UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

ARTHUR J. PORTER and CHRISTIE L. PORTER,	)	
Plaintiffs,	)	**3:05-cv-00142-JWS**
vs.	)	**ORDER AND OPINION**
	)	**[Re: Motion at Docket 91]**
ARTHUR J. OSBORN and JOSEPH WHITTOM,	)	
Defendants.	)	

I. MOTION PRESENTED

At docket 91, plaintiffs Arthur and Christie Porter (the "Porters" or "plaintiffs") move to compel production of personnel records of defendant Arthur J. Osborn ("Osborn"), a retired Alaska State Trooper, and for sanctions pursuant to D.Ak.LR 37.1 The Porters seek records showing prior instances in which Osborn is alleged to have used force in the line of duty and in which complaints may have been lodged against him. At docket 97, Osborn opposes the motion, arguing that the records are confidential, irrelevant, and contain inadmissible character evidence. The Porters reply at docket 99. Oral argument was not requested and would not assist the court.

II. BACKGROUND

The background of this matter has been recited in this court's order at docket 63 and in the Court of Appeals' opinion at docket 85. After the Court of Appeals issued its opinion and remanded the matter to this court, the parties filed a joint report on January 26, 2009 requesting nine months for discovery, which they agreed would be completed by October 31, 2009.[1] However, the court ordered that discovery be completed by August 31, 2009.[2] The Porters served Osborn with requests for production and interrogatories on March 18, 2009. Relevant to the pending motion, the Porters' requests for production seek Osborn's personnel files and "any reports, grievances, complaints, evaluations by supervisors, filed training officer evaluations, training note evaluations, and any other such document maintained in the personnel file of Arthur J. Osborn."[3] Osborn did not respond to the Porters' requests immediately, but rather sought two extensions of time to respond.

On June 10, 2009, counsel for the Porters advised counsel for Osborn that he intended to file a motion to compel responses to the Porters' requested discovery. Counsel for Osborn responded on June 15, 2009 that discovery responses would be forthcoming, although she objected to the production of Osborn's personnel records. The Porters filed their motion to compel on June 22, 2009. Osborn served his objections and responses on July 7, 2009. Although he responded to some interrogatories and produced some non-confidential documents, Osborn refused to provide plaintiffs with his personnel file, citing

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[1]Doc. 89.

[2]Doc. 90 at 2.

[3]Doc. 93, Exhibit 5 at 2.

Alaska Constitution, Article I, Section 22, and AS 39.25.080, and also making relevance and admissibility objections. The court addresses the parties' arguments below.

III. DISCUSSION

A. Confidentiality

Although the Porters concede that Osborn's personnel records are confidential, they argue that the court may compel a release of the records for an *in camera* inspection and have offered to stipulate to protection of the documents from public disclosure. Osborn counters that pursuant to AS 39.25.080 the court may not compel disclosure of personnel records. In the alternative, Osborn argues that production should first be subject to an *in camera* review and other limitations to protect confidential information. AS 39.25.080, enacted as part of the State Personnel Act, provides that "[s]tate personnel records, including employment applications and examination and other assessment materials, are confidential and not open to public inspection except as provided in this section."[4] Records that are not privileged under AS 39.25.080(a) are governed by the more general provisions of AS 09.25.110-120, which provide for otherwise unfettered inspection of the records of state agencies and departments.[5] In general, questions of whether to make such records available for inspection "require a balance to be struck between the public interest in disclosure on the one hand and the privacy and reputation interests of the

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[4] AS 39.25.080(a).

