Mason v. Stock

1994

BELOT, District Judge.

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This is an excessive force action under 42 U.S.C. § 1983. Plaintiff alleges that, on the night of November 7, 1991, while driving through the city of Haysville, he was stopped by Haysville police officer Timothy Stock, wrongfully accused of driving under the influence of alcohol, removed from his car, roughed up, detained, and taken to a hospital for several hours. Plaintiff's blood-alcohol content was found to be 0.00. Officer Stock, however, claims to have sincerely and reasonably believed that plaintiff was under the influence of alcohol.

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Plaintiff served requests for production (RFPs) and interrogatories on the City of Haysville seeking police personnel files and internal affairs files. Haysville objected to plaintiff's RFPs on essentially two grounds: (1) that the requests were not reasonably calculated to lead to the discovery of admissible evidence; and (2) that the information sought was privileged. Plaintiff subsequently filed this motion to compel.

Plaintiff claims he is entitled to all the police personnel files and internal affairs files because they are relevant to his "pattern and practice" claim against Haysville. Plaintiff is particularly interested in records of complaints that have previously been lodged against the Haysville police department, contending Haysville should be ordered to provide access to: (1) all complaints of police misconduct received; (2) all investigatory files and case files related to those complaints; (3) all records of the investigation of those complaints; (4) all documentation related to the disposition of each complaint; and (5) the personnel files of all officers requested and any others named in any such complaint. Plaintiff argues that he and plaintiffs like him will not be able to establish § 1983 claims against municipalities without such information.

Haysville concedes that portions of the personnel and internal affairs files concerning the incident at issue in this case are probably discoverable. However, Haysville maintains that plaintiff is basically on a "fishing expedition" and that much of the information he is seeking is privileged and/or completely irrelevant to this case. With respect to the personnel files, Haysville contends that "[a]t least 99% of the documents ... requested cannot even arguably lead to the discovery of admissible evidence" and asserts that many of the files are privileged by virtue of statutorily recognized privacy interests in personnel records. With respect to the internal affairs files, Haysville claims that these too are largely irrelevant and, moreover, fall within a "federal common law privilege for the internal investigatory files of police departments [that] has been recognized for at least 25 years." (Doc. 78, p. 13).

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The scope of discovery under Federal Rule of Civil Procedure 26 is exceedingly broad. Parties may obtain discovery regarding any matter that is (1) "not privileged" and (2) "relevant to the subject matter involved in the pending action." Fed.R.Civ.P. 26(b)(1). The phrase "relevant to the subject matter involved in the pending action" "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978). Hence, any nonprivileged information is discoverable so long as it is "reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1).

In the present case, as discussed *supra*, Haysville claims that many of the documents sought by plaintiff are not discoverable under Rule 26 because they are either privileged or not reasonably calculated to lead to the discovery of admissible evidence. The court will first consider Haysville's assertions of privilege.

. . . First, Haysville contends that some of the information in its police files, particularly the personnel files, are privileged because of the privacy interests of its police officers. Second, Haysville contends that other information, particularly that in the internal affairs files, is privileged because of public interests in preventing disclosure.

Privacy interests of police officers

. . . .Rule 501 clearly authorizes federal courts to consult constitutional provisions in making privileges determinations. In *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432 (10th Cir.1981), a case not cited by Haysville, the Tenth Circuit considered whether and to what extent police officers had a right to prevent disclosure of personal matters within police personnel and investigative files. *Id.* at 435. Looking primarily to substantive due process decisions of the Supreme Court, *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425, 457, 97 S.Ct. 2777, 2797, 53 L.Ed.2d 867 (1977), the court acknowledged the existence of such privacy interests. The court then adopted the "Colorado test" for determining whether information contained in police and other governmental files is "of such a highly personal or sensitive nature that it falls within the zone of confidentiality." *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir.1989) (discussing *Lichtenstein*). Under this test,

> the court must consider, (1) if the party asserting the right has a legitimate expectation of privacy, (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner.

Lichtenstein, 660 F.2d at 435 (citing *Martinelli v. District Court in and for the City and County of Denver*, 199 Colo. 163, 612 P.2d 1083, 1091 (1980)).

Since *Lichtenstein*, the court has continued to recognize a constitutional right to privacy and confidentiality in personal information within government records. *See Flanagan*, 890 F.2d at 1570 ("The Supreme Court has recognized that the constitutional right to privacy protects an individual's interest in preventing disclosure by government of personal matters.") (citing *Whalen*); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir.1986) ("Due process thus implies an assurance of confidentiality with respect to certain forms of personal information possessed by the state."). Based on these authorities, the court concludes that the Haysville police officers have constitutionally-based privacy interests in personal matters contained within their police files and that such matters may be privileged.

It is a "venerable legal axiom that privileges are to be narrowly, not expansively, construed." *Hill v. Sandhu*, 129 F.R.D. 548, 550 (D.Kan.1990) (citing *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974)). This is especially true in federal civil rights actions, where an assertion of privilege must " 'overcome the fundamental importance of a team need to insure each citizen from unconstitutional state action.'" *Skibo v. City of New York*, 109 F.R.D. at 61 (quoting *Wood*, 54 F.R.D. at 13). Moreover, the privacy interests of police officers in personnel records "should be especially limited in view of the role played by the police officer as a public servant who must be accountable to public review." *King*, 121 F.R.D. at 191.

