1997 WL 630183
United States District Court, S.D. New York.

Marisol A., et al., Plaintiffs,
v.
Rudolph W. GIULIANI, Mayor of the City of New York, et al., Defendants.

No. 95 CIV. 10533(RJW). | Oct. 10, 1997.

Opinion

MEMORANDUM DECISION AND ORDER

WARD, D.J.

***1** The municipal defendants in this action, including the City of New York ("defendants" or "the City"), have moved this Court for a protective order pursuant to Rule 26(c), Fed.R.Civ.P., prohibiting the release of or disclosure to any non-party of the court-ordered report prepared by the Case Review Team, until the report has been received in evidence at the trial of this action. For the following reasons, the motion is denied.

BACKGROUND

This class action was filed in December 1995 on behalf of children who have suffered, and some of whom continue to be at risk of, severe abuse and neglect. The complaint alleges that defendants, who are officials with responsibility for the Child Welfare Administration of the City of New York, now renamed the New York City Administration for Children's Services ("ACS"), mishandled plaintiffs' cases and, through action or failure to act, deprived plaintiffs of their rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution, under Article XVII of the New York State Constitution, as well as under several federal and state statutes.

On June 27, 1996, plaintiffs served defendants with a request for the production of a random sample of class members' case records to conduct a case record review. After hearing the parties, the Court directed on November 22, 1996 that a case record review proceed. The parties subsequently agreed that the case record review would be conducted jointly. In a stipulation "So Ordered" by the Court on January 28, 1997 ("the Stipulation"), the parties established a Case Review Team ("the CRT") to carry out the case review. The CRT consists of the Center for the Study of Social Policy, the United Way of New York City, and Larry G. Brown, the Director of the Performance Monitoring and Analysis Unit, Office of Children and Family Services, New York State Department of Social Services ("DSS").

Under the Stipulation, the CRT is to "conduct a review of an appropriate sample(s) of records of members of the class for the purpose of determining the accuracy of the factual allegations in the complaint concerning alleged deficiencies in the New York City child welfare system." Stipulation, ¶ 5. The Stipulation also provides that the "Case Review team shall produce a jointly written report based on the data obtained in the case record review. All parties reserve their right to present any other data or to call expert witnesses of their own selection at the trial in this matter." Stipulation, ¶ 8. It was later decided that the written report of the CRT ("the Report") would be issued in three stages.

Although the Stipulation requires that the "Case Review Team ... maintain the confidentiality of all case review information, case records and individual-identifying information," Stipulation, ¶ 21, there is no provision of confidentiality for the Report itself.

On August 13, 1997, the CRT issued the first stage of its Report to counsel and the Court. That day, Children's Rights Inc., counsel for plaintiffs, released the Report to the press. Defendants immediately sought an order from the Court prohibiting

further release of the Report. During a telephone conference with the parties on August 13, 1997, the Court directed that the Report not be released pending further consideration by the Court. That directive was reaffirmed in a subsequent telephone conference on August 14, 1997. At a court conference on September 10, 1997, the Court set a briefing schedule for the instant motion for a protective order.[1]

DISCUSSION

***2** Under Rule 26(c), Fed.R.Civ.P., a court may, for good cause shown, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including an order that "disclosure or discovery ... be had only on specified terms and conditions." The rule places the burden of showing good cause squarely on the movant.

Emphasizing that they are not asking that the Report be permanently sealed, defendants seek a protective order that would prohibit the release of the Report until such time as it is received in evidence at the trial of this matter. Their request centers on the timing of the disclosure of the Report.

According to defendants, this restriction is necessary "so that ACS can continue to function at the highest possible level without defeatism and demoralization." Defs.' Mem. in Supp. Mot. for a Protective Order ("Defs.' Mem.") at 6. Defendants claim that the press published abbreviated versions of both the first stage of the Report and the parties' comments, focusing on controversy and tending to emphasize that which it interpreted as negative. Affidavit of Commissioner Scoppetta in Supp. Mot. for a Protective Order ("Scoppetta Aff.") at ¶ 6. Such coverage, continues the City, "was needlessly embarrassing and demoralizing to many of the [ACS] staff." Scoppetta Aff. at ¶ 8.

I. The presumption of access

In *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), the Supreme Court discussed the common law right of public access to judicial documents:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, ... American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, ... and in a newspaper publisher's intention to publish information concerning the operation of government.

Id. at 597–98 (citations omitted).

A. Whether the Report is a "judicial document"

The Second Circuit explored the definition of "judicial document" in *United States v. Amodeo,* 44 F.3d 141 (2d Cir.1995). The panel rejected the Third Circuit's mechanical view of the term, which " 'focused on the technical question of whether a document is physically on file with the court." ' *Id.* at 145 (quoting *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 782 (3d Cir.1994)). Instead, the court held that

> ***3** the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access. We think that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.

Id.

