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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

B.B.,

Plaintiff,

v.

CASE NO. 502008CA037319XXXMB AB

JEFFREY EPSTEIN,

Defendant.

NON-PARTY TOWN OF PALM BEACH POLICE OFFICERS'
MOTION TO QUASH SUBPOENAS AND/OR MOTION FOR PROTECTIVE ORDER

Non-parties, former Town of Palm Beach Chief of Police Michael Reiter, Captain George Frick, Detective Joseph Recarey, Detective Michael Dawson, Detective Michelle Pagan, and the Town of Palm Beach Police Department Record Custodian (collectively "Town of Palm Beach Police Officers"), hereby move to quash the subpoena or for a protective order pursuant to Florida Rule of Civil Procedure 1.280(c) directing that discovery sought by the civil subpoenas for deposition issued by Plaintiff, B.B., and the cross-notices with subpoenas for deposition duces tecum issued by Defendant, JEFFREY EPSTEIN, in the underlying action, attached as Composite Exhibit A, not be had or that the discovery may be had only on specified terms. In further support, the Town of Palm Beach Police Officers state as follows:

SUMMARY OF ARGUMENT

At issue here is whether certain documents and associated testimony sought by Mr. Epstein, including personal cell phone records, calendars and diaries and surveillance information, constitute public records subject to disclosure or are statutorily

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protected from disclosure under Florida's Public Records Law, Section 119.071 Fla. Stat., and if the documents and testimony sought constitute private records of the individual officers not otherwise statutorily protected, whether Mr. Epstein's requests are improper as not likely to lead to the discovery of admissible evidence and overly broad.

The Town of Palm Beach Police Officers respectfully submit that the Epstein duces tecum constitutes a fishing expedition into the private and confidential matters of these non-parties that do not constitute matters of public record under the Florida Public Records Law and bear little relationship to the issues in this civil litigation. The duces tecum is intended solely to harass these non-parties in advance of their depositions. As set forth in detail below, the Epstein duces tecum seeks a broad range of statutorily protected information not just regarding these law enforcement officers and the crime victims associated with Mr. Epstein's investigation, but a broad range of protected information regarding other crime investigations undertaken by the Town over a 5-year period.

BACKGROUND

By this and related suits,¹ an alleged minor victim of lewd acts and/or prostitution has filed a civil suit against Mr. Epstein for sexual battery and intentional infliction of emotional distress. Mr. Epstein was the subject of an investigation by the Town of Palm Beach Police Department in 2005 and 2006, which investigation resulted in the issuance of a Probable Cause Affidavit for Mr. Epstein and others in May 2006.

¹ A number of related cases are pending against Mr. Epstein in Florida state and federal courts. In May 2009, the related federal court cases were consolidated before Judge Kenneth Marra for discovery and procedural purposes. Judge Marra directed that witnesses common to the multiple cases would be deposed only once. Undersigned counsel understands from conversations with counsel for Mr. Epstein and the Plaintiff in this case that counsel in the related state court actions have acted in accordance with Judge Marra's order to depose witnesses common to the state and federal cases only once.

Following the issuance of the Probable Cause Affidavits, the Town's investigation ceased and the matter was referred to the appropriate state and federal law enforcement authorities. Mr. Epstein ultimately pled guilty and was sentenced by the State Attorney to incarceration for a period of 12 months in county jail and designated a sex offender.

Counsel for Plaintiff first subpoenaed the Town of Palm Beach Police Officers for deposition in October 2009. Those subpoenas did not include any duces tecum. Thereafter, Epstein's counsel cross-noticed the depositions and served the Town of Palm Beach Police Officers with subpoenas duces tecum ("the Epstein duces tecum"). With the exception of the Epstein duces tecum issued to the Records Custodian, which additionally seeks state grand jury testimony (No. 7) and personnel records of Chief Reiter and Detectives Recarey, Pagan and Dawson (No. 19), the Epstein duces tecum served on the Town of Palm Beach Police Officers are identical.