[5] *Jones v. Jennings*, 788 P.2d 732, 737 n.9 (Alaska 1990); *Doe v. Alaska Sup. Court*, 721 P.2d 617, 622 (Alaska 1986); *see also* AS 09.25.110.

affected individuals and the government's interest in confidentiality, on the other."[6] "In striking a proper balance the custodian of the records in the first instance, and the court in the next, should bear in mind that the legislature has expressed a bias in favor of public disclosure. Doubtful cases should be resolved by permitting public inspection."[7]

The parties disagree about the extent to which the Alaska Supreme Court decision in *Jones v. Jennings* governs this case. In *Jennings*, the Municipality of Anchorage and two of its police officers appealed from an order to produce documents relating to the police officers' personnel records and internal investigations of citizen complaints.[8] The court addressed two issues: "(1) whether documents pertaining to prior citizen complaints, as well as personnel records, are privileged and undiscoverable under Anchorage Municipal Code (AMC) 03.90.040; and (2) whether disclosure of personnel records and prior citizen complaints would contravene the officers' right to privacy under the Alaska Constitution."[9] In reviewing whether the municipal ordinance at issue comported with Alaska's constitutional right to privacy, the court found that the weight of authority has "allowed the discovery of personnel records in similar actions maintained against police departments and individual police officers"[10] and ultimately held that "the trial court properly

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[6] *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1323 (1982).

[7] *Id.*

[8] *Jennings*, 788 P.2d at 733.

[9] *Id.*

[10] *Id.* at 737 (collecting authorities).

ordered the documents discoverable subject to prior in camera inspection for the purpose of screening particularly sensitive files."[11]

Although the present case involves a state statute and the records of a state employee, the reasoning underlying the *Jennings* court's interpretation of AMC 03.90.040 applies. As the *Jennings* court noted, "[t]he cornerstone of a democracy is the ability of its people to question, investigate and monitor the government. Free access to public records is a central building block of our constitutional framework enabling citizen participation in monitoring the machinations of the republic."[12] Although *Jennings* recognized that the "municipality's disclosure ordinance is broader than the state's disclosure statute," that was based on the existence of exceptions to the state's disclosure statute, not on an analytical distinction between the ordinance and the statute.[13] Indeed, this court finds no material difference between the operation of the municipal disclosure ordinance and the state disclosure statutes - both support broad access to public records,[14] and are subject to exemptions protecting personal, medical and financial information.[15]

In addition, AS 39.25.080(a) refers broadly to "public inspection," which is not what the Porters seek. Rather, they seek an *in camera* inspection, and have agreed to abide by a protective order.[16] Moreover, although the statute does not specifically provide for

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[11] *Id.*

[12] *Id.* at 735

[13] *Id.* at 737 n.9.

[14] *Compare* AMC 03.90.010 *with* AS 09.25.110-120.

[15] *Compare* AMC 03.90.040 *with* AS 39.25.080.

[16] Doc. 99 at 3.

disclosure to particular parties under a protective order or *in camera* inspection, the general prohibition on public disclosure must yield to allow limited disclosure for legitimate purposes. Indeed, the Alaska Office of the Attorney General has condoned disclosure of records that are otherwise subject to AS 39.25.080 under protective order to the State ombudsman[17] and the Commissioner of the Department of Administration, concluding that AS 39.25.080 "is intended to restrict personnel records of state employees from the general right of access to public records guaranteed by AS 09.25.120 (inspection and copying of public records)."[18] As in *Jennings*, the balance of factors here weighs in favor of disclosure.

Osborn also argues that Alaska's constitutional right to privacy precludes disclosure of his personnel records. An individual's right to privacy is specifically protected by Article I, Section 22 of the Alaska State Constitution which says that "[t]he right of the people to privacy is recognized and shall not be infringed." "The Alaska Supreme Court has interpreted the right to privacy to extend to the communication of 'private matters,' 'a person's more intimate concerns,' 'the type of personal information which, if disclosed even to a friend, could cause embarrassment or anxiety.'"[19] A court may recognize a right to privacy where an individual has an actual or subjective expectation of privacy and the

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[17] *See* "Release of personnel records to the ombudsman," 1992 Alaska Op. Atty. Gen. (Inf.) 37, 1990 WL 538918 (Alaska A.G.), File No. 663-90-0318 (July 19, 1990).

[18] *See* "Distribution of eligibility lists for certification election," 1988 WL 249570 (Alaska A.G.), File No. 663-88-0422 (March 24, 1988).

