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2005 WL 1996625
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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Ed BRENNAN

v.

GILES COUNTY BOARD OF EDUCATION.

No. M2004-00998-COA-R3-CV.
|
July 13, 2005 Session.
|
Aug. 18, 2005.
|
Application for Permission to Appeal
Denied by Supreme Court
Dec. 19, 2005.

A Direct Appeal from the Chancery Court for Giles County, No. 2799; Stella Hargrove, Judge.

Attorneys and Law Firms

Matt Q. Bastian of Columbia, Tennessee for Appellant, Ed Brennan.

Joe W. Henry, Jr., of Pulaski, Tennessee for Appellee, Giles County School Board.

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, M.J., joined.

OPINION

W. FRANK CRAWFORD, P.J., W.S.

***1** Appellant requested certain records under the Public Records Act. After an *in camera* review, the trial court determined that these records were not accessible under that Act as they fell outside the definition of public or state records found at T.C.A. § 10-7-301(6). On appeal, Appellant contends that, by virtue of the fact that the requested documents were made during business hours and were made or stored on computers owned by the school system, these facts, per se, make them "public records". Finding that the trial court did not err in performing an *in camera* review to determine whether any of the requested documents fell within the purview of the statutory definition, we affirm.

On January 9, 2004, Edward Brennan ("Appellant") filed a written request with the Giles County Board of Education ("Board," or "Appellee") to view and inspect "digital records of Internet activity, including e-mails sent and received, web sites visited and transmissions sent and received and the identity of any and all Internet Service Providers." By letter of January 12, 2004, the Board denied Mr. Brennan's request. On January 21, 2004, Mr. Brennan filed a "Petition to Access Public Records" in the Chancery Court of Giles County.[1]

[1] On January 21, 2004, Mr. Brennan also filed a "Show Cause Motion for Immediate Hearing *Pendente Lite,*" which was granted by an "Order to Show Cause for Immediate Hearing" entered on the same day. According to Appellant's brief, this Order initiated the pleadings in the lower court and the parties' respective attorneys agreed that the original pleadings could be filed with the lower court simultaneous with the agreed upon hearing date of January 21, 2004.

Following a hearing on January 21, 2004, the trial court reviewed the requested documents *in camera.* On March 19, 2004, the trial court issued an Order denying Mr. Brennan's Petition. The Order reads, in pertinent part, as follows:

> This cause came on to be heard on the 21st day of January, 2004 ... upon the Petition filed on behalf of Mr. Edward Brennan asking for various relief including the right to view, inspect and/or make copies of certain records, the response of the Defendant thereto, the argument of counsel for both parties in open Court, the in camera review of the requested records submitted by the Defendant, and upon the entire record from all of which the Court finds as follows:
>
> 1. That the Court has reviewed the materials forwarded for an in camera inspection, as well as the public records statutes and all case law provided by attorneys for both parties.
>
> 2. The Court finds that the records requested by the petitioner are not public records under the definition of Tennessee Code Annotated Section 10-7-301.
>
> 3. The test in determining whether material is a public record is whether the materials are made or received

> pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.
>
> 4. Application of the test requires an examination of the totality of the circumstances.
>
> 5. The Court finds that none of the material provided are public records under this test. Mr. Brennan appeals from this Order and raises one issue for review as stated in his brief:
>
> Whether digital records of computer activity maintained by the school systems' internet service provider and on two school owned computers or computers privately owned that were connected to the school owned internet system are "public records" within the meaning of T.C.A. 10-7-101 et seq. and thus available to a resident of the State of Tennessee for viewing and inspection?

***2** We first note that the issue before this Court is quite narrow. The parties hereto raise no issue concerning the outcome of the trial court's *in camera* review of the requested documents (i.e. whether specific documents were accessible under the Public Records Act). Rather, the Appellant contends that, by virtue of the fact that the requested documents were created during school hours and/or by virtue of the fact that the requested documents were created and/or stored on school owned computer equipment, these facts, per se, make them public records under the Act. Consequently, according to Appellant, there was no need for the trial court to review the documents *in camera* since same were arguably "public records" by virtue of the nature of their creation and storage regardless of their specific content.

The trial court's determination that an *in camera* review of the requested documents was necessary to determine whether same fell within the purview of the Public Records Act is a question of law. As such, our review of the trial court's Order is ***de novo*** upon the record with no presumption of correctness accompanying the trial court's conclusions of law. ***See*** Tenn. R.App. P. 13(d); ***Waldron v. Delffs,*** 988 S.W.2d 182, 184 (Tenn.Ct.App.1998); ***Sims v. Stewart,*** 973 S.W.2d 597, 599-600 (Tenn.Ct.App.1998).

The Public Records Act, at T.C.A. § 10-7-503 (Supp.2004) reads, in pertinent part, as follows:

> ... all state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

In construing the Public Records Act, we are guided by the General Assembly's directive that the public records statutes are to be "broadly construed so as to give the fullest possible public access to public records." T.C.A. § 10-7-505(d); ***see also Chattanooga Publishing Co. v. Hamilton Co. Election Comm'n,*** No. E2003-00076-COA-R3-CV, 2003 WL 22469808, at * 4 (Tenn.Ct.App. Oct.31, 2003) and cases cited therein. In deciding whether the records are subject to public disclosure, we must be guided by the clear legislative policy favoring disclosure. Thus, unless it is clear that disclosure of a record or class of records is excepted from disclosure, we must require disclosure even in the face of "serious countervailing considerations." ***Memphis Publishing Co. v. City of Memphis,*** 871 S.W.2d 681, 684 (Tenn.1994); ***Swift v. Campbell,*** No. M2003-02607-COA-R3-CV, 159 S.W.3d 565, 2004 WL 1920783, at * 4 (Tenn.Ct.App. Aug.25, 2004), perm. appeal denied January 31, 2005.

That being said, the Appellant herein interprets the Public Records Act very broadly and champions a reading whereby any citizen of Tennessee may gain access to any and all records created during work hours on computers owned and operated by governmental entities. However, when read in light of the applicable statutory definitions, it is clear that the legislature did not intend for all records to be available for public perusal. T.C.A. § 10-7-301(6) (Supp.2004) limits access to those materials that meet the definition of public or state records, to wit:

> ***3** "Public record or records" or "state record or records" means all documents, papers, letters, maps, books, photographs, microfilm, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics **made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.**

(Emphasis added).

It is well settled that the interpretation of statutory law is a judicial function. ***See, e.g., State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle,*** 63 S.W.3d 734, 754 (Tenn.Ct.App.2001) (citations omitted). When interpreting a statute, the role of the Court is to "ascertain and give effect to the legislative intent." ***Sharp v. Richardson,*** 937 S.W.2d 846, 850 (Tenn.1996). In the absence of ambiguity, legislative intent is derived from the face of the statute, and the Court

may not depart from the "natural and ordinary" meaning of the statute's language. ***Davis v. Reagan,*** 951 S.W.2d 766, 768 (Tenn.1997); ***Westland West Community Assoc. v. Knox County,*** 948 S.W.2d 281, 283 (Tenn.1997).

The language of T.C.A. § 10-7-301(6) unambiguously states that, in order to be a public or state record and thereby subject to access under T.C.A. § 10-7-503, the document must be "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." As in this case, when a question arises as to whether certain documents fall within the purview of the statutory definition, it is the role of the trial court, as the gatekeeper of the law, to make that determination.

When T.C.A. § 10-7-503 is read in conjunction with the relevant definition at T.C.A. § 10-7-301(6), it is clear that the legislature placed some limitation on those documents that may be accessed under the Public Records Act. By the plain language of the definition, this limitation involves the purpose behind the creation of the document (i.e. whether it was "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency"). However, the limitation does not, as the Appellant argues, rest upon an inquiry into the time (i.e. whether during business hours) or upon the place where the document was produced and/or stored (i.e. on school owned computers). It was, therefore, necessary for the trial court to perform its judicial function by viewing the requested documents *in camera* to determine whether these documents were "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." For the trial court to allow the documents to be accessed under the Public Records Act just by the mere fact that they were made during business hours and/or on computers that were school-owned would be a violation of the clear intent of the legislature and, consequently, a dereliction of the most basic judicial duty.

***4** While we have found no Tennessee cases directly on point with the one at bar, we have looked to other jurisdictions that have public record acts similar in language to our own. Fla. Stat. Ann. § 119.011(11) (West 2004) provides, in relevant part, as follows:

> "Public records" means 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).

As set out above, the Tennessee Public Records Act's definition of public records is almost verbatim to the Florida statute, i.e. the documents accessible thereunder must be "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." In ***Times Publishing Co. v. City of Clearwater,*** 830 So.2d 844 (Fla.App.2002), the Florida Appellate Court addressed a case similar to the one at bar wherein newspaper employees petitioned for mandamus, declaratory judgment, and injunctive relief, seeking an order compelling the city to release all e-mail sent from or received by two city employees who used government-owned computers for communication. The crux of the argument in ***Times Publishing,*** like that of the case before us, was whether the fact that the documents requested were created and stored on government computers made them public records per se under the Florida Statute. The ***Times Publishing*** Court held, in pertinent part, as follows:

> Information stored on a computer is as much a public record as written documents in official files. ***See Seigle v. Barry,*** 422 So.2d 63 (Fla. 4th DCA 1982). Moreover, because section 119.01, Florida Statutes (2000), established a state public policy of open records, the public records law must be construed liberally in favor of openness. ***City of St. Petersburg v. Romine,*** 719 So.2d 19 (Fla. 2d DCA 1998). In this case, however, "private" or "personal" e-mail simply falls outside the current definition of public records. Such e-mail is not "made or received pursuant to law or ordinance." Likewise, such e-mail by definition is not created or received "in connection with the official business" of the City or "in connection with the transaction of official business" by the City. Although digital in nature, there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk.
>
> Moreover, the supreme court has rejected a similar argument that the mere placement of a document in a public official's file makes the document a public record. In ***Shevin v. Byron, Harless, Schaffer, Reid & Associates,*** 379 So.2d 633 (Fla.1980), the supreme court rejected the decision of the district court of appeal that "in effect said that section 119.011(1) applies to almost everything generated or received by a public agency." ***Id.***

at 640. Instead, the supreme court held that only materials prepared "with the intent of perpetuating and formalizing knowledge" fit the definition of a public record. ***Id.*** The court specifically recognized:

> ***5** It is impossible to lay down a definition of general application that identifies all items subject to disclosure under the act. Consequently, the classification of items which fall midway on the spectrum of clearly public records on the one end and clearly not public records on the other will have to be determined on a case-by-case basis.

Id. ***See also*** ***Lopez v. State,*** 696 So.2d 725 (Fla.1997) (holding handwritten notes of state attorney, although not exempt from disclosure, were not "public record" by definition); ***Hill,*** 701 So.2d 1218, 1220 (recognizing generally that private party's privileged documents do not become public record simply by virtue of fact they are in government's possession); ***News & Sun-Sentinel, Co. v. Modesitt,*** 466 So.2d 1164 (Fla. 1st DCA 1985) (holding that records held by commissioner of agriculture as custodian of funds for group of private citizens were not public records).

As discussed by Judge Rondolino in his order denying the Times' claim, the courts themselves have struggled with the rules that should govern public access to and retention of such e-mail. The supreme court has recognized that judicial e-mail "may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as public record." ***In re Amendments to Rule of Judicial Administration 2.051-Public Access to Judicial Records,*** 651 So.2d 1185, 1190 (Fla.1995). The Times' request would require a definition of public record that is broader than the definition provided by the supreme court for use by this court. ***See*** Report of the Supreme Court Workgroup on Public Records, 825 So.2d 889(Fla.2002) (amending Florida Rule of Judicial Administration 2.051(b) to define records of judicial branch). Neither the statute nor the case law supports such a broad interpretation of the term "public record."

Id. at 847.

While the ***Times Publishing*** Court concedes that records stored or created on public computers **may** be public records **if** they meet the definition of "public records" under the Florida statute, the Court declines to make a bright-line rule wherein all records stored on governmental computers are public records. As in this case, the determination of whether the requested documents fall within the statutory definition requires a case-by-case, or record-by-record, review. ***See also*** ***Media General Operation, Inc. v. Tom Feeney, Etc.,*** 849 So.2d 3 (Fla.App.2003); ***State of Florida v. City of Clearwater,*** 863 So.2d 149 (Fla.2003). Although we are not bound to follow the Florida cases, the Court in ***Times Publishing*** held, in its well-reasoned opinion, what we perceive to be the correct ruling if made pursuant to the Tennessee statute. Applying the principles set forth above, we find that the trial court did not err in holding an *in camera* review of the documents requested by Mr. Brennan to determine whether any met the statutory requirements of the Tennessee Public Records Act.

***6** We emphasize that the Appellant does not question the ruling of the trial court concerning whether the particular documents are within the definition of public records as set out in the statute.

Accordingly, we affirm the judgment of the trial court. Costs of this appeal are assessed against the Appellant, Edward Brennan, and his surety.

All Citations

Not Reported in S.W.3d, 2005 WL 1996625

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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

LARRY H. COLEMAN,	)	
	)	
Petitioner,	)	
	)	NE
vs.	)	**CASE NO. 10-137-IV**
	)	
MATTHEW KISBER, in his official capacity as Commissioner of Tennessee Department of Economic and Community Development,	)	
	)	
and	)	
	)	
REAGAN FARR, in his official capacity as Commissioner of Tennessee Department of Revenue,	)	
	)	
Respondents.	)	

MEMORANDUM

Petitioner, Larry H. Coleman ("Petitioner" or "Mr. Coleman"), is seeking records from Respondents under the Tennessee Public Records Act. Respondents, Matthew Kisber, Commissioner of Tennessee Department of Economic and Community Development ("Commissioner Kisber"), and Reagan Farr, Commissioner of Tennessee Department of Revenue ("Commissioner Farr"), have produced some of the requested records, but are claiming that Petitioner's remaining requests fall within three exceptions to the Public Records Act. This matter was heard in an expedited hearing on February 16, 2010. It is undisputed that all the records at issue are public records.

The question before the Court is not whether the public records should be produced because a large sum of public funds ($120 million) is implicated or because there is a general, legitimate sense that the public has the right to know about every aspect of the process by which state officials make decisions affecting this large sum of

public funds; rather, the question is whether the particular material in question falls within an exception to the Public Records Act. When the Tennessee Small Business Investment Company Credit Act ("TNInvestco Act") became law on July 9, 2009, there was an existing body of law relating to the Public Records Act and potential exceptions to it. In deciding Petitioner's Petition, the Court has carefully considered this body of law, other applicable law, and the entire record in this case.

Background and Overview

The TNInvestco Act was passed by the General Assembly on June 18, 2009, and signed into law by Governor Bredesen on July 9, 2009. *See* 2009 Tenn. Pub. Acts, ch. 610. The TNInvestco Act establishes a statutory program for spurring investment in qualified small businesses in Tennessee. These businesses generally must be independently owned and operated with headquarters and principal business operations in Tennessee, and they must not have more than 100 employees, 60% of which must be located in Tennessee. *See* Tenn. Code Ann. § 4-28-102(10). The TNInvestco Act's investment program is designed to deliver the venture capital that these emerging businesses need to create jobs and economic growth within Tennessee.

To infuse capital into the investment program, Respondents are authorized to award six $20,000,000 investment tax credit allocations among up to six qualified TNInvestcos. *See* Tenn. Code Ann. § 4-28-105(d). To become a qualified TNInvestco eligible to receive one of the six $20,000,000 investment tax credit allocations, an applicant must have submitted its application by October 1, 2009, demonstrating the capitalization requirements of Tenn. Code Ann. § 4-28-104(b), as well as the applicant's overall strength on the criteria set forth in Tenn. Code Ann. § 4-28-105(c)(1)(A). The TNInvestco Act expressly provides that "[t]he awarding of investment tax credits shall be

in the sole discretion of the commissioner of revenue and the commissioner of economic and community development." Tenn. Code Ann. § 4-28-105(c)(2).

The qualified TNInvestcos receive the capital they need to invest in qualifying small businesses from participating insurance companies that purchase the investment tax credits awarded to the TNInvestcos under Tenn. Code Ann. § 4-28-105. *See* Tenn. Code Ann. §§ 4-28-102(7) & -103(a). A participating insurance company may take such credits against its gross premiums tax liability in tax years 2012 through 2019 pursuant to the terms and conditions set forth in Tenn. Code Ann. § 4-25-103. By November 30, 2009, each qualified TNInvestco was required to submit irrevocable investment commitments from participating insurance companies and TNInvestcos owners in an aggregate amount of at least the "base investment amount," which is $14,000,000 per each $20,000,000 investment tax credit allocation. *See* Tenn. Code Ann. §§ 4-28-102(4) & -105(b).

The TNInvestco Act further provides that each TNInvestco shall make qualified investments of its base investment amount ($14,000,000) in qualified small businesses over the investment period of January 1, 2010, through December 31, 2019. *See* Tenn. Code Ann. §§ 4-28-102(6), (10), (12) & -106(a). Such qualified investments are subject to the terms and conditions of Tenn. Code Ann. § 4-28-106, including the requirement found in Tenn. Code Ann. § 4-28-106(b) that TNInvestcos submit their proposed investments in specific businesses to the Department of Economic and Community Development and receive the Department's determination that such proposals meet the TNInvestco Act's requirement of making qualified investments in qualified businesses.

Distributions from TNInvestcos, including profits and investment returns, are governed by Tenn. Code Ann. §§ 4-28-108 & -109. For certain distributions, the

TNInvestco must pay the State a profit share percentage of 50%. *See* Tenn. Code Ann. §§ 4-28-102(9) & -109(a)(1). The TNInvestco Act provides that the State and the TNInvestcos shall work together to structure distributions to minimize any related federal tax obligation. *See* Tenn. Code Ann. § 4-28-109(c). TNInvestcos must also meet certain annual review and reporting requirements regarding their participation in the investment program. *See* Tenn. Code Ann. §§ 4-28-110, -111 & -112. Thus, the TNInvestco Act reflects the General Assembly's policy decision to capitalize qualifying small businesses in Tennessee through investment tax credits awarded under the TNInvestco program.

In order to execute and administer this policy decision, the Departments of Revenue and of Economic and Community Development were required to formulate additional policies and develop new procedures to: (1) award the investment tax credits to qualified TNInvestcos; (2) facilitate the purchase and future application of the investment tax credits by participating insurance companies; and (3) administer the investment tax credit purchase transactions for the TNInvestco program. *See* Tenn. Code Ann. §§ 4-28-103 & -106. In administering the TNInvestco Act, the Departments obtained certain information from participants in the TNInvestco program.

Petitioner is a citizen of Tennessee and a principal in one of the applicants that Respondents did not select as a finalist in the TNInvestco program. Between December 17, 2009 and January 20, 2010, Petitioner made several public records requests. As of the February 16, 2010 hearing, Respondents produced certain of the requested documents and certified that certain of the requested documents did not exist. Accordingly, four categories of documents remain at issue: 1) the 25 scored TNInvestco Evaluation Matrices; 2) the Tax Credit Purchase Agreement; 3) the Side Letter; and 4) the Letter of Understanding. These documents were filed under seal for the Court's *in camera* review.

Evidentiary Record

The evidentiary record in this Public Records Act proceeding consists of: a) correspondence between the parties; b) the affidavits of the parties (Mr. Coleman,[1] Commissioner Kisber, and Commissioner Farr); c) affidavits of principals of four applicants who were not selected by Respondents as one of the ten finalists (Richland Ventures IV LLC, Marathon Partners LLC, Stonehenge Claritas Capital Fund Tennessee LLC, and Delta Capital Advisors L.P.);[2] d) various press releases and similar material; e) documents produced to Petitioner by Respondents; and f) documents not produced by Respondents, but submitted to the Court for *in camera* inspection.

On December 17, 2009, Petitioner sent a letter to Commissioners Kisber and Farr, requesting the scored Evaluation Matrix for each of the twenty-five TNInvestco applications and the commitment letter to the successful TNInvestcos. Commissioner Farr, in a letter dated December 22, 2009, asserted that "the information you have requested constitutes confidential tax information and is not open to public inspection." Petition for Access to Public Records ("Petition"), Exh. B. On January 13, 2010, Petitioner wrote Respondents renewing the earlier public records request and adding a few additional requests, including "any letter or opinion from Bass, Berry & Sims, PLC or any other law firm opining on the State's compliance with Tenn. Code Ann. § 4-28-105." Petition, Exh. C. On January 14, 2010, General Counsel for Commissioner Kisber's Department wrote a letter providing copies of "the irrevocable investment commitments you requested." Petition, Exh. D. The commitment documents for all six

[1] Mr. Coleman filed separate affidavits on February 11, 2010 and February 18, 2010, respectively.
[2] Some of the material was filed after February 16, 2010 without leave of Court. Given the expedited schedule, the Court considered all of this material, along with material attached to unsworn submissions which would normally not be given any evidentiary value.

TNInvestcos were stamped as "Received" on November 30, 2009 by Commissioner Kisber's office. *See id.*

On January 20, 2010, Petitioner, through legal counsel, sent a letter to Commissioner Kisber's General Counsel raising concerns about "whether the TNInvestco program is being managed in accordance with the requirements of the Act" and renewing Petitioner's demand for the documents requested on January 13, 2010. Similarly, Petitioner, on January 20, 2010, in his role as the requesting citizen under the Public Records Act, wrote a separate letter renewing the request for these same records. On January 29, 2010, General Counsel for the Department of Economic and Community Development conveyed a letter to Mr. Coleman denying the remaining documents as confidential tax information.

Petitioner and the principals of four other companies who were not selected by Respondents as finalists filed affidavits asserting that they do not "object to the release by the State of the scored evaluation matrices reflecting my Firm's scores and ranking vis-à-vis the other applicants." Affidavits of Jack Tyrrell, Mathew A. King, Thomas J. Adamek, Scott A. Zajac, and Larry H. Coleman. Additionally, all five of these principals assert that their respective firms were not "contacted by the State of Tennessee to ask if my Firm objects to the release of the scored evaluation matrices reflecting how the State scored my Firm in the TNInvestco application process." *Id.* Respondents, on the other hand, asserted concern that disclosure of the matrices might harm the unsuccessful applicants and have a chilling effect on future economic development efforts.

Discussion

The Tennessee Public Records Act (the "Act") requires public officials to provide Tennessee citizens with access to public records. In simple terms, "public records" are

records created or received by a public entity in some official context. The Act itself contains specific exceptions. Apart from these specific exceptions, which do not apply here, the Act contains a broad, catch all exception.[3] This exception is not limited to statutory non-disclosure provisions outside the Public Records Act itself, but includes, for example, records that are not discloseable under the common law. Despite the specific exceptions and the potential breadth of the catch-all exception, the courts have consistently held that there is a presumption in favor of access to public records.

The Tennessee Supreme Court recently reiterated Tennessee's clear public policy favoring disclosure of public records:

> Providing access to public records promotes governmental accountability by enabling citizens to keep track of what the government is up to. Recognizing the importance of providing the public access to governmental records, the Tennessee General Assembly has enacted statutes that clearly favor the disclosure of public records. These statutes contain a presumption that the records listed in Tenn. Code Ann. § 10-7-301(6) (Supp. 2007) and Tenn. Code Ann. § 10-7-503 are to be open to the public, and they direct the courts to construe the statutes broadly to assure the "fullest possible access" to public records. Tenn. Code Ann. § 10-7-505(d). Thus, unless it is clear that a record or class of records is legally exempt from disclosure, the requested record must be produced.

Konvalinka v. Chattanooga-Hamilton County Hosp. Auth., 249 S.W.3d 349, 360 (Tenn. 2008)(internal citations omitted). Under this approach, it has to be clear that a record or class of records is legally exempt from disclosure before a public official can deny a public records request.

The Act has two basic "liability" features. First, the Act has what might be called a "status" feature. If the requestor enjoys the status of being a "citizen" of Tennessee and he or she requests records that are public records not falling within any exception, the Act mandates that the requesting party be afforded access to those records. Although

[3] "All state, county, and municipal records shall . . . be open for personal inspection by any citizen of this state, . . . unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A).

questions related to expenses and redaction might arise in this context, access is mandatory. Generally speaking, the Public Records Act is neutral on whether or not the requestor's cause is laudatory. Conversely, the separate question of whether or not a requesting party can recover reasonable attorney's fees triggers the second "liability" feature of the Act. Liability for the requesting party's reasonable fees flows from whether the public custodian of the records was "willful" in withholding access to the documents in question. Consequently, if the custodian mistakenly withheld documents in good faith, this good faith does not excuse the custodian from the duty to produce those records (because of the "status" feature mentioned earlier), but a good faith mistake would relieve the custodian from any liability for the requesting party's attorney's fees.

Tax Administration

Tennessee law provides that "tax information" and "tax administration information" shall be confidential:

> Notwithstanding any provision of law to the contrary, returns, tax information and tax administration information shall be confidential and, except as authorized by this part, no officer or employee of the department and no other person, or officer or employee of the state, who has or had access to such information shall disclose any such information obtained by such officer or employee in any manner in connection with such officer's or employee's service as an officer or employee, or obtained pursuant to the provisions of this part, or obtained otherwise.

Tenn. Code Ann. § 67-1-1702.

The terms, "tax information," "tax administration information," and "tax administration," are defined in Tenn. Code Ann. § 67-1-1701 as follows:

> "Tax information" means a taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner with respect

> to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax, penalty, interest, fine, forfeiture, or other penalty, imposition or offense, administered by or collected by the commissioner, either directly or indirectly. "Tax information" does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer[.]

Tenn. Code Ann. § 67-1-1701(8). Further, "'[t]ax administration information' means criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards; audit procedures; and any other information relating to tax administration[.]" Tenn. Code Ann. § 67-1-1701(7).

"Tax administration" means:

> . . . the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the state of Tennessee is a party. "Tax administration" also means the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements[.]

Tenn. Code Ann. § 67-1-1701(6).

The decision to disclose "tax administration information," other than tax returns, and "tax information" is within the sole discretion of the Commissioner of the Department of Revenue:

> The commissioner is authorized to disclose tax administration information, other than returns and tax information, if the commissioner determines that such disclosure is in the best interests of the state; provided, that no provision of law shall be construed to require disclosure of criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards, if the commissioner determines that such disclosure will impair assessment, collection, or enforcement under state tax laws.

Tenn. Code Ann. § 67-1-1711. The Court concludes that the TNInvestco documents in question are documents outside the "tax information" and "tax administration information" exceptions because they were not submitted to Commissioner Farr as part of a past or current tax review by the Department of Revenue. Given the Tennessee Supreme Court's pronouncements, this Court is reluctant to rule that the foregoing tax law exceptions clearly apply to exclude from public disclosure documents gathered under the TNInvestco Act where, as here, no past or current need to apply the Tennessee tax law exists and no need to invoke Tennessee's tax administrative mechanisms is present.