Epstein's extremely broad document requests to the Town of Palm Beach Police Officers are detailed in more than twenty (20) separate requests, many with multiple subparts. Among other things, the Epstein duces tecum requests the following:

- **Video and Physical Surveillance:** Any and all logs, pictures, videos, digital information, reports, memoranda or notes, and any record of expenditure, which relate to video or physical surveillance of Mr. Epstein, his residence or his visitors (or, with regard to physical surveillance, any individual believed to be a potential witness or co-conspirator) from January 1, 2004 to the present (Nos. 11-12);
- **Cell Phone Records:** All cell phone records, both official cell phone and personal cell phone, used by the Police Officers from January 1, 2004 through the present (No. 15);
- **Calendars or Diaries:** All calendars or diaries, electronic or hard-copy kept from October 1, 2004 through and including today (No. 16).

LEGAL ARGUMENT

Florida Rule of Civil Procedure 1.280(c) allows a person from whom discovery is sought to move for an order to protect that person from annoyance, oppression or undue burden by directing "(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters..... Rule 1.280(b)(1) provides that parties "may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . ." As federal courts have observed in construing identical language under the Federal Rules of Civil Procedure, "requested information is not relevant to 'subject matter involved' in the pending action if the inquiry is based on the party's mere suspicion or speculation." Micro Motion, Inc. v. Kane Steel Co., Inc., 894 F.2d 1318, 1325-26 (Fed. Cir. 1990).³

"A trial court has authority to prevent discovery which it believes is a mere fishing expedition calculated for harassment." Sugarmill Woods Civic Association, Inc. v. Southern States Utilities, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997). Where it has been affirmatively established that the discovery sought is neither relevant nor will lead to the discovery of relevant information, a trial court has discretion to deny the irrelevant discovery. Allstate Insurance Company v. Langston, 655 So. 2d 91, 95 (Fla. 1995); Residence Inn by Marriott v. Cecile Resort, Ltd., 822 So. 2d 548, 550 (Fla. 5th DCA 2002) (agreeing that carte blanche discovery of material is impermissible and noting that the record was insufficient regarding the relevancy of the requested documents).

³ Florida courts "look to the federal rules and decisions for guidance in interpreting Florida's civil procedure rules" so as to harmonize the Florida and federal rules. Gleneagle Ship Mgmt. v. Leondakos, 602 So.2d 1282, 1283-84 (Fla. 1992).

A. Information Regarding Crime Victims; Victims of Sexual Offenses; Minor Victims

As a threshold matter, the Town states that in accordance with its obligations under Section 119.07 of the Florida Public Records Law, any documents and testimony provided in response to the Epstein duces tecum will be redacted and/or limited to protect those matters excepted from disclosure including, but not limited to, the home addresses and telephone numbers of the law enforcement personnel and any identifying information regarding the victims. Such redaction is necessary because of the broad range of criminal intelligence and investigative information regarding minor victims of sexual offenses under Florida Statutes Chapter 794 and/or 800 sought by the Epstein duces tecum. Such information is carefully protected under the Public Records Law. Fla. Stat. § 119.071(2)(j) (excepting from disclosure any document that reveals the identity, home or employment telephone number, home or employment address, or personal assets of the victim of a crime, including the crime of sexual battery, and identifies that person as the victim of a crime); Fla. Stat. § 119.071(2)(h)1.b (excepting any information which may reveal the identity of a person who is a victim of a sexual offense, including a sexual offense proscribed in Chapters 794 and 800).

