

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, and  
JEROME SCHIAGER, former Deputy Chief of Police, in his individual capacity,

Defendants.

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**DEFENDANT SCHIAGER’S MOTION (1) TO RETAIN CONFIDENTIALITY OF  
CERTAIN DEPOSITION TESTIMONY PURSUANT TO THE PROTECTIVE ORDER,  
AND (2) TO RESTRICT PUBLIC ACCESS TO THAT TESTIMONY**

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Defendant JEROME SCHIAGER (“Schiager”), by his attorneys, submits this Motion for an Order (1) to retain the confidentiality of certain deposition testimony of Greg Yeager pursuant to the parties’ Stipulated Protective Order (Doc. 32), and (2) for a Level 1 restriction of access to the same testimony pursuant to D.C.COLO.LCivR 7.2 . In support of this Motion, Schiager states:

CERTIFICATION PURSUANT TO D.C.COLO.LCivR 7.1(a): Undersigned counsel certifies that he and counsel for the City Defendant discussed this issue with counsel for Plaintiff and that she opposes this Motion.

1. Under the parties’ Stipulated Protective Order approved by the Court on May 8, 2019, a party may designate portions of a deposition as “confidential” (Doc. 32, ¶ 5. c.). The term “confidential information” is defined in part in the Protective Order to include information and materials that are protected by a common law right of privacy, or otherwise contain non-public

personal, personnel, employment, private, or other information implicating privacy interests of any of the Defendants or non-parties (Id. at ¶ 4).

2. “The U.S. Supreme Court recognizes public officers have a constitutional right of confidentiality - albeit not absolute - in private, personal information such as may be contained within a personnel or investigation file.” *Scherbarth v. Woods*, 16-CV-2391 - KHR, 2018 WL 851344, \*2 (D. Colo. 2018), citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977), and *Nixon v. Admin. of Gen. Services*, 433 U.S. 425, 457 (1977). This Court has authority under Fed. R. Civ. P. 26 (c)(1) to issue a protective order for good cause “to protect a party or person from annoyance, embarrassment, oppression or undue burden...”

3. On January 27, 2020, Schiager’s counsel designated as confidential four excerpts of testimony from the 119-page deposition of Greg Yeager, the City’s Deputy Chief of Police: page and lines 11:24 - 13:7, 27:7 - 29:20, 68:16 - 77:1, and 113:18 - 114:25. These pages are Exhibit A to this Motion and are being filed as restricted. Schiager seeks in this Motion to have these pages continue to be designated as confidential under the Protective Prder and also requests an Order providing that the pages in Exhibit A are and continue to be a Level 1 restricted document pursuant to D.C.COLO.LCivR 7.2.

4. Undersigned counsel understands that the City joins in this Motion to the extent that it designated the same pages in Mr. Yeager’s deposition that Schiager designated.

5. On February 6, 2020, Plaintiff’s counsel sent an email to Defendants’ counsel objecting to all of these pages of Mr. Yeager’s deposition being designated as confidential. Under the Protective Order, if the parties cannot resolve the objection in ten business days (and they could

not), it is the obligation of the attorney who made the designation of confidentiality “to file an appropriate motion requesting that the Court determine whether the disputed information should be subject to the terms of the Protective Order” and to show good cause to treat the information as confidential (Doc. 32, ¶ 13).

6. To put this dispute into context, Plaintiff has made one claim under 42 U.S.C. § 1983 against Schiager, her supervisor at the City’s Police Department from late 2015 to February 2017, for gender discrimination in violation of her constitutional right to equal protection. There are separate claims against the City, but some overlap with the claim against Schiager.

7. In August 2016, the City’s Police Chief invited all department employees to submit any complaints they had. Many employees, including Plaintiff, submitted complaints against supervisors, including Schiager. Plaintiff submitted a complaint against Schiager which was investigated, but that is not at issue on this Motion. What is at issue here is the confidentiality of testimony of Mr. Yeager about complaints against Schiager submitted by employees other than Plaintiff, which were on issues other than discrimination. Those complaints, which relate to matters dating back as far as 15 years, were investigated by an outside investigator who concluded in a report dated April 27, 2017, that they were unfounded, except for a policy violation in 2012 when Schiager was initially dismissive of questions raised by the training staff as to how Schiager handled a matter with a police applicant. In addition, the City has explained in other filings that these investigations were conducted under a promise of confidentiality to witnesses (Doc. 71, p. 4).

8. The four groups of pages Schiager designated as confidential are Mr. Yeager’s testimony about these non-plaintiff, non-discrimination complaints against Schiager. Mr. Yeager

testified about some of the complaints and the procedural process by which these complaints were considered, including the issue noted above as identified by the investigator, plus another issue where he testified that Schiager had communicated poorly in April 2016 with an applicant for another job.

9. All of these non-plaintiff, non-discrimination issues are personal to Schiager and are confidential personnel matters in which Schiager has a privacy interest, including job performance and communications with other employees, and two salacious issues (although Mr. Yeager was not asked about these and Plaintiff's counsel indicated that she does not intend to go into these two issues). These complaints relate to events going back many years and are unfounded, except arguably the two minor communication issues noted above. Some of the issues in these investigations (including the two unfounded salacious issues) were raised by other employee witnesses in depositions taken in September and October 2019, and Defendants designated such testimony as confidential, and Plaintiff has not challenged those designations. This Court has held that events that occurred prior to December 14, 2016, are barred by the statute of limitations (Doc. 40, pp. 9-12).

10. In addition to the Stipulated Protective Order, this Court has entered a series of Orders protecting the confidentiality of personal matters in this case. On September 16, 2019, Judge Jackson ordered Defendants to produce a number of files containing investigations and personnel matters under an "attorney eyes only" designation (9/16/19 transcript, p. 20) . That designation was later changed to "confidential" in a November 4, 2019, Order by Magistrate Judge Neureiter, who also denied "additional production related to various investigations" (Doc. 54). The Magistrate Judge also ordered, over Plaintiff's objection (Doc. 72), that other documents are to continue to have a Level

1 restriction, citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984), for the proposition that “pretrial depositions and interrogatories are not public components of a civil trial” (Doc. 74). Continuing to have this deposition testimony be designated as “confidential” is consistent with these Orders.

11. Finally, Plaintiff has made clear in numerous documents she produced in this case that she is very upset with Schiager, blames him for her employment, and criticizes him to others very frequently. If the confidentiality designation is removed from Mr. Yeager’s testimony about these private and irrelevant investigations, we expect that Plaintiff will take the opportunity to spread this information and her comments about it to any one she wants to at the Police Department, where both she and Schiager are still employed. Plaintiff should not be given that opportunity. On the other hand, Plaintiff is not prejudiced by an Order continuing the confidentiality designation of Mr. Yeager’s deposition testimony and can still attempt to elicit the testimony at trial.

Wherefore, Schiager requests that (1) the deposition testimony of Mr. Yeager that has been designated as confidential be ordered to continue to be confidential, and (2) Exhibit A, the designated pages of Mr. Yeager’s deposition, be continued under a Level 1 restriction.

Respectfully submitted,

Date: February 21, 2020

s/ David R. DeMuro  
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CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of February, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

**Jennifer Robinson**

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and I hereby certify that the foregoing was placed in the U.S. Mail, postage prepaid, and addressed to the following:

[none]

s/ David R. DeMuro

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David R. DeMuro