[19] *Anchorage Police Dep't. Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 566-67 (Alaska 2001) (quoting *Doe v. Alaska Superior Court*, 721 P.2d 617, 629 (Alaska 1986)).

expectation is one “that society is prepared to recognize as reasonable.”[20] However, the privacy right is not absolute. "When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated."[21] The right to privacy "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare.”[22]

Here, “[t]here is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public’s trust in those charged with enforcing the law.”[23] As the *Jennings* court recognized, Alaska has taken a “forceful position against shielding official information” - indeed, the Alaska Evidence Rules note that “in the rare case when internal government documents would be relevant to litigation, they should be disclosed.”[24] Finally, it is also in the public’s interest to ensure the effective functioning of the judiciary. In the context of executive privilege, the Alaska Supreme Court has noted that “[i]n each case a court must balance the government's interest in confidentiality against the need for disclosure to insure the effective functioning of the judicial system.”[25] In the present case, it is important that the court view all potential relevant facts in order to function effectively. Weighed against Osborn’s expectation of privacy in his personnel file, which can be

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[20] *Jennings*, 788 P.2d at 738 (quoting *State v. Glass*, 538 P.2d 872, 875 (Alaska 1978)).

[21] *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

[22] *Id.*

[23] *Jennings*, 788 P.2d at 738.

[24] *Id.* at 739 (quoting Alaska R. Evid. Art. V, Introductory Comment at 366).

[25] *Doe*, 721 P.2d at 623.

protected by an *in camera* inspection and appropriate redactions, the balance strongly favors disclosure. Thus, the court concludes that Osborn's personnel file is not protected from disclosure by AS 39.25.080 or Alaska's constitutional right to privacy to the extent of the disclosure sought by plaintiffs in the present matter.

B. Relevance

Osborn also contends that the court should decline to order disclosure of his personnel records on the ground that the Ninth Circuit limited the scope of issues to be litigated on remand. Specifically, Osborn argues that the Ninth Circuit "suggested that whether Trooper Osborn acted with an unlawful purpose to harm must be evaluated by the totality of the circumstances *of this specific incident*, not any unrelated situations."[26] The Porters contend, on the other hand, that "information concerning any act of violence, insubordination, . . . [or] psychological or other mental health claims contained within the personnel file" may be relevant to Osborn's potential liability. The Porters believe that Osborn's file contains information pertaining to an incident in which Osborn allegedly beat a person in a wheel.

The Ninth Circuit remanded the matter to this court for further consideration, holding that "the standard of culpability for a due process right to familial association claim" is met by a "showing that [Osborn] acted with a *purpose to harm* Casey for reasons unrelated to a legitimate law enforcement objective."[27] The court then set forth a non-exhaustive list of facts that are "relevant to an unlawful purpose to harm that need to be considered on

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[26]Doc. 97 at 8 (emphasis in original) (citing *Porter v. Osborn*, 546 F.3d 1131, 1141-42 (9th Cir. 2008)).

[27]*Porter*, 546 F.3d at 1137.

remand - that is, to assess whether under the totality of the circumstances a jury could infer that Osborn was acting for purposes other than legitimate law enforcement."[28] The court summarized those facts as follows:

> First is the nature of the suspicious car and driver Osborn found in the pull-out near the Sterling Highway. The lone car was stationary and posed no overt threat to officer safety at the outset. Once Casey started moving the car, he created at least a minimal threat to safety, although hardly on the level of a car chase. Trooper Whittom reported that he did not feel threatened by Casey's car, but he and Osborn nevertheless drew their guns. Second is the nature of the back and forth between Casey and the troopers. In response to Casey's rolling his window down and refusing to exit the vehicle, Osborn precipitously sprayed him with pepper spray, an action that could be viewed as punishing or harassing when it is unclear whether Casey even knew he was dealing with law enforcement. Whittom's testimony suggests Casey's attempt to drive away may have been a normal effort to escape further spraying, making Osborn an active participant in triggering Casey's flight. Third and most important is Osborn's severe and sudden escalation of the situation: where Casey's only violation was non-compliance, Osborn's extraordinary response was to fire five shots, which shocked even Whittom. There are other facts suggested by the record that may also bear on Osborn's intent, but they are not clearly developed. For instance, it is not clear whether Osborn was in compliance with Alaska State Trooper regulations governing the use of force, or whether expert testimony might show that Casey was driving slowly away from Whittom at the time he was shot. Although Osborn may be able to show indisputably that his actions all accorded with proper law enforcement purposes, on the record before us, we are unable to decide in the first instance whether the Porters have presented enough facts to survive summary judgment.[29]