Likewise, the Town of Palm Beach Police Officers will not provide testimony or documents that reflect their own exempted personal information including their home addresses, telephone numbers and social security numbers. Chapter 119.071 of the Florida Public Records Law specifically exempts from disclosure personal information belonging to law enforcement personnel and their families as well as personal information for crime victims, including minor victims and victims of sexual offenses. "The home addresses, telephone numbers, social security numbers and photographs of

active or former law enforcement personnel" are exempt from statutory disclosure provisions. Fla. Stat. § 119.071(4)(d)1.a; Atty. Gen. Op. 2007-21 (Apr. 25, 2007) (sworn officers of a police department fall within this exemption as "law enforcement personnel"). Along with the places of employment, the same information is protected relative to the spouses and children of such law enforcement personnel.

B. Private or Personal Information Belonging To the Town of Palm Beach Police Officers

The Epstein duces tecum seeks a number of documents including all cell phone records, calendars and diaries used or created by the Town of Palm Beach Police Officers from January 1, 2004 to the present. These requests clearly encompass personal records not covered by the Public Records Law. Moreover, the requests cover a five-year time period, are not limited in any way to matters involving Mr. Epstein and are therefore overly broad and not likely to lead to the discovery of admissible evidence.

1. Personal Calendars and Diaries (Request No. 16)

Mr. Epstein is not entitled to obtain "[a]ll calendars or diaries" kept by the Town of Palm Beach Police Officers from January 1, 2004 to the present because these documents are not public records subject to disclosure and because these records may contain statutorily excepted information regarding the law enforcement personnel themselves and other criminal investigations. Section 119.011(1), Florida Statutes, defines "public records" to include:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.
(emphasis added)

Documents and other information that is not "made or received" in connection with the "transaction of official business" are not public records subject to disclosure. Times Publ'g Co. v. City of Clearwater, 830 So. 2d 844, 847 (Fla. 2d DCA 2002) (holding private or personal e-mails stores in government computers do not automatically become public records).

Personal calendars and diaries do not constitute public records because they are not actions of government, but merely personal notes or work papers created for the convenience of the individual keeping the calendar. Florida courts have consistently held that under Chapter 119, public employees' notes to themselves and designated for their own personal use in remembering certain things do not fall within the definition of "public record." The Justice Coalition v. First DCA Nominating Comm'n, 823 So. 2d 185, 192 (Fla. 1st DCA 2002) (citing Lopez v. State, 696 So. 2d 725 (Fla. 1997); Times Pub. Co. v. City of St. Petersburg, 558 So. 2d 487, 491-92 (Fla. 2d DCA 1990) (notes which "serve no governmental function" but are "merely the personal tools of recollection of the writer" are not public records). As one court has observed,

... the cases consistently hold that personal notes, as well as telephone messages and daily appointment calendars are not public records. This is because they are generally created solely for the individual's convenience or to refresh the writer's memory, are maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer's sole discretion.

Yacobellis v. City of Bellingham, 780 P.2d 272, 275-76 (Wash. App. 1989) (collecting cases). See also Bur. of Nat'l Affairs v. U.S. Dep't. of Justice, 742 F.3d 1484 (D.C. Cir. 1984) (holding that personal appointment materials, such as calendars and daily agendas for the convenience of Assistant Attorney General, are not agency records

under the Freedom of Information Act); Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Voinovich, 654 N.E.2d 139, 142-43 (Ohio App. 1995) (holding governor's personal calendars and appointment books were not "public records" subject to disclosure under public records statute where calendars and appointment books were created and maintained solely for governor's personal convenience, were not circulated within office for any official purpose, were not under control of governor's office, could be discarded at any time, and did not serve to document any official activities or functions of governor); Courier-Journal v. Jones, 895 S.W.2d 6 (Ky. App. 1995) (same).