Sensitive Economic or Community Development Information

The Tennessee Department of Economic and Community Development is charged with the statutory duty to coordinate development services to communities, businesses, and industries in this State. *See* Tenn. Code Ann. § 4-3-703. The Department is further specifically charged with the duty to stimulate the creation of new jobs and income through services to business and industry, *see* Tenn. Code Ann. § 4-3-705; to promote research, development, recruitment, and investments in conservation, and renewable technology business, *see* Tenn. Code Ann. § 4-3-708(1); and to assist new and existing business and industry that relocate or expand in this State and create or retain jobs, *see* Tenn. Code Ann. § 4-3-715. In order to effectively perform these duties, the Tennessee General Assembly has recognized that there may be instances where records or information made or received by the Department is of such a sensitive nature that its disclosure or release would seriously harm the ability of the State to compete or conclude agreements or contracts for economic or community development. Accordingly, the General Assembly has provided an exception to the availability to these records:

> (1) Notwithstanding any other provision of law to the contrary, any record, documentary materials, or other information, including proprietary

> information, received, produced or maintained by the department shall be considered public unless the commissioner, with the affirmative agreement of the attorney general and reporter, determines that a document or information is of such a sensitive nature that its disclosure or release would seriously harm the ability of this state to compete or conclude agreements or contracts for economic or community development.
>
> (2) If the commissioner, with the agreement of the attorney general and reporter, determines pursuant to subdivision (c)(1) that a document or information should not be released or disclosed because of its sensitive nature, such document or information shall be considered confidential for a period of up to five (5) years from the date such a determination is made. After such period, the document or information made confidential by this subsection (c) shall become a public record and shall be open for inspection.

Tenn. Code Ann. § 4-3-730(c).

It appears that the exception triggered by the certification by the Commissioner of Economic and Community Development in consultation with the Attorney General is at the heart of what is at issue in terms of the TNInvestco documents Petitioner seeks. After a review of the documents presented for *in camera* inspection, the Court agrees with Respondents that the records could reasonably be characterized as sensitive documents that "disclosure or release would seriously harm the ability of our State to compete or conclude agreements on contracts for economic or community development." Affidavit of Commissioner Matthew Kisber, ¶ 12. The Court, therefore, declines to second-guess Commissioner Kisber's decision to not release (or redact) these records at this time. According to the clear statutory language of Tenn. Code Ann. § 4-3-730(c), this exception applies.

Deliberative Process Privilege

Respondents are also relying on the deliberative process privilege. This privilege is grounded in the federal common law; it posits that information used in certain governmental deliberations is not discloseable to the public. The deliberative process

privilege has been recognized by the federal courts. While the deliberative process privilege was alluded to in one Tennessee appellate decision in a public records case, this privilege has not been clearly adopted by a Tennessee appellate court. In *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004), the Court of Appeals ruled that the deliberative process privilege did not apply to a federal public defender's request to get a county prosecutor's closed file. The Court ruled that the privilege is closely tied to the office held by the public official in question. There, the Court declined to hold that the privilege applied to an assistant district attorney's work product in preparing for a state court *coram nobis* proceeding. In *Swift*, the Court of Appeals interpreted Tenn. R. Civ. P. 16 to conclude that the records sought were not public records.[4] This Court has been unable to locate any Tennessee appellate court decision that applies the deliberative process privilege to prevent production of public records. This Court, therefore, respectfully declines to adopt this privilege as an exception to the Public Records Act in this trial court proceeding. Consequently, this Court respectfully declines to treat the deliberative process privilege as an exception "otherwise provided by law" to the general requirement that public records must be produced.[5]

Waiver

The Court respectively declines to rule that Respondents have to produce the records in question on the ground of waiver for two basic, interrelated reasons. First, the authorities relied on by Petitioner do not apply in the context of the two statutory exceptions to the Public Records Act relied on by Respondents. *See Arnold v. City of*

[4] A recent Tennessee Supreme Court decision suggests that our highest court might be reluctant to enforce a common law exception to the Public Records Act based largely on federal legal authority. *See Schneider v. City of Jackson*, 226 S.W.3d 332, 342-44 (Tenn. 2007).

[5] The phrase, "provided by law," contemplates law that is readily and currently ascertainable, not law expected to be adopted in the future. If this privilege were sufficiently recognized in Tennessee to warrant its use as an exception to the Public Records Act, the factual situation presented here would probably trigger the application of the privilege.

Chattanooga, 19 S.W.3d 779, 787 (Tenn. Ct. App. 1999). When the legislature provides for documents to be confidential (or declared confidential by public officials), there has to be, at minimum, an intentional waiver,[6] preferably in the manner prescribed by the legislature, to preserve the legislatively determined public interest. For example, tax administrative information, as evidenced by the record in this case, can be released by an affirmative certification by the Commissioner of Revenue that releasing those records are in the public interest. It follows, therefore, given the Court's decision to not apply the common law, non-statutory deliberative process privilege here, that Petitioner's argument that Commissioner Farr's public statements about the TNInvestco program operated to waive the deliberative process privilege is without merit. Finally, even if the waiver arguments urged by Petitioner apply with equal force to all three exceptions relied on by Respondents, the Court concludes that Respondents' conduct did not amount to a waiver under the authorities relied on by Petitioner. Commissioner Farr's statements to the effect that Respondents had followed the law and applied the scoring matrices did not amount to a waiver of the confidentiality (or the privileged nature) of the documents in question.

Attorney's Fees

As mentioned earlier, Respondents' conduct in declining to produce the documents in question would have to constitute a willful refusal to produce the documents before Respondents would be liable for Petitioner's attorney's fees. Petitioner points to the fact that he filed this lawsuit before Respondents released certain documents. After a review of the entire record, the Court concludes that Respondents' failure to produce these records or any of the records at issue was not willful. As

[6] The Court declines to rule on Petitioner's contention that the statutory tax administration information and sensitive documents exceptions cannot be waived.

Respondents and their counsel grappled with Petitioner's requests under the new TNInvestco Act, it appears that Respondents, acting in good faith, gradually scaled down their insistences over time. This degree of give and take is commendable and should not be chilled by the Court taking a heavy-handed approach to it.

Conclusion

This Court has attempted to balance the public's right to know as provided in the Public Records Act, and the broad discretion possessed by public officials charged with the responsibility of implementing and administering complex statutory schemes designed to promote Tennessee's economy and to maximize the recovery and investment of Tennessee's tax revenue. The Court, therefore, concludes that this legislatively-determined balance, as confirmed by Tennessee's appellate courts, militates in favor of the Court holding that the tax information and tax administration information exceptions to the Public Records Act do not apply in the unique context presented here. The Court determines, however, that the statutory exception to the Public Records Act that allows the Commissioner of Economic and Community Development (in consultation with the Attorney General) to designate certain public records as sensitive and confidential applies here to shield the documents in question from public disclosure for a period of five years. The records in question, therefore, are confidential and not subject to public disclosure at this time. As indicated above, the Court declines to apply the deliberative process privilege, which is founded in the federal common law, as an exception to the Public Records Act in the absence of a Tennessee appellate decision applying this privilege to prevent the disclosure of public records. The Court directs counsel for Respondents to prepare a proposed Final Order for the Court's approval that: 1) incorporates this Memorandum decision by reference; 2) describes the public records in

detail that will remain confidential and under seal for a period of five years from February 5, 2010; 3) denies Petitioner's request for attorney's fees; and 4) assesses court costs against Petitioner.

RUSSELL T. PERKINS
CHANCELLOR

cc: Steven A. Riley, Esq.
James N. Bowen, Esq.
Gina J. Barham, Esq.
Janet M. Kleinfelter, Esq.

484 F.2d 1086
United States Court of Appeals,
District of Columbia Circuit.

Gilbert A. CUNEO et al., Appellants
v.
James A. SCHLESINGER,
Secretary of Defense, et al.

No. 72-1328.
|
Argued June 6, 1973.
|
Decided Sept. 5, 1973.

Synopsis

Proceeding under Freedom of Information Act to compel disclosure of the defense contract audit manual. On cross motions for summary judgment, and after an in camera inspection, the United States District Court for the District of Columbia, George L. Hart, Jr., J., 338 F.Supp. 504, held that portions of the manual not available to the public were exempt from disclosure. Plaintiffs appealed. The Court of Appeals, Wilkey, Circuit Judge, held that justification for exempting information from disclosure may not consist of conclusory and generalized allegations of exemptions, but requires relatively detailed analysis in manageable segments, and that information which is in effect substantive law may not be concealed beneath a mass of other material.

Case remanded; order in accordance with opinion.

Bazelon, Chief Judge, filed a concurring opinion.

Attorneys and Law Firms

***1086 **368** Robert L. Ackerly, Washington, D. C., with whom Herbert L. Fenster,Washington, ***1087 **369** D. C., was on the brief for appellants.

William Kanter, Atty., Dept. of Justice, with whom Harold H. Titus, Jr., U. S. Atty., and Walter H. Fleischer, Atty., Dept. of Justice, were on the brief, for appellees.

Before BAZELON, Chief Judge, and ROBINSON and WILKEY, Circuit Judges.

Opinion

WILKEY, Circuit Judge:

Appellant sought to obtain disclosure under the Freedom of Information Act[1] ***1088 **370** of the Defense Contract Audit Manual, a manual prepared by the Defense Contract Audit Agency in the Department of Defense. On cross-motions for summary judgment, and after an *in camera* inspection, the District Court held that the portions of the Manual not available to the public were exempt from disclosure under exemptions two and five of the FOIA.[2] For lack of a detailed record essential to this type action, we are unable to determine if the information sought by appellant falls within one of the exemptions. We remand for further proceedings.

1 "(a) Each agency shall make available to the public information as follows:
"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public–
"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
"(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
"(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.
"(2) Each agency in accordance with published rules, shall make available for public inspection and copying–

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
"(C) administrative staff manuals and instructions to staff that affect a member of the public;
unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if–
"(i) it has been indexed and either made available or published as provided by this paragraph; or
"(ii) the party has actual and timely notice of the terms thereof.
"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.
"(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.
"(b) This section does not apply to matters that are–
"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
"(2) related solely to the internal personnel rules and practices of an agency;
"(3) specifically exempted from disclosure by statute;
"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
"(9) geological and geophysical information and data, including maps, concerning wells.
"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."
5 U.S.C. § 552 (1970).

2 Cuneo v. Laird, 338 F.Supp. 504 (D.D.C. 1972).

I. *Facts*

The Defense Contract Audit Agency was established to provide necessary audit services to government officers in contract administration. DCAA acts in an advisory capacity to the contracting officer, and verifies that the costs incurred in performing a contract for the Armed Services comply with criteria of the Armed Services Procurement Regulations by conducting an examination of government contractors' books and records. In view of the large number of government contractors and the great volume of contracts in different stages of performance, the DCAA must necessarily be selective and must limit its scrutiny to a relatively small portion of the books and records which could be audited. The

Defense Contract Audit Agency Manual, first issued in its *current* form in 1965,[3] was designed to guide DCAA auditors in effective auditing in a selective manner.

3 The Manual sought here was preceded by earlier editions that were readily available to the public. Portions of these earlier editions were separated into appendices to the current Manual; these appendices are available to the public.

Appellant alleges that the Manual, or parts of it, have regularly been made available to members of the public, including on occasion appellant's clients. Appellees do not dispute this but, rather, allege that these disclosures were never authorized.[4] In addition, a relatively complete description of the contents of the Manual, including quotations from it, has been published in a treatise on ***1089** ****371** defense contract auditing.[5] Finally, the Manual is made available to certain non-federal agencies and foreign governments who deal with American contractors.[6] Thus, to at least some extent, the Manual has been made available to individuals outside the DCAA.

4 Until 1967 the foreword to the Manual provided:
While the Manual is not available for public distribution, there is no prohibition against showing portions to contractors or others, when such action would be mutually beneficial.
Joint App. at 54.

5 P. Trueger, Accounting Guide for Defense Contracts (6th ed. 1971).

6 Joint App. at 54, 104, 106 & 107.

The Government argued before the trial court that the information in controversy was exempt because it was "(2) related solely to the internal personnel rules and practices of an agency"; constituted "(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; and/or was composed of "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[7] The trial court, after examining the Manual *in camera*, on motions for summary judgment held that it was a "playbook," or "game plan," i.e., tactics to be employed, and that this playbook was exempt from disclosure under categories (2) and (5).

7 *See* note 1, *supra*.

On appeal appellant abandoned his efforts to obtain those portions of the Manual that constitute a mere playbook.[8] He redoubled his argument, however, that portions of the Manual dealt with the allowability of costs. Such portions, according to appellant, constitute a form of substantive "secret law" that must be disclosed under the FOIA. Appellant also argued that the disclosure of portions of the Manual to various individuals, other non-federal agencies and foreign governments, constituted a waiver of exemption as to those portions.

8 There was considerable confusion regarding precisely what appellant wanted to have disclosed. After questioning by this court during oral argument it became obvious that appellant was not asking for the Manual to be disclosed in its entirety. The following dialogue indicates the parameters of appellant's request for disclosure:
THE COURT: Are there any instructions available to the field auditors which you would agree you do not have access to?
APPELLANT: Well, as we have suggested in our brief, if there are such things as saying the time of the audit, or it is not necessary to audit, say, fringe benefits, then of course, that might be excluded, but to the extent that any of the principles of ASPR–ASPR has the force and effect of law, in accordance with several decisions of the Supreme Court–to the extent that this Manual refines ASPR and its application, it becomes secret law, because it is ASPR that we are bound by.
*****
THE COURT: How would you distinguish between what Judge Hart referred to as the "game plan" and the law?
APPELLANT: Well, to the extent that the Manual refines ASPR–which we believe it must because ASPR is very general and every agency has an audit manual refining the cost principles set forth in their regulations–that is law and that becomes secret law. To the extent that the Manual might say "conduct the audit at a certain hour during the day or pick out this account and not that account," we don't need that and I don't think the public is entitled to it. But, to the extent that there are refinements of cost principles, I think that is clearly secret law. That is not giving away the game plan; that is a refinement of regulations that have the force and effect of law.
*****
THE COURT: If we find some things in there that don't fall within your definition of secret law, and are outside those areas that you contended relate to costs of contracts audited, then perhaps those things should remain secret?
APPELLANT: I agree, I agree.

II. *The Nature of the Information Sought*

Before the trial court appellant was requesting the entire contents of the Manual. According to the Government, the non-public portions of the Manual provide "uniform guidance and instructions concerning the criteria to be used in deciding what must be audited, how it shall be audited, what is to be the depth of the examination, what the frequency of the audit shall be, and how to determine the extent of reliance which may be placed on the contractor's own internal ***1090 **372** controls."[9] In other words, the Manual is a mere "playbook" that tells auditors where to look in the mass of books and records confronting them, but does not provide substantive guidance or otherwise set standards for what costs will actually be allowed. If a contractor knows in advance the coverage, depth, and scope of an audit, the contractor may be able to claim improper costs in areas that will receive little or no scrutiny. Thus, the Government argues that, for an audit to be effective, the portion of the Manual on coverage, depth, and scope must be kept secret.

9 Joint App. at 74.

Appellant disputes as a matter of fact this characterization of the Manual's contents. As a matter of law appellant's primary theory originally was that the Manual was an "administrative staff manual . . . that affect[s] a member of the public."[10] The FOIA specifically requires that such "administrative staff manuals" be made available to the public.

10 5 U.S.C. § 552(a)(2)(C) (1970).

In addition to his principal contention that the entire Manual be disclosed as being an "administrative staff manual," appellant advanced two subsidiary arguments that, if accepted, would require the disclosure of *portions* of the Manual. *First*, appellant contended that at least portions of the Manual set forth standards of interpretation of ASPR and guidelines for the allowability of costs; these portions were said to constitute a form of "secret law" that must be disclosed under the FOIA. *Secondly*, appellant claimed that portions of the Manual had been made available to various persons and entities outside the Federal Government, and that at least as to these disclosed portions, DCAA had waived any right it might have to keep them secret.

At oral argument appellant abandoned his request for the entire Manual and narrowed his efforts to seeking disclosure of the portions that constituted "secret law."[11] Due to this concession, we no longer have reason to consider whether the entire Manual must be disclosed under the requirement covering "administrative staff manuals."[12] By like token, we need not consider the argument that disclosure to certain individuals and entities constituted a waiver of any right to keep those portions secret. This is true because appellant has stated that he wants only those portions of the Manual which constitute "secret law." Since appellant has an undeniable right to obtain such law, it is irrelevant whether those portions may also be obtained under a theory of waiver. We therefore do not decide any waiver issue here.

11 *See* note 8, *supra*.

12 The scope of the "administrative staff manual" disclosure requirement has recently been considered by two other Circuits. *See* Stokes v. Brennan, 476 F.2d 699 (5th Cir., 1973); Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972).

There does not appear to be any disagreement between the parties regarding what the nature of the "secret law" being sought actually is. The portions sought by appellant, which the Government agrees should be made available if they actually exist, are those which either create or determine the extent of the substantive rights and liabilities of a person affected by those portions. Information that falls within this definition would include, for example, guidelines for what costs would be allowed under ASPR, and rules or interpretations dealing with other substantive laws. Appellant does not seek to obtain disclosure of those portions of the Manual that prescribe techniques to uncover the facts relevant to a particular contract. Nor is a right to disclosure claimed for procedures directing auditors to concentrate examination on certain elements of a contractor's records.

It is clear that if any portion of the Manual does consist of interpretations of rules and statutes or guidelines for allowability of costs, appellant has a ***1091 **373** right to obtain disclosure.[13] Indeed, this was conceded by government counsel during oral argument. The sole remaining issue is thus purely factual– whether the Manual does contain any "secret law".

13 It is well established that information which either creates or provides a way of determining the extent of substantive rights and liabilities constitutes a form of law that cannot be withheld from the public. *See* Sterling Drug, Inc. v. FTC, 146 U.S.App.D. C. 237, 450 F.2d 698 (1971); American Mail Line, Ltd. v. Gulick, 133 U.S.App.D.C. 382, 411 F.2d 696 (1968). The FOIA by its explicit terms condemns "secret law" and requires that it be made public:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying–
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register . . .
> 5 U.S.C. § 552(a)(2)(A) & (B) (1970). *See generally* Davis, Administrative Law, § 3A.27 (1970 Supp.).

In the unsatisfactory manner in which these FOIA cases have been arising, we have no record before us containing the answer to this issue. The District Judge was confronted with appellant's original claim for total access to the Manual, opposed by the Government's claim to blanket exemption under three exceptions to disclosure. On cross-motions for summary judgment, after *in camera* examination of the several volumes constituting the Manual, the District Judge sustained the Government's overall non-disclosure position under exemptions (2) and (5). Counsel apparently made no discriminating analysis of how portions of the Manual might differ in their purpose, nature, and content, and thus be subject to different criteria of disclosure; understandably, the trial judge made none.

III. *Procedures Under the FOIA*

A. *Problems of Testing Disclosability of Allegedly Secret Information*

Recently in Vaughn v. Rosen[14] this court had occasion to discuss the problems inherent in implementing the FOIA. Despite the heavy emphasis in favor of disclosure[15] and the specific requirement that the *Government* shall have the burden of proving that information need not be revealed,[16] we noted in *Vaughn* that procedures most often used in FOIA cases permit the Government very easily to avoid disclosure.[17] Since the party seeking disclosure does not know the contents of the information sought, he cannot argue as effectively that the documents sought are, for example, "secret law" to which he is entitled access. In contrast, the Government does have access to the information and with confidence can convincingly argue to the trial judge that the factual nature of the information is as the Government alleges.

14 157 U.S.App.D.C.–, 484 F.2d 820 (1973). (1973).

15 "The legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed." Getman v. NLRB, 146 U.S.App. D.C. 209, 211, 450 F.2d 670, 672, stay denied, 404 U.S. 1204, 92 S.Ct. 7, 30 L.Ed.2d 8 (1971). *See also*, Bristol Myers v. FTC, 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938, cert. denied, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970); M.A.Schapiro & Co. v. SEC, 339 F.Supp. 467, 469 (D.D.C.1972).

16 5 U.S.C. § 552(a)(3) (1970).

17 Vaughn v. Rosen, 484 F.2d at 823-827 (1973).

As we noted in *Vaughn*, the burden of actually determining whether the information is as the Government describes it falls ultimately on the court system.[18] After the Government alleges that the documents in controversy do not contain material which must be disclosed, but on the other hand consist of information whose secrecy must be preserved, the very claim of secrecy, under the usual court procedures in vogue, means that the Government has substantially relieved itself of the burden of proving more. To preserve secrecy it is then ***1092 **374** up to the trial judge to wade through the mass of documents and determine whether the information must be disclosed. The party seeking disclosure is helpless to contradict the Government's description of the information or effectively to assist the trial judge.

18 *Id*. at 824-826.

In *Vaughn* we concluded that the ease with which the Government could carry its burden, and the difficulty that a trial judge faces in determining whether information should be disclosed, created intolerable problems. *First*, it encouraged agencies to argue for the widest possible exemption from disclosure for the greatest bulk of material. *Secondly*, it had a tendency to undermine the reliability of a trial judge's findings; a trial judge, without the aid of counsel seeking disclosure, cannot be expected to investigate and isolate the factual nature of individual documents in a mass of similar appearing material. *Thirdly*, because the points of factual dispute have not been isolated by the traditional forms of argumentation and adversary testing, a determination is virtually unreviewable on appeal. The case at bar we remand for additional proceedings which hopefully will rectify to some extent these flaws.

B. *Procedures Upon Remand*

1. As in Vaughn v. Rosen, we believe that the problems adverted to will be substantially ameliorated if the Government is required to provide particularized and specific justification for exempting information from disclosure. This justification must not consist of "conclusory and generalized

allegations of exemptions, such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments."[19] It is particularly important that information which is in effect substantive law not be concealed beneath a mass of other material. Even when the law is closely intermingled with other data, we cannot conceive of a situation in which legal interpretations and guidelines could not be segregated from other material and isolated in a form which could be disclosed.

19 *Id*. at 826.

2. Upon remand the Government should correlate its reasons for claiming that the various portions of the Manual should not be disclosed with the relevant portions of the Manual.

[A]n indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification. Opposing counsel should consult with a view toward eliminating from consideration those portions that are not controverted and narrowing the scope of the court's inquiry. After the issues are focused, the District Judge may examine and rule on each element of the itemized list.[20]

20 *Id*. at 827.

3. Finally, if the District Judge deems it appropriate, he may appoint a special master to examine the Manual, the Government's justification, and the indexing. This could, in some circumstances, relieve much of the burden of evaluating voluminous documents that currently falls on the trial judge.

IV. *Conclusion*

The case is remanded so that the Government may undertake to index and justify the Manual in a manner consistent with Part III of this opinion, and for the District Judge to rule thereon.

So ordered.

BAZELON, Chief Judge, concurring:

I agree entirely with Judge Wilkey's exposition of the impediments that have confronted courts in enforcing compliance with the mandate of openness in the Freedom of Information Act. These impediments derive, of course, from exactly the problem against which the Act was directed–the enthusiasm for secrecy that seems all too often epidemic in our Government. Courts are responsible under the Act for testing broad claims of exemption from disclosure, claims that information must remain secret, ***1093 **375** against the precise categories of necessary secrecy that Congress has defined. Yet the claim of exemption has, in the past, foreclosed adversary analysis of whether, in fact, exemption is warranted, presenting the grave danger that, despite the best efforts of the court, the claim alone might conclude the case. *See* Sterling Drug, Inc. v. FTC, 146 U. S.App.D.C. 237, 450 F.2d 698, 715-716 (1971) (Bazelon, C. J., concurring in part and dissenting in part).

I do not suppose, nor, I assume, does the Court, that the procedures we have mandated to govern the remands here and in Vaughn v. Rosen, – U.S.App. D.C. –, – F.2d – (1973) will completely dispose of the problem. They are, like much in the law, an experiment to be tried by experience. And experience may prove that additional steps or different approaches are called for. Nonetheles, I think that these procedures bear substantial promise of facilitating enforcement of the Act. I join in the opinion of the Court.

All Citations

484 F.2d 1086, 157 U.S.App.D.C. 368

2013 WL 5872286
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Karl S. DAVIDSON
v.
Governor Phillip BREDESEN, in his Individual Capacity and David Cooley, Deputy to the Governor, in his Individual Capacity.

No. M2012–02374–COA–R3–CV.
|
Sept. 11, 2013 Session.
|
Oct. 29, 2013.
|
Application for Permission to Appeal Denied by Supreme Court March 5, 2014.

Appeal from the Chancery Court for Davidson County, No. 072339III; Ellen H. Lyle, Chancellor.

Attorneys and Law Firms

John Edward Herbison, Clarksville, Tennessee, and Joseph H. Johnston, Nashville, Tennessee, for the appellant, Karl S. Davidson.

Harold Richard Donnelly and Hal Hardin, Nashville, Tennessee, for the appellees, Governor Phillip Bredesen and David Cooley, Deputy to the Governor.

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL P. J., M. S., and FRANK G. CLEMENT, JR., J., joined.

OPINION

RICHARD H. DINKINS, J.

***1** Participant in protest action which took place at the Tennessee State Capitol brought an action alleging that former Governor and Deputy Governor retaliated against him for the exercise of his First Amendment rights during the protest. Participant appeals the grant of summary judgment against him and the trial court's ruling that certain documents created by the Governor's legal counsel were protected from discovery by the attorney-client and deliberative process privileges. Finding no error, we affirm the judgment of the trial court in all respects.

I. FACTS AND PROCEDURAL HISTORY

This case is before us for the second time. Karl Davidson, who participated in a sit-in demonstration at the Tennessee State Capitol in 2005 protesting proposed cuts to the TennCare program, brought suit against various state officials,[1] asserting several claims arising out of the treatment of the protesters, including a claim under 42 U.S.C. § 1983 for violation of his First Amendment rights. The trial court dismissed Mr. Davidson's complaint for failure to state a claim; in the first appeal we affirmed the trial court's dismissal of all the claims except his First Amendment retaliation claim and remanded the case for further proceedings. *Davidson v. Bredesen,* 330 S.W.3d 876 (Tenn.Ct.App.2009).

[1] In the original complaint, Mr. Davidson named the following individuals as defendants: Governor Phillip Bredesen, in his individual capacity; Gina Lodge, Commissioner of Department of Human Services, in her individual capacity; J.D. Hichey, Director of Bureau of TennCare, in his individual capacity; David Geotz, Commissioner of Department of Finance and Administration, in his individual capacity; Paula Flowers, Commissioner of Department of Commerce and Insurance, in her individual capacity; and David Cooley, Deputy to the Governor, in his individual capacity.