Construing the privacy interests of the Haysville police officers narrowly in the present case, the court views only one type of item in their personnel files as so highly personal and sensitive in nature that it should be safeguarded as privileged: the psychological evaluations of each of the Haysville police officers, including Officer Stock. *See Lichtenstein*, 660 F.2d at 435. All other items concern more official, duty connected types of information, such as payroll and vacation/absence records, official oaths, letters of appreciation, and periodic performance evaluations, and these clearly are not privileged.

Public interests in internal affairs files

The second type of privilege asserted is characterized by Haysville as a "self-policing privilege." (Doc. 65, attachments, Haysville's responses to plaintiff's RFPs). It is akin to the "executive privilege," *Lichtenstein*, 660 F.2d at 437, "official information privilege," *Kelly*, 114 F.R.D. 653; *King*, 121 F.R.D. at 190, and "self-critical analysis privilege," *Skibo*, 109 F.R.D. at 63-64, discussed by other federal courts. This privilege focuses on public interests in keeping police files confidential. The "self-policing" or "self-critical analysis" privilege in particular is predicated on the notion that disclosure of officers' observations made during past internal investigations of their co-officer's alleged misconduct could have a chilling effect on their willingness to be candid in criticizing their fellow officers during future investigations. *Lichtenstein*, 660 F.2d at 437; *Skibo*, 109 F.R.D. at 63-64 (describing "self critical analysis privilege" as aimed at "assur[ing] that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations"); *King*, 121 F.R.D. at 192 (discussing this aspect of the "official information" privilege as based on the theory that disclosure will "compromise internal police investigations by inhibiting the candor of police officers contributing information to those files"). Federal courts recognizing this privilege balance the various factors weighing in favor and against disclosure to determine whether police files should be disclosed. *Lichtenstein*, 660 F.2d at 437-38; *King*, 121 F.R.D. at 190-97.

After giving considerable thought to the arguments and authorities supporting a "selfpolicing" or "self-critical analysis" type of privilege, the court is unwilling to find that such a privilege exists in the present case. First, because privileges restrict access to facts and therefore can interfere with the search for the truth, this judge is philosophically opposed to the unnecessary multiplication of the number of privileges floating around in the sphere of federal jurisprudence under the rubric of general principles of common law. The Supreme Court has recently reiterated that " '[t]here is no federal general common law,' " *O'Melveny & Myers v. F.D.I.C.*, ___ U.S. ___, ___, 114 S.Ct. 2048, 2053, 129 L.Ed.2d 67 (1994) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938)), and the Court "has taken a cautious approach to expansion of common law privileges," *United States v. Burtrum*, 17 F.3d 1299, 1301 (10th Cir.1994) (discussing *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980); *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980); *University of Penn. v. EEOC*, 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990)). This court is consequently reluctant to acknowledge the existence of privileges beyond those traditionally recognized by the common law, such as the attorney-client privilege.

Second, the theoretical basis underlying a "self-policing" or "self-critical analysis" type of privilege (set forth *supra*) is, in this judge's view, fundamentally flawed. It has been questioned and challenged by many, including the Tenth Circuit and the revered Judge Weinstein. The Tenth Circuit has stated: "[I]t is doubtful that citizens and police officers will absolutely refuse to cooperate in investigations because of a few isolated instances of disclosure." *Lichtenstein*, 660 F.2d at 437. Judge Weinstein goes even further, thoroughly attacking the "chilling effect" concept and persuasively arguing that disclosure of police files to civil rights litigants is, at best, a "minute influence on officers' candor" and can, in some circumstances, serve to "increase candor [rather] than chill it." *King*, 121 F.R.D. at 192-93.

Third, even if the court was to recognize a so-called "self-policing privilege," the court does not find it applicable here. It is well established that a party asserting that documents or other materials covered by a production request are privileged must specifically identify those documents or other materials. *Conaco, Inc. v. United States Dept. of Justice*, 687 F.2d 724, 730 (3d Cir.1982); *Kelly*, 114 F.R.D. at 669. Blanket assertions of privilege will not do. Moreover, as stated *supra*, privileges are to be construed especially narrowly when asserted by officers or cities in federal civil rights actions. In the present case, Haysville has produced no evidence that its police officers have "clammed up" during past investigations and evaluations or will "clam up" in the future because internal affairs files are disclosed. Haysville has not established that any of the files contain statements by officers which, if disclosed, would inhibit them from being candid later on, and thus Haysville has not shown that the files fall within the narrowly-construed confines of the self-policing or self-critical analysis privilege it has asserted.

> Unless the government [Haysville], through competent declarations, shows the court *what interests* would be harmed, *how* disclosure under a protective order would cause the harm, and *how much* harm there would be, the court cannot conduct a meaningful balancing analysis.

Kelly, 114 F.R.D. at 669; *see King*, 121 F.R.D. at 189.