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United States District Court, E.D. Pennsylvania.

Martin HARRIS, et al

v.

The CITY OF PHILADELPHIA, et al

No. CIV. A. 82-1847. | June 26, 1995.

Opinion

SHAPIRO, J.

MEMORANDUM AND ORDER

*1 Before the court is defendants' Emergency Motion for Stay of the Court's Order of June 6, 1995 Relating to the Deliberative Process Privilege ("Emergency Motion"); defendants seek the stay pending a ruling by the United States Court of Appeals for the Third Circuit on their Petition for Writ of Mandamus filed on June 19, 1995. The court has considered defendants' Memorandum of Law, plaintiffs' opposition and held a hearing on June 21, 1995. This memorandum explains the court's order this day.

1. Plaintiffs noticed the deposition of Dr. John S. Goldkamp, Ph.D. ("Dr. Goldkamp") and subpoenaed certain documents from Dr. Goldkamp in connection with the court's hearing on approval of the Alternatives to Incarceration Plan ("Plan");

2. Dr. Goldkamp is Director of the Criminal Justice Research Institute ("CJRI"); CJRI is a consultant on the design and implementation of the Plan to both defendant City of Philadelphia and the Court of Common Pleas of Philadelphia County ("Court of Common Pleas");

3. Defendants and the Court of Common Pleas asserted a deliberative process privilege with regard to nine (9) of the subpoenaed documents;

4. Last December, following *in camera* inspection of the purportedly privileged documents, the court held that Documents # 1-5 were not privileged, but that Documents # 6-9 (with the exception of the attachment to Document # 9) were privileged, *see* Order of December 9, 1994;¹

5. Defendants and the Court of Common Pleas did not request a stay during the conference communicating this

ruling of the court. Accordingly, Documents # 1-5 and the attachment to Document # 9 were provided to plaintiffs by the court, subject to certain confidentiality restrictions. *See* Order of December 9, 1994;

6. Defendants and the Court of Common Pleas filed timely motions for reconsideration. Upon reconsideration, the court held that none of the nine (9) documents were protected by the deliberative process privilege, *see* Memorandum and Order of June 6, 1995;

7. The court ordered that defendants "forthwith" provide plaintiffs with copies of Documents # 6-9, *i.e.*, the documents previously held privileged; that the transcript of Dr. Goldkamp's deposition be unsealed; and that the Order of December 16, 1994 (which placed Documents # 6-9 under seal) be vacated, *see* Order of June 6, 1995;

8. The Order of June 6, 1995 was filed on June 7, 1995 but defendants did not file the Emergency Motion, pending a ruling by the United States Court of Appeals for the Third Circuit on the Petition for Writ of Mandamus, until June 15, 1995;

9. Defendants filed a Petition for Writ of Mandamus with the Court of Appeals on June 19, 1995;

10. Following the December, 1994 hearing on the Plan, the court: a) approved the Plan; and b) ordered defendants to file quarterly reports on progress made in implementing the Plan, *see* Order of December 19, 1994;

11. The court also stated at the December, 1994 approval hearing that the Admissions Moratorium and Release Mechanism, provisions of the Consent Decree intended to remedy violation of the maximum allowable population ("MAP"), might be suspended when the Pre-Trial Release Guidelines (one of the ten (10) strategies outlined in the Plan) had been implemented;

*2 12. The court suggested, during the December, 1994 hearing, a July 1, 1995 deadline for implementation of the PreTrial Release Guidelines;

13. The second quarterly hearing on defendants' progress in implementing the Plan is scheduled for July 5, 1995; it is expected to result in a modification or suspension of the Admissions Moratorium and Release Mechanism;

14. Plaintiffs have a need for the documents related to implementation of the Plan in evaluating the likely result of modification or suspension of the Admissions Moratorium and Release Mechanism temporarily or permanently. It will be difficult for the court to reach a proper decision on discontinuation of the MAP without availability of the remainder of the disputed documents to

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plaintiffs, especially since the court is familiar with their contents;

15. Closing the courtroom to protect the confidentiality of the allegedly privileged documents is not a realistic possibility. The public and the press have a First Amendment and a common law right of access to civil proceedings. A court may limit this right only when an important countervailing interest is shown (e.g., to protect trade secrets). *See Publicker Industries v. Cohen*, 733 F.2d 1059, 1071 (3d Cir.1984);

16. Plaintiffs and the public have had access to the documents at issue since June 7, 1995, *see* Order of June 6, 1995 (modifying Order of December 9, 1994 and vacating Order of December 16, 1994);

17. The court must consider four (4) factors in determining whether to grant defendants' Emergency Motion: A) whether defendants have made a strong showing that they are likely to succeed on the merits; B) whether defendants will be irreparably injured absent a stay; C) whether issuance of the stay will substantially injure any other parties interested in the proceeding; and D) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987);

A) The court is not of the opinion that the City defendants are likely to succeed on the merits of their petition for mandamus. If it were, the outcome of the Motion for Reconsideration would have been different and there would be no need for a Petition for Mandamus on appeal. Moreover, at oral argument on the motion, the City's principal concern seemed to be the adverse reaction of this court's ruling on the personnel of the Court of Common Pleas rather than the error of this court's analysis of the finality of the Plan actually at issue.