The Court acknowledges that it is implicit in the Second Circuit's definition of "judicial document" that the document be

filed with the Court. It is a mere technicality, however, that the Report in the instant case has been submitted to, but not filed with, the Court. The Report was created pursuant to a Stipulation which was "So Ordered" by the Court. A procedure was established whereby drafts of the Report are circulated to the parties for comment. Once finalized, the Report is submitted to the Court, which, in turn, distributes it to the parties. The Report is the essence of a judicial document because it came into existence through a court order.

Furthermore, like the report in *Amodeo,* the Report at issue in this case is "relevant to the performance of the judicial function and useful in the judicial process." *Id.* at 146. According to the Stipulation, the purpose of the Report is to determine the accuracy of the factual allegations in the complaint concerning alleged deficiencies in the New York City child welfare system. Stipulation, ¶ 5. The determination of litigants' substantive rights is conduct at the heart of Article III. *United States v. Amodeo,* 71 F.3d 1044, 1049 (2d Cir.1995). Since the Report was ordered by the Court and is likely to play a significant role in the determination of the litigants' substantive rights in this case—be it as evidence at trial or as a basis for a dispositive motion—the Court considers it a judicial document. Having determined that the Report is a judicial document, the Court now must consider the strength of the presumption of access to the Report.

B. The strength of the presumption of access

The presumption of access is based on the need for federal courts to have a measure of accountability to the public and for the public to have confidence in the administration of justice. *Id.* at 1048. The weight to be given the presumption of access depends on "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* at 1049.

As explained in section I.A., *supra,* the Report is likely to play an important role in the Court's Article III function in this case. Since "the public has an 'especially strong' right of access to evidence introduced at trials," and to materials on which a court bases the grant of summary judgment, the presumption of access is strong. *See, Amodeo,* 71 F.3d at 1049 (citation omitted).

***4** The Second Circuit has also held that public access to discovery materials is "particularly appropriate when the subject matter of the litigation is of especial public interest." *In Re Agent Orange Prod. Liab. Litig.,* 821 F.2d 139, 146 (2d Cir.), *cert. denied,* 484 U.S. 953, 108 S.Ct. 344, 98 L.Ed.2d 370 (1987). The fate of children in the City's child welfare system is important to the public. This is demonstrated by the press coverage of this case and of several highly publicized instances of sometimes fatal child abuse in the metropolitan area.

That the defendants are City and State officials responsible for child welfare also weighs in favor of access. Speaking of the federal government, the First Circuit held that, "[t]he appropriateness of making court files accessible is accentuated in cases where the government is a party." *Federal Trade Comm'n v. Standard Fin. Management Corp.,* 830 F.2d 404, 410 (1st Cir.1987). The extension of this principle to State and City officials seems only logical. Members of the public have a discrete interest in monitoring agency-spending of their tax dollars.

The presumption of access to the Report is strong because it is likely to play an important role in the Court's Article III function and since both the parties and the subject matter of this litigation are of public interest.

II. Showing of good cause under Rule 26(c)

It is defendants' burden to overcome the strong presumption of access with a showing of good cause for the issuance of a protective order. *Agent Orange,* 821 F.2d at 145. The good cause requirement of Rule 26(c) "acts as a guardian of the public's right of access to discovery documents by requiring parties to make a threshold showing before documents will be withheld from public view." *Havens v. Metropolitan Life Ins. Co.,* No. 94 Civ. 1402, 1995 WL 234710 at *12 (S.D.N.Y. Apr. 20, 1995).

A. The possible effects of negative publicity on the functioning of ACS

The City's argument for good cause is essentially that ACS will be unable to function effectively in the wake of public release of the Report. According to the City,

> [t]he media coverage of the first CRR Report had an immediate negative impact on ACS. ACS workers are engaged in one of the most demanding and stressful jobs of public service—protecting children from abuse. This involves the constant stress of interacting with dysfunctional families, which requires the highest degree of concentration and morale. The negative press reports generated by plaintiffs' counsel and the press demoralized ACS workers by implying that they were failing to perform adequately and might even be harming the children they are trying so hard to protect.
>
> ACS then had to take remedial action to reassure the ACS workers that they are doing a good job, and to explain the actual basis of the CRR Report, in contrast to what was reported about it. Resources which could have been used to further ACS's mission were expended in this effort.

***5** Defs.' Mem. at 8 (citations omitted).

There is no question that ACS workers have a demanding and stressful job that requires dedication. The Court is also mindful of the fact that, since its inception, ACS has been an agency under fire. That being said, it is difficult to gauge whether negative press resulting from the release of the Report would have any direct effect on dedicated ACS workers. It is not entirely clear to the Court that releasing the Report would, or should, hamper the functioning of ACS. Moreover, it is not the province of this Court, or Rule 26(c), to insulate a public agency or its workers from bad publicity. *See e.g., Department of Econ. Dev. v. Arthur Andersen & Co.,* 924 F.Supp. 449, 487 (S.D.N.Y.1996) (holding that " '[g]ood cause' is not established merely by the prospect of negative publicity"); *Vassiliades v. Israely,* 714 F.Supp. 604, 606 (D.Conn.1989) (observing that "[t]he possibility of 'adverse publicity' in and of itself does not justify sealing"). The Court is sensitive to the pressures under which ACS and Commissioner Scoppetta are operating. Restricting access to the Report will not necessarily alleviate the pressure, however, and might serve only to increase public concern regarding ACS.

