

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
LOCATION: Portland
Docket No. BCD-CV-11-28

KAILE R. WARREN, JR.,
RENT-A-HUSBAND LLC,
RENT-A-HUSBAND ENTERPRISES,
LLC, and KW ENTERPRISES, INC.,

Plaintiffs,

v.

PRETI, FLAHERTY, BELIVEAU &
PACHIOS, LLC, MARCUS, CLEGG &
MISTRETТА, P.A., and ACE
HARDWARE CORP.,

Defendants



ORDER ON DEFENDANTS' JOINT MOTION TO COMPEL

On December 3, 2012, Defendants Preti, Flaherty, Beliveau & Pachios, LLC (Preti), Marcus, Clegg & Mistretta, P.A. (MCM), and Ace Hardware Corp. (Ace) jointly moved to compel production of documents from the Maine Attorney General's office as they related to the civil and criminal prosecutions of Plaintiff Kaile R. Warren, Jr. *See* Superseding Indictment, *State v. Warren*, CUMSC-CR-2009-9716 (Me. Super. Ct., Cum. Cty., Apr. 9, 2010). The Attorney General asserted that both work-product privilege and deliberative process privilege protected the documents in question.¹

¹ The Attorney General also asserted work-product protection for the documents. *See* M.R. Civ. P 26(b)(3). Because, however, 1) the Defendants and the Attorney General are not adversaries in this proceeding; 2) the Defendants were not a party to the prior proceeding; and 3) the Attorney General is not a party to the present proceeding, work product protection is inapplicable. The Court does not address this argument any further.

The Court heard oral argument on the motion on February 3, 2012, but at that time, the deposition of Assistant Attorney General Colleran had not yet taken place. The Court instructed the parties to “proceed with the deposition of [AAG] Colleran, focusing on documents already disclosed.” (CMC Order No. 2, Feb. 9, 2012, at 3.)

The parties could then re-present their arguments with more context for the Court and in light of the actual objections made at the deposition. The Colleran deposition could not be scheduled before the case was stayed pending Ace’s appeal of the Court’s March 12, 2012, order, which denied Ace’s special motion to dismiss. Once the stay was lifted in June of 2012, the case proceeded and AAG Colleran’s deposition took place on September 18, September 19, and November 5 of 2012. The parties then supplied the Court with supplemental briefing in December of 2012. The Court heard oral argument again on January 9, 2013.

One of the key issues in this case is why the Attorney General decided to forego its criminal and civil prosecutions against Kaile Warren in favor of a civil consent judgment. In a letter to Rent-A-Husband investors dated February 18, 2011, AAG Colleran wrote that the State had been investigating Warren’s claim

to have relied upon his attorneys in disclosing information to investors and drafting the promissory notes. We finally obtained documents from [Warren’s] former law firm late in 2010 and received further explanatory information from them last month. This evidence has caused us to conclude that we would be unlikely to obtain criminal convictions against Mr. Warren. As a result, we have decided to pursue a civil enforcement action against Mr. Warren instead of continuing with the criminal prosecution. In civil actions, the State need not prove that Mr. Warren acted knowingly or intentionally, and the extent to which he relied upon counsel is not the obstacle it would be in a criminal case.

After several weeks of discussions, we have reached an agreement with Mr. Warren under which a civil judgment will be entered against him for sale of unregistered securities and failure to disclose material facts in connection with securities transactions.

(Colleran Depo. Exh. 49.) The civil consent judgment, dated February 23, 2011, dismissed the pending criminal charges but obligated Warren, Rent-A-Husband, LLC, and KW Enterprises,

Inc. to pay restitution in the amount of \$1,994,657.08 (plus post judgment interest at the rate of 6.30% from the date of judgment) to the State of Maine. Consent Judgment, *State v. Rent-A-Husband, LLC*, CUMSC-CV-2011-07, at ¶ 1 (Me. Super. Ct., Cum. Cty., Feb. 23, 2011) (hereinafter, "Consent Judgment").² The State, in turn, would distribute the restitution *pro rata* to the victims identified in the Superseding Indictment. (Consent Judgment ¶ 2.)

The Consent Judgment also required that Warren, Rent-A-Husband, and KW Enterprises "make best efforts to recover damages from any person or entity . . . who might be liable to the Defendants in connection with activities that are the subject of the Superseding Indictment and the Amended Civil Complain in this matter." (Consent Judgment ¶ 3.) The Consent Judgment further required that Warren, Rent-A-Husband, and KW Enterprises "make monthly detailed reports to the State regarding these efforts" and prohibited them from settling claim unless it was on "terms acceptable to the State." (Consent Judgment ¶ 3.) Any funds recovered would go to fund the restitution and interest requirements of the Consent judgment. (Consent Judgment ¶ 3.) The Plaintiffs filed suit in this case against the Defendants less than one month after the court approved the Consent Judgment.

The Court recognizes the vital importance of the deliberative process privilege.³ The privilege protects

documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance

² The Consent Judgment appears in several places in the record: as Exhibit C to Plaintiffs' Complaint; as Exhibit 2 to Defendants' Joint Motion to Compel dated January 19, 2012; and attached to Defendants' supplemental briefing on the Joint Motion to Compel.

³ Although the Law Court has not formally recognized the privilege, the court has consistently forbade inquiry "inquiry into the mental processes of administrative decision maker[s]." *Cutler v. State Purchasing Agent*, 472 A.2d 913, 918 (Me. 1984).

Defendants have not asserted that the documents are not subject to the deliberative process privilege. Instead, the parties have asserted their substantial need for the information.

the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government.

Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001).