2. Cellular Telephone Records (Request No. 15)

Mr. Epstein's request for "[a]ll cell phone records" from 2004 to the present is similarly improper as it not only seeks private, non-public records, but statutorily protected information regarding the law enforcement officers who made the calls and the persons to whom calls were made including, but not limited, to family members, crime victims and confidential informants. As with personal or private e-mails stored in government computers, private phone calls that were not created or received in connection with official business do not become public records simply because they are made on a government issued telephone. See Media Gen'l Operation, Inc. v. Feeney, 849 So. 2d 3 (Fla. 1st DCA 2003) (private or personal cellular telephone calls of five staff employees of House of Representatives were not public records); Times Publ'g Co., 830 So. 2d at 847. See also State v. Ohio Atty. Gen., 910 N.E.2d 504, 677-78 (Ohio Ct. App. 2009) (holding cell phone number of state trooper was not a "public record" subject to disclosure under public records act); Gannett N.J. Partners v. Cty. of Middlesex, 877

A.2d 330 (N.J. Super. Ct. App. Div. 2005) (finding news organization not entitled to disclosure of the telephone billing records of county officials under the state's open public records act, observing that public officials and persons they talk to have a right to confidentiality, public records act excepted from "public records" the "unlisted telephone number" of any person and there was no practical way to prevent disclosure of such numbers, and voluminous request for 12 months worth of records would disrupt agency operations).

C. Surveillance Techniques, Procedure or Personnel

The Town of Palm Beach Police Officers do not dispute that if they possessed any surveillance tapes or photographs of Mr. Epstein during the time of the investigation in 2005 and 2006, which they do not, that such evidence may be subject to disclosure if it did not identify the victims or contain any other statutorily protected information. However, Mr. Epstein is not entitled to any testimony or documents regarding the techniques, procedure or personnel involved in any video or physical surveillance of Mr. Epstein. See Epstein duces tecum, Nos. 11-12. Any information revealing law enforcement surveillance techniques, procedures or personnel is clearly exempt from public inspection under the Public Records Law. Fla. Stat. §119.071(2)(d), referring to Section 24(a), Art. I, Fla. Const.

D. Epstein's Requests are Unduly Burdensome

Finally, even if subject to disclosure under the Public Records Law, Mr. Epstein's request for "[a]ll cell phone records" and "[a]ll calendars and diaries", whether in hard-copy or electronic format, for the Town of Palm Beach Police Officers for a 5-year period is not only overly broad and not likely to lead to the discovery of admissible

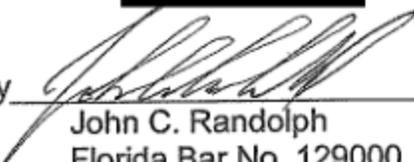
evidence, it is unduly burdensome. In addition to the time needed to initially gather these records, considerable effort would be required to review them to determine whether they contain statutorily protected information excepted under Section 119.071 of the Public Records Law and to thereafter redact that information in order to protect the identities of crime victims, undercover personnel, confidential informants, etc. which bear absolutely no relation to this case and are entitled to have their privacy protected. The Town of Palm Beach Police Officers respectfully request that should the Court overruled its other objections to the requested discovery, that they be given the opportunity to provide evidence in support of their claim of undue burden.

WHEREFORE, the Town of Palm Beach Police Officers respectfully request that the Court enter an Order pursuant to Florida Rule of Civil Procedure 1.280(c) directing that the Epstein duces tecum be quashed as set forth herein and that the Court grant the Town of Palm Beach Police Department all other relief deemed just and proper under the circumstances.

I HEREBY CERTIFY that a true copy of the foregoing instrument has been furnished by facsimile and United States mail to **Theodor J. Leopold, Esquire** and **Spencer T. Kuvin, Esquire**, Leopold-Kuvin, P.A., 2925 PGA Boulevard, Suite 200, Palm Beach Gardens, Florida 33410; **Jack Alan Goldberger, Esquire**, Atterbury Goldberger & Weiss, P.A. 250 Australian Avenue South, Suite 1400, West Palm Beach, Florida 33401-5012; and **Robert D. Critton, Jr., Esquire**, Burman, Critton, Luttier & Coleman, LLP, 515 North Flagler Drive, Suite 400, West Palm Beach, Florida 33401, this 20th day of November, 2009.

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