On September 10, 2010, Mr. Davidson amended his complaint to name former Governor Bredesen and former Deputy Governor Cooley as the only defendants ("Defendants" herein); he summarized his claims against them thusly:

> During the course of this sit-in demonstration, Plaintiff and other enrollees were willfully and maliciously harassed and intimidated by various state officials and certain State Highway Patrol officers. They were denied food and water on several occasions, which placed Plaintiff's health in jeopardy because of his diabetes and other medical conditions. Food items and clothing were also seized from Plaintiff on at least six (6) different occasions during this seventy-seven (77)-day period. Plaintiff avers on information and belief that these acts were either

done at the express direction of Defendant Gov. Bredesen and/or Defendant Dep. Gov. Cooley, or done with their knowledge, approval, and acquiescence.

... The actions of Defendant Gov. Bredesen, by and through his agents, including but not limited to, Defendant Dep. Gov. Cooley, were carried out in retaliation for Plaintiff's protected conduct and therefore amount to a deprivation of Plaintiff's civil rights under color of law and entitle him to damages pursuant to 42 U.S.C. § 1983.

Defendants answered the amended complaint on January 5, 2011, generally denying all allegations.

Defendants filed a motion for summary judgment on December 7, 2011 along with a memorandum in support of the motion and a statement of undisputed material facts. The motion was to be heard on January 13, 2012, but was rescheduled to March 23 at the request of Mr. Davidson's counsel. On March 19 Mr. Davidson filed a motion to continue the March 23 hearing, partly on the grounds that he needed "further discovery and time to prepare responsive pleadings and affidavits." Although no order appears in the record, the motion was apparently granted and the hearing reset for April 13. On April 9 Mr. Davidson filed a response to the motion for summary judgment, accompanied by his amended and supplemental answers to Defendants' interrogatories and request for production and his "Sworn Response in Opposition to Defendants' Statement of Material Undisputed Facts." On April 12 the court entered an order continuing the motion for summary judgment and set a deadline for Mr. Davidson to file a motion to compel production of the documents and have it heard. [2]

[2] The order recited that the court, while preparing for oral argument on the motion, noticed "references in the plaintiff's papers to possible important evidence ("Documents") that ha[ve] been withheld by the defendants on the grounds of privilege." After noting that Mr. Davison identified certain documents in his response to the motion that could provide additional facts regarding the retaliation claim, the court continued the hearing to allow Mr. Davidson the opportunity to seek production of the documents "because one of the defendants' summary judgment arguments is that the plaintiff's claims are so *de minimus* as to not rise to the level of being constitutional violations under 42 U.S.C. § 1983, the Court needs to have any and all evidence before it in order to rule effectively."

***2** Mr. Davidson filed a motion to compel on April 19 requesting production of "certain documents provided to [Defendants'] attorneys by Deputy Attorney General Steve Hart, which documents he produced in response to Plaintiff's Subpoena Duces Tecum, but because General Hart thought they were subject to the attorney-client privilege, he did not provide copies to Plaintiff's Counsel." [3] Defendants filed a response to the motion on May 21 asserting that the documents requested "were not produced by the Office of the Attorney General on the basis of one or more of the following legal theories: 1) that the documents are work product of the attorney(s) involved; 2) that the documents contain privileged attorney-client communications; and 3) that the documents are protected by the deliberative process." Mr. Davidson filed a reply to Defendants' response on July 16 asserting that documents did not fall within either of the three privileges asserted by Defendants.

[3] The documents being sought were identified in an August 16, 2011 letter to Mr. Davidson's counsel from Steve Hart, Special Counsel to the Office of the Attorney General, responding to a subpoena *duces tecum* issued in connection with Mr. Davidson's request for production of documents.

A hearing on the motion to compel was held on July 20, during which the documents in question were filed with the court under seal for an in camera inspection. On July 26 the court issued its order that Defendants produce two of the letters and that the remainder were privileged under either the attorney client privilege, the deliberative process privilege, or both. On July 27 Defendants filed a motion for a stay of the court's July 26 order, to alter or amend the order, or in the alternative for permission to appeal; the court granted the motion, ruling that two documents which the court had ordered produced were also privileged from disclosure.

Mr. Davidson filed a supplemental memorandum in opposition to the motion for summary judgment on September 19. The summary judgment hearing was held on September 21 and the court granted the motion on October 3. Mr. Davidson filed a notice of appeal on October 19.

On appeal Mr. Davidson contends that the trial court erred in holding that the documents which he sought to discover were privileged and, therefore, not subject to production and in granting summary judgment on his claim of retaliation for the exercise of his First Amendment rights. Mr. Davidson also raises the issue of whether the deliberative process privilege is recognized under Tennessee law.

II. DISCUSSION

A. PRIVILEGES

The documents for which production was sought in the motion to compel were:

> 1. Notes of Deputy Legal Counsel Steve Elkins re: meeting with Legal Counsel Robert Cooper on 7/13/05;
>
> 2. Notes of Deputy Legal Counsel Steve Elkins re: meeting and telephone calls on 6/29/05—including contacts and consultations with the Tennessee Attorney General's Office;
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> 3. Notes of Deputy Legal Counsel Steve Elkins re: meeting on 7/14/05, including Steve Elkins and members of the Tennessee Attorney General's Office;
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> 4. Notes of Deputy Legal Counsel Steve Elkins of telephone call with Thad Watkins, General Counsel for Department of General Services (on 7/14/05);
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> ***3** 5. Notes and edits of Legal Counsel Robert Cooper and Deputy Legal Counsel Steve Elkins re: Implementation of Procedures for the Use of Public Areas of the Tennessee State Capitol;
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> 6. (7/14/2005) Implementation of Procedures for the Use of Public Areas of the Tennessee State Capitol; and
>
> 7. Notes of Deputy Legal Counsel Steve Elkins re: meeting on 7/25/05, "Independent policy analysis".

In the July 26, 2012 Memorandum and Order, the court discussed the various privileges asserted and ordered Defendants to produce documents 1 and 4; it held that items 2, 3, 5, 6, and 7 were protected by the deliberative process privilege and that documents 2 and 3 were also protected by the attorney-client privilege. On July 27, pursuant to Defendants' motion, the court amended the July 26 order and held that documents 1 and 4 were also protected by the attorney-client and deliberative process privileges.[4] Mr. Davidson complains that the court's rulings in this regard "inappropriately prevented [him] from obtaining relevant documents from non-party recipients of Tenn. R. Civ. P. 45.02 subpoenas."[5]

[4] The court stated in its order: "The problem is that counsel did not assert the privileges of attorney-client and deliberative process as to documents 1 and 4. The Court, therefore did not have those privileges asserted as a basis to deny production.... Now that defendants have notified the Court that they are asserting these privileges, the Court shall construe their July 27, 2012 motion as one to amend their previous papers. With that amendment before the Court, it is authorized to alter the July 26, 2012 Memorandum and Order."

[5] Mr. Davidson served interrogatories and a request for production of documents on Defendant Cooley; he subsequently served a request for production of documents on Attorney General Robert Cooper and a subpoena *duces tecum* on Highway Patrol Captain Lee Chaffin. Mr. Hart responded to the request for production served on General Cooper in a letter to Mr. Davidson's counsel advising:

> General Cooper does not have possession of any personal documents that are responsive to the Request. The accompanying documents and the privileged documents described below were contained within the files of the Office of the Governor's Legal Counsel and are now in the possession of the Attorney General. As noted herein, for some of these documents from the files of the Office of the Governor's Legal Counsel appropriate privileges are being asserted, including work product, attorney-client communications, and deliberative process privileges.

Mr. Hart provided Mr. Davidson's counsel with Capital security assignments, addendums to post instructions, capitol security log forms, and memos. The fact that the information was requested from nonparties does not affect our analysis of this issue.

Decisions regarding pretrial discovery are inherently discretionary; accordingly, we review such decisions under the abuse of discretion standard. *Culbertson v. Culbertson,* 393 S.W.3d 678 (Tenn.Ct.App.2012). In so doing, we review the underlying factual findings using the preponderance of the evidence standard and review the lower court's legal determinations *de novo* with no presumption of correctness. *Id.;* see also Tenn. R.App. P. Rule 13(d). Further, as noted by the *Culbertson* court:

> When a discovery dispute involves the application of a privilege, the court's judgment should be guided by the following three principles. First, Tennessee's discovery rules favor discovery of all relevant, non-

> privileged information. Second, even though privileges do not facilitate the fact-finding process, they are designed to protect interests and relationships that are regarded as sufficiently important to justify limitations on discovery. Third, while statutory privileges should be fairly construed according to their plain meaning, they need not be broadly construed.

Culbertson, 393 S.W.3d at 683 (quoting *Powell v. Cmty. Health Sys., Inc.,* 312 S.W.3d 496, 504 (Tenn.2010)).

1. DELIBERATIVE PROCESS PRIVILEGE

The deliberative process privilege protects "the confidentiality of conversations and deliberations among high government officials" and "ensures frank and open discussion and, therefore, more efficient government operations." *Swift v. Campbell,* 159 S.W.3d 565 (Tenn.Ct.App.2004) (citing *United States v. Weber Aircraft Corp.,* 465 U.S. 792, 104 S.Ct. 1488, 79 L.Ed.2d 814, (1984)). Mr. Davidson contends that Tennessee has not adopted such a privilege and, therefore, the trial court and this court are without authority to adopt it "according to the plain language of Tenn. R. Evid. 501."

In *Swift* we considered whether the deliberative process privilege shielded an assistant attorney general's records related to a case involving a prisoner on death row. A petition had been filed to secure the documents pursuant to Tenn.Code Ann. § 10–7–505; the defendant's motion to dismiss the petition on the grounds of the work product doctrine, the law enforcement investigative privilege, the deliberative process privilege, and Tenn. R.Crim. P. 16(a)(2) was granted by the trial court. On appeal, we affirmed the dismissal on the ground that the documents were not subject to disclosure in accordance with Tenn. R.Crim. P. 16(a)(2). With respect to the deliberative process privilege argument, we stated:

> ***4** We have no doubt that there exists a valid need to protect the communications between high government officials and those who advise and assist them in the performance of their duties. *United States v. Nixon,* 418 U.S. 683, 705, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974). However, an assistant district attorney general preparing to defend a conviction in state court is not the sort of official to whom the privilege applies.

Although we did not specifically hold that Tennessee recognizes such privilege in the manner in which Mr. Davidson seeks, we opined:

> Whether the "deliberative process privilege" may be invoked depends on the government official or officials involved. We have no doubt, for example, that the Governor may properly invoke this privilege, should he or she care to, in meetings with staff or cabinet members.

Id.

In *Coleman v. Kisber,* 338 S.W.3d 895 (Tenn.App.Ct.2010), a petition had been filed to obtain documents from the Commissioner of Revenue and the Commissioner of Economic and Community Development related to the administration of the Tennessee Small Business Investment Company Credit Act, Tenn.Code Ann. § 4–28–101, *et seq.* In their response to the petition, the defendants asserted that the documents were confidential and privileged in accordance with the tax information and tax administration information exceptions at Tenn.Code Ann. § 67–1–1702, the "ECD exception" at Tenn.Code Ann. § 4–3–730(c), and the deliberative process privilege. The trial court denied the petition on the ground that the ECD exception applied, found that the tax information and tax administration exception did not apply, and declined to apply the deliberative process privilege. We reversed the trial court's decision that the tax administration information and tax information exceptions did not apply and, on that alternative ground, affirmed the denial of the petition; our consideration of other issues presented in the appeal were pretermitted. With respect to the deliberative process privilege, however, we noted:

> [T]he trial court found that Tennessee had not adopted the Deliberative Process Privilege and that the Commissioners raised this as an issue on appeal. Because we have decided this case on another ground, we do not find it necessary to address this issue. However, our opinion should not be interpreted as an affirmance of the trial court's finding on this issue.

Id. at 909.

As is apparent from these cases, this Court has implicitly recognized the existence of the deliberative process privilege, a recognition with which we agree. As noted in *Swift v. Campbell,* there is a "valid need" that the advice high governmental officials receive be protected from disclosure. The officials who are able to claim the privilege are those vested with the responsibility of developing and implementing law and public policy, many times requiring that differing and various interests and viewpoints be considered. In this context, the privilege recognizes the official's relationship with trusted advisors as a relationship which is fundamental to the process of deliberating toward the result and which is sufficiently important to justify a limitation on the "need to develop all relevant facts in the adversary system [which] is both fundamental and comprehensive." *Nixon,* 418 U.S. at 709. The deliberative process privilege is a common law privilege which, pursuant to Tenn. R. Evid. 501, can be asserted to prevent the production of a document and the trial court did not err in considering Defendants' claim of the privilege. [6]

6 Tenn. R. Evid. 501, Privileges Recognized Only as Provided, states:

> Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:
> (1) Refuse to be a witness;
> (2) Refuse to disclose any matter;
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

***5** The trial court held with respect to Defendants claim of the privilege that:

> [I]t is clear from the Court's in camera review of the text of the documents that they come within the privilege. The Court finds from its in camera inspection that the text of the documents establishes that they are communications between high government officials and those who advise and assist them in the performance of their official duties. Moreover, many of the documents contain no facts, only deliberations, and in the few documents that arguably contain mixed fact/opinion information, the possible facts are so inextricably intertwined with deliberative text that production must be denied.

We have reviewed the material for which the privilege was sought and agree with the trial court's findings. The trial court did not abuse its discretion in ruling that the deliberative process privilege applied to documents.

2. ATTORNEY CLIENT PRIVILEGE

As an initial matter, we address Mr. Davidson's contention in his brief on appeal that the Defendants did not assert the attorney-client privilege. As noted earlier, supra footnote 5, the privileges were asserted in a letter from Mr. Hart to Mr. Davidson's counsel. In addition, the attorney-client privilege was asserted in Defendants' Response to Plaintiff's Motion to Compel. [7]

7 In their response Defendants stated:

> The documents were not produced by the Office of the Attorney General on the basis of one or more of the following legal theories: 1) that the documents are work product of the attorney(s) involved; 2) that the documents contain privileged attorney-client communications; and 3) that the documents are protected by the deliberative process privilege.

The attorney-client privilege encourages full and frank communication between an attorney and client by sheltering

these communications from disclosure. *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust, et al.,* 209 S.W.3d 602, 615–16 (Tenn.Ct.App.2006) (citing Tenn.Code Ann. § 23–3–105). [8] The attorney-client privilege, however, is not absolute, and does not encompass all communications between an attorney and a client. *Id.* at 616 (citing *Bryan v. State,* 848 S.W.2d 72, 80 (Tenn.Crim.App.1992)). [W]hether the attorney-client privilege applies to any particular communication is necessarily question, topic and case specific. *Bryan,* 848 S.W.2d at 80. To invoke the protection of the attorney-client privilege, the burden is on the client to establish the communications were made pursuant to the attorney-client relationship and with the intention that the communications remain confidential. *State ex rel. Flowers,* 209 S.W.3d at 616 (citing *Bryan,* 848 S.W.2d at 80).

8 Tenn.Code Ann. § 23–3–105, Attorney-client privilege, states:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.

With respect to the claim of the attorney-client privilege the trial court held:

> As to documents 2, 3, 5, 6, and 7, the defendants objected to their production on the grounds of the attorney-client privilege. The Court sustains the objection as to documents 2 and 3. From the in camera inspection of the documents, linked with the facts testified to by Attorney Elkins in his June 18, 2012 affidavit in paragraph 7, identifying that the defendants were present when the documents were created, the Court finds that documents 2 and 3 concern facts which the attorney was informed by the client. This is an essential element of the attorney-client privilege and must be established by the party invoking the privilege. *Reed v. Baxter,* 134 F.3d 355–356 (6th Cir.1998). This element, however, is not established as to documents 5, 6, and 7. Neither the documents themselves nor the Elkins' affidavits establish the facts contained therein came from the client. The Court, therefore, overrules the defendants' attorney-client privilege objection as to documents 5, 6, and 7.

***6** We have likewise considered the attorney-client privilege in our review of the documents at issue, as well as the affidavits Mr. Elkins. [9] The affidavits attest to the fact that the documents for which production was not ordered were maintained and /or prepared by Mr. Elkins in his capacity as Deputy Legal Counsel to Governor Bredesen and pursuant to his responsibilities in that capacity [10]; that the documents specifically relate to his analysis of questions presented to him by the Governor as well as related issues surrounding the protest at the Capitol; and reflect counsel given the Governor and the Governor's advisors in that regard. We agree with the trial court's findings in this regard and hold that the court did not abuse its discretion in ruling that the documents were covered by the attorney-client privilege.

9 In addition to the June 18, 2012 affidavit referenced by the trial court, Mr. Elkins submitted a Supplemental Affidavit on July 24.

10 Mr. Elkins attests that his responsibilities included advising members of Governor Bredesen's staff, including Mr. Cooley.

3. OTHER RELATED MATTERS

Defendants' objection to production of the documents on the basis of the work product privilege was overruled by the trial court, as was Mr. Davidson's invocation of the crime-fraud exception to the attorney-client privilege; neither party raises an issue with respect to the court's rulings on appeal. In any event, our holding that the documents are covered by the deliberative process privilege and the attorney-client privilege renders moot any issue relating to the work product privilege or the crime-fraud exception to the attorney-client privilege.

B. SUMMARY JUDGMENT ANALYSIS

Summary judgment is an appropriate vehicle for resolving a case where a party can show that "there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; see also Tenn.Code Ann. § 20–16–101. [11] The moving party may meet this burden by either: (1) affirmatively negating an essential element of the non-moving party's claim; or (2) showing that the non-moving party will not be able to prove an essential element at trial. *Hannan v. Alltel Publ'g Co.,* 270 S.W.3d 1, 8–9 (Tenn.2008). If the moving party's motion is properly supported, "[t]he burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists." *Id.* at 5 (citing *Byrd v. Hall,* 847 S.W.2d 208, 215(Tenn.1993)). The non-moving party may accomplish this by:

11 Tenn.Code Ann. § 20–16–101, applicable to summary judgments, was enacted by 2011 Tenn. Pub. Acts. Ch. 498, became effective July 1, 2011 and is applicable to cases filed on or after that date.

> (1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for the trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P. Rule 56.06. *Martin v. Norfolk S. Ry. Co.,* 271 S.W.3d 76, 84 (Tenn.2008) (citations omitted).

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Draper v. Westerfield,* 181 S.W.3d 283, 288 (Tenn.2005); *BellSouth Adver. & Publ. Co. v. Johnson,* 100 S.W.3d 202, 205 (Tenn.2003); *Scott v. Ashland Healthcare Ctr., Inc.,* 49 S.W.3d 281, 284 (Tenn.2001); *Penley v. Honda Motor Co.,* 31 S.W.3d 181, 183 (Tenn.2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.,* 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer,* 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, we review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.,* 142 S.W.3d 288, 291 (Tenn.2004); *Blair v. West Town Mall,* 130 S.W.3d 761, 763 (Tenn.2004); *Staples v. CBL & Assoc.,* 15 S.W.3d 83, 88 (Tenn.2000). We consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and afford that party all reasonable inferences. *Draper,* 181 S.W.3d at 288; *Doe v. HCA Health Servs., Inc.,* 46 S.W.3d 191, 196 (Tenn.2001); *Memphis Hous. Auth. v. Thompson,* 38 S.W.3d 504, 507 (Tenn.2001). "If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd,* 847 S.W.2d at 215.

***7** In order to succeed on a claim of retaliation for the exercise of First Amendment rights, a plaintiff must establish: (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights. *Davidson v. Bredesen,* 330 S.W.3d 876, 887 (Tenn.Ct.App.2009) (citing *Bloch v. Ribar,* 156 F.3d 673, 678 (6th Cir.1998).

Mr. Davidson alleged in the amended complaint that certain actions of Defendants, specifically harassment of himself and others, denial of water and food, and confiscation of his clothing, "were carried out in retaliation for Plaintiff's protected conduct and therefore amount to a deprivation of Plaintiff's civil rights under color of law and entitle him to damages...." In support of their motion for summary judgment Defendants relied upon Mr. Davidson's response to the following interrogatory:

> Describe in complete detail all damages you have suffered as a result of the allegations contained within the Amended Complaint for Declaratory Relief and Damages for Deprivation of Federal Civil Rights Under Color of Law. Include in your answer the method by which you calculated those damages, the dates and times you allege the damages occurred and the names and addresses of all possible witnesses to said damages. Please also include in your answer a summary of the expected testimony of each of the potential witnesses.

Mr. Davidson's response to the interrogatory was six and a half pages; we will refer to the salient portions of the response as we discuss each individual claim. [12]

12 Mr. Davidson asserts on appeal that the Defendants did not present "any affidavit from any person present during the protests and under the control of the Defendants, such as a State Trooper or Capitol police officer, attesting that Plaintiff was *not* denied food and water during the sit-in, that his clothing was *not* removed from him, or that he was *not* deprived of sleep by police or troopers rousing him to see 'whether [he] was all right' " and that, as a consequence, the court erred in granting summary judgment. In making this argument, Mr. Davidson misconstrues the evidentiary requirements to support a motion for summary judgment. Tenn. R. Civ. P. 56.04 allows a moving party to rely on "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" to show that there is no genuine issue as to any material fact. Defendants' reliance on Mr. Davidson's answer to the interrogatory to meet their initial burden is sufficient to comply with the rule.

1. HARASSMENT OF OTHERS

The trial court held that Mr. Davidson's claim relative to the alleged harassment of other protestors failed as a matter of law. [13] Mr. Davidson does not assign error to the trial court's ruling on this particular matter.

13 Mr. Davidson asserted that he witnessed Capitol police and/or state troopers harass his co-protestors by threatening them with physical harm and directing racial slurs at them. Furthermore, Mr. Davidson contended that Defendant Cooley had a "confrontational meeting" with four protestors in which he "shouted at them so vigorously that he spit on them."

A § 1983 action is entirely personal to the direct victim of the alleged constitutional tort; therefore only the victim or the victim's representative(s) may prosecute the claim. *Claybrook v. Birchwell,* 199 F.3d 350, 357 (6th Cir.2000). Mr. Davidson's use of these alleged incidents to support his contention that Defendants retaliated against him for exercising his First Amendment rights is misplaced because he is not a direct victim of the alleged harassment. For that reason, Mr. Davidson's claim regarding the alleged harassment of others was properly dismissed.

2. HARASSMENT

The trial court held that Mr. Davidson's claim for harassment by verbal abuse failed as a matter of law and that his claim regarding sleep deprivation was *de minimus.*

The portions of the interrogatory answer pertinent to Mr. Davidson's claim that he was harassed by Defendants in retaliation for his participation in the protest stated:

> ***8** We were repeatedly accused by Capitol police and/or state troopers of being "paid agitators" and not TennCare beneficiaries at risk of being disenrolled. This was not true. None of the sit-in protestors to my knowledge was a paid outside agitator.... Yet on more than one occasion, the Governor made public announcements to this effect which further encouraged the harassment by Capitol police and/or state troopers. This additional harassment by the Governor was intended to publicly attack my (our) credibility with the public, the Governor's staff, and the police, and further contributed to my fear, anxiety, and mental distress.
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> * * *
>
> There was a period of about one week during the demonstration where the Capitol Hill police on night duty would play the television and radio exceptionally loud so as to disrupt what little sleep we (I) could get on the marble floor of the Capitol Building. If we did fall asleep, an officer would wake us up and ask if we were "all right." This sleep deprivation was harassment which caused me fear, frustration, and anxiety.

The answer does not support the allegation that either of Defendants harassed Mr. Davidson by calling him a "paid agitator" or by depriving him of sleep during the nights he slept at the Capitol after hours; neither is there any fact asserted to support the allegation that either Defendant ordered the Capitol police and/or state troopers to accuse him of being a paid agitator and deprive him of sleep by playing the television and radio loudly and waking him up. This was sufficient to negate an essential element of Mr. Davidson's claim, i.e., that he suffered an adverse action, harassment, as a result of his participation in the sit-in demonstration, and requiring him to produce evidence of the same.

As part of his response to the motion, Mr. Davidson amended his interrogatory answer and filed a document styled Plaintiff's Sworn Response in Opposition to Defendants' Statement of Material Undisputed Facts. In the amended interrogatory answer, he did not assert any additional facts relative to his claim of verbal abuse or deprivation of sleep. In his response to the statement of material facts Mr. Davidson admitted the following statement, which was the only statement relative to the harassment claim: "One of

Plaintiff's claims is that he was accused of being a 'paid outside agitator.' "

The material relied upon by Mr. Davidson does not establish an issue of fact as to the allegations that Defendants verbally abused him or deprived him of sleep because of his participation in the protest. Mr. Davidson does not state any fact in his amended interrogatory answer or in his response to the statement of undisputed facts to support his allegation that Defendants harassed him in any manner. Rather, his contention regarding the amount of sleep he received is centered around a time at which the Capitol is closed to the public. [14] Other material in the record, e.g., the procedures in effect for use of the public areas of the Capitol, the post instructions for officers assigned to the Capitol, and memoranda to and from those officers, provide context for the actions of those responsible for operation of the Capitol, including insuring the safety of the protestors. The failure of Mr. Davidson to produce evidence to establish a genuine issue of fact, that any action which he alleges was taken against him was taken in retaliation for his participation in the protest, supports the grant of summary judgment. [15]

14 The hours of operation for the public area of the Capitol are from 8:00 a.m. to 4:30 p.m. daily, except for Saturdays, Sundays, and holidays.

15 We agree with the trial court that Mr. Davidson's claim that there was one week during the protest during which he was deprived of sleep was *de minimus.* The protest extended for seventy-seven days and Mr. Davidson was present for forty-two of those days. As is clear from the materials in the record, the Department of Safety and the Department of General Services, charged with the responsibility of maintaining operations in the Capitol, were addressing a situation-persons who had camped out in the Capitol building as an act of protest—for the first time. As acknowledged in *Thaddeus–X v. Blatter,* not every action taken rises to the level for which the Constitution is concerned. *Thaddeus–X v. Blatter,* 175 F.3d 378, 396 (6th Cir.1999) ("... every action, no matter how small, is constitutionally cognizable ... [t]here [is], of course, a *de minimus* level of imposition with which the Constitution is not concerned."). The allegation that for one week Defendants took action that deprived him of sleep in retaliation for his participation in the protest, even if taken as true, does not constitute a constitutional violation.

3. DENIAL OF FOOD AND WATER

***9** The trial court held that there was no issue of fact relative to Mr. Davidson's claim that he was denied food and water during the protest in retaliation for the exercise of his First Amendment rights. [16] The following portion of Mr. Davidson's interrogatory answer relates to the alleged denial of access to food and water:

16 Mr. Davidson does not allege that there was a duty on the part of Defendants or the State to supply him with food or water, and we hold that there was no such duty.

> At various times I was denied adequate access to food and water. On weekends we were allowed to bring in enough food for only one meal for the 6–9 hour period. On the weekends, if one of us left the building to get food, he or she, would not be allowed to re-enter the Capitol until 8:00 a.m. the following Monday.... On one occasion, when I attempted to bring in extra food for myself from the outside, it was confiscated by the Capitol Hill police. I did not attempt to do it again for fear of being barred from the sit-in demonstration.
>
> ... I paid for my own food and bottled water everyday I was there....
>
> After 4:00 p.m. each day and on weekends, we were denied access to water outside of the restroom. Public water fountains did not work because of some remodeling work that was in progress.... [O]n the weekends, we had to rely upon commercial bottled water. We were restricted to no more than two 12–ounce bottles of commercial water apiece for the weekends. Additional water or food, except for peanut butter crackers, was denied to us on weekends.
>
> The response to the interrogatory acknowledges that he was not denied food or water during his protest but, rather, that there were restrictions on the amount which he could possess: the wording in the response is that he was denied "adequate access to food and water."

There was no rule governing the manner in which food was to be brought to the Capitol or consumed under the circumstances presented. Section II C.9 of the Procedures for Use of Public Areas: Tennessee State Capitol provides that "Food and beverages shall not be served in the public areas inside the Capitol without the approval of the State Capitol Commission (see Section II B 6). Food and beverages must be consumed on the area approved for an event." Mr. Davidson does not state and we find no evidence in our review of the record that Mr. Davidson or his fellow protesters were

in compliance with the procedures relative to the service or consumption of food in the Capitol building. Considered in this context, the acknowledgment that he was allowed to bring in food and water negates an essential element of his claim, thereby requiring him to produce evidence establishing a genuine issue of material fact that the defendants denied him food and water in retaliation for his participation in the protest.

In the amended interrogatory response Mr. Davidson added the following statement relative to the alleged deprivation of food and water:

> When denied proper food over the weekends, by the following Monday morning, I would be fatigued, light-headed, and giddy.

In his response to the statement of undisputed facts, Mr. Davidson gave several qualified admissions and one denial; the pertinent answers regarding food and water are as follows:

***10** 5. The protestors were allowed to bring in food on the weekends.

RESPONSE: Admitted only that Plaintiff and his co-protestors were permitted to bring in enough food for the meal for a 6–9 hour period out of the 48–hour weekend. The denial of sufficient food for the 2–day weekend was an attempt by Defendants to disrupt the sit-in protest and aggravate the medical conditions of Plaintiff and his co-protestors.

6. "Extra" food was confiscated a single time from the Plaintiff as he attempted to bring it in the Capitol building.

RESPONSE: Admitted; however, this incident and the threat of being barred from participating in the sit-in protest prevented Plaintiff from attempting to bring additional food into the Capitol Hill Building on weekends.

7. Other than the time described in number 6, above, food was not confiscated from Plaintiff on any other occasion.

RESPONSE: Admitted; however, food had been confiscated from other co-protestors on other occasions in the presence of Plaintiff.

* * *

12. Every day Plaintiff was at the Capitol during the protest he paid for his own food and bottled water.

RESPONSE: Admitted, any food or bottled water Plaintiff consumed at the sit-in protest was paid for by him.... It does not mean that Plaintiff had adequate food and water over the weekends.

13. Plaintiff had food and water every day he was at the Capitol as a protestor.

RESPONSE: Denied that Plaintiff had enough food during the weekends because of Defendants' directive that enough food for only one meal per person could be brought in on the weekends.

* * *

18. Water was always available to Plaintiff during the protest via water bottles he had purchased or in the restrooms.

RESPONSE: Admitted that Plaintiff had to rely on bottled water after 4:00 p.m. on weekdays and all day on weekends. However, Plaintiff and other protestors were limited to two–12 ounce bottles of commercial water apiece for the weekends.

19. According to the rules and regulations in place at the time of the protest, food and beverages were not served in the public areas inside the Capitol without the approval of the State Capitol Commission.

RESPONSE: Admitted that the Procedures for Use of Public Areas: Tennessee State Capitol published on August 6, 2001, were in effect during the sit-in protest.... The rules and regulations provide that food and beverages could be consumed in designated areas with written permission of the State Capitol Commission.... Plaintiff and his co-protestors were permitted to eat and drink in designated areas, but the amount of food was arbitrarily limited to enough for one (1) meal on weekends....

The material produced by Mr. Davidson in his response to the motion fails to establish a genuine issue of material fact that he suffered an adverse action—the denial of food and water—because of his participation in the protest. Mr. Davidson admits that Procedures for Use of Public Areas: Tennessee State Capitol published on August 6, 2001 were in effect during the time of the protest; he also admits that

he had access to water in the restrooms and bottled water on weekdays and that he was allowed to bring in food and water on the weekends. Mr. Davidson has failed to assert any fact which would establish a genuine issue of material fact that the enforcement of the rules was in retaliation for the exercise of his First Amendment rights; summary judgment on this issue was proper. [17]

17 As with Mr. Davidson's claim relative to the alleged deprivation of sleep, the claim that extra food he sought to bring into the Capitol on one weekend was confiscated is *de minimus.* The claim that he was denied extra food, even if true, does not rise to the level of a constitutional violation.

4. CONFISCATION OF CLOTHING

***11** The portion of the interrogatory answer relative to Mr. Davidson's claim that his clothing was confiscated in retaliation for his participation in the protest is as follows:

> On several occasions, Capitol police and/or state troopers confiscated my few extra clothes (including underwear and socks).

In this response Mr. Davidson does not state that either Defendant ordered the confiscation or even that they were aware of the alleged action, rather, he states that his clothing was confiscated by Capitol police and/or state troopers. This response was sufficient to negate an essential element of Mr. Davidson's case—that the Defendants took an adverse action against him by taking his clothing in retaliation for the exercise of his First Amendment rights.

In his amended interrogatory response Mr. Davidson did not add any facts relative to the confiscation of his clothing. In his response to the statement of undisputed facts, Mr. Davidson admitted the following statement, which was the only statement relative to the claim that his clothes were confiscated: "Plaintiff's clothes (socks and underwear) were confiscated several times by Capitol police and/or state troopers."

This material, produced by Mr. Davidson to establish the a genuine issue of material fact that he was retaliated against by Defendants by having his clothing confiscated, is insufficient. He does not state that Defendants confiscated his clothing and does not produce evidence that Defendants ordered or knew that his clothing had been confiscated. He gives none of the circumstances surrounding the taking of his clothing which would present an issue of fact that the clothing was taken in retaliation for his participation in the protest rather than as actions the Capitol police took as they performed their responsibilities. [18] Summary judgment on this issue was proper. [19]

18 Section II B. 14 of the Procedures for Use of Public Areas: Tennessee State Capitol provide that "To enhance security and public safety, security officers may insect packages and briefcases suspected of concealing items or contraband and items being brought into the State Capitol building which are suspected to be capable of destructive or disruptive use within the building." In addition, certain of the procedures called for routine maintenance of the public areas of the Capitol and for any activity to be cognizant of the fact that the Capitol is "a working Capitol where various agencies carry out their government responsibilities" and that "[p]ublic use of the Capitol shall not interfere with any legislative session or the conduct of public business by agencies of the State which normally occupy and use the Capitol and shall not affect the safety and well-being of the individuals conducting the work of these agencies."

19 In addition, for the reasons set forth previously with respect to the claims of deprivation of sleep and confiscation of extra food, we agree with the trial court's ruling that this claim is *de minimus.*

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

All Citations

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United States District Court,
M.D. Tennessee,
Columbia Division.

Darlene HILL, Roy Garrett, Individuals, Tri–County Environmental association, inc. et al, Plaintiffs,
v.
WASTE MANAGEMENT, INC. OF TENNESSEE, a Tennessee Corporation, Defendant.
Cedar Ridge Landfill, Inc.
A Tennessee Corporation.

No. 1:10–cv–0033.
|
Aug. 9, 2011.

Attorneys and Law Firms

Elizabeth L. Murphy, Nashville, TN, for Plaintiffs.

John Philip Williams, Tune, Entrekin & White, Elizabeth Parker McCarter, Tennessee Attorney General's Office, Nashville, TN, for Defendant.

MEMORANDUM

WILLIAM J. HAYNES, JR., District Judge.

***1** Plaintiffs, Tennessee citizens and members of Tri–County Environmental Association, a non-profit corporation, filed this action under the Resource Conservation and Recovery Act, ("RCRA") 42 U.S.C. §§ 6945 and 6972(b) and the Clean Water Act ("CWA"), 33 U.S.C. §§ 125 and 1365 *et seq.* against the Defendants: Waste Management of Tennessee, Inc. ("WMT") that operates a landfill in Marshall County, Tennessee on land owned by Cedar Ridge Landfill Inc. Plaintiffs' claims arise from leakages and runoffs of contaminants and waste from WMT's landfill causing contamination of the East Falk Globe Creek, the Vickory Creek and Poteet Creek in Marshall County. Plaintiffs assert that such contamination adversely impacts their properties and interests. Plaintiffs cite notices from the Tennessee Department of Environment and Conservation ("TDEC") of WMT's violations of environmental laws since 2005 that continue. Plaintiffs seek injunctive relief and damages caused by Defendants' violations of the RCRA and CWA.

Before the Court are the Plaintiffs' and the State of Tennessee's motions for review of and objections (Docket Entry Nos. 35 and 36) to the Magistrate Judge's Order (Docket Entry No. 33) compelling, but limiting discovery at the deposition of James Clark, a senior geologist and TDEC employee. On August 3, 2011, responses to these motions were filed and on August 8, 2011, Plaintiffs filed a reply to the State's response. (Docket Entry No. 41). The Court agreed to give expedited review of these motions given Clark's departure for military duty on August 14, 2011.

Plaintiff deposed Clark and during his deposition, the State asserted the "deliberative process privilege" to bar any questions about statements of the TDEC Commissioner, Deputy Commissioner and General Counsel as well as members of the State Attorney General's office who participated in "internal settlement discussions" that resulted in TDEC's Memorandum of Understanding ("MOU") with WMT. That memorandum mooted WMT's appeal of an administrative order denying WMT's application for a permit to expand its landfill operation in Marshall County. In its motion, the State contends that the Magistrate Judge erroneously failed to recognize that the Solid Waste Board's proceeding is an adjudicative proceeding to which the TDEC Commissioner is a party. Thus, TDEC's officials' discussions were settlement negotiations and Fed.R.Civ.P. 408 bars discovery of the settlement discussions on the TDEC–WMT MOU.

Plaintiffs' objections are that the Magistrate Judge restricted discovery by applying the attorney-client privilege to bar discovery of Clark's knowledge of the discussion about the WMT's MOU with TDEC because neither Plaintiffs nor the State cited or briefed the attorney-client privilege on Plaintiffs' motion to compel Clark's testimony. Plaintiffs assert that neither Tennessee case law nor Tennessee's Open Records Act recognizes the deliberative process privilege asserted by the TDEC's counsel at Clark's deposition.

A. Analysis of the Motion

***2** To provide some context to this dispute, according to the complaint, beginning in 2005, TDEC officials found

high levels of ammonia, chloride, calcium, nitrate potassium, sodium and magnesium near Vickery Creek and a nearby residential area and the Center Ridge Landfill. (Docket Entry No. 1, Complaint at ¶ 32). The State cited WMT with violations of the Water Quality Control Act and Solid Waste Act. *Id.* ¶ 33. From 2007 through 2009, TDEC found additional violations at WMT's landfill. *Id.* at ¶ ¶ 26–30. WMT allegedly violated the Solid Waste Division Director's 2007 order to employ remedial measures to prevent pollution and land erosions near the WMT landfill. *Id.* at ¶ 45.

In April 2010, the State's Division of Solid Waste denied WMT's permit to expand its landfill operations in Marshall County .WMT appealed that decision in May2010 to the State's Solid Waste Board that issues its findings and orders. Tenn.Code Ann. § 68–211–113(f). With the appeal, TDEC Commissioner lacks any decision-making authority on the issues, but is a party to the administrative appeal. Tenn.Code Ann. § 68–211–113(e). Pending the appeal, TDEC officials met with WMT representatives and those discussions led to a June 8, 20011 Memorandum of Understanding ("MOU") that settled WMT's administrative appeal. Under this MOU, WMT agreed to monitor the groundwater at a location other than in the backyards of nearby residents.

Clark, a TDEC geologist, worked for the last ten (10) years on the contamination issues at Cedar Ridge landfill that he has visited over 50 times. Clark monitors groundwater reports and effectiveness monitoring reports on the landfill. Clark is TDEC's most knowledgeable person on the geology underlying the landfill site. Clark reports to Dennis Lampley, whose supervisor is Glen Pugh, who then reports to Mike Apple, division director for Solid Waste.

At his deposition, Clark explained that prior to Solid Waste's April 2010 denial of WMT's application to expand the landfill representatives from the TDEC's office of general counsel rarely attended meetings on the WMT expansion application. After the April 2010 denial of WMT's expansion permit, Joseph Sanders, David Henry, Ashley Ball and Lisa McCarter of the TDEC general counsel's office attended all such meetings and TDEC's General Counsel attended the meeting that discussed Phase 7 of the MOU. (Docket Entry No. 31, Exhibit 2 at 101). Carter testified that he felt pressured to agree to terms that were included in the MOU. *Id.* at 209–210.

In the discovery process, the State agreed to produce documents with raw technical data that WMT provided during the TDEC–WMT settlement negotiations. At Clark's deposition, the State's counsel invoked the deliberative process privilege to questions that would elicit from Clark any opinions or recommendations of TDEC staff based upon that data, during TDEC's internal settlement meetings between January 1, 2010 and June 8, 2011. (Docket Entry No. 32). At Clark's deposition, the State attorney general's representative expressly denied any reliance on the attorney client privilege for her objection in the following colloquy among counsel:

> ***3** Ms. Murphy (plaintiffs' counsel): **So is it the State's position that anything that was said by the geologists or the technical reviewers in any of their meetings regarding Cell 7, post denial, post appeal by Waste Management, is going to be covered under the attorney/client privilege if counsel was present?**
>
> Ms. McCarter (deputy Attorney General): **No, it's covered under deliberative process privilege.**
>
> * * *
>
> Ms. McCarter: In these formal meetings that you're referring to, yes, because my understanding is the formal meetings were called for the purpose of trying to deliberate on this entire issue.
>
> Ms. Murphy: **So the deliberative process privilege is asserted by the State as to what occurred in the formal meetings?**
>
> **Ms. McCarter: Yes.**

(Docket Entry No. 41, Exhibit 1, at pp. 98–99). Later, McCarter stated: "Objection. In the context of any discussions or statements that may have been made to Mr. Clark since the settlement negotiations began, I would again invoke the deliberative process privilege and instruct him not to answer if it comes within that time frame" (Docket Entry No. 31, Exhibit 2 at pp. 209–10). The State's counsel reiterated that "yes" that State's counsel was relying on the deliberative process privilege for any questions about these meetings. (Docket Entry No. 41, Exhibit 1 at p. 99, lines 15–23). Moreover, the State's counsel stated that the meetings were "trying to deliberate on this entire issue." *Id.*

B. Conclusions of Law

At the outset, the Court notes that at the Clark deposition, the State's counsel did not mention nor rely on Fed. R Evid. 408 on settlement negotiations for the State's objections to

Plaintiffs' counsel's questions to Clark. Rather, the State's counsel clearly and repeatedly relied on the deliberative process privilege. Counsel for a party may instruct a witness not to answer a question at a deposition, where the objection is based upon a privilege. *Boyd v. University of Maryland Med. Sys.,* 173 F.R.D. 143, 147 (D.Md.1997). As here, Plaintiffs' counsel properly questioned as to the specific privilege asserted. See Moore's Federal Prac. § 30.43[2] at 30–91. Yet, a party cannot assert one privilege at the deposition and then assert different privileges or other grounds in a motion to compel the testimony at issue. *Moloney v. United States,* 204 F.R.D. 16, 20–21 (D.Mass.2001)[1]. Thus, the Court will consider only the privilege asserted by the State at Clark's deposition.

1 Fed.R.Evid. 403 and 408 bar evidence of settlement discussions at trial, but courts have held that those rules do not necessarily bar discovery on settlement discussions, *Levick v. Maimonides Medical Center,* 2011 WL 1673782 at ——2–3 (E.D.N.Y. May 3, 2011) provided there is a showing of relevance.

Here, TDEC disclosed its "Memorandum of Understanding" with WMT, but insists that all discussions of TDEDC personnel leading up to and creating the document are within the "deliberative process" privilege. The Magistrate Judge ruled that discovery of the contents of TDEC's "internal" meetings leading to MOU is barred by the attorney-client privilege, but that privilege was not asserted at the deposition nor briefed by the parties on the motion to compel. To that extent, that Order is set aside.

***4** In *Swift v. Campbell,* 159 S.W.3d 565 (Tenn.Ct.App.2004)[2], cited by the parties, the Tennessee Court of Appeals addressed an assistant district attorney's assertion of the work-product and attorney-client privileges as well as the deliberative process privilege to bar a federal habeas petitioner's request, under the Tennessee Public Records Act, for the assistant's files during his state prosecution. In *Swift,* the Tennessee Court of Appeals assumed that state court decision could serve as a "state law" to except documents from the Public Record Act, *id.* at 571, and then the Court stated as to the deliberative process privilege:

2 On this issue, the Court considers *Swift* as the most applicable state precedent. *See, Miles v. Kohli & Kaliher Assoc., Ltd.,* 917 F.2d 235, 241 (6th Cir.1991) ("Where the state supreme court has not spoken, our task is to discern from all available sources, how that court would respond if confronted with the issue.").

Finally, the State argues that the records maintained by the Office of the District Attorney General for the Thirtieth Judicial District should be shielded from public inspection by the "deliberative process privilege." **We have no doubt that there exists a valid need to protect the communications between high government officials and those who advise and assist them in the performance of their official duties. *United States v. Nixon,* 418 U.S. 683, 705, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974). However, an assistant district attorney general preparing to defend a conviction in state court is not the sort of official to whom this privilege applies.**

> Protecting the confidentiality of conversations and deliberations among high government officials ensures frank and open discussion and, therefore, more efficient government operations. *United States v. Weber Aircraft Corp.,* 465 U.S. 792, 802, 104 S.Ct. 1488, 1494, 79 L.Ed.2d 814 (1984). However, **the deliberative process privilege must be applied cautiously because it could become the exception that swallows up the rule favoring governmental openness and accountability. If governmental employees at any level could claim the privilege, Tennessee's public records statutes and open meetings law would become little more than empty shells.**
>
> **Whether the "deliberative process privilege" may be invoked depends on the governmental official or officials involved. We have no doubt, for example, that the Governor may properly invoke this privilege, should he or she care to, in meetings with staff or cabinet members. We have also held that the Constitution of Tennessee embodies a version of the privilege for the General Assembly when it decides to invoke it.** *Mayhew v. Wilder,* 46 S.W.3d 760, 772 Tenn.Ct.App.2001) (holding that the public does not have a right of access to all legislative meetings because of Tenn. Const. art. II, §§ 21 and 22). However, **we decline to hold that the privilege applies to an assistant district attorney general preparing for a hearing in state court involving a writ of error coram nobis proceeding under Tenn.Code Ann. § 40–26–105. Tenn. R.Crim. P. 16 adequately protects his or her work product.**

Id. at 578–79 (emphasis added with footnote omitted).

In Tennessee's Open Meetings Act, the Legislature declared as public policy that "the formation of public policy and decisions is public business and **shall not be conducted in secret."** (Tenn.Code Ann. § 8–44–101(a) (emphasis added). The "Open Meetings Act" prohibits governing bodies from holding secret meetings. The Public Records Act creates a presumption of 'openness' that the non-disclosing party must overcome. *Tennessean v. City of Lebanon,* 2004 WL 290705 (Tenn.Ct.App.2004). The General Assembly has directed the courts to construe the public records statutes broadly "so as to give the fullest possible public access to public records." Tenn.Code Ann. § 10–7–505(d). The Tennessee appellate court dicta in *Swift* clearly suggests the recognition of such a privilege for high ranking state officials, but not for an assistant who would advise such an official. Moreover, *Swift* suggests a very narrow application of this privilege given Tennessee's Open Meetings and Public Records laws.

***5** In any event, in its dicta, *Swift* relied upon federal law for this privilege. Under federal law, this privilege must be asserted by the head of the agency involved as first established under the related "state secrets" privilege. *United States v. Reynolds,* 345 U.S. 1, 7–8, 73 S.Ct. 528, 97 L.Ed. 727 (1953) ("There must be a formal claim of privilege lodged by the head of the department which has control over the matter, after personal actual consideration of the matter"). Courts continue to apply this requirement for assertion of the deliberative process privilege. *Equal Employment Opportunity Commn. v. Texas Hydraulics Inc.,* 246 F.R.D. 548, 552 (E.D.Tenn.2007); *Equal Employment Opportunity Commn. EOC v. Peoplemark, Inc.,* 2010 WL 7482801 ——2–3 (W.D.Mich. Feb. 26, 2010); *Proctor and Gamble v. United States,* 2009 WL 5219726, at *8 (S.D.Ohio Dec.31, 2009); *Alpha I, L.P. v. United States,* 83 Fed. Cl. 279, 289 (2008); *Equal Employment Opportunity Commn EOC v. Texas Hydraulics, Inc.,* 246 R.R.D. 548, 552 (E.D.Tenn.2007). The State did not do so here for its counsel's assertion of this privilege. As to Clark's deposition, the privilege is deemed waived and under *Swift,* this privilege would not exist for Clark.

For these reasons, the Plaintiffs should be permitted to question Clark on the bases for the TDEC–WMT memorandum of understanding and his knowledge of those discussions.

An appropriate Order is filed herewith

It is so **ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2011 WL 3475545

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Only the Westlaw citation is currently available.
United States District Court, W.D. Tennessee, Western Division.

Terra JOHNSON, Individually and as next friend and mother of Tamario Miller, a minor, Plaintiffs,

v.

ADVANCED BIONICS, LLC d/b/a Advanced Bionics Corporation, Advance Bionics Holding Corporation d/b/a Advanced Bionics Corporation, and Astro Seal, Inc., Defendants.

Christine Purchase, Individually and as next friend and mother of Clyce ("Chase") Purchase Weatherly, a minor, Plaintiffs,

v.

Advanced Bionics, LLC d/b/a Advanced Bionics Corporation, Advance Bionics Holding Corporation d/b/a Advanced Bionics Corporation, and Astro Seal, Inc., Defendants.

Civil Action No. 2:08-cv-2376,
Civil Action No. 2:08-2442
|
Signed 07/28/2009

Attorneys and Law Firms

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ORDER GRANTING PLAINTIFFS' THIRD MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY DEFENDANT ADVANCED BIONICS, LLC

CHARMIANE G. CLAXTON, UNITED STATES MAGISTRATE JUDGE

***1** Before this Court is Plaintiffs' Third Motion to Compel Production of Documents by Defendant Advanced Bionics, LLC ("Advanced Bionics"). (D.E. #81). The instant motion was referred to United States Magistrate Judge Charmiane G. Claxton for determination. (D.E. #82). For the reasons set forth herein, Plaintiffs' motion is hereby GRANTED.

I. Introduction

The instant case arises from allegations that a medical device manufactured by Advanced Bionics contained a defective component manufactured by Astro Seal, Inc.[1] ("Astro Seal"). The device at issue is the HiRes 90k cochlear implant, a Class III medical device that provides a sense of sound by direct stimulation of the auditory nerves. The device was implanted in the minor Plaintiffs and subsequently failed, which allowed their devices to contain unsafe levels of moisture.

1 All claims against Astro Seal have been dismissed with prejudice following a settlement between the parties, which the Court approved on July 14, 2009. (D.E. #127, 128).

During the discovery phase, Plaintiffs served their First Request for Production of Documents. Specifically, Plaintiffs' Request for Production No. 26 sought as follows: "All documents related to quality audit procedures, quality audits, and quality re-audits related to the Device, including any conducted pursuant to 21 C.F.R. § 820.22."[2] Pls' Third Mot. to Compel, Ex. A, at 21. In response, Advanced Bionics stated that it would provide copies of quality audit procedures that relate to hermeticity or moisture content of the HighRes 90k device, but Advanced Bionics objected to the requests for production of the quality audits and the quality re-audits related to the implant. Id.

2 21 C.F.R. § 820.22 states as follows:
Each manufacturer shall establish procedures for quality audits and conduct such audits to assure

> that the quality system is in compliance with the established quality system requirements and to determine the effectiveness of the quality system. Quality audits shall be conducted by individuals who do not have direct responsibility for the matters being audited. Corrective action(s), including a reaudit of deficient matters, shall be taken when necessary. A report of the results of each quality audit, and reaudit(s) where taken, shall be made and such reports shall be reviewed by management having responsibility for the matters audited. The dates and results of quality audits and reaudits shall be documented.

In Advanced Bionics' Responses to Plaintiffs; Request for Production No. 26, it stated several objections to the requests, including "a privilege for critical self-evaluation." Pl's. Third Mot. to Compel, Ex. A. at 21. Additionally, in Advanced Bionics' privilege log, it further contends that certain documents are protected by the "Critical Self-Evaluation Privilege." Pls.' Third Mot. to Compel, Ex.B, *passim*.

On March 17, 2009, Plaintiffs filed the instant motion to compel asserting that the critical self-evaluation privilege does not exist under Tennessee law. Accordingly, Plaintiffs requested that this Court compel Advanced Bionics to produce any documents that it is withholding due to its reliance on this privilege. Advanced Bionics responded by admitting that neither the Tennessee legislature, the Tennessee Supreme Court, nor the Tennessee appellate courts have recognized the critical self-evaluation privilege. However, Advanced Bionics requests that this Court establish the critical self-evaluation privilege under Tennessee law based upon "common law principles," the policies behind FDA's audit requirements for medical device manufacturers, the policy behind the Food and Drug Administration's ("FDA") decision to exempt those audits from disclosure to the FDA, and the stated policy in the Tennessee Peer Review Law of 1967, see Tenn. Code Ann. § 63-6-219(b)(1), which includes fostering and encouraging candid evaluations in order to promote public health.

II. Analysis

***2** The sole issue presented in the instant motion to compel is whether Tennessee law should recognize the critical self-evaluation privilege. Under Rule 26 of the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). Relevant evidence must appear "reasonably calculated to lead to the discovery of admissible evidence." Id. The scope of discovery is both broad and liberal, Hickman v. Taylor, 329 U.S. 495, 507 (1947), and is "within the broad discretion of the trial court," Lewis v. ABC Business Servs., Inc., 135 F.3d 389, 402 (6th Cir. 1998).

