IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AMERICAN CIVIL LIBERTIES UNION OF DELAWARE,	)	
v.	)	C.A. NO. 06C-08-067-JRS
CARL C. DANBERG, IN HIS OFFICIAL CAPACITY AS THE **COMMISSIONER OF THE DELAWARE DEPARTMENT OF CORRECTION.**	)	

Date Submitted: December 6, 2006
Date Decided: March 15, 2007

MEMORANDUM OPINION.

Upon Consideration of American Civil Liberties Union of Delaware's Motion for Protective Order.
GRANTED in part and DENIED in part.

Julia M. Graff, Esquire, American Civil Liberties Union of Delaware, Wilmington, Delaware. Michael T. Kirkpatrick, Esquire, Jennifer Soble, Esquire, Public Citizen Litigation Group, Washington, DC. Attorneys for Plaintiff.

Aaron A. Goldstein, Deputy Attorney General, Wilmington, Delaware. Attorney for Defendant, Carl C. Danberg, as Commissioner of the Delaware Department of Correction.

Amy A. Quinlan, Esquire, Morris James, LLP, Wilmington, Delaware. K. Lee Marshall, Esquire, Bryan Cave, LLP, St. Louis, Missouri. Attorneys for Intervenor, Defendant, Correctional Medical Services, Inc.

SLIGHTS, J.

I.

In this opinion, the Court considers the elements of the so-called "pending or potential litigation exception" to Delaware's Freedom of Information Act ("FOIA") and the scope of permissible discovery relating to this defense.[1] The plaintiff, American Civil Liberties Union of Delaware ("ACLU"), has filed a complaint in this court seeking to compel the Defendant, Carl C. Danberg ("defendant"), the Commissioner of the Delaware Department of Correction ("DOC"),[2] to comply with FOIA in connection with the ACLU's request for information regarding the delivery of health care services within Delaware's prison facilities. The defendant filed an answer in which he raised several defenses, including that the requested information was comprised of protected trade secrets, and that the ACLU was seeking the information on behalf of its clients in order to prosecute litigation against the defendant or others. At the time he served his answer to the complaint, the defendant also propounded interrogatories and requests for production of documents directed to the ACLU which, *inter alia,* sought information relating to the various defenses

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[1]DEL. CODE ANN., tit. 29, §§ 10001 *et. seq.* (2003).

[2]The original complaint named Mr. Danberg's predecessor, Stanley W. Taylor, Jr., as defendant. By stipulation, Mr. Danberg has been substituted as the defendant to reflect his recent appointment to the Commissioner's position. Defendant, Correctional Medical Services, Inc. ("CMS"), has been permitted by the Court to intervene as a defendant in this litigation but has not taken a position with respect to this discovery dispute.

raised in the answer. The ACLU objected to the discovery and sought protection from the Court.

After receiving supplemental briefing from the parties, and oral argument, the Court has concluded that the ACLU's objections to the discovery are well-founded, assuming it will verify that it has not been engaged by any client for the purpose of investigating a potential claim against the defendant or CMS for inadequate medical care in Delaware's correctional facilities. The "pending or potential litigation exception" cannot serve as a platform from which to initiate the broad discovery that has been propounded here. The defendant is, however, entitled to a verified statement as to whether the ACLU is investigating and/or pursuing a claim, on behalf of a client or in its own right, based on inadequate medical care at DOC facilities. Accordingly, the ACLU's motion for protective order is **GRANTED in part and DENIED in part.**[3]

II.

The ACLU initiated this action on August 6, 2006, and alleged that the defendant, on behalf of the DOC, had refused to comply with the ACLU's written

[3]The Court issued an oral ruling on the motion *sub judice* at the outset of a conference with counsel on January 9, 2007. The Court indicated to the parties that it would further articulate the bases for the decision in a written opinion. To the Court's knowledge, the verified statement contemplated here has already been supplied by the ACLU.

FOIA request in which it demanded access to five designated categories of documents, all of which related to the medical care rendered to inmates while in the custody of the DOC. The DOC responded to the FOIA request by producing certain documents but declining to produce others. As grounds for the refusal, the DOC pointed to various exceptions enumerated in FOIA which designate certain information that will not be subject to public inspection. The defendant's answer in this court reiterated these defenses and requested judgment in his favor as to all claims raised in the complaint.

