

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' OPPOSITION TO
EPSTEIN'S MOTION TO COMPEL AND
MEMORANDUM IN SUPPORT OF
MOTION TO QUASH AND/OR 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 (collectively "Town Police Officers"), submit this memorandum in opposition to Defendant Epstein's Motion to Compel Town of Palm Beach Records Custodian's and Police Officers to Produce Records Sought Pursuant to Defendant's Subpoenas Duces Tecum ("Epstein's Motion to Compel") and in support of their Motion to Quash Subpoenas and/or for Protective Order ("Motion for Protective Order") and state the following in support:

SUMMARY OF ARGUMENT

Epstein's Motion to Compel fails to identify any discoverable evidence that is likely to result from production of the cell phone records of the Town Police Officers. These records will show nothing more than the time a call was made and the telephone numbers associated with the maker and recipient of the call. Based on questioning at

5-17-10
cc JE
DA

the depositions of Chief Reiter and Detective Recarey, counsel for Epstein presumably seeks information regarding any telephone calls to the minor victims of sexual offenses investigated by the Town Police Officers as well as any calls made to other law enforcement personnel or to the state or federal attorneys during the Epstein investigation. The telephone numbers of all of these individuals are exempt from disclosure under Florida's Public Records Law. Mr. Epstein has failed to make any showing of "exceptional necessity" or "extraordinary circumstances" to warrant their disclosure here. Even if he had, the Court should protect the Town Police Officers from this improper fishing expedition, which threatens the disclosure of not only purely personal information in which the officers have a reasonable expectation of privacy, but records reflecting active law enforcement investigations and confidential informants the disclosure of which could jeopardize the Town's ability to protect its citizens. There is no adequate way to protect against the disclosure of such highly prejudicial information.

BACKGROUND

A. The Town's Investigation: March 2005 to May 2006

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. Although an initial, unverified report had been received by the Town Police Department regarding Mr. Epstein on November 28,

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.

2004, the investigation at issue did not begin until March 14, 2005 when a report was received by Officer Michele Pagan. Detective Joseph Recarey took over the Epstein investigation from Officer Pagan in September 2005.

The investigation ultimately resulted in the issuance of a Probable Cause Affidavit for Mr. Epstein and others in May 2006 and a state grand jury indictment of Mr. Epstein in July 2006. 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.

B. Cellular Telephone Records

Pursuant to a federal subpoena, the Town Police Department turned over its entire case file to the federal government on or about August 28, 2006. It has produced to the parties in this case those documents it still maintains relative to the Epstein investigation, including a significant number of e-mails between law enforcement personnel assigned to the case, with the exception of cell phone records of the Town Police Officers. Epstein's request for such records broadly asks the Town Police Officers to produce:

15. All cell phone records, both official cell phone and personal cell phone, used by you between during [sic] the following time periods:
 - a. January 1, 2004 - December 31, 2004
 - b. January 1, 2005 - December 31, 2005
 - c. January 1, 2006 - December 31, 2006
 - d. January 1, 2007 - December 31, 2007
 - e. January 1, 2008 - December 31, 2008
 - f. January 1, 2009 - today's date.

Detective Recarey is currently employed as a Town police detective, as are Captain Frick, Detective Pagan and Detective Dawson. Chief Reiter is a retired Town chief of police.

Chief Reiter and Detective Recarey, the only Town Police Officers deposed in the civil suits, have testified that they do not possess any of the cell phone records sought by Epstein because it is their practice to destroy their monthly bills shortly after receipt and/or payment. Detective Recarey testified that there was a short period of time during the Epstein investigation when he had two cell phones. This overlap occurred because the Town Police Department had begun to offer a stipend for cell phone service with another provider, which he took advantage of, while he had a few months remaining on his original cell phone.

Detective Recarey has never received an itemized bill from either of his cell phone carriers that would reflect specific calls made or received. After contacting ATT and Sprint/Nextel regarding the possibility of obtaining records from during the 2005 Epstein investigation, Detective Recarey was advised by AT&T that it could reprint calls made or received in 2005 whereas Sprint/Nextel can only offer a non-itemized bill reprint.

Chief Reiter could not recall any specific phone calls related to the Epstein investigation that he may have made with his personal cell phone. (Reiter at 222). Detective Recarey testified that he may have given the victims in the Epstein investigation one of his cell phone numbers.

LEGAL ARGUMENT

A. **The Requests are Impermissibly Overbroad and Not Likely to Lead to Discoverable Evidence**

The requests for all official and personal cell phone records over a five-year period, from January 1, 2004 to the present, not limited in any way to matters involving the Epstein investigation, are impermissibly overbroad and not likely to lead to the discovery of admissible evidence.

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

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).

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).

Mr. Epstein has not and cannot identify any relevant information the discovery of which is likely to result from the production of their personal cell phone records for the past five years. The Court should exercise its discretion to protect these non-parties from these harassing requests.

B. The Town Police Officers' Cell Phone Records Contain Information Exempt under Florida's Public Records Law

To the extent that any of the cell phone records sought by Mr. Epstein contain any information related to the Epstein investigation, those documents are exempt from disclosure under the Public Records Law. Specifically, Mr. Epstein's requests seek statutorily protected information regarding the law enforcement officers who made the calls and the recipients of those calls including, but not limited, to their own family members and crime victims. These records may also reflect calls with confidential informants and/or relating to active criminal investigations.

1. Telephone Numbers of Law Enforcement Personnel and their Spouses are Exempt.

The Public Records Law, Section 119.071, protects the disclosure of personal information regarding its police officers and their families as well as personal information for crime victims, including minor victims and victims of sexual offenses. Fla. Stat. §119.071(4)(d)1.a ("The home addresses, telephone numbers, social security numbers and photographs of active or former law enforcement personnel ... are exempt ...").

Along with the places of employment, the same information is protected relative to the spouses and children of such law enforcement personnel. See id. Telephone numbers of current or former state attorneys, assistant state attorneys, statewide prosecutors or assistant statewide prosecutors are also protected. See id. §119.071(4)(d)1.d.

2. Identifying Information, Including Telephone Numbers of Minor Victims of Sexual Offenses and Crime Victims, are Exempt.

The Public Records Law also exempts from disclosure any and all documents that reveal the identity, including the home or employment telephone number, of a victim of a sexual offense. In this way, the law carefully protects 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. 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).

C. Epstein Has Made No Showing of “Exceptional Necessity” or “Extraordinary Circumstances” to Warrant Disclosure of Otherwise Exempt Public Records

The Town Police Officers concede that a documents' exemption from disclosure under the Public Records Act does not render it automatically privileged for purposes of civil discovery. However, material that is exempt from disclosure under Chapter 119 is discoverable only upon a showing of “exceptional necessity” or “extraordinary

circumstances.” Henderson v. Perez, 835 So. 2d 390, 392 (Fla. 2d DCA 2003). Epstein has made no such showing here.

In Henderson, for example, the Court found that plaintiff failed to make a showing of exceptional necessity or extraordinary circumstances sufficient to require the Hillsborough County Sheriff’s Office to produce information including the home addresses and photographs of ten of its active law enforcement officers during discovery in a civil action. 835 So. 2d at 391-92 (citing Dep’t of Hwy. Safety & Motor Vehicles v. Krejci Co., 570 So. 2d 1322 (Fla. 2d DCA 1990)). The Court rejected plaintiff’s arguments that without the addresses and photographs he would be unable to effectively investigate them and attack their credibility should they be witnesses at the trial, or to prove any of his claims or rebut any defenses. See id. Compare Crews v. Hensley, 2006 WL 1679596, *2 (M.D. Fla. June 13, 2006) (finding exceptional circumstances and compelling interest in identifying 911 phone callers related to fatal car accident where parties had been unable to find any witnesses, despite their best efforts); Allen v. Miami, 2003 WL 23312748, *3 (S.D. Fla. Nov. 14, 2003) (finding exceptional necessity or extraordinary circumstances warranting court order requiring disclosure of exempt information regarding defendant police officer’s address, date of birth and social security number where service of process could not be completed because search by private investigator produced 21 persons with defendant’s name).

As in Henderson, there is no “exceptional necessity” or “extraordinary circumstances” that would justify the disclosure of the cell phone records containing otherwise exempt telephone numbers of the Town’s active and former law enforcement officers and minor victims of sexual offenses. Detective Recarey and Chief Reiter

testified to the best of their recollection as to any telephone calls or other communications that they may had with other law enforcement personnel, victims, witnesses and third parties related to the Epstein investigation. Unlike Crews, the witnesses and victims in this case are the plaintiffs who can likewise be questioned regarding any conversations they may have had with law enforcement personnel. It will be nearly impossible to determine which calls, if any, relate in any way to the Epstein investigation. Moreover, there is no practical way to prevent the disclosure of exempted information under the circumstances, by protective order or otherwise. 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). The Court should not risk the disclosure of exempt law enforcement and victim information on these facts.²

CONCLUSION

In sum, 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) and the Public Records Law denying Epstein's Motion to Compel, quashing the subpoenas duces

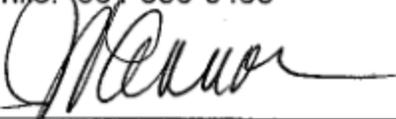
² Should the Court be inclined to uphold the subpoena and direct any of the Town Police Officers to produce any part of their cell phone records, it is respectfully requested that such records be produced only pursuant to a confidentiality order that restricts disclosure of the information in this case to the parties and those witnesses and third parties necessary to the litigation of the case.

tecum to the extent that they seek cell phone records and granting the Town of Palm Beach Police Officers 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 **Theodore 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 10th day of May, 2010.

JONES, FOSTER, JOHNSTON & STUBBS, P.A.
505 South Flagler Drive, Suite 1100
Post Office Box 3475
West Palm Beach, Florida 33402-3475
Telephone: 561-659-3000
Facsimile: 561-650-0465

By



John C. Randolph
Florida Bar No. 129000
jrancholp@ [REDACTED]
Joanne M. O'Connor
Florida Bar No. 498807
joconnor@ [REDACTED]