The United States Supreme Court has advised that privileges "are not lightly created nor expansively construed for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974). Additionally, the United States Supreme Court has held that privileges hinder the fundamental principle that "the public ... has a right to every man's evidence." Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). Privileges must be strictly construed and tolerated "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Trammel, 445 U.S. at 50. Based upon these principles, the United States Supreme Court has cautioned district courts in creating new privileges. Id.

When a federal court exercises jurisdiction based upon the diversity of citizenship, the court must look to state law to determine the existence of any privilege. Surles ex. rel Johnson v. Greyhound Lines, Inc., 474 F.3d 288, 296 n.1 (6th Cir. 2007). Accordingly, a federal court should "apply state law in accordance with the then controlling decision of the state's highest court." Angelota v. Am. Broadcasting Co., 820 F.2d 806, 807 (6th Cir. 1987). If the state's highest court has not considered the issue, a federal court "must ascertain the state law from 'all relevant data.' " Id. "A state's intermediate appellate court decision announcing a rule of law is a 'datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " Id.

In the instant case, it is undisputed that neither the Tennessee General Assembly nor the Tennessee appellate courts have recognized the critical self-evaluation privilege. Thus, this Court does not have clear guidance on the issue presented in the instant motion. Accordingly, the Court will begin with considering the origins of privileges in Tennessee.

Under Tennessee law, privileges arise from five sources: (1) constitution; (2) statutes; (3) common law; (4) the Tennessee

Rules of Evidence; or, (5) any other rules promulgated by the Tennessee Supreme Court. Tenn. R. Evid. 501. In the instant case, Advanced Bionics initially argues that this Court should recognize the critical self-evaluation privilege because Tennessee law recognizes common law privileges. It is critical to the analysis, however, to clarify that Advanced Bionics does not assert that the critical self-evaluation privilege existed under the common law of Tennessee. Rather, Advanced Bionics requests that the Court look to general "common law principles" that would support the creation of such a privilege. Advanced Bionics posits that such a reliance is appropriate because the Tennessee Supreme Court has previously resorted to common law principles in its analysis of the attorney-client privilege. See, e.g. Johnson v. Patterson, 81 Tenn. 626, 649, 1884 WL 3292, *10 (Tenn. 1884); see also Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, 190 F.R.D. 463, 484 (W.D. Tenn. 1999) (reasoning that, "in accordance with the Tennessee Rule of Evidence 501, the courts of Tennessee are often guided by state and federal common law when fashioning the contours of the attorney-client privilege).

***3** In Johnson v. Patterson, the Tennessee Supreme Court noted that the statute "embodied but the common law principle" of the attorney-client privilege. 81 Tenn. at 649. The court noted, however, that "there is much if not all of the matter that is not within the settled rules of the law on this subject." Id. Specifically, the statute discussed communications made to the attorney in the confidence of the relationship. Id. However, the Court noted that "there are many transactions between attorney and client, that have no element of confidence in them," such as proving a client's handwriting and proving payment of monies. Id. The court thus cited two legal treatises to support its conclusion that such communications are not within the scope of the attorney-client privilege. Id.

The circumstances presented in Johnson v. Patterson are highly distinguishable from the present case. In Johnson v. Patterson, the Tennessee Supreme Court was considering the scope of a privilege established under the common law and codified by the Tennessee legislature. The court elected to rely upon treatises to determine the *scope* of the privilege, but looked directly to the statute and to common law together to determine the *existence* of the privilege under Tennessee law. In the instant case, the critical self-evaluation privilege was not recognized by common law and has not been codified by the Tennessee legislature. Accordingly, the rationale utilized in Johnson v. Patterson does not provide support for this Court to create an entirely new privilege under Tennessee law.

Likewise, in Royal Surplus Lines, the Court considered the scope of the attorney-client privilege. 190 F.R.D. at 484. The Court began its analysis by noting that the attorney-client privilege is "established 'by statute and case law.' " Id. (citing State v. Bobo, 724 S.W.2d 760 (Tenn. Crim. App. 1981)). The Court further concluded that, "when fashioning the contours of the attorney-client privilege," it was "guided by state and federal common law" and would consider "authority from other jurisdictions" and "treatises." Id. Thus, as in Johnson v. Patterson, the Royal Surplus Lines court was merely attempting to determine the proper scope of the attorney-client privilege rather than the existence of the privilege itself. As the Royal Surplus Lines court clearly references, the attorney-client privilege existed at common law and has been codified by the legislative body. However, the privilege advocated by Advanced Bionics in the instant case has no such common law or statutory basis. Thus, the Court finds that the Royal Surplus Lines analysis regarding the use of persuasive authority to determine the scope of a well-established privilege is not instructive to this Court when considering whether to create an entirely new privilege under Tennessee law. Quite simply, as the privilege did not exist at common law, the Court cannot use the common law as a basis under Rule 501 of the Tennessee Rules of Evidence for recognizing this privilege. Finally, even if this Court were inclined to look to general common law principles, Advanced Bionics has not cited any such principle that would support the establishment of the critical self-evaluation privilege. Accordingly, the Court declines to recognize the critical self-evaluation privilege on the basis of common law.

In addition to Advanced Bionic's argument that the Court should recognize the critical self-evaluation privilege based upon the common law, Advanced Bionics posits that the privilege should be recognized for two other policy-based reasons: (1) because the policy behind the self-evaluation privilege is to promote candid, conscientious and objective evaluations, which the Tennessee General Assembly has recognized as a worthy goal in adopting the Tennessee Peer Review Law of 1967, see Tenn. Code Ann. § 63-6-219; and, (2) because quality audits and re-audits required by the Food and Drug Administration ("FDA") must not be disclosed to the FDA, see 21 C.F.R. § 820.22.

***4** Advanced Bionics' assertions regarding the policy aims of the critical self-evaluation privilege in Tennessee are not

sufficient to convince this Court to create a new privilege under Tennessee Law. Rule 501 of the Tennessee Rules of Evidence does not allow courts to recognize privileges based upon arguments that the privilege would further a sound policy objective. Instead, as the Tennessee Supreme Court has noted, "the General Assembly, not this Court, establishes the public policy of Tennessee." Scheneider v. City of Jackson, 226 S.W.3d 332, 344 (quoting State v. Cawood, 134 S.W.3d 159, 167 (Tenn. 2004)). Even though the Schneider court admitted that it was "sympathetic to ... concerns about the potential consequences of disclosing" the requested information, the Tennessee Supreme Court declined to recognize a new privilege because it was not proper for the court to perform this function. Id.

This Court further notes that the Tennessee General Assembly has already established the public policy of Tennessee when it codified the common law privileges and when it enacted the Tennessee Peer Review Law of 1967, Tenn. Code Ann. § 63-6-219. Although Advanced Bionics relies heavily upon the stated purpose of the Tennessee Peer Review Law, which requires candid, conscientious and objective evaluations of peer physicians, the General Assembly solely made this privilege applicable to "committees made up of Tennessee's licensed physicians." Tenn. Code Ann. § 63-6-219(b)(1). The General Assembly elected not to create a similar privilege for audits and re-audits by medical device manufacturers. Further, the General Assembly elected not to create a critical self-evaluation privilege even though the FDA has exempted such audits and re-audits from being disclosed to the FDA through its protocol. See 21 C.F.R. § 820.22. Thus, the Tennessee General Assembly has explicitly chosen not to create a privilege that would apply to the circumstances of this case. Accordingly, as the Schneider court explicitly determined, Advanced Bionics' assertions regarding the arguably sound policy aims of a critical self-evaluation privilege in Tennessee are appropriate to be presented to the legislature, not to this Court.

Finally, Advanced Bionics asserts that the court could further look to "the decisional law of the Tennessee Supreme Court in analogous cases and relevant dicta in related cases, positions expressed in the restatement of law, law review commentaries and decisions from other jurisdictions or the majority rule for guidance." See Royal Surplus Lines Ins. Co., 190 F.R.D. at 485. Although Advanced Bionics has cited persuasive authority to support the establishment of the critical self-evaluation privilege in Tennessee, the Court does not find that any persuasive authority is necessary when neither the Tennessee Supreme Court, the Tennessee Court of Appeals, the Tennessee General Assembly, nor the sources listed in Rule 501 of the Tennessee Rules of Evidence have recognized the existence of the critical self-evaluation privilege in Tennessee.

III. Conclusion

For the reasons set forth herein, the Court declines to establish a critical self-evaluation privilege under Tennessee law. Accordingly, Plaintiffs' Third Motion to Compel Production of Documents by Advanced Bionics is GRANTED. Advanced Bionics, LLC is ORDERED to produce all documents that it has withheld on the basis of its assertion of the critical self-evaluation privilege.

IT IS SO ORDERED this 28th day of July, 2009.

All Citations

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969 So.2d 326
Supreme Court of Florida.

Ian Deco LIGHTBOURNE, Petitioner,

v.

Bill McCOLLUM, etc., et al., Respondents.

No. SC06–2391.
|
Nov. 1, 2007.
|
Rehearing Denied Nov. 7, 2007.

Synopsis

Background: Prisoner, who had been convicted of first degree murder and sentenced to death, 438 So.2d 380, filed an all writs petition that challenged the State's lethal injection procedures. After the Supreme Court relinquished jurisdiction to the circuit court for determination of various issues, the circuit court denied relief. Prisoner appealed.

Holdings: The Supreme Court held that:

time limitations imposed by the Supreme Court and the circuit court, and prisoner's alleged inability to present certain evidence, did not deprive prisoner of a full and fair hearing,

circuit court erred when it excluded two memoranda that had been prepared by an assistant general counsel for the Department of Corrections (DOC) from evidence; and

the lethal injection procedures currently in place in Florida, as actually administered, did not violate the constitutional prohibition against cruel and unusual punishment.

Affirmed.

Anstead, J., concurred in result only.

Attorneys and Law Firms

***328** Neal A. Dupree, Capital Collateral Regional Counsel, Suzanne Myers Keffer, Roseanne Eckert, Assistant CCRC and Anna–Liisa Nixon, CCRC Staff Attorney, Southern Region, Fort Lauderdale, Florida, for Petitioner.

Bill McCollum, Attorney General, Tallahassee, Florida, Carolyn M. Snurkowski, Assistant Deputy Attorney General, and Kenneth S. Nunnelley, Senior Assistant Attorney General, Daytona Beach, Florida, for Respondent.

Opinion

PER CURIAM.

This case is before the Court on the all writs petition of Ian Deco Lightbourne, challenging Florida's lethal injection procedures after complications occurred in the administration of chemicals during the execution of Angel Diaz on December 13, 2006.[1] The main issue in this case is whether Florida's current lethal injection procedures violate the Eighth Amendment to the United States Constitution.[2]

1 The Court has authority to issue all writs necessary to the complete exercise of its jurisdiction, *see* art. V, § 3(b)(7), Fla. Const., based on the Court's ultimate jurisdiction under article V, section 3(b)(1) of the Florida Constitution. This Court accepted review of the all writs petition because an appeal relating to Lightbourne's successive claims for postconviction relief, including a claim challenging the constitutionality of the lethal injection procedures, was pending before this Court at the time in *Lightbourne v. State,* 956 So.2d 456 (Fla.2007) (No. SC06–1241).

2 Lightbourne is a prisoner under sentence of death but with no outstanding death warrant. His conviction and death sentence were originally affirmed in *Lightbourne v. State,* 438 So.2d 380 (Fla.1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). After a death warrant was signed, Lightbourne filed a motion for postconviction relief, which was denied by the circuit court. This Court affirmed the denial of postconviction relief in *Lightbourne v. State,* 471 So.2d 27 (Fla.1985). Lightbourne filed a petition for writ of habeas corpus in the federal district court, which initially stayed the execution until it ruled on the merits of the claim and ultimately denied relief. The district court denied relief, and the Eleventh Circuit affirmed the denial. *Lightbourne v. Dugger,* 829 F.2d 1012 (11th Cir.1987), *cert. denied,* 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988). Before his scheduled execution, Lightbourne filed another postconviction motion in state court which was summarily denied. We entered a stay of execution and granted relief in part, remanding

one claim for an evidentiary hearing. *Lightbourne v. Dugger,* 549 So.2d 1364 (Fla.1989). Denial of relief was affirmed in *Lightbourne v. State,* 644 So.2d 54 (Fla.1994). Lightbourne filed another postconviction motion, which the trial court denied after an evidentiary hearing on part of the claims. This Court again remanded for another evidentiary hearing. *Lightbourne v. State,* 742 So.2d 238, 250 (Fla.1999). After the evidentiary hearing, the circuit court denied relief, and this Court affirmed in *Lightbourne v. State,* 841 So.2d 431 (Fla.2003).

FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 2006, Angel Diaz was executed by lethal injection, but his execution ***329** "took 34 minutes, which was substantially longer than in any previous lethal injection in Florida."[3] The day after Diaz's execution, Lightbourne and other death row inmates filed the instant emergency all writs petition, requesting that this Court: (1) address whether Florida's lethal injection procedures violate the Eighth Amendment; (2) enjoin Diaz's autopsy and order that the autopsy be conducted by an independent medical examiner or with petitioners' independent expert present; (3) order the production of all records previously requested by Lightbourne; and (4) appoint a special master to hear and receive evidence regarding the pain suffered during lethal injection.

3 The Governor's Commission on Administration of Lethal Injection, Final Report with Findings and Recommendations (March 1, 2007) ("*Governor's Commission Report* ") at 8.

On December 14, 2006, this Court entered an order allowing Lightbourne to designate a representative to attend the Diaz autopsy and relinquishing jurisdiction to the circuit court for an immediate determination of Lightbourne's request for an independent autopsy and "all other issues raised" by Lightbourne. By our order of December 14, 2006, we essentially ruled on two of Lightbourne's requests in his petition, first by addressing the issue of the autopsy and then by relinquishing to the trial court to decide the issues that required factual development. On February 9, 2007, the Court dismissed without prejudice all petitioners' claims in Case No. SC06–2391 other than Lightbourne's.

At the time that the emergency all writs petition was filed in this case, Lightbourne had another appeal pending before this Court which challenged the constitutionality of the lethal injection statute and procedures and raised a public records issue. *See Lightbourne v. State,* 956 So.2d 456 (Fla.2007) (SC06–1241) (unpublished decision affirming the denial of his successive motion for postconviction relief). In affirming the denial, this Court stated by order:

> [A]s a result of Angel Diaz's execution by lethal injection, a series of events occurred that the trial court could not have considered in denying Lightbourne's motion. The impact of those events on the issue of the constitutionality of Florida's lethal injection procedures is currently being litigated in *Lightbourne v. McCollum,* SC06–2391. Accordingly, we conclude that the better course is to allow that case to proceed, in which Lightbourne has reasserted his public records request and in which an evidentiary hearing will be held in May 2007.

Lightbourne v. State, No. SC06–1241, 956 So.2d 456 (Fla. Apr. 16, 2007) (unpublished order).

At the same time that Lightbourne has been pursuing relief in this Court, the executive branch has also responded to the Diaz execution, working expeditiously on a parallel track with the goal of addressing issues regarding Florida's lethal injection procedures. We briefly detail the executive branch's efforts because its response to the Diaz execution and the revisions to the protocol affect our ultimate determination of the constitutionality of the current lethal injection procedures.

Shortly after the Diaz execution, on December 15, 2006, then-Governor Bush stayed all executions and issued an executive order creating a Governor's Commission ***330** on Administration of Lethal Injection to "review the method in which the lethal injection procedures are administered by the Department of Corrections and to make findings and recommendations as to how administration of the procedures and protocols can be revised." The Commission held hearings over four days and submitted a final report to the Governor on March 1, 2007. After noting that Diaz's execution "called into question the adequacy of the lethal injection protocols," the Commission found that during the execution of Angel Diaz, the Department of Corrections ("DOC") and the execution team failed to follow its protocols, failed to ensure successful intravenous ("IV") access, failed to provide adequate training, and failed to have guidelines in place for handling complications. *Governor's Commission Report* at 2, 8–9. Based on conflicting expert medical opinions and witnesses' observations of the inmate, the Commission was unable to reach a conclusion as to whether inmate Angel Diaz was in pain during the execution. Even though the Commission found these numerous failures during the Diaz execution, it opined that an agency following

procedures framed in its recommendations could carry out an execution in a constitutional manner using the current three-chemical combination. The Commission provided detailed recommendations regarding how the DOC should modify its protocols and practices.

DOC Secretary James McDonough also responded to the Diaz execution by creating an initial task force to collect information as to what occurred during the Diaz execution. Subsequent to the Governor's Commission's report, Secretary McDonough established another task force to recommend modifications to the existing lethal injection protocols in accord with the findings and recommendations previously made, including planned renovations to the execution facility. As a result of the findings of the DOC task force and the findings and recommendations of the Governor's Commission, the DOC revised its lethal injection procedures, effective May 9, 2007.

Although this Court relinquished jurisdiction in the *Lightbourne* proceedings in December 2006, the trial court appropriately waited until after the Governor's Commission studied the matter and issued its report before it held evidentiary hearings on the claims raised. The evidentiary hearings lasted thirteen days, and approximately forty witnesses testified, resulting in a record exceeding 6,500 pages. The testimony and evidence focused on three main topics: (1) whether Diaz suffered pain during his execution; (2) what deficiencies existed in the lethal injection procedures and how those alleged deficiencies contributed to the complications; and (3) whether the risk of pain in future executions had been sufficiently minimized by changes made to the protocol as a result of the Diaz execution.

On July 22, 2007, the trial court verbally issued a temporary stay of any death warrant for Lightbourne and ordered the State to revise its lethal injection procedures in accord with the DOC's testimony about anticipated revisions to the protocol and the trial court's comments. The trial court expressed its concerns regarding the qualifications, training, licensure, and credentials for members of the execution team. The trial court commented on the need for training for contingencies, as well as the need for creating checklists, providing for periodic review of DOC procedures, providing for certification of readiness by the DOC to carry out an execution according to the protocol, and providing clear directions that any observed problems or deviations from the protocols should be ***331** immediately brought to the attention of the warden.

The DOC again revised its lethal injection procedures in response to the trial court's comments and in line with its anticipated revisions, submitting its revised procedures (the "August 2007 procedures") which provided more detail as to the qualifications of the execution team members, more clarification that the warden is to ensure that the team members are properly trained, and procedures that require the team members to report any problems or concerns to the warden. After this revision, the parties were allowed to present additional evidence to the trial court.

On September 10, 2007, the trial court entered a final order, which denied the relief sought by Lightbourne, lifted the temporary stay of execution, and found that the August 2007 lethal injection procedures were not unconstitutional. The trial court found that the DOC addressed the irregularities that occurred in the Diaz execution and had taken appropriate action in the revised protocol to reduce the risk of similar irregularities happening in the future. The trial court found that when properly injected, the three-drug protocol used by the State will produce a sequence of unconsciousness, cessation of all muscular function, and cessation of heart function, resulting in death. The trial court also found that Diaz's execution took longer than expected because the drugs were injected subcutaneously, rather than delivered intravenously as intended, because the needles penetrated through the veins in both arms. The trial court concluded that the lethal injection procedures now in place in Florida do not violate the constitutional prohibition against cruel and unusual punishment.

Lightbourne appeals to this Court raising three issues: (1) whether he was denied a full and fair hearing in violation of his constitutional right to due process; (2) whether the lower court erred in refusing to consider certain memoranda on the grounds that they fall under the definition of attorney work-product and are thus protected by the lawyer-client privilege; and (3) whether Florida's lethal injection procedures violate the Eighth Amendment. We treat these claims in the order in which they were presented.

DENIAL OF A FULL AND FAIR HEARING

In his first issue on appeal, Lightbourne alleges that he was denied a full and fair hearing for several reasons, including the time limits imposed by this Court and the trial court as well as his inability to present certain evidence after the DOC revised the protocol in August 2007. He also complains

about his counsel not being able to observe a "walk through" lethal injection training session conducted in the actual death chamber. We conclude that none of these issues individually or collectively denied Lightbourne a full and fair hearing or prevented this Court from obtaining a complete picture of the issues raised by Lightbourne regarding his lethal injection claim and any alleged deficiencies.

The bottom line, despite numerous complaints raised by Lightbourne, is that Lightbourne was given ample opportunity over four months, with thirteen days of hearings and voluminous documentary evidence, to present his own witnesses and to cross-examine the witnesses presented by the State concerning both the Diaz execution and the revised lethal injection procedures. While this Court's interest is in the quality rather than the quantity of the testimony presented, the evidentiary hearing was quite extensive. Even after the lethal injection procedures were revised, Lightbourne was given the further opportunity ***332** to visit the death chamber and to present additional testimony, including the affidavit of his expert who had already testified and which affidavit was accepted as if he had testified in person.

We further conclude that the trial court spent considerable time addressing the issue of public records and that no abuse of discretion occurred in any of its rulings. *See Rodriguez v. State,* 919 So.2d 1252, 1272–74 (Fla.2005); *Provenzano v. Moore,* 744 So.2d 413, 415 (Fla.1999). In conclusion, we reject Lightbourne's claim, based on the specific assertions in his brief, that he was denied a full and fair hearing in the proceedings below as a result of the manner in which the trial court conducted the evidentiary hearing and its rulings on evidentiary matters. *Cf. Sims v. State,* 754 So.2d 657, 665–66 (Fla.2000) (rejecting similar claim).

THE "DYEHOUSE" MEMORANDA

Lightbourne next claims error in the trial court's exclusion of two memoranda, dated June 16, 2006, and August 15, 2006, and prepared by Sara Dyehouse, an assistant general counsel for the Department of Corrections. The trial court concluded these memoranda both constituted work product and were protected by attorney-client privilege. In this case, the memoranda were actually provided to Lightbourne in August 2007 as part of a public records request. After producing the memoranda, the State belatedly filed a motion for protective order, arguing that the memoranda were protected by work-product and attorney-client privilege. The memoranda were transmitted to this Court under seal, although they also appear in a separate portion of the record on appeal that is not under seal.

Chapter 119, Florida Statutes, makes broad provision for agency records to be made available to the public. The exemption that is provided by statute is set forth in section 119.071(1)(d) 1, Florida Statutes (2006), which provides:

> A public record that was prepared by an agency (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State constitution until the conclusion of the litigation or adversarial administrative proceedings. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

Therefore, the exemption only extends to those records that contain the attorney's mental impressions, litigation strategy, or legal theory *and* are prepared exclusively for litigation or in anticipation of imminent litigation. Importantly, any exemption under this section exists only until the conclusion of the litigation or, in the case of public records prepared for an appeal or postconviction proceedings, only until the execution of the sentence.

The public records act "is to be construed liberally in favor of openness, and all exemptions from disclosure are to ***333** be construed narrowly and limited in their designated purpose." *City of Riviera Beach v. Barfield,* 642 So.2d 1135, 1136 (Fla. 4th DCA 1994). Under section 119.071, the State has the burden of showing that the Dyehouse memoranda fall within the statutory requirements. The State asserts the memoranda were prepared for or in anticipation of litigation because lethal injection litigation is and has been ongoing in Florida since January of 2006. The State also contends that the memoranda were prepared for litigation because they were prepared for use in litigation concerning imminent executions, citing the

cases of Clarence Hill and Arthur Rutherford. When the State asserted privilege based on these cases, however, the litigation in these cases was concluded, and these defendants had been executed.[4] The State appears to be contending that it is entitled to a continuing exemption as to these memoranda because lethal injection litigation is ongoing. We reject this contention.

4 Clarence Hill and Arthur Rutherford were executed by lethal injection prior to the Diaz execution. *See Diaz v. State,* 945 So.2d 1136, 1148 (Fla.), *cert. denied,* —— U.S. ——, 127 S.Ct. 850, 166 L.Ed.2d 679 (2006).

Further, neither memorandum on its face relates to any pending litigation or appears to have been prepared "exclusively for litigation." The first memorandum, dated June 16, 2006, relates generally to the lethal injection procedures and describes the process by which the chemicals were administered at that time. The second memorandum, dated August 15, 2006, relates to the possible use of a "bispectral index monitor" (BIS monitor) to assess the inmate's level of consciousness during an execution.

Although the two memoranda were prepared by a DOC attorney, each memorandum appears to be final in form and conveyed specific factual information rather than mental impressions or litigation strategies.[5] Accordingly, we conclude that the trial court erred in excluding these memoranda on the basis of either work-product or attorney-client privilege.

5 *Cf. Ragsdale v. State,* 720 So.2d 203, 205 (Fla.1998) (holding that an attorney's notes and preliminary documents are not public records); *Johnson v. Butterworth,* 713 So.2d 985, 986 (Fla.1998) (holding that rough drafts and notes intended as "mere precursors" of agency records or made only to aid the attorney in remembering are not public records subject to disclosure under chapter 119).

Even if the memoranda were otherwise exempt under chapter 119, Lightbourne contends that any privilege that might have existed was waived by actions of the Department of Corrections and the State. The State produced the memoranda to Lightbourne's counsel as part of a public records response. The State also filed copies of the memoranda in the court file along with other public records submitted on August 7. The State confirmed on the record with the trial court that the memoranda had been filed in at least one other postconviction proceeding.

The State contends, however, that the privilege should apply because the disclosure was inadvertent. Although some courts have held that any disclosure waives the privilege, others have applied a "relevant circumstances" test which looks at various factors to determine if inadvertent disclosure should constitute a waiver. *See Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc.,* 698 So.2d 276, 278 (Fla. 3d DCA 1997).[6] Nothing in the record ***334** supports the State's contention that reasonable precautions were taken to prevent the release of the memoranda or that the interests of justice would be served by suppressing these documents. Accordingly, we conclude that, even assuming a privilege attached to these memoranda, the privilege was waived by the State's own actions.

6 A five-part test has been applied to determine if the release is inadvertent. The court must consider: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; (2) the number of inadvertent disclosures; (3) the extent of disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error. *Abamar Hous. & Dev., Inc.,* 698 So.2d at 279.

In short, we conclude that neither memorandum is privileged, and in any event, any asserted privilege was waived as a result of the manner of production in this case. Although we conclude that the trial court erred in excluding the memoranda, we also conclude that its exclusion is not a basis to return this case to the trial court. Because this petition was filed as an original writ petition, we relinquished the proceeding to the trial court only for the purpose of conducting an evidentiary hearing to ascertain the facts. Accordingly, we will consider the Dyehouse memoranda in consideration of the Eighth Amendment claim, specifically Lightbourne's claim of the inadequacy of the procedures in assessing consciousness.

EIGHTH AMENDMENT CHALLENGE

At the outset, we emphasize what this claim is about and what this claim is not about. The claim is not about whether the death penalty is per se unconstitutional or whether lethal injection is per se unconstitutional under the Eighth Amendment. The claim is specifically about whether the method of execution through lethal injection, as currently implemented in Florida, is unconstitutional because

it constitutes cruel and unusual punishment. Because the Court has already upheld the method of lethal injection against attacks beginning with *Sims v. State,* 754 So.2d 657 (Fla.2000), the more specific inquiry is whether the concerns raised as a result of the execution of Angel Diaz and the response of the executive branch to those concerns compel us to recede from the essential holding of *Sims* which upholds as constitutional lethal injection as administered in Florida. The exact constitutional measuring stick, based on our own precedent and United States Supreme Court precedent, will be further discussed with due regard to the specifics of the evidence adduced in this case and the claims raised.

CRUEL AND UNUSUAL PUNISHMENT: ANALYSIS OF UNITED STATES SUPREME COURT PRECEDENT

We begin with acknowledging as critical that in 2002, the Florida Constitution was amended to provide that Florida's interpretation of the cruel and unusual punishment clause is be construed in conformity with the United States Supreme Court's decisions. The amendment specifically provides:

> The death penalty is an authorized punishment for capital crimes designated by the legislature. *The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.* Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively.

***335** Art. 1, § 17, Fla. Const. (emphasis added). Accordingly, we must evaluate whether lethal injection is unconstitutional "in conformity with decisions of the United States Supreme Court." *Id.*

The Eighth Amendment forbids the infliction of "cruel and unusual punishments."[7] This amendment has been applied to claims regarding the method and type of punishment (such as to electrocution), to claims involving a particular class of individuals (such as to minors or those who are mentally retarded), to claims of excessive punishment (such as to the death penalty per se), and to claims involving prison conditions. A claim, as here, that the lethal injection procedures are unconstitutional is a method of execution challenge, and we will primarily limit our discussion to those cases.

7 The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Eighth Amendment has historically been the vehicle used to measure whether a particular method of execution was permissible. *See Wilkerson v. Utah,* 99 U.S. 130, 136, 25 L.Ed. 345 (1878) (holding that the sentence of being shot until the inmate was dead did not violate the Eighth Amendment). The Eighth Amendment also addresses whether a particular *type* of punishment is excessive for the crime. In *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion), the United States Supreme Court was faced with the question of whether the imposition of the death sentence itself constitutes cruel and unusual punishment.

The plurality in *Gregg* recognized that the earliest Eighth Amendment cases dealt primarily with determining whether particular methods of execution were too cruel to pass constitutional muster, although the death sentence itself was not at issue. 428 U.S. at 170, 96 S.Ct. 2909. Relying on the prior decision in *Weems v. United States,* 217 U.S. 349, 373, 30 S.Ct. 544, 54 L.Ed. 793 (1910), Justice Stewart explained the principles behind the Eighth Amendment as follows:

> [T]he Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital, must be capable of wider application than the mischief which gave it birth." *Weems v. United States,* 217 U.S. 349, 373[, 30 S.Ct. 544, 54 L.Ed. 793] (1910). *Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.*" *Id.,* at 378, 30 S.Ct. 544.

Gregg, 428 U.S. at 171, 96 S.Ct. 2909 (emphasis added). Accordingly, the plurality stated that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 173, 96 S.Ct. 2909 (quoting *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)).[8] In making this assessment, courts are to look to objective indicia that reflect the public attitude and ensure the ***336** penalty accords with

the dignity of man, including whether it is inhumane or is excessive. A punishment is excessive if: (1) the punishment involves the "unnecessary and wanton infliction of pain"; or (2) the punishment is grossly out of proportion to the severity of the crime. *Id.* As the plurality stressed, the role of the judicial branch is limited; courts cannot require the legislature to select the least severe penalty so long as the penalty is not inhumane or disproportionate to the crime. *Gregg,* 428 U.S. at 175, 96 S.Ct. 2909. Instead, courts must presume validity when assessing a punishment that was selected by a democratically elected legislature. *Id.*

8 Although both *Gregg* and *Trop* were plurality opinions, the Supreme Court has reaffirmed the importance of this principle numerous times. *See, e.g., Atkins v. Virginia,* 536 U.S. 304, 311–12, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992); *Browning–Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 264 n. 4, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

After discussing this background, the plurality then turned its attention to whether the death penalty itself was constitutional. In making this determination, Justices Stewart, Powell, and Stevens reviewed the common law, the history of capital punishment, whether society currently endorsed capital punishment as a necessary criminal sanction, and whether the punishment comports with the basic concept of human dignity, and concluded that there was no constitutional ban on this form of punishment.

In short, while *Gregg v. Georgia* addressed whether the penalty of death violated the Eighth Amendment and first introduced the "unnecessary and wanton infliction of pain" standard, that case was not a "method of punishment" case but instead addressed a challenge to the excessiveness of the punishment. *See also Weems,* 217 U.S. at 382, 30 S.Ct. 544 (holding that a sentence of fifteen years of imprisonment for the crime of the falsification of a public and official document was cruel and unusual punishment); *Robinson v. California,* 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (holding that the Eighth Amendment imposes substantive limits on what can be made criminal and punished, and to that end, a state cannot criminalize an illness like a narcotic addiction without violating the Eighth Amendment); *Coker v. Georgia,* 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (holding that the sentence of death for the crime of rape of an adult woman was a "grossly disproportionate and excessive punishment" and thus forbidden by the Eighth Amendment).

Few United States Supreme Court cases address whether a method of execution violates the Eighth Amendment. In *Wilkerson v. Utah,* 99 U.S. 130, 25 L.Ed. 345 (1878), the Court considered its first case regarding a challenge to a method of execution. In that case, the petitioner was sentenced to be "publicly shot until you are dead." *Id.* at 131. In analyzing this claim, the Court first reviewed typical laws providing for execution, most of which involved execution by hanging or shooting, and then contrasted those methods of execution to some forms of execution from pre-revolutionary times in England, including being emboweled alive, beheaded, and quartered; public dissection; and burning alive. The Court did not set forth a specific standard to apply to these claims, but found that the sentence at hand did not fall within the same category as those involving torture: "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment." *Id.* at 134–35. The Court did not provide significant guidance as to what constitutes cruel and unusual punishment, stating: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides ***337** that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Id.* at 135–36.

Twelve years later, the Court issued another method of execution case. *See In re Kemmler,* 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890). In that case, the petitioner asserted that his sentence of death by electrocution was cruel and unusual punishment within the meaning of the Eighth Amendment. At the time, electrocution was a new method of execution and was statutorily authorized in New York after a state legislative commission found that it was the most humane method of execution and much less barbaric than hanging. After noting its prior holding in *Wilkerson,* the United States Supreme Court provided more analysis as to the meaning of cruel and unusual punishment: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* at 447, 10 S.Ct. 930. The Court concluded that

electrocution, as a more humane form of execution, did not constitute cruel and unusual punishment.

Electrocution gradually became the accepted method of execution over the next century for those states that had a death penalty. Since 1890, the Court has not specifically decided a method of execution case. One opinion comes close, although the circumstances of that case are slightly different. In *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), the state attempted to use the electric chair to execute Willie Francis, a convicted murderer, but due to a mechanical failure that occurred, Francis did not die. Francis asserted that a second attempt to electrocute him would violate the double jeopardy clause and would constitute cruel and unusual punishment in violation of the Eighth Amendment. The Court denied Francis's claim that a second attempt at electrocution would subject him to a lingering death or cruel and unusual punishment, holding as follows:

> Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. *The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.* The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.

Id. at 464, 67 S.Ct. 374 (emphasis added).

The final case that bears on the United States Supreme Court precedent is *Hill v. McDonough,* 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), wherein a Florida death row inmate sought to challenge whether Florida's three-drug protocol violates the cruel and unusual punishment clause. The issue before the United States Supreme Court was narrow: whether ***338** Hill's claim must be brought by a writ of habeas corpus, as statutorily authorized by 28 U.S.C. § 2254, or whether it may proceed as an action for relief under 42 U.S.C. § 1983, which is generally used to challenge an inmate's condition of confinement. The Court distinguished between these two vehicles, holding that habeas corpus is to challenge the lawfulness of the confinement or the particulars affecting its duration, while a challenge to the circumstances of the confinement may be brought under § 1983. The Court held that because the challenged protocol, including the three-drug mix, was not mandated by law, the injunctive relief sought would not prevent the State from implementing the sentence; hence, the claim was not a challenge to the sentence itself and not cognizable under a habeas action. *Id.* at 2101. In reaching this decision, the Court noted that Hill's complaint was that the protocol allegedly causes a "foreseeable risk of ... gratuitous and unnecessary" pain and that other methods of lethal injection would be constitutional. *Id.* at 2102. While the Supreme Court did not explicitly adopt this standard, other courts have begun to use the "foreseeable risk" standard.[9]

9 *See, e.g., Taylor v. Crawford,* 487 F.3d 1072, 1079 (8th Cir.2007) ("While we do not imply that the Court [in *Hill*] thereby adopted a new constitutional standard, we do observe that the Court expressed no dissatisfaction with that statement of the issue [whether the protocol allegedly causes foreseeable risk of gratuitous and unnecessary pain], and further, we find it to be consistent with settled Eighth Amendment jurisprudence."), *petition for cert. filed,* 76 U.S.L.W. 3094 (U.S. Sept. 5, 2007) (No. 07–303); *Harbison v. Little,* 511 F.Supp.2d 872 (M.D.Tenn. 2007).

State and federal courts have used an array of standards in gauging what constitutes a sufficient risk such that the protocol for lethal injection violates the Eighth Amendment's prohibition against cruel and unusual punishment. A number of courts use a "substantial risk" standard.[10] *See, e.g., Baze v. Rees,* 217 S.W.3d 207, 209 (Ky.2006) (holding that in order for a method of execution to be considered cruel and unusual punishment, the procedure for execution must create "a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death"), *cert. granted,* 551 U.S. 1192, 128 S.Ct. 34, 168 L.Ed.2d 809 (U.S. 2007); *Taylor v. Crawford,* 487 F.3d 1072, 1080 (8th Cir.2007) ("If Missouri's protocol as written involves no inherent substantial risk of the wanton infliction of pain, any risk that the procedure will not work as designated in the protocol is merely a risk of accident, which is insignificant in our constitutional analysis."); *LaGrand v. Stewart,* 173 F.3d 1144, 1149 (9th Cir.1999) (holding that the district court's findings of "extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual"). The United States District Court in *Morales*

declared that the operative issue is whether the lethal injection protocol, as actually administered in practice, creates an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment. *See Morales v. Hickman,* 415 F.Supp.2d 1037 (N.D.Cal.), *aff'd,* 438 F.3d 926 (9th Cir.), *cert. denied,* ***339** 546 U.S. 1163, 126 S.Ct. 1314, 163 L.Ed.2d 1148 (2006). However, a number of other courts have used different standards, including "an undue and unnecessary risk,"[11] a "foreseeable risk,"[12] and a "constitutionally significant risk."[13] Some courts have even used the "deliberate indifference" standard, although our review of the United States Supreme Court case law demonstrates that phrase has been used in connection with prison condition cases, not method of execution cases.[14]

10 United States Supreme Court cases addressing condition of confinement claims have used a "substantial risk" standard. *See Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (recognizing that "conditions posing a *substantial risk of serious harm* " may rise to the level of an Eighth Amendment violation) (emphasis added).

11 *Morales v. Tilton,* 465 F.Supp.2d 972, 974 (N.D.Cal.2006) (phrasing the issue as: "does California's lethal-injection protocol—as actually administered in practice—create an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment?"); *Evans v. Saar,* 412 F.Supp.2d 519, 524 (D.Md.2006) (holding that an inmate must show "that he is subject to an unnecessary risk of unconstitutional pain or suffering.... Inherent in this formulation is the requirement that the risk must be substantial.").

12 *Harbison v. Little,* 511 F.Supp.2d 872, 881 (M.D.Tenn.2007) (holding that in determining the objective component, the court looked to whether there was "a foreseeable risk of ... gratuitous and unnecessary pain").

13 *See Taylor,* 487 F.3d at 1080 (emphasizing that the proper focus is not the risk of accident, but "whether the written protocol inherently imposes a constitutionally significant risk of pain"); *Nooner v. Norris,* No. 5:06CV00110SWW, 2007 WL 2710094, at *7 (E.D.Ark. Sept.11, 2007) (stating the standard as "whether the written protocol inherently imposes a constitutionally significant risk of pain").

14 In fact, in this case Lightbourne argues that without "an adequate medical determination of unconsciousness before the administration of drugs known to produce pain and continuing monitoring of unconsciousness throughout the lethal injection procedure, there is a deliberate indifference to the risk of the infliction of unnecessary pain in violation of the Eighth Amendment."

We recognize that the Court recently granted certiorari jurisdiction in *Baze v. Rees,* 551 U.S. 1192, 128 S.Ct. 34, 168 L.Ed.2d 809 (U.S. 2007), to review a Kentucky Supreme Court decision which held that Kentucky's protocol for lethal injection did not violate the Eighth Amendment. In the *Baze* petition, the petitioners urge the United States Supreme Court to adopt a standard that would interpret the Eighth Amendment to prohibit a method of execution that creates "an unnecessary risk of pain and suffering." Petitioner's Petition for Writ of Certiorari at 6, *Baze v. Rees,* No. 07–5439, (U.S. Sept. 25, 2007). Still, given the current uncertainty in the exact standard that the United States Supreme Court might employ, we deem it important to review our own precedent as to this issue.

FLORIDA'S JURISPRUDENCE ON METHOD OF EXECUTION

Although the issue in this case is the constitutionality of lethal injection procedures, a review of this Court's jurisprudence involving challenges to electrocution, the previous method used in Florida, is instructive. In *Buenoano v. State,* 565 So.2d 309 (Fla.1990), the petitioner challenged whether the electric chair violated the Eighth Amendment, based on a malfunction during the execution of inmate Jesse Tafero. The governor ordered an investigation into the circumstances of Tafero's execution, and it was determined that a synthetic sponge caused the smoke and flames to shoot from his head. The attending physician and the medical examiner both stated that the first surge of electricity caused Tafero to become unconscious so he did not suffer.

Buenoano asserted that a faulty electrode in the electric chair did not properly conduct electricity and that the DOC was not competent to carry out executions. This Court found that Buenoano's claim ***340** was not procedurally barred, but denied relief, holding that execution is clearly within the province of the executive branch and that the record as proffered did not justify judicial interference with the executive function. *Id.* at 311. Relying on the United States Supreme Court's decision in *Resweber,* 329 U.S. at 463, 67 S.Ct. 374, the Court held that "one malfunction is not

sufficient to justify a judicial inquiry into the Department of Corrections' competence." *Buenoano,* 565 So.2d at 311.

In 1997, a similar malfunction occurred during the execution of Pedro Medina, where flames and smoke again erupted from the headpiece shortly after the electrocution began. Leo Jones, who was under a warrant of death, filed a petition to invoke this Court's all writs jurisdiction, challenging whether Florida's electric chair in its then-present condition violated the Eighth Amendment. *Jones v. State,* 701 So.2d 76 (Fla.1997). This Court stayed the pending execution and relinquished jurisdiction to the trial court for an evidentiary hearing. The trial court denied relief, finding that the electric chair was working properly and that inmates did not suffer conscious pain within a millisecond of the initial surge of electricity.

Jones appealed to this Court, raising an Eighth Amendment challenge. Jones asserted that a state official's failure to prevent harm to prisoners constitutes cruel and unusual punishment if the official shows "deliberate indifference to the prisoner's well-being" and thus the trial court erred by requiring him to show electrocuted inmates experienced conscious pain. *Id.* at 79. Jones then argued that the state has shown "deliberate indifference" through its executions. After rejecting Jones' contention as "totally without merit," the Court held:

> In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947). As the Court observed in *Resweber:* "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

Id. The Court then noted that there was substantial evidence that Florida executions are conducted "without any pain whatsoever" and that the record was devoid of evidence "suggesting deliberate indifference to a prisoner's well-being."[15]

15 This Court did not explicitly adopt the "deliberate indifference" standard in *Jones,* but limited its analysis to the standard adopted by the United States Supreme Court in method of execution cases—the "inherent in the method" standard. Some federal courts have applied a "deliberate indifference" standard to method of execution cases to determine whether the wanton element was met in terms of the "unnecessary and wanton infliction of pain" standard. Again, it is important to note that this "deliberate indifference" standard was first mentioned by the United States Supreme Court when the Court expanded the Eighth Amendment protections to condition of confinement cases, and it has used the deliberate indifference standard only in those cases to determine a state actor's mental intent when that actor inflicted harm or potential harm that was not part of the prescribed punishment. *See, e.g., Wilson v. Seiter,* 501 U.S. 294, 300, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991) (holding that in prison condition cases, a mental element must be attributed to the inflicting officer "[i]f the pain inflicted is not formally meted out *as punishment* ... by the sentencing judge."). Here, death is clearly part of the penalty and thus United States Supreme Court precedent does not require a showing as to any mental element in this type of claim.

***341** Following *Jones,* challenges to the electric chair continued. In 1999, Thomas Provenzano asserted that the electric chair in its then-present condition constituted cruel or unusual punishment, alleging that it malfunctioned in the four executions since the Court's decision in *Jones. Provenzano v. State,* 739 So.2d 1150, 1153 (Fla.1999) (*Provenzano I*). The trial court rejected all of Provenzano's claims concerning the electric chair, finding most of the claims were decided adversely to him in *Jones.* The trial court further rejected Provenzano's claim as to newly discovered evidence pertaining to electrical engineers that contracted with the DOC to work on the chair, holding that the fact that the DOC was actively testing and maintaining the chair established that the DOC was attempting to maintain the reliability of the electric chair. On appeal, this Court held that the trial court did not err in relying on *Jones* and noted that this Court had repeatedly rejected the claim that death was not instantaneous. *Id.* at 1153. The Court further affirmed the trial court's holding that evidence pertaining to recent work on the electric chair is insufficient to overcome the presumption that members of the executive branch will properly perform their duties in carrying out the next execution. *Id.* Despite the Court's holding, the Court expressed concern that the DOC had repeatedly failed to follow the protocol established for executions. However, because there was no showing that any of the last four executions caused "unnecessary and wanton pain" or that they involved "torture or a lingering death," the Court declined the stay of execution. *Id.* at 1154.[16]

16 The Court did require the DOC to provide an open file policy relating to "*any* information regarding the operation and functioning of the electric chair" and further directed the DOC to certify prior to any execution that the electric chair was able to perform consistent with the "Execution Day Procedures" and "Testing Procedures for Electric Chair."

Shortly after *Provenzano I,* in *Provenzano v. Moore,* 744 So.2d 413 (Fla.1999) (*Provenzano II*), the Court stayed Provenzano's execution after problems occurred during inmate Allen Lee Davis's execution and permitted another evidentiary hearing before the trial court. In *Provenzano II,* the Court again affirmed its statement in *Jones:* "[I]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.' " *Id.* at 415 (quoting *Jones,* 701 So.2d at 79). The Court stressed that "[t]he record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain." *Id.* at 415. The Court also concluded that based on the record, the electric chair was functioning properly, and the electric circuitry was being maintained. While holding that the execution protocol was followed in the Davis execution, we also observed that "it may be appropriate for DOC to revisit the protocol, including the use of the mouth strap, to ensure that it is consistent with the functioning of the electric chair." *Id.* We rejected Provenzano's claim that the current use of electrocution is unconstitutional because it "violates the evolving standards of decency that mark the progress of a maturing society." *Id.*

HISTORY OF LETHAL INJECTION IN FLORIDA

In 2000, the Florida Legislature provided for a new method of execution: lethal injection. *See* ch.2000–1, § 1, Laws of Fla.[17] Section 922.105(1) now provides: "A ***342** death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." *See* § 922.105(1), Fla. Stat. (2006). The statute does not provide the specific procedures to be followed or the drugs to be used in lethal injection; instead it expressly provides that the policies and procedures created by the DOC for execution shall be exempt from the Administrative Procedure Act, chapter 120, Florida Statutes. *See* § 922.105(7), Fla. Stat. (2006); *Sims v. State,* 754 So.2d 657, 670 (Fla.2000).

17 On October 26, 1999, the United States Supreme Court granted certiorari in *Bryan v. Moore,* 744 So.2d 452 (Fla.1999) (table), a case where the constitutionality of Florida's electric chair was at issue. *Bryan v. Moore,* 528 U.S. 960, 120 S.Ct. 394, 145 L.Ed.2d 306 (1999). In direct response, on December 7, 1999, Governor Bush announced that a special session of the Florida Legislature would be held for the sole purpose of considering a piece of legislation that would authorize that "death sentences be carried out by lethal injection or electrocution." After section 922.105, Florida Statutes, was amended to provide for lethal injection, the United States Supreme Court dismissed its grant of certiorari in *Bryan* as improvidently granted "[i]n light of the representation by the State of Florida, through its Attorney General, that petitioner's 'death sentence will be carried out by lethal injection, unless petitioner affirmatively elects death by electrocution.' " *Bryan v. Moore,* 528 U.S. 1133, 1133, 120 S.Ct. 1003, 145 L.Ed.2d 927 (2000).

Shortly after the amendment of section 922.105, Terry Sims challenged the lethal injection protocol in effect in 2000 as failing to provide sufficient details and procedures for administering lethal injection. *Sims,* 754 So.2d at 666. The issues raised by Sims included: reported problems in correctly administering lethal injections in other states; lack of guidelines for handling problems that may occur; lack of specification as to the duties of each participant; and conflict between the protocol and testimony as to what should occur if the inmate does not expire after the initial injections. *Id.*

At an evidentiary hearing before the circuit court, Sims presented expert testimony concerning specific examples of "botched" executions that occurred in other states. He further presented expert testimony concerning potential problems such as too low a dose of sodium pentothal being administered, which would make pain more acute, or the drugs not being given in the proper order. It was undisputed in *Sims* that the dosage levels set forth in the protocol, if administered correctly, would result in a quick and relatively painless death. The Court rejected Sims' claim that the DOC's execution day protocol failed to provide sufficient details and procedures for administering lethal injection, relying upon *LaGrand v. Lewis,* 883 F.Supp. 469 (D.Ariz.1995), *aff'd sub nom. LaGrand v. Stewart,* 133 F.3d 1253 (9th Cir.1998), where that court held that the Arizona lethal injection protocol did not expose a prisoner to "more than a negligible risk of being subjected to a cruel and wanton infliction of pain." *Sims,* 754 So.2d at 667 (quoting *LaGrand,* 883 F.Supp. at 471). After noting that Sims raised similar challenges to the

sufficiency of the written protocol and after reviewing all of the evidence presented in that case, this Court denied Sims' challenge, concluding:

> Sims' reliance on Professor Radelet and Dr. Lipman's testimony concerning the list of horribles that could happen if a mishap occurs during the execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. Other than demonstrating a failure to reduce every aspect of the procedure to writing, Sims has not shown that the DOC procedures will subject him to pain or degradation if ***343** carried out as planned. Sims' argument centers solely on what may happen if something goes wrong. From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Sims, 754 So.2d at 668. After this Court rejected Sims' challenges to the lethal injection protocol, the United States Supreme Court denied certiorari review. *See Sims v. Florida,* 528 U.S. 1183, 120 S.Ct. 1233, 145 L.Ed.2d 1122 (2000).

In the same year *Sims* was decided, this Court decided *Provenzano v. State,* 761 So.2d 1097 (Fla.2000) (*Provenzano III*), upholding lethal injection as follows:

> [T]his Court [previously] stated that there is a presumption that the members of the executive branch will properly perform their duties in carrying out an execution. The circuit court determined that there has been no showing of abuse or cruel or unusual punishment in this case. There is competent, substantial evidence in the record to support this conclusion. Therefore, we hold that execution by lethal injection does not amount to cruel and/or unusual punishment.

Id. at 1099 (citation omitted). The *Sims* holding has been since reaffirmed in many cases.[18] *See, e.g., Diaz v. State,* 945 So.2d 1136, 1144 (Fla.2006); *Rolling v. State,* 944 So.2d 176, 179 (Fla.2006); *Rutherford v. State,* 926 So.2d 1100, 1113 (Fla.2006); *Hill v. State,* 921 So.2d 579, 583 (Fla.2006); *Parker v. State,* 904 So.2d 370, 380 (Fla.2005); *Thompson v. State,* 796 So.2d 511, 515 (Fla.2001); *Bryan v. State,* 753 So.2d 1244, 1254 (Fla.2000).

18 Subsequent to *Sims,* a research study reported in a publication called *The Lancet* was offered in several cases as newly discovered evidence that execution by lethal injection exposes inmates to a substantial risk of unnecessary and wanton pain. *See* Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution,* 365 Lancet 1412 (2005). This Court found the study to be inconclusive and did not justify holding an evidentiary hearing to review the newly discovered evidence claim. *See Diaz v. State,* 945 So.2d 1136, 1144 (Fla.), *cert. denied,* —— U.S. ——, 127 S.Ct. 850, 166 L.Ed.2d 679 (2006); *Rolling v. State,* 944 So.2d 176, 179 (Fla.), *cert. denied,* 549 U.S. 990, 127 S.Ct. 466, 166 L.Ed.2d 332 (2006); *Rutherford v. State,* 926 So.2d 1100, 1113–14 (Fla.), *cert. denied,* 546 U.S. 1160, 126 S.Ct. 1191, 163 L.Ed.2d 1145 (2006); *Hill v. State,* 921 So.2d 579, 583 (Fla.), *cert. denied,* 546 U.S. 1219, 126 S.Ct. 1441, 164 L.Ed.2d 141 (2006). As the Court explained in *Hill,* the study in *The Lancet* "does not assert that providing the inmate with 'no less than two grams' of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect." *Hill,* 921 So.2d at 583 (citation omitted) (quoting *Sims,* 754 So.2d at 665 n. 17).

THIS CASE

With this legal background in mind, we turn to the primary issue for us to decide in this case: whether the lethal injection procedures currently in place in Florida, as actually administered, violate the constitutional prohibition against cruel and unusual punishment. We start from the proposition that in *Sims* we upheld the constitutionality of lethal injection and the chemicals employed during lethal injection against a challenge that the procedures in effect in 2000 did not provide sufficient detail for administering lethal injection. There are two reasons that we revisit our ***344** holding in *Sims,* which was decided shortly after lethal injection was adopted.

First, in *Sims* we rejected as speculative Sims' arguments concerning the "list of horribles" that Sims argued could occur in a lethal injection execution, holding that the testimony presented did not "sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner." *Sims,* 754 So.2d at 668. We noted that "Sims' argument centers solely on

what may happen if something goes wrong." *Id.* In the Diaz execution, we now have actual experience of complications that can arise in the carrying out of a lethal injection execution. However, rather than ignoring what might have gone wrong during the Diaz execution, the executive branch under the direction of the Governor and the DOC instituted an extensive and comprehensive review of the problem and proposed solutions, many of which have been enacted by the DOC.