The City defendants contend that the Plan is final but its implementation strategies are not. If this argument prevails nothing is ever final; all documents are "pre-decisional because the City's pretrial post-adjudication strategy has yet to be finalized." The City defendants contend that it is the court that fails to give proper weight to the purpose of the documents at issue—to comply with a Consent Decree—and to the context in which the documents were created—supposedly in compliance with a court order—and the necessity of examining the documents to evaluate compliance.

*3 However, at least as to documents # 6–# 9, reasonable minds may differ as to the likelihood of success on the merits, especially since the court changed its mind on reconsideration. The court must admit some possibility that a mandamus may issue.

B) The City contends that failure to meet the likelihood of

success factor may be excused where the applicant for stay has made a particularly strong showing on the other factors. The City claims it will be irreparably harmed if the June 6, 1995 Order is not stayed, as compliance with the Order will compel the disclosure of confidential communications to the plaintiffs and would render moot any subsequent appellate review. However, the City has been content to rely on court ordered confidentiality provisions as to Documents # 1–# 5 since the original Order of December 9, 1994. The plaintiffs have offered to stipulate to confidentiality of all disputed documents (# 1# 9); the court will reimpose confidentiality as to Documents # 1# 5 and impose the same confidentiality restrictions as to Documents # 6–# 9 pending disposition of the Petition for Writ of Mandamus.

The documents at issue, prepared by consultants for both the City and the courts of the First Judicial District regarding matters related to the Consent Decree, have been disseminated within the City's criminal justice agencies; it is hard to conceive irreparable harm to the defendants from the dissemination of these one and two year-old documents to the plaintiffs under conditions that restrict their further dissemination to plaintiffs' counsel.

The City's claim of irreparable harm seems directed not to these particular documents but to the effect on the Court of Common Pleas of the possible release of future documents. This consideration not only does not require a stay as to these documents but overlooks the purpose of the court's continuing inquiry—to determine when and how the court's jurisdiction may terminate. Because the Consent Decree envisages its termination upon the preparation of particular plans and their implementation, the City's fear that the court's decision on the deliberative process privilege regarding these documents "will irreparably impair the City's ability to develop its criminal justice policy in the future, because all the City's working efforts in the area of criminal justice reform may be subject to disclosure" seems largely misplaced.

C) The prejudice to the plaintiffs and to the court is great. The plaintiff class is unable to deal with the issue before the court—implementation of the City's Alternative to Incarceration Plan and its relation to a stay or vacatur of the limitations on the maximum allowable population under the Consent Decree—without knowledge of all arguably relevant documents. This impediment to the adversary system deprives the court of maximum assistance in considering an important decision in a matter of public importance.

D) The importance of the matter before the court impacts on the public interest. The "deliberative process privilege" has great importance when properly invoked; it aids frank discussion before important governmental policy decisions are made. But improperly invoked in the context presented to the court, it impedes not only court

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consideration of a matter of public importance but prevents the parties and ultimately the public from understanding and evaluating the reason for court actions. On balance, the City's desire for secrecy for all evidence it chooses not to file with the court does not overcome the interest of the plaintiffs and the court in having this set of documents available to plaintiff's counsel at this time.

*4 Therefore, the court will grant a stay only until the business day preceding the court hearing on the implementation of the Alternatives to Incarceration Plan and the stay or vacatur of the limitations on the population of the City jails. Of course, the City defendants may seek a further stay in the Court of Appeals.

18. In view of the hearing scheduled for July 5, 1995, the court will grant defendants' request for a stay of the Order of June 6, 1995 until July 3, 1995; any further stay may be sought from the Court of Appeals pending its action on defendants' Petition for Writ of Mandamus; to allow the Court of Appeals to exercise its jurisdiction and protect the respective interests of the parties, this court will restrict the documents at issue (# 1-9) to counsel and prohibit any further distribution. The copies in possession of the court will be ordered to remain under seal pending

Footnotes

¹ Although the documents—as listed in the Amended Logs submitted to the court by defendants and the Court of Common Pleas—are unnumbered, we have numbered the documents in the order they are listed on the Amended Logs.

a ruling by the United States Court of Appeals for the Third Circuit on the Petition for Writ of Mandamus filed by defendants on June 19, 1995.

An appropriate order follows.

AND NOW, this day of June 1995, upon consideration of defendants' Emergency Motion, plaintiffs' response thereto and a hearing held on June 21, 1995, it is ORDERED that:

1. The Emergency Motion is GRANTED IN PART and DENIED IN PART. Defendants' request for a stay of the Order of June 6, 1995 is granted only until July 3, 1995; any further stay must be requested from the United States Court of Appeals for the Third Circuit.

2. Documents # 1-9, the subject of the Petition for Mandamus, shall be placed under seal, and their further use and distribution limited pending a ruling by the United States Court of Appeals for the Third Circuit on the Petition for Writ of Mandamus filed June 19, 1995.