Nevertheless, as the Attorney General concedes, the privilege is not absolute. The documents may be disclosed if the court determines that the “plaintiff’s need for the information outweighs the [agency]’s claim of privilege” and the party seeking the documents has the burden of establishing that need. *See Ass’n for Reduction of Violence v. Hall*, 734 F.2d 63, 66 (1st Cir. 1984). “The interest of the party seeking disclosure tends to be strongest when the information in question is highly relevant, helpful, and unavailable from other sources.” *Id.*

In the present case, the Court has limited Defendant’s inquiry to documents relevant to the Attorney General’s decision to indict Warren and the ultimate decision to pursue a civil consent judgment instead of a criminal case,⁴ and the Court has reviewed *in camera* the documents filed by the Attorney General. The bases of the decision to indict and the decision to settle are the key causation issues in the malpractice case. Plaintiffs assert that they relied upon the advice of counsel in issuing promissory notes to raise capital for the Rent-A-Husband venture, notes that violated Maine securities laws and led to the criminal prosecution of Plaintiff Warren. Defendants assert that Plaintiff Warren made misrepresentations to investors unrelated to the advice given by Preti and MCM.

⁴ Defendants’ initial motion was quite broad, seeking the State’s complete civil and criminal files regarding the prosecution of Warren and the other Plaintiffs, including notes of AAG Colleran, and the State’s complete file regarding the Consent Judgment. Ostensibly, the request covered the time period from before the original indictment in 2009 through the 2011 consent judgment.

In its supplemental briefing of this issue, the Attorney General suggested that “[a]ny intrusion” into the deliberative process privilege “should be limited to documents and testimony regarding the decision to charge Warren in December of 2009 and documents and testimony regarding the decision to resolve the case in January-February 2011.” (AG’s Supp. Opp’n 10.) The Court agreed and the AG filed those documents with the Court for its *in camera* review, divided into documents relevant to the indictments and documents relevant to the dismissal.

Much has already been produced in discovery related to the Attorney General's decision-making process,⁵ and if this case were not unusual in two respects the Court would likely leave the parties to the existing discovery. The Court has reviewed the cases cited by Defendants in support of the motion and the Attorney General and in opposition to the motion, but none of these cases fully squares with facts of this case.

The two respects that set this case apart are: first, the fact that the agency decision maker has already made a substantial disclosure as to the deliberative process, as reflected in Mr. Colleran's February 2011 letter to investors, and second, the agency's initial and continuing role in this civil case, as contemplated in the Consent Judgment, despite the fact that the agency is not a party. The Consent Judgment *required* Plaintiffs to bring this action.⁶ Moreover, the Attorney General is not a passive spectator in these proceedings. The Attorney General can prevent Plaintiffs from settling this action if it determines the terms are "unacceptable," an undefined, and thus highly discretionary standard.

Under the peculiar circumstances of this case, the Court concludes that the documents filed *in camera* should be produced to the Defendants. The information cannot be obtained from any other source, and its relevance and central significance to this case can hardly be overstated. The Court does not reach this decision lightly, and cautions that the analysis is highly specific to the unusual circumstances of this case. Nevertheless, Defendants have met their burden and, with one redaction for privileged information unrelated to this case in an internal memorandum,⁷ the Court grants Defendant's motion to compel with respect to the documents filed *in camera*. On the other hand, based on the present record, the Court has no

⁵ (See AG's Supp. Opp'n 5-6 (listing discovery already produced or adduced on this topic).)

⁶ The common law has long recognized that a party may not put a communication into issue in litigation and then assert a privilege as to that communication, as is evident in modern-day privilege rules. See, e.g., M.R. Evid. 502(d)(3); M.R. Evid. 503(e)(3).

⁷ The documents filed *in camera* were not indexed or Bates stamped, but the redacted document is the first page of a memo dated March 22, 2010. The Court is redacting the first paragraph and the final, partial paragraph of that single-paged document.

intention of permitting any further inquiry into the agency decision making process. No party will be allowed to bootstrap the disclosure mandated by this Order into further discovery that would not have been allowed in the absent of the disclosure mandated by this Order. In other words, the parties will have to work with the data they have, and will get by virtue of this Order.

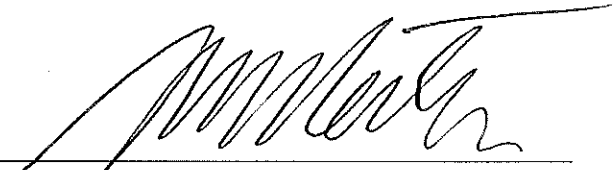
Consistent with the Court's order on Defendant Preti's Motion for Protection, the Court will hold the documents for twenty-two more days to afford the Attorney General the opportunity to appeal. See *Pierce v. Grove Mfg. Co.*, 576 A.2d 196, 198 (Me. 1990); *Moffett v. City of Portland*, 400 A.2d 340, 343 n.8 (Me. 1979).

Based on the foregoing, it is hereby ORDERED as follows:

1. Defendants' motion to compel is GRANTED in part, and DENIED in part. The Court GRANTS the motion with respect to the documents filed *in camera* with the court, with the exception of a redacted document described in footnote 7 of the order. The Court DENIES the motion in all other respects.
2. The Clerk will release only this Order at this time.
3. If the Attorney General files a notice of appeal within 21 days of this Order, those documents shall remain sealed until further order.
4. If no notice of appeal is filed within 21 days of this Order, or if the Attorney General alerts the Clerk that it intends to file no such notice, the Clerk shall provide copies of the documents described in paragraph 1(a) to the parties. The unredacted, partially-privileged document shall remain sealed.
5. The documents that are the subject of this order shall be subject to the parties' existing Confidentiality Order.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: March 12, 2013


A. M. Horton
Justice, Business & Consumer Court

Entered on the Docket: 3.12.13
Copies sent via Mail Electronically