The second and more important difference is that the protocol has become increasingly more specific and more detailed as to the drugs administered and the procedures to be followed. Yet, Lightbourne still criticizes the protocol as inadequate to prevent the unnecessary risk of pain and in fact claims that the most recent revisions are essentially no more than "window dressing."

Most of Lightbourne's claims rely on the assertion that Diaz suffered pain during his execution and that the current protocol does not adequately guarantee that this risk is sufficiently minimized so as to comply with the Eighth Amendment. However, as the trial court noted, the Governor's Commission could not determine whether Diaz suffered pain and the trial court found that "it is unclear and disputed whether inmate Diaz suffered any pain." The trial court ultimately concluded that Diaz did not suffer any pain, stating as follows:

> It is unclear and disputed whether inmate Diaz suffered any pain. It is unclear exactly how conscious or unconscious inmate Diaz was after injection of the sodium pentothal into the soft body tissue. It is unknown what the absorption rate is for that chemical or the other chemicals injected into soft body tissue. It is medically clear that anyone would experience pain if pancuronium bromide or potassium chloride were injected into a body that was not properly anesthetized. It is not uncommon for this to happen in the best of hospital settings. Medical experts testified to patients screaming or yelling from severe pain from injection of drugs before being properly anesthetized. No witness testified that inmate Diaz screamed or yelled after the injection of pancuronium bromide or potassium chloride. Therefore, the Court concludes and so finds that inmate Diaz did not suffer any pain from the process of injecting these chemicals. The Governor's Commission which investigated this execution could not find whether or not inmate Diaz suffered any pain.

In reviewing the trial court's order and the facts as developed in the evidentiary hearing, we note that it is undisputed that in the execution of Angel Diaz, the intravenous lines were not functioning properly because the catheters passed through his veins in both arms and thus delivered the lethal chemicals into soft tissue, rather than into his veins. Lay witnesses to the execution, including Mr. Diaz's spiritual advisor, an interpreter, and a press representative, testified that several minutes after the injections began, Diaz was still moving, squinting, taking deep breaths, and clenching his jaw. It is also undisputed that if pancuronium bromide or potassium ***345** chloride, the second and third chemicals administered, are injected into a conscious person, significant pain would result from each of the chemicals.

The medical experts differed in opinion as to whether the subcutaneously injected sodium pentothal was absorbed into Diaz's blood stream to a sufficient degree to prevent him from feeling the effects of the pancuronium bromide and potassium chloride. Lightbourne's expert, Dr. Heath, a board certified anesthesiologist, could not say with certainty whether Diaz was "awake" when the second and third drugs were administered and also could not say with certainty which drug caused Diaz's death. Based on the witness observations, he opined that Diaz likely suffocated from the pancuronium bromide. On the other hand, Dr. Kris Sperry, chief medical examiner for the State of Georgia, testified for the State and opined that Diaz did not feel the pain of injection of potassium chloride, which caused blisters under his skin, because "he had already been given the sodium pentothal, which is what would have rendered him unconscious and insensate." Dr. Sperry did concede the possibility that if the sodium pentothal was injected into soft tissue, its effect would be delayed, and Diaz could have felt the suffocating effects of the pancuronium bromide, although in his opinion, the sodium pentothal would be absorbed before the remaining two chemicals.

Because it is disputed whether or not Diaz suffered pain, we view this issue based on what is undisputed: if Diaz was not unconscious before the other drugs were injected, he would have indeed suffered unnecessary pain. Therefore, we evaluate the procedures with the knowledge that the execution of Diaz raised legitimate concerns about the adequacy of Florida's lethal injection procedures and the ability of the DOC to implement them.

As the amount and sequence of chemicals used in Florida have not changed from the time of the Diaz execution,

we begin with a review of the combination of chemicals administered under the current lethal injection procedures. Specifically, the protocols in effect both at the time of the Diaz execution (the August 2006 procedures) and at the present time (the August 2007 procedures) provide for intravenous administration of five grams of sodium pentothal[19] (a fast-acting sedative), 100 milligrams of pancuronium bromide (a paralytic agent that can stop respiration), and 240 milliequivalents of potassium chloride (a substance that will cause the heart to stop).[20] A saline solution is injected before a new drug is administered in order to clear the line between chemicals.

19 Sodium pentothal is a brand name, which is the name used in Florida's lethal injection protocol. This drug is also known by its chemical name, thiopental sodium.

20 Challenges to the mix of chemicals have been a recurrent theme both in this State and around the country. Notably, this Court has previously rejected requests for evidentiary hearings on the issue of whether Florida's lethal injection procedures that directed that an inmate receive "no less than two" grams of sodium pentothal provided inadequate anesthesia. *Hill v. State,* 921 So.2d 579, 583 (Fla.2006); *see Rutherford v. State,* 926 So.2d 1100, 1114 (Fla.2006). Florida's protocols now direct that an inmate be given five grams of sodium pentothal.

After the Diaz execution, the report of the Governor's Commission suggested that the Governor have the DOC "on an ongoing basis explore other more recently developed chemicals for use in a lethal injection execution with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic." However, ***346** the Commission did not expressly recommend any modification to the current three-drug protocol or to the individual amounts of the chemicals used in the lethal injection procedures.

The Commission did make a number of other specific recommendations, including that DOC: develop written procedures to clearly establish the chain of command and include that the warden has the final decision-making authority; require documentation as to all stages of the lethal injection process; add a second Florida Department of Law Enforcement (FDLE) agent and require that both keep documented logs during the execution; develop and implement a process to determine the most suitable method of venous access which does not require movement of the inmate after venous access is obtained; ensure the inmate is unconscious after sodium pentothal is administered and proceed no further until the warden authorizes the team to do so; require that if a second IV site is utilized at any time, that the entire lethal chemical administration process be reinitiated from the beginning; develop procedures that clearly establish and define the role of each person; develop a training program for all persons involved; and review foreseeable contingencies and formulate responses to those contingencies. In light of these recommendations and its own examination of the Diaz execution, the DOC first revised its procedures, effective May 9, 2007 (the May 2007 procedures). After additional questions were expressed by the trial court in this case and as part of its own continuing internal review, the DOC revised its lethal injection procedures again, resulting in the August 2007 procedures. In the introduction to its August 2007 procedures, the DOC stated that the "foremost objective of the lethal injection process is a humane and dignified death."

This stated objective is reflected in the most significant difference between the August 2006 procedures under which Diaz was executed and the May 2007 procedures: the inclusion of a pause during which the DOC personnel will assess the inmate for the presence or absence of unconsciousness. The August 2006 procedures that were in effect at the time of the Diaz execution did not require that any determination of unconsciousness be made before the pancuronium bromide was injected. The May 2007 procedures added the requirement that the team warden must "determine, after consultation, that the inmate is indeed unconscious. Until the inmate is unconscious and the Warden has ordered the executioners to continue, the executioners shall not proceed...." Further, the warden is required to stop the execution at any point when venous access becomes compromised and must take appropriate action to remedy the problem before proceeding.

The August 2007 procedures are even more specific. These procedures require the warden to "assess whether the inmate is unconscious" after injection of the two syringes of sodium pentothal and the first saline syringe. If the inmate is not determined to be unconscious at that point, the warden shall suspend the execution process, order the window closed, and consider a secondary access site. The August 2007 procedures make clear that the process of assessing consciousness is a critical step that must be conducted before the execution proceeds. The August 2007 procedures state

that the warden makes the determination of consciousness "after consultation."[21]

21 We acknowledge, however, that while the procedures as well as the checklist now in use require an assessment of consciousness, neither the procedures nor the checklist specifies what procedures are to be followed for such an assessment or with whom the warden is to consult.

***347** As to the critical issue of consciousness, Warden Cannon, who is currently designated by the Secretary of the DOC as team warden in charge of future executions, testified that he would assess consciousness by employing an "eyelash touch," calling the inmate's name, and shaking the inmate. Warden Cannon testified that if there is a disagreement as to consciousness, the execution will be temporarily suspended —the curtains will close and the medical team members will come out from the chemical room and consult in the assessment of the inmate. When a determination of unconsciousness is made, the curtains will reopen, and the process will continue. Under the August 2007 procedures, the second and third drugs will not be administered until the inmate is deemed unconscious and the warden orders that the execution proceed.

While the August 2007 procedures do not expressly state that a medically qualified team member will continuously monitor the IV sites, Warden Cannon testified that he will require the person who inserted the IV lines to monitor by closed circuit television cameras each IV access point, as well as the inmate's face, throughout the execution process. This camera system is part of the renovated execution facility.

The Governor's Commission recommended that the DOC establish a clear hierarchy of authority and provide open communication between team members during the execution. The August 2007 procedures address these recommendations by establishing the position of "team warden" who is ultimately responsible for every aspect of the execution process and by providing that the security team members will be in radio contact with the team warden during the execution in order to report any problems that may occur. The August 2007 procedures state that "each execution member is responsible and authorized to raise concerns that become apparent during the execution and bring them to the attention of the team warden."

Lightbourne, however, contends that these changes are inadequate and submitted expert testimony, as well as the testimony of DOC personnel, in an attempt to show that the training, qualifications, and consciousness assessment under the new procedures were still insufficient. In support of this claim, Lightbourne relies primarily on the opinion of Dr. Heath. In an affidavit submitted to the trial court (which has been considered as record evidence), Dr. Heath stated that the revised August 2007 procedures fail to require that qualified personnel ensure a "surgical plane of anesthesia," which he considers essential. He found fault with the procedures calling for the determination of consciousness to be made by the warden, whom Dr. Heath characterized as one of the least qualified persons present to make such an assessment. According to Dr. Heath, the methods Warden Cannon would use to assess consciousness are inadequate when performed by a person without clinical experience. Because of ethical considerations surrounding any participation in lethal injection procedures, Dr. Heath did not provide any specific recommendations as to how to carry out the lethal injection procedure or to assess consciousness in a lethal injection setting. He did testify, however, that in a surgical setting, a surgical plane of anesthesia is required to ensure the person will be insensate to the painful procedures to follow and that this can be assessed accurately only by applying a noxious stimulus, such as a surgical incision, a pinch with a hemostat, or a needle prick. This determination should be made ***348** by medically trained personnel positioned by the side of the person being assessed.

Dr. Heath criticized the Florida procedures for requiring administration of the drugs remotely from a separate room, making it difficult to monitor the "anesthetic depth." He alleges that, given their location outside the death chamber, the executioners and medically trained team members will not be able to hear the inmate, which also impedes assessment of "anesthetic depth." He concluded that the changes made in the August 2007 procedures were merely cosmetic.

Dr. Heath also disapproved the use of a syringe holder in which to place the syringes while they are being used to deliver the drugs because he believes it will impede any ability to detect "back pressure," which indicates if the IV is working correctly. He testified that competence in IV injections requires clinical experience because when an IV is not inserted properly into a vein, extravasation occurs and fluids flow outside the vein into surrounding tissue. Extravasation can sometimes be detected by looking at the patient and can also be determined by palpation of the site. He further testified that failure of the drug injectors to have clinical experience in intravenous drug injection fails to meet any reasonable standard. Lack of experience

in the executioners, who inject the syringes into the IV, is exacerbated by the lack of clinically trained personnel at the bedside, who could palpate the IV site and observe any problems.

However, other experts disagreed with Dr. Heath's conclusions. Dr. Sperry testified that an appropriate method to assess consciousness is to put hands on the person's shoulders, shake them, and call their name. This is a basic neurological assessment of consciousness and responsiveness which lay persons are taught and which any paramedic, emergency medical technician, registered nurse, or licensed practical nurse knows. The technique is "extremely fundamental" and is also a part of cardiopulmonary resuscitation (CPR) training. As to any concerns with IV lines, Dr. Sperry testified that problems inserting IV lines are common even in a hospital setting. He also disagreed that the syringe-holding apparatus would interfere with the ability to feel resistance or "back pressure" since back pressure is felt through the plunger, not the barrel of the syringe. According to Dr. Sperry, the apparatus stabilizes the syringe and prevents a person from pulling back on the barrel of the syringe while pushing the drugs.

Lightbourne also challenged the training and qualifications of personnel who perform the lethal injection procedures. Warden Cannon testified in the evidentiary hearing as to this issue as well. As the designated team warden in charge of lethal injections, he selects the members of the execution team. He testified to the role of groups of the execution team: security team members; technical team members (or medical team); and executioners. In addition, two agents from the FDLE will monitor the actions of the execution team. The "medically qualified" team members are responsible for the chemicals and IVs necessary to carry out an execution. Two medical personnel insert IVs. Two medical personnel are on standby in case the execution requires a central venous line placement, which is a more complicated procedure for placing an IV. A pharmacist will mix the lethal chemicals. The pharmacist's license and credentials, as well as those of all the medically qualified personnel, are verified through the Department of Health, and a background check is conducted. Each member of the team has a back-up person trained to step into the designated role in the event of contingencies.

***349** Warden Cannon stated that team members are selected based on their training, licensure, certifications, background checks, and everyday duties. The medically qualified personnel must also be currently employed in the area of medical expertise for which they are selected and must perform their assigned functions in their daily duties. Warden Cannon explained that the executioners, who are not required to have any specific professional experience or certifications, will only inject the drugs into the IV lines after receiving instructions from the team warden. Warden Cannon testified that monthly training sessions are held and include mock executions where the team also practices their responses to problems which might arise like equipment failure or a blocked IV line. However, the IVs are not actually placed into a person, and Warden Cannon would simply call out the hypothetical contingency.

Lightbourne also points out that the August 2007 procedures place the responsibility on the team warden, normally not a medically trained individual, to make the final decision as to the unconsciousness of the inmate. Even though Warden Cannon, or likely any other team warden chosen for future executions, does not have medical training beyond basic CPR training, the August 2007 procedures state that the team warden shall make the consciousness assessment in consultation with other team members. Warden Cannon testified that he would consult with those members of the team who are medically qualified in making his determination.

After considering the findings of the DOC investigative teams, the findings of the Governor's Commission, the most recently adopted procedures, and all of the witnesses and evidence presented below, the trial court concluded that there was no Eighth Amendment violation. Based on our analysis of the evidence presented as discussed above and, based on the application of the law to the evidence as discussed below, we agree.

APPLICATION OF LAW TO THE FACTS OF THIS CASE

This Court's obligation is to ensure that the method used to execute a person in Florida does not constitute cruel and unusual punishment. Unlike prior methods of execution, Lightbourne does not assert that lethal injection is inherently cruel and inhumane, only that if it is not properly carried out, there will be a risk of unnecessary pain. This Court set forth the constitutional standard for method of execution claims in *Jones v. State,* 701 So.2d 76, 79 (Fla.1997), a standard which is based solely upon rulings from the United States Supreme Court:

> In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947). As the Court observed in *Resweber:* "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

Id. In *Sims,* we elaborated on our decision in *Jones.* Relying on *LaGrand,* which held that the punishment is not cruel and unusual if a state's protocol does not expose the prisoner to "more than a negligible risk of being subjected to cruel and wanton infliction of pain," we held that an inmate's speculative list of horribles that could happen is insufficient to demonstrate more than a negligible risk. *Sims,* 754 So.2d at 667 (quoting ***350** *LaGrand,* 883 F.Supp. at 471). The mere possibility of human error or a technical malfunction cannot constitute a sufficient showing to meet this burden. *See, e.g., Resweber,* 329 U.S. at 464, 67 S.Ct. 374 (holding that an accident which occurred during the first attempt at execution did not render a second attempt an Eighth Amendment violation); *Buenoano,* 565 So.2d at 311 (holding that one malfunction is "not sufficient to justify a judicial inquiry into the Department of Corrections' competence"). Moreover, we held that the DOC need not reduce every minute detail of the lethal injection process to writing in order to pass constitutional muster. *See Sims,* 754 So.2d at 668.

Turning to this case, Lightbourne contends that the protocol fails to appropriately ensure proper training and certification of both the executioners and the technical team members and that the protocol fails to adequately assess and ensure unconsciousness.[22] Lightbourne does not assert that the amount of sodium pentothal is inadequate, thereby disavowing any agreement with the *Lancet* article, which had been the subject of prior challenges to lethal injection.[23] Lightbourne does not explicitly challenge the use of the three-drug combination, although he does question the necessity for the use of pancuronium bromide, given that the dosage of sodium pentothal is sufficient to cause death.[24]

22 Lightbourne raises the following specific allegations regarding the sufficiency of the August 2007 procedures: the revised procedures do not meaningfully increase the qualifications of executioners; there is no requirement that the team warden or executioners have experience in conducting executions; the protocol does not require that training sessions use more accurate simulations than pushing syringes into a bucket; there is no reason for using a syringe holder; positioning executioners in a separate room from the inmate results in long lengths of IV tubing, which creates greater opportunity for malfunction; the procedures do not specifically indicate the qualifications needed by each designated team member; phlebotomists are not trained to place catheters in veins; the procedures leave inmates to guess if the execution team members are adequately experienced and "medically qualified"; the warden is not qualified to make hiring decisions regarding medical personnel; the procedures do not provide any method for monitoring the inmate's consciousness after administration of sodium pentothal, and the warden is not qualified to make this assessment; anesthetic depth should be assessed by a variety of indicators to reach an accurate reading; the warden is not qualified to make the final decision regarding the appropriate method of obtaining venous access; pancuronium bromide is used for purely cosmetic reasons; the contingency portion of the protocols does not detail any responses to contingencies; and the certification portion of the protocols does not result in individual accountability of team members. In a related case where another inmate is also challenging the protocol after a death warrant was signed in his case, Mark Dean Schwab raises similar concerns, focusing primarily on whether the protocols adequately ensure the assessment of consciousness and whether the use of a paralytic drug during the execution is warranted. *See Schwab v. State,* No. SC07–1603, 969 So.2d 318, 2007 WL 3196523 (Fla. Nov. 1, 2007).

23 Both Lightbourne's expert, Dr. Heath, and the State's expert, Dr. Dershwitz, testified at the evidentiary hearing and criticized *The Lancet* article that claimed inadequate thiopental sodium has been used in executions, asserting that the study employed flawed methodology and the conclusions are not supported by the data because of the delay in drawing blood. *See supra* note 18.

24 The petition for certiorari filed in *Baze v. Rees* raises as the third issue whether "the continued use of sodium thiopental, pancuronium bromide and potassium chloride, individually or together, violate the cruel and unusual punishment clause because lethal injections can be carried out by using other chemicals that pose less risk of pain."

It is important to review these claims in conjunction with each other since the chemicals used, the training and certification, ***351** and the assessment of consciousness all affect each

other. If all of the team members have the appropriate training, experience, and certification, the risk of complications will be greatly reduced. If the inmate's consciousness is appropriately assessed and monitored after the dosage of sodium pentothal is administered, he or she will not suffer any pain from the injection of the remaining drugs. In reviewing the alleged risk of an Eighth Amendment violation, whether framed as a substantial risk, an unnecessary risk, or a foreseeable risk of extreme pain, the interactions of these factors must be considered.

Again, Lightbourne's most significant challenge is not to the chemicals themselves, but to whether they will be administered "properly" and whether the protocol has sufficient safeguards in place to prevent harm in the event that, as in the Diaz execution, the protocol is not properly followed. Lightbourne expends considerable effort disputing whether the lethal injection procedures set forth sufficient detail as to the training, qualifications, and experience required for the executioners and the various medically qualified team members. While the lethal injection procedures do not spell out in exact detail what training each team member must have, they do provide significant guidance and clearly require that the medically qualified personnel chosen for the execution team have adequate certification and training for their respective positions.

Our precedent makes clear that this Court's role is not to micromanage the executive branch in fulfilling its own duties relating to executions. We will not second-guess the DOC's personnel decisions, so long as the lethal injection protocol reasonably states, as it does here, relevant qualifications for those individuals who are chosen.

The next significant issue raised by Lightbourne focuses on whether DOC's protocol for assessing consciousness is adequate. If the inmate is not fully unconscious when either pancuronium bromide or potassium chloride is injected, or when either of the chemicals begins to take effect, the prisoner will suffer pain. Pancuronium bromide causes air hunger and a feeling of suffocation, and potassium chloride burns and induces a painful heart attack.

If the sodium pentothal is properly injected, it is undisputed that the inmate will not feel pain from the effects of the subsequent chemicals. While we cannot determine whether Diaz suffered pain, as detailed above, the protocol has changed since the Diaz execution, with the most significant change consisting of a pause after the sodium pentothal is injected in order to assess the inmate's consciousness. The DOC has clearly attempted to reduce the risk that the human errors will occur in future executions.

Although Lightbourne suggests that trained medical personnel would do a better job of assessing consciousness, based on the evidence presented below and after reviewing the newly revised protocol, we cannot conclude that Lightbourne has sufficiently demonstrated that the alleged deficiencies rise to the level of an Eighth Amendment violation. A claim that the protocol can be improved and the potential risks of error reduced can always be made. However, as this Court has already recognized, the Eighth Amendment is not violated simply because there is a mere possibility of human error in the process.

Moreover, this claim must be reviewed in light of the testimony presented. As mentioned above, sodium pentothal is an extremely fast-acting sedative which will have an immediate effect if it is injected properly. According to Dr. Dershwitz, a ***352** person will be rendered unconscious in a minute or less if only a few hundred milligrams are injected into the patient. In lethal injection procedures in which five grams of this chemical are injected, it should be clear that there is a problem if the inmate is still talking minutes after the injection, as occurred in Diaz's execution. Moreover, the August 2007 procedures requires the warden to determine that the inmate is indeed unconscious "after consultation." Warden Cannon also testified that he would consult the medically qualified members of his team in making this assessment. If the warden determines that there is a problem and the inmate is not unconscious, he must suspend the execution process and the execution team will assess the viability of the secondary access site. Once a viable access site has been secured, the team warden will order the execution to proceed, and the executioners will inject another five grams of sodium pentothal into the inmate. Thus, even if the first five grams of the drugs were injected subcutaneously and took longer to be absorbed into the inmate's system, the inmate would have a total of ten grams in his system by the time that the warden made his second assessment of unconsciousness, which is required before the pancuronium bromide is injected.

With regard to the Dyehouse memorandum recommending the use of a BIS monitor to more accurately assess the level of consciousness of the inmate, it might be beneficial to incorporate a device that could monitor the inmate's level of sedation to ensure the inmate will not experience subsequent pain of execution. However, the Court's role

regarding the executive branch in carrying out executions is limited to determining whether the current procedures violate the constitutional protections provided for in the Eighth Amendment.

We do not believe that it is within this Court's purview to mandate the use of a specific device to assess consciousness. We reaffirm the Court's essential holding in *Sims* that "determining the methodology and the chemicals to be used are matters best left to the Department of Corrections." *Sims,* 754 So.2d at 670. Unless the United States Supreme Court intends for the judicial branch to exercise detailed supervisory authority over the process of lethal injection, we do not consider the failure of the DOC to incorporate the use of the BIS monitor to constitute an Eighth Amendment violation in itself.

Determining the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation. Lightbourne has failed to overcome the presumption of deference we give to the executive branch in fulfilling its obligations, and he has failed to show that there is any cruelty inherent in the method of execution provided for under the current procedures.

Alternatively, even if the Court did review this claim under a "foreseeable risk" standard as Lightbourne proposes or "an unnecessary" risk as the *Baze* petitioners propose, we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation. As stressed repeatedly above, it is undisputed that there is no risk of pain if the inmate is unconscious before the second and third drugs are administered. After Diaz's execution, the DOC added additional safeguards into the protocol to ensure the inmate will be unconscious before the execution proceeds. In light of these additional safeguards and the amount of the sodium pentothal used, which is a lethal ***353** dose in itself,[25] we conclude that Lightbourne has not shown a substantial, foreseeable or unnecessary risk of pain in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment protections.

25 As defense counsel conceded during oral argument, there was no evidence presented that once the five-gram dose of sodium pentothal has been properly administered and an inmate is rendered unconscious, there is any likelihood that he will become conscious during the execution, even if the procedure lasts for thirty minutes or more. The evidence clearly established that this dose is lethal and once unconsciousness is reached, the inmate will slip only deeper into unconsciousness until death results. This conclusion is borne out by the medical testimony.

CONCLUSION

After reviewing the evidence and testimony presented below and the lethal injection procedures themselves, we affirm the circuit court's order denying relief for the reasons set forth above and deny Lightbourne's all writs petition. Lightbourne has failed to show that Florida's current lethal injection procedures, as actually administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution.

It is so ordered.

LEWIS, C.J., and WELLS, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

ANSTEAD, J., concurs in result only.

All Citations

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10 F.Supp.2d 205
United States District Court,
N.D. New York.

Susan LONG, Transactional Records Access Clearinghouse Syracuse University, and David Burnham, Transactional Records Access Clearinghouse Syracuse University, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

No. 98–CV–370.
|
July 7, 1998.

Synopsis
In ongoing action brought by nonprofit research organization against United States Department of Justice pursuant to Freedom of Information Act (FOIA), organization moved for order directing Department of Justice (DOJ) to produce index of withheld documents and portions of documents pursuant to *Vaughn*. Justice Department cross-moved for protective order and to stay discovery pending filing of summary judgment motion. The District Court, Hurd, United States Magistrate Judge, held that: (1) District Court would require DOJ to create *Vaughn* Index of documents with respect to which it claimed statutory exemption from disclosure; (2) questions of fact and of DOJ's good faith precluded grant of protective order with respect to plaintiffs' interrogatories and document requests; and (3) District Court would not compel DOJ to comply with plaintiffs' requests for admissions.

Plaintiffs' motion granted; defendant's motion denied in part and granted in part.

Attorneys and Law Firms

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United States Department of Justice, Washington, DC (Michael S. Weinstein, of counsel), for U.S. Attorneys.

MEMORANDUM–DECISION and ORDER

HURD, United States Magistrate Judge.

I. *INTRODUCTION*

The plaintiffs have moved for an order directing the defendant to provide their attorneys with an index of withheld documents and portions of documents at issue pursuant to *Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973), *cert. denied,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974)("*Vaughn* Index"). The defendant has opposed the motion and filed a cross-motion for a protective order and to stay discovery pending the filing of a summary judgment motion. In a reply, the plaintiff opposed the cross-motion. Oral argument was heard on June 11, 1998, in Utica, New York, and decision was reserved.

II. *BACKGROUND*

Plaintiffs Susan Long ("Long") and David Burnham are co-directors of the Transactional Records Access Clearinghouse ("TRAC"). TRAC is a nonprofit research organization affiliated with Syracuse University. Its mission is to compile and disseminate comprehensive information about the functioning of federal enforcement and regulatory agencies. Plaintiffs claim a statutory right to information under the Freedom of Information Act ("FOIA") 5 U.S.C. § 552.