While the appellate court set forth three distinct facts that would be relevant to a "purpose to harm" analysis, it also recognized that other potentially relevant facts have not been "clearly developed."[30]

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[28] *Id.* at 1141.

[29] *Id.* at 1141-42 (paragraph break omitted).

[30] *Id.* at 1142.

Federal Rule of Civil Procedure 26(b)(1) permits a court to "order discovery of any matter relevant to the subject matter involved in the action." The information need not be admissible at trial, so long as the "discovery appears reasonably calculated to lead to the discovery of admissible evidence."[31] Osborn does not argue, and the court does not find, that discovery of Osborn's personnel file is unreasonably cumulative or duplicative, that the Porters have had ample opportunity to obtain the information by other means, or that fulfilling the request is unduly burdensome. As the comments to Rule 26 make clear, discovery "may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence."[32] Courts that have limited discovery on the basis of admissibility are universally found to be in error.[33] The exact content of Osborn's personnel file are unknown at this time, but the court cannot conclude the file contains no material relevant to the considerations noted by the Ninth Circuit, especially given that court's statement that some facts have not yet been clearly developed.

In conclusion, neither AS 39.23.080, nor the Alaska Constitution, nor the Federal Rules prohibit disclosure of Osborn's personnel records in this case. However, the protection which can be provided by an *in camera* inspection is warranted. Accordingly, Osborn shall submit his personnel records for an *in camera* inspection within 10 days of this order. The court will determine the scope of any additional protections, such as

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[31]Fed. R. Civ. P. 26(b)(1).

[32]Rule 26(b)(1), cmt. to 1946 Amendment.

[33]*Id.*

redactions or a protective order, once the records have been reviewed and prior to their disclosure to the Porters.

C. Sanctions

The Porters ask the court to sanction the state "in the sum of $1,000 for the necessity of brining this motion and making these arguments."[34] The court agrees that the expense to the Porters of bringing the motion to compel should be awarded pursuant to Fed. R. Civ. P. 37(a)(5)(A), because plaintiffs made a good faith effort to obtain the discovery before filing the motion, the refusal to provide the information in the limited format requested by the Porters was not substantially justified, and there are no other circumstances which render an award of the expenses of the motion "unjust."[35] To the extent that plaintiffs seek an additional or different sanction pursuant to D.Ak.LR 37.1, the court declines to impose such, because the sanction under Federal Rule 37 is sufficient and appropriate under the circumstances. The Porters shall file a request for the costs of bringing the motion to compel which is properly supported by an affidavit or declaration showing the costs incurred and the reasonableness thereof. Defendant may oppose on the grounds that the amount sought is unreasonable, but may not contest the Porters' entitlement to recover reasonable expenses.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion at docket 91 is **GRANTED** as follows:

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[34]Doc. 99 at 9.

[35]*See* Fed. R. Civ. P. 37(a)(5)(A) (i), (ii) and (iii).

(1) Osborn shall submit his personnel records for an *in camera* inspection within 10 days of this order. These shall be delivered to the court in paper format in one or more sealed folders labeled "Confidential for Review by the Judge Pursuant to Court Order."

(2) The court will review the personnel records, determine the scope of any additional protections, such as redactions or an additional protective order, and then afford plaintiff appropriate access to the records .

(3) Within 10 days, plaintiffs shall file a motion for the costs of brining the motion to compel which is adequately supported. Within 10 days from service of that motion Osborn may file a response (opposition or statement of non-objection) to the quantum of expenses sought, but not to plaintiffs' entitlement thereto. No reply shall be filed unless requested by the court.

DATED at Anchorage, Alaska, this 4th day of August 2009.

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE