains an allegation against the City regarding gender discrimination or gender-related relation whether sustained or not;
2. Any complaint of discrimination on bases other than gender discrimination if sustained;
3. Documents regarding any complaint about any type of discrimination deemed unfounded if the decision was made internally and not by outside investigators;
4. Any complaint versus Defendant Schiager except complaints regarding alleged extramarital affairs or against his wife;
5. Any investigation involving any complaint of discrimination or retaliation against any person listed in Defendants' initial disclosures; and
6. Any investigation of Kelly French's complaints which were disclosed but not produced due to a confidentiality provision in the City's settlement agreement with a non-party.

The documents were ordered to be produced unredacted. However, this group of Bates labeled documents are portions of investigative files and primarily consist of witness statements. The witness statements include and intermix allegations that fall within the categories of information ordered produced as well as information ordered not to be produced. According to the Defendants the "redacted text consists of complaints of discrimination on bases other than gender discrimination that were not sustained by outside investigators; complaints of retaliation unrelated to gender, and a variety of criticisms, disagreements, and conflicts among employees in the workplace, which would not be responsive and have not been ordered to be produced."

I have personally reviewed the redacted portions of documents FC-SEP16ORDER 000408-000535. I agree generally that the redacted texts do not fall within the categories of documents that Judge Jackson ordered produced. The exception is documents Bates pages FC-SEP16ORDER **000523-535**. This is an extensive recitation by a single individual recounting numerous incidents of alleged *racial* discrimination and retaliation over an extended period of time. I have no way to tell whether these allegations were or were not sustained, and if not sustained, whether they were not sustained by an outside entity. If these allegations on pages 000523-535 were investigated by an outside entity and not sustained, then they are not materials that need be produced per Judge Jackson's order.

Accordingly, I ORDER that Defendants (via someone with personal knowledge) certify by November 26, 2019 as to whether the allegations contained in pages 000523-535 were investigated and *not* sustained or substantiated. The certification should include the outside entity that investigated the allegations and the date when the allegations were found not to be sustained. If no such certification can be procured, the documents pages 000523-535 should be produced to the Plaintiff by close of business November 26, 2019. If the requested certification is produced, the documents may be withheld. To be clear, if an independent investigation substantiated certain of the allegations, but not others, then the entire statement of this individual should be produced. It makes little sense to continue to parse such allegations on a statement by statement basis, if some of the allegations were later found to be sustained.

3. Conclusion

The ILG Executive Summary and ILG Report are attorney-client privileged and attorney-client work product. They need not be produced. Unredacted portions of Bates

pages FC-SEP16ORDER 000408-000522 need not be produced. With respect to Bates pages FC-SEP16ORDER 000523-000535, unredacted versions of those pages shall be produced only in the event Defendants cannot certify that the allegations on those pages were investigated by an outside entity and found not to be substantiated.

Dated this 22nd day of November, 2019.

BY THE COURT:

A handwritten signature in black ink, reading "N. Reid Neureiter". The signature is written in a cursive style with a horizontal line underneath.

N. Reid Neureiter
United States Magistrate Judge