The City concedes that the Report will ultimately be released to the public. Accordingly, the Court sees no reason to delay such release until trial in this matter, which is currently set for March 1998. Moreover, following the City's argument to its logical conclusion, negative coverage of the Report is no less likely to hinder the functioning of ACS in March than it is now.

B. Prejudice

Defendants' argument that all levels of the judiciary might be prejudiced by negative press directed at ACS hardly merits discussion. The parties have agreed to a bench trial. As a preliminary matter, the Court notes that the dangers of prejudice are much less prevalent in bench trials than in cases to be tried by a jury.

Like the parties, the Court has the Report in hand. Therefore, it is unlikely to resort to press accounts *in lieu* of reading the Report carefully and in its entirety. When the time comes, the Court will listen to the interpretation presented by each party and its experts. The same would be expected from any other member of the judiciary who may someday rule on this case.

C. Interpretive commentary accompanying release of the Report

Arguing that the Report is to be presented at trial in conjunction with interpretive commentary from one or more expert witnesses, defendants maintain that by itself, the Report presents an incomplete and inaccurate picture. In short, defendants "want the public to get the complete picture, not just the raw statistical data (shaped for publication by plaintiffs' counsel and the media)." Defs.' Mem. at 6. According to defendants, when the first part of the Report was released, plaintiffs and the press emphasized only the negative and scandalous parts of the Report, purposely misconstruing it. To assess the motives of journalists, however, "risks self-serving judicial decisions tipping in favor of secrecy." *Amodeo,* 71 F.3d at 1050.

***6** The City may well be underestimating the public's ability to grasp and absorb raw statistical data. Given all the circumstances, the Court is loathe to order that the Report be withheld on the ground that the press or the public might interpret it inaccurately. It is not for this Court to filter information for the public.[2]

D. First Amendment concerns

Defendants contend that the plaintiffs and the press have no First Amendment right to discovery materials. To support their argument, they rely on *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), in which the Supreme Court affirmed the grant of a protective order.

In *Seattle Times,* a religious organization and its leader sued local newspapers for defamation. During discovery, the defendant newspapers sought the identities of the organization's members and donors. Plaintiffs moved for a protective order preventing defendants from disseminating any information gained through discovery, arguing that it "would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association." *Id.* at 25. Although the trial court initially denied the motion without prejudice, it was ultimately persuaded to grant the motion by affidavits of members filed in support of the motion, which detailed threats of physical harm and reprisals.

In affirming the grant of a protective order, the Supreme Court held that where "a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id.* at 37. That a protective order entered in conformance with Rule 26(c) is not violative of the First Amendment, however, does not assist defendants in their attempt to show good cause.

Seattle Times is illustrative in that it provides an example of what constitutes good cause for a protective order. It is distinguishable from the case at bar in that it involved substantial government interests. Specifically, in seeking a protective order, plaintiffs had relied upon the rights of privacy and religious association. *Id.* at 37 n. 24. Additionally, "[b]oth the trial court and the Supreme Court of Washington ... emphasized that the right of persons to resort to the courts for redress of grievances would have been 'chilled" ' had the motion for a protective order been denied. *Id.*

***7** Although *Seattle Times* makes clear that this Court has broad discretion to "decide when a protective order is appropriate and what degree of protection is required," *Id.* at 36, the compelling interests presented in that case are absent here. Release of the Report would in no way infringe on any individual's constitutional rights. The most it could do is result in negative press for defendants, which, standing alone, does not amount to good cause for the issuance of a protective order.

CONCLUSION

The presumption of access to the Report is strong due to the likelihood that the Report will play a significant role in the Court's exercise of Article III power in this case, and the public's interest in this litigation. Moreover, defendants have failed to show good cause for the issuance of a protective order.

In light of the public's interest in monitoring both the Article III functions of this Court and the operations of ACS and DSS, it would be improvident of the Court to delay release of the Report. Therefore, defendants' motion for a protective order pursuant to Rule 26(c), Fed.R.Civ.P., is denied.

Notwithstanding the denial of the motion for a protective order, release of the Report shall be stayed until October 16, 1997 at 5:00 p.m., to afford defendants the opportunity to apply to the Court of Appeals for a further stay if so advised. Absent a stay from the Court of Appeals, the Report will be filed with the Clerk of the Court on October 17, 1997.

It is so ordered.

Parallel Citations

26 Media L. Rep. 1151

Footnotes

1 In addition to the parties' submissions, the New York Times Company and the Public Advocate of the City of New York have each filed briefs as amici curiae in opposition to the City's motion for a protective order.

2 In ruling in favor of televising oral arguments on defendants' motion to dismiss, this Court rejected defendants' argument that accepting plaintiffs' allegations as true might confuse the public. The Court held that it "is unwilling to deny access to information based on the perceived inability of the public to grasp such information." Memorandum and Order, March 1, 1996 at 4.