A. *FOIA Request to Western Kentucky*

Around November 18, 1996, Michael Troop ("Troop"), United States Attorney for the Western District of Kentucky, criticized TRAC's data related to the handling of referrals from the Drug Enforcement Administration by his office. On November 27, 1996, Long submitted a FOIA request for records to Troop. The U.S. Attorney responded on November 29, 1996, stating that all requests for Department of Justice ("DOJ") information must go through the Executive Office of the United States Attorney FOIA Unit ("EOUSA") in Washington, D.C. On December 9, 1996, Long repeated her request to the Western District of Kentucky and sent an identical FOIA request to EOUSA. On May 21, 1997,

EOUSA responded to Long's request by releasing two pages and asserting that the release was a full response to Long's FOIA request. Long telephoned EOUSA because the May 21 response did not fully respond to the November 27 request. During the month of June 1997, six months after the FOIA request, computer tapes containing data from the office computer system were destroyed during a "massive shredding."

***208** On June 17, 1997, EOUSA supplemented its response to Long's FOIA request by releasing three additional records consisting of eighty pages. EOUSA refused to release any additional responsive records citing the exceptions from disclosure under FOIA, 5 U.S.C. § 552(b)(3), (b)(7)(A), (b)(7)(C), and Fed.R.Crim.P. 6(e) which governs the disclosure and recording of grand jury proceedings.

On July 14, 1997, Long sent a letter appealing the determination made by EOUSA. By letter dated November 9, 1997, plaintiffs asked EOUSA to confirm that the FOIA request was processed in accordance with the requirements of the Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C. § 552(a)(3)(B)-(D). By letter dated November 19, 1997, EOUSA confirmed that it had been implementing the Electronic FOIA Amendments when it responded to Long's FOIA request.

B. *FOIA Request to Minnesota*

On August 6, 1997, Long submitted a request to the United States Attorney for the District of Minnesota and EOUSA for nine categories of records concerning that office's computerized record-keeping systems for law enforcement data.

On November 6, 1997, EOUSA responded by releasing five pages in full, withholding one page in full, and withholding three pages in part, on the ground that the withheld pages were protected pursuant to the deliberative process privilege and the law enforcement exemption of FOIA. 5 U.S.C. § 552(b)(5), (b)(7)(C).

III. *DISCUSSION*

A. *Vaughn Index*

Plaintiffs argue that their motion for a *Vaughn* Index should be granted because the Government has provided insufficient information to sustain the exemption claim under FOIA.

An agency may deny a FOIA request if the information requested falls within one of nine statutory exemptions set forth in 5 U.S.C. § 552(b).[1] When there is a factual ***209** dispute whether the records actually fall within one of the nine statutory exemptions, the court can inquire through a *Vaughn* Index into the reasons the agency is withholding the information. *Vaughn,* 484 F.2d 820, 826–28. The agency bears the burden of proving the validity of the exemptions claimed. *Brown v. Federal Bureau of Investigation,* 658 F.2d 71, 73 (2d Cir.1981).

1 The nine statutory exemptions apply to information which is:

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security

> intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
>
> (9) geological and geophysical information and data, including maps, concerning wells.
>
> 5 U.S.C. § 552(b)(1)-(9)(1996 & Supp.1998).

Conclusory and generalized allegations, as well as the mere reiteration of statutory language, is unacceptable. *E.P.A. v. Mink,* 410 U.S. 73, 93, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). Parties who seek documents through FOIA are at a disadvantage when a government agency refuses to turn over records claiming statutory exemption because the seeking party can only speculate as to the exact nature of the withheld documents. *Brown,* 658 F.2d at 73. To alleviate this disadvantage, the government agency must create a *Vaughn* Index to "assist the trial court in its de novo review of agency refusals to disclose materials or portions of materials." *Ferguson v. F.B.I.,* 722 F.Supp. 1137, 1144 (S.D.N.Y.1989). The *Vaughn* Court stated that the index would assist the trial court to "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." 484 F.2d at 826.

In this case, the DOJ bears the burden of showing the validity of the exemptions claimed by EOUSA. The defendant has simply withheld certain requested documents claiming exemptions under 5 U.S.C. § 552(b)(3), (b)(5), (b)(7)(A)-(D) and Fed.R.Crim.P. 6(e). More than recitation of the statutory language is required in order for the DOJ to prevail. *See Mink,* 410 U.S. at 93, 93 S.Ct. 827. Here, plaintiffs can only speculate as to the nature of the documents and the validity of the statutory reasons for exemption that EOUSA cited. *See Brown,* 658 F.2d at 73. To alleviate this inequality and create balance between the parties, DOJ must create a *Vaughn* Index to separate the disclosable and nondisclosable documents and to highlight to the court which FOIA provision is associated with which nondisclosable document. *See id.* at 74. This will allow the court to neutrally review the nondisclosable documents and allow the plaintiffs "to present [their] case effectively." *See id.*

B. *Stay of Discovery and Protective Order*

Defendant moves for a protective order staying discovery until such time as its motion for summary judgment has been filed. Plaintiffs argue in opposition that the adequacy of the agency's search for requested documents was insufficient, therefore discovery should carry forward in order to reveal the adequacy of the search.

In order for a government agency to prevail on a motion for summary judgment in a FOIA case, it must prove through a *Vaughn* Index "that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from FOIA inspection requirements." *Bay Area Lawyers Alliance v. Department of State,* 818 F.Supp. 1291, 1295 (N.D.Cal.1992) (citing *Goland v. CIA,* 607 F.2d 339, 352 (D.C.Cir.1978)). Further, the agency must show that it conducted an adequate search for documents. *Carney v. United States Dep't of Justice,* 19 F.3d 807, 812 (2d Cir.1994). Adequacy of a search can be shown by affidavits submitted by the agency that are " 'relatively detailed and nonconclusory and must be submitted in good faith.' " *Simmons v. United States Dep't of Justice,* 796 F.2d 709, 712 (4th Cir.1986) (quoting *Goland,* 607 F.2d at 339).

In addition, the affidavits must reasonably outline the method of search for the requested records and show that all likely responsive files were searched. *Oglesby v. United States Dep't of the Army,* 920 F.2d 57, 68 (D.C.Cir.1990). A search is complete where the declaration "describes with particularity the files that were searched, the manner in which they were searched, and the results of the search." *Steinberg v. United States Dep't of Justice,* 23 F.3d 548, 552 (D.C.Cir.1994). The filing of a *Vaughn* Index ***210** and affidavits that outline the method and adequacy of the search will allow the court to make an informed decision whether to grant summary judgment and forgo discovery, or decide that discovery is needed to further investigate the extent of the search for documents.

Here, plaintiff needs discovery because it is alleged that defendant insufficiently searched for documents. The search conducted by the DOJ and outlined in the affidavits submitted in support of its motion fails to meet the test because they are not sufficiently detailed and are conclusory. *Simmons,* 796 F.2d at 712. The affidavits do not reasonably outline the method of the search to a degree which shows that all

likely responsive files were searched, therefore, discovery is needed. In addition, the defendant's affidavits raise questions as to the adequacy of the search performed by the local United States Attorney Offices and the EOUSA. Affidavits by three local employees Wheatley, Hill, and Small, state that no search for records was required because all requested material is available with EOUSA. This claim is in direct conflict with the affidavits of Menton and Bryant, members of the EOUSA who claim that some data and procedures are local in nature and are only available from the local office. Further, Carol J. Uebelhoer, Systems Manager for the U.S. Attorney's Office for the Western District Kentucky, states in her affidavit that records were destroyed in June of 1997, six months after plaintiffs' FOIA requests. This immediately brings into question good faith on the part of DOJ, the extent of DOJ's and EOUSA's search, and their ability to identify and extract relevant records before the records destruction.

Defendant argues that it is improper to proceed with discovery until after DOJ has filed a motion for summary judgment. *See Simmons,* 796 F.2d at 710; *Military Audit Project v. Casey,* 656 F.2d 724, 738, 751–52 (D.C.Cir.1981); *Goland,* 607 F.2d at 353. This argument is inappropriate here. For example, in *Simmons,* the court granted defendant's motion for a stay of discovery until the defendant had filed a motion for summary judgment on the grounds that its affidavits sufficiently detailed the reasons for nondisclosure and the court reviewed the withheld documents *in camera. Simmons,* 796 F.2d at 712. Similarly, in *Casey* and *Goland,* the defendants submitted sufficient affidavits and documentation for the court to determine that the search for documents was adequate and summary judgment was granted. *Simmons,* 796 F.2d at 710, *Goland,* 607 F.2d at 353.

Here, the affidavits filed by DOJ do not sufficiently detail the reasons for nondisclosure and the court has not reviewed a *Vaughn* Index or the documents *in camera.* In fact, the only evidence of nondisclosure is boilerplate language cited from the statute. Further, as stated before, there are direct contradictions, questions of fact, and questions of good faith that arise when reviewing the adequacy of the search for documents conducted by EOUSA and the local United States Attorney Offices.

The plaintiffs' demands for interrogatories and requests for production of documents are appropriate to test the adequacy of the search. However, the plaintiffs' requests for admissions cover a far broader range, and need not be responded to by the defendant at this stage of the proceedings.

Upon the creation of a *Vaughn* Index and with responses to the demands for interrogatories, the plaintiffs will be in a position to respond to defendant's motion for summary judgment. Additionally, and just as important, the District Judge will have the necessary information to review DOJ's refusal to disclose and the adequacy of its search. A stay of discovery must be denied. *Ruotolo v. Department of Justice,* 53 F.3d 4, 11 (2d Cir.1995)("[T]he better course would have been ... to grant the adjournment ... for further discovery in aid of [plaintiffs'] opposition to the summary judgment motion.... Further discovery should have been afforded to the [plaintiffs].").

IV. *CONCLUSION*

Upon consideration of plaintiffs' motion for a *Vaughn* Index, and defendant's cross-motion for a stay of discovery and a protective order, it is

***211** ORDERED, that

1. Plaintiffs' motion is GRANTED;

2. On or before August 7, 1998, defendant shall provide plaintiffs' attorneys with an index of the records and portions that have been withheld, describing each such record or portion of a record withheld, and detailing the agency's claims for withholding such record or portion of a record, correlating each asserted exemption of the Freedom of Information Act with the material for which the defendant claims the exemption applies;

3. Defendant's motion for a stay of discovery is DENIED;

4. Defendant's motion for a protective order is DENIED in part, and defendant is directed to respond to plaintiffs' interrogatories and production of documents on or before August 7, 1998;

5. Defendant's motion for a protective order is GRANTED in part, and defendant need not respond to plaintiffs' requested admissions; and

6. A summary judgment motion shall not be filed by the defendant until completion of the above discovery.

IT IS SO ORDERED.

All Citations

10 F.Supp.2d 205

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484 F.2d 820
United States Court of Appeals,
District of Columbia Circuit.

Robert G. VAUGHN, Appellant,

v.

Bernard ROSEN, Executive Director, United States Civil Service Commission, et al.

No. 73-1039.

Argued June 7, 1973.

Decided Aug. 20, 1973.

Rehearing Denied Oct. 18, 1973.

Synopsis

A law professor doing research on the Civil Service Commission brought an action pursuant to the terms of the Freedom of Information Act to compel disclosure by the Commission of certain reports of the Bureau of Personnel Management. The Commission, by a conclusory affidavit, claimed that the documents in question were of such nature as to fall within exceptions to the Act's general requirements of disclosure. The District Court for the District of Columbia, John H. Pratt, J., entered summary judgment for the Commission on that ground. On the professor's appeal, the Court of Appeals, Wilkey, Circuit Judge, held that the record before it was insufficient to permit a determination of whether the documents were subject to disclosure under the Act, and remanded the case with directions that the Commission provide detailed justification of its claims, that it specifically itemize and index the documents or portions thereof so as to show which were disclosable and which were exempt and that, in its discretion, the trial court might designate a special master to examine the documents and evalute the Commission's contentions of exemption.

Remanded with directions.

Attorneys and Law Firms

***820** ****340** Ronald L. Plesser, Washington, D. C., with whom Alan B. Morrison, Washington, D. C., was on the brief, for appellant.

John C. Lenahan, Asst. U. S. Atty., with whom Harold H. Titus, Jr., U. S. Atty., John A. Terry and Derek I. Meier, Asst. U. S. Attys., were on the brief, for appellees.

Before ROBINSON and WILKEY, Circuit Judges, and FRANK A. KAUFMAN,[*] District Judge for the District of Maryland.

[*] Sitting by designation pursuant to 28 U.S.C. § 292(c).

Opinion

***821** ****341** WILKEY, Circuit Judge:

Appellant sought disclosure under the Freedom of Information Act[1] of various government documents, purportedly evaluations of certain agencies' personnel management programs. The District ***822** ****342** Court denied disclosure, presumably on the ground the documents fell within one or more exemptions to the FOIA.[2] The scant record makes it impossible to determine if the information sought by appellant is indeed exempt from disclosure; we must remand the case to the trial court for further proceedings.

[1] "5 U.S.C. § 552. *Public information; agency rules, opinions, orders, records, and proceedings*
"(a) Each agency shall make available to the public information as follows:
"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public–
"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
"(B) statements of the general course and methods by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying–

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

"(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if–

"(i) it has been indexed and either made available or published as provided by this paragraph; or

"(ii) the party has actual and timely notice of the terms thereof.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

"(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

"(b) This section does not apply to matters that are–

"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells.

"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

[2] The trial court below granted appellee's motion for summary judgment without giving any reasons for its action. We do not, therefore, know why the District Court found the documents to be exempt from disclosure.

I. *Facts*

Overall responsibility to evaluate, oversee, and regulate the personnel management activities of the various federal agencies rests with the Civil Service Commission.[3] The Bureau of Personnel Management, the arm of the Civil Service Commission for this task, works with the agencies in evaluating their personnel management programs. After each evaluation is complete, the Bureau issues a report entitled Evaluation of Personnel Management. These evaluations assess the personnel policies of a particular agency and set forth recommendations and policies customarily adopted by both agencies and Commission.[4] Appellant, a law professor doing research into the Civil Service Commission, sought disclosure of these evaluations and certain other special reports of the Bureau of Personnel Management.[5]

[3] *See* Exec.Order 9830 (24 Feb. 1947).

[4] The documents under discussion are not a part of the record on appeal; the court does not, therefore, know precisely what is contained in the evaluations. Both parties, however, seem to agree that the general nature of the documents is as we have described them in the text. We may, therefore, accept this description for purposes of our discussion.

[5] The documents other than the evaluations were described as "special studies of the Commission for fiscal years 1969-72." The exact nature of these "special studies" does not appear from the record, but it appears that they deal with the same general issues as do the evaluations.

The Director of the Bureau of Personnel Management Evaluation declined to release the documents sought.[6] This refusal to disclose was sustained by the Executive Director of the Civil Service Commission, who asserted that the information was exempt from disclosure because it (1) related solely to the internal rules and practices of an agency;[7] (2) constituted inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with ***823** ****343** the agency;[8] and (3) was composed of personal and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[9]

[6] Letter of Gilbert A. Schulkind (15 June 1972) (Joint App. at 15).

[7] The FOIA provides that
this section does not apply to matters that are

_____

related solely to the internal personnel rules and practices of an agency . . . .
5 U.S.C. § 552(b)(2) (1970).

[8] The FOIA provides that
This section does not apply to matters that are

_____

inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
5 U.S.C. § 552(b)(5) (1970).

[9] The FOIA provides that
This section does not apply to matters that are

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personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
5 U.S.C. § 552(b)(6) (1970).

After this refusal appellant filed this action in the District Court, seeking injunctive relief and an order requiring disclosure of the requested materials in accordance with 5 U.S.C. § 552(a)(3) (1970). The Government filed a motion to dismiss, or in the alternative for summary judgment, in which it was contended that the reports fell within the three exemptions given above.

Aside from legal arguments, the sole support, regarding the contents of the documents and their exemption, of the Government's motion was an affidavit of the Director of the Bureau of Personnel Management Evaluation. This affidavit did not illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the Director's opinion that the evaluations were not subject to disclosure under the FOIA. On the basis of this affidavit, the trial court granted the Government's motion for summary judgment. This appeal followed.

II. *Problems of Procedure and Proof under the Freedom of Information Act*

The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself.[10] This court has repeatedly stated that these exemptions

from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act.[11] By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions to the FOIA.[12] Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure.

10 *See* footnote 1, *supra*.

11 "The Legislative plan creates a liberal disclosure requirement limited only by specific exemptions, which are to be narrowly construed." Getman v. N. L. R. B., 146 U. S.App.D.C. 209, 211, 450 F.2d 670, 672, stay denied, 404 U.S. 1204, 92 S.Ct. 7, 30 L.Ed. 2d 8 (1971). *See also* Bristol-Myers v. F. T. C., 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938, cert. denied, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970); M. A. Shapiro & Co. v. S. E. C., 339 F.Supp. 467, 469 (D.D. C.1972).

12 *See* 5 U.S.C. § 552(a)(3) (1970).

In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, ***824 **344** and this case provides a classic example of such a situation. Here the Government contends that the documents contain information of a personal nature the disclosure of which would constitute an invasion of certain individuals' privacy. This factual characterization may or may not be accurate. It is clear, however, that appellant cannot state that, as a matter of his knowledge, this characterization is untrue. Neither can he determine if the personal items, assuming they exist, are so inextricably bound up in the bulk of the documents that they cannot be separated out. The best appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information.

E.P.A. v. Mink[13] differentiates between the action by the trial court called for when the factual nature of the disputed information is known and when it is not known. The first portion of the Supreme Court's decision dealt with documents the factual nature of which was not disputed; all parties agreed that the documents had been classified as "secret" by the President. The first exemption under the FOIA provides that documents which are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," are exempt from disclosure.[14] Since the factual nature of the documents was undisputed and since under this undisputed description of the documents they clearly fit within the exemption, the Court held that no further inquiry or argument was permitted; they need not be revealed.

13 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

14 5 U.S.C. § 552(b)(1) (1970).

A second group of documents considered by the Court in *Mink* had not been classified "secret." They were claimed to be exempt as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[15] There was, however, a *factual* dispute regarding whether the documents actually fit this description. The Court concluded that, while material dealing with facts contained in such memoranda could be disclosed, memoranda dealing with law or policy were exempt. There was a still further *factual* dispute regarding how much of the material was factual, how much law or policy, and how much a combination of the two. With regard to this material which did not fit squarely within the language of the exemption, the Court remanded to the trial court to make a determination regarding the actual composition of the material.

15 5 U.S.C. § 552(b)(5) (1970).

The disputed information in this case is analogous to the second group of documents considered in *Mink*, in that on the record facts they do not indisputably fit within one of the exemptions to the FOIA. If the factual nature of the documents were so clearly established on the record, then the court would inquire no further and would make the legal ruling as to whether they fit within the defined exemption or exemptions. In this situation, in which there is a dispute regarding the nature of the information, the Supreme Court in *Mink* provided the outline of how trial courts should approach

the job of making this factual determination.[16] Our discussion here is intended to be an elaboration of this outline.

16 In E. P. A. v. Mink, 410 U.S. 73, 92-93, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the Supreme Court provided guidance for the trial court regarding when it should conduct an *in camera* examination. The Court made it clear that it was not always necessary for a court to conduct an *in camera* examination.

This lack of knowledge by the party seeing disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under ***825** ****345** the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to the Act. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously an appellate court is even less suited to making this inquiry than is a trial court.

Here we are told that certain documents fall under three exemptions which permit the agencies to decline disclosure.[17] We do not know precisely how voluminous this information is, but from the general descriptions provided it seems reasonable to conclude that the documents run to many hundreds of pages. We could test the accuracy of the trial court's characterizations by committing sufficient resources to the project, but the cost in terms of judicial manpower would be immense.

17 *See* footnotes 7-9, *supra*.

This burden is compounded by the fact that an entire document is not exempt merely because an isolated portion need not be disclosed.[18] Thus the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information.[19] It is quite possible that part of a document should be kept secret while part should be disclosed. When the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information. Isolating what exemptions apply to what parts of a document makes the burden of evaluating allegations of exemption even more difficult.

18 This was made clear in E. P. A. v. Mink, 410 U.S. 73, 85-94, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). *See also* Sterling Drug v. F. T. C., 146 U.S.App.D.C. 237, 243, 450 F.2d 698, 704 (1971).

19 It may be, of course, that the exempt and the non-exempt portions are so inextricably intertwined that it is impossible to separate them. The issue of whether they are intertwined is, itself, a matter of fact which must be determined by the trial court as the trier of fact. *See* E. P. A. v. Mink, 410 U. S. 73, 92, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible. The burden has been placed specifically by statute on the Government. Yet under existing procedures, the Government claims all it need do to fulfill its burden is to aver that the factual nature of the information is ***826** ****346** such that it falls under one of the exemptions. At this point the opposing party is comparatively helpless to controvert this characterization. If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation. This is clearly not what Congress had in mind.

In two definite ways the present method of resolving FOIA disputes actually *encourages* the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed.

First, there are no inherent incentives that would affirmatively spur government agencies to disclose information. Under current procedures government agencies *lose* very little by refusing to disclose documents. At most they will be put to a court test stacked in their favor, the burden of which can be easily shifted to another by simply averring that the information falls under one of several unfortunately imprecise exemptions. Conversely, there is little to be *gained* by making the disclosure. Indeed, from a bureaucratic standpoint, a general policy of revelation could cause positive harm, since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure.

Secondly, since the burden of determining the justifiability of a government claim of exemption currently falls on the court system there is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information. Let the court decide! And the tactical ploy is, to the extent that the number of facts in dispute are increased, the efficiency of the court system involved in that dispute resolution will be decreased. If the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt. Thus, as a tactical matter, it is conceivable that an agency could gain an advantage by claiming overbroad exemptions.

The simple fact is that existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information. To possible ways of achieving this goal we now turn our attention.

III. *Procedures for Testing the Classification of Claims to Exemptions*.

A. *Detailed Justification*

The problem of assuring that allegations of exempt status are adequately justified is the most obvious and the most easily remedied flaw in current procedures. It may be corrected by assuring government agencies that courts will simply no longer accept conclusory and generalized allegations of exemptions,[20] such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments. An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be ***827 **347** composed without excessive reference to the actual language of the document.[21]

20 This requirement is clearly mandated by the Supreme Court's language in *Mink*:
An agency should be given the opportunity, by means of *detailed affidavits or oral testimony*, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material . . . [subject to disclosure].
E. P. A. v. Mink, 410 U.S. 73, 93, 93 S.Ct. 827, 839, 35 L.Ed.2d 119 (1973) (emphasis added).

21 In E. P. A. v. Mink, *ibid*., the Supreme Court made the following relevant comment:
[T]he Agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter.
In employing these techniques approved by the Court the agency should be careful that it does not discuss only the representative example while ignoring the bulk of the documents which may be disclosable. Such a course of action is not permissible under the Court's language in *Mink* and would lead to the undesirable result of sweeping disclosable material under a blanket allegation of exemption.

B. *Specificity, Separation, and Indexing*

The need for adequate specificity is closely related to assuring a proper justification by the governmental agency. In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt. This could be achieved by formulating

a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document.[22]

22 In our opinion in Sterling Drug, Inc. v. F. T. C., 146 U.S.App.D.C. 237, 450 F.2d 698 (1971), we remanded a FOIA case to the trial court because it was impossible to determine from the record if the trial court had considered whether all of the disputed information was exempt or whether part was exempt and part not. There we said:

> We must agree, however, that there is no indication in the opinion below that the judge considered the possibility of deleting portions of the documents. It may well be that making deletions would not change the character of these documents, since they appear to consist primarily of the thoughts and recommendations of the Commission and its staff. However, there may be appendices or statements of facts which are clearly subject to disclosure. See Soucie v. David, 145 U.S.App. D.C. 144 at 155, 448 F.2d 1067 at 1078 (1971). We must therefore remand the case so that the District Court judge can consider this possibility and state in his opinion that he has done so.

146 U.S.App.D.C. at 243, 450 F.2d at 704. This case is similar in that we have no way of determining the scope of the trial court's determination of exemption. From all that appears on the record, the trial judge's determination was that he found all information exempt under all three of the alleged exemptions. This inability to determine which exemptions apply to what portions of the information gives rise to the need for an adequate indexing system such as described above.

Such an indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification. Opposing counsel should consult with a view toward eliminating from consideration those portions that are not controverted and narrowing the scope of the court's inquiry. After the issues are focused, the District Judge may examine and rule on each element of the itemized list. When appealed, such an itemized ruling should be much more easily reviewed than would be the case if the government agency were permitted to make a generalized argument in favor of exemption.

The need for an itemized explanation by the Government is dramatically illustrated by this case. The Government claims that the documents, as a whole, are exempt under three distinct exemptions. From the record, we do not and cannot know whether a particular portion is, for example, allegedly exempt because it constitutes an unwarranted invasion of a person's privacy or because it is related solely to the internal rules and practices of an agency. While it is not impossible, it seems highly unlikely that a particular element of the information sought would be exempt under both exemptions. Even if isolated portions of the document are exempt under more than one exemption, it is preposterous to contend that all of the information is equally exempt under all of ***828 **348** the alleged exemptions. It seems probable that some portions may fit under one exemption, while other segments fall under another, while still other segments are not exempt at all and should be disclosed. The itemization and indexing that we herein require should reflect this.

C. *Adequate Adversary Testing*

Given more adequate, or rather less conclusory, justification in the Government's legal claims, and more specificity by separating and indexing the assertedly exempt documents themselves, a more adequate adversary testing will be produced. Respect for the enormous document-generating capacity of government agencies compels us to recognize that the raw material of an FOIA lawsuit may still be extremely burdensome to a trial court. In such cases, it is within the discretion of a trial court to designate a special master to examine documents and evaluate an agency's contention of exemption. This special master would not act as an advocate; he would, however, assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge.

IV. *Conclusion*

Upon remand the Government should undertake to justify in much less conclusory terms its assertion of exemption and to index the information in a manner consistent with Part III above. The trial judge may, if he deems it appropriate, appoint a special master to undertake an evaluation of the information.

The procedural requirements we have spelled out herein may impose a substantial burden on an agency seeking to avoid disclosure. Yet the current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution–for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden

is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.[23]

23 In this regard, administrative agencies should consider the example set by government investigative agencies following the passage of the Jencks Act. 18 U.S.C. § 3500 (1970). Confronted with a Congressional mandate to disclose information relevant to the testimony of witnesses in criminal trials, investigative agencies adopted procedures that assured proper disclosure. Investigative reports were prepared in a form in which the portions to which defense counsel should have access were easily removed from the file and made available to the defense counsel. Other parts of the file were kept segregated and relatively few problems were encountered.

For the reasons given, the case is remanded for further proceedings consistent with this opinion.

So ordered.

All Citations

484 F.2d 820, 157 U.S.App.D.C. 340

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