As stated, the defendant propounded his discovery at the same time he served his answer to the complaint. In his interrogatories, the defendant asked the ACLU to identify, *inter alia*: all communications it has had with inmates in the custody of the DOC; all ACLU clients who are past or current inmates in the custody of the DOC; any inmate in the custody of the DOC that the ACLU has sought as a client; any advice given to inmates derived from public records disclosed pursuant to FOIA; any advice given to inmates regarding the means by which to preserve claims against the DOC; any decision made by the ACLU to pursue concerted legal action against the DOC; and past instances where the ACLU has litigated against Delaware or its employees or agencies. In his requests for production of documents, the defendant asked the ACLU to produce, *inter alia*: any medical records obtained by ACLU

regarding any past or current inmate in the custody of the DOC; any written accounts of medical care prepared by past or current inmates in the custody of the DOC regarding medical care received while in custody; and any correspondence between the ACLU and past or current inmates in the custody of the DOC within the last year.

The ACLU objected to the discovery and moved for a protective order on the grounds that the discovery was premature, irrelevant, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and sought information protected by the attorney-client privilege and/or the work product immunity.[4] The motion has been fully briefed and argued and the matter is now ripe for decision.

III.

As the arguments of the parties were refined through litigation, it became clear that the discovery most troublesome to the ACLU was the discovery that addressed the ACLU's intent to pursue litigation against the DOC. Specifically, it is evident that several of the defendant's interrogatories and requests for production are intended to develop facts that might support the defendant's claim, asserted as an affirmative defense, that the ACLU was seeking documents in its FOIA request for the purpose of pursuing litigation against the DOC for inadequate medical care

[4]D.I. 13 (ACLU Motion for Protective Order).

rendered to inmates. The ACLU claims that this sort of discovery is not appropriate in FOIA litigation. Indeed, according to the ACLU, "it is highly unusual for a defendant in a FOIA case to take **[any]** discovery of the FOIA requester."[5] The ACLU argues that the discovery requests at issue here are particularly inappropriate because they go to one of the defendant's proffered excuses for refusing to produce information. Under the circumstances, the ACLU contends that the defendant should have been well aware of the factual bases for his denial of the FOIA demand at the time he refused to provide the requested information. Alternatively, the ACLU argues that the discovery is premature because the defendant has yet to state specifically why he has refused to comply with the FOIA demand.

The defendant counters that discovery is not as uncommon in FOIA cases as the ACLU would have the Court believe. He has cited a number of cases in Delaware where some limited discovery of the relevant issues was pursued, apparently without challenge. He also contends that he is entitled to confirm his belief - - supported by some limited information he has uncovered without discovery - - that the ACLU intends to prosecute litigation against the DOC, either in its own name or on behalf

[5]D.I. 13, at 4 (emphasis supplied).

of clients, for alleged inadequate medical care at DOC facilities.[6]

IV.

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[7] In determining whether to grant a protective order, the court will consider whether the discovery will impose an undue burden on the responding party, whether it is calculated to lead to the discovery of admissible evidence and whether it seeks information that is subject to a recognized privilege or immunity (e.g., attorney-client privilege or work product immunity).[8] Whether or not to enter a protective order lies within the sound discretion of the court.[9]

V.

The parties disagree as to the extent to which discovery is permitted in FOIA actions generally and also, more specifically, the extent to which a defendant's

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[6]The defendant attached as exhibits to his response to the motion for protective order several letters from the ACLU, some directed to inmates in the custody of the DOC, which he contends evidence the ACLU's intent to pursue litigation against him and/or the DOC. These letters will be addressed below in the discussion of the "pending or potential litigation" exception to FOIA.

[7]Del. Super. Ct. Civ. R. 26(c).

[8]*See Williams v. Morris*, 223 A.2d 390, 391 (Del. 1966).

[9]*See American Ins. Co. v. Synvar Corp.*, 199 A.2d 755, 757 (Del. 1964).

reliance upon the "pending or potential litigation" exception will justify discovery into the FOIA requester's plans for litigation. The Court will consider these issues in turn.

A. Discovery In FOIA Litigation

Delaware's FOIA law is intended "to ensure government accountability, inform the electorate and acknowledge that public entities, as instruments of government, should not have the power to decide what is good for the public to know."[10] FOIA contemplates a process whereby "citizens [will] have easy access to public records in order that the society remain free and democratic."[11] The statute's emphasis of "easy access to public records" suggests a legislative intent that the proceedings to enforce a FOIA request will be appropriately streamlined to accommodate the public's "right to know" while also affording all parties procedural due process. Needless to say, prolonged, involved and expensive discovery would be contrary to the summary process envisioned by the General Assembly when it enacted FOIA.

Generally, the motives of the party requesting information from a "public

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[10] *Mell v. New Castle County,* 835 A.2d 141, 146 (Del. Super. Ct. 2003)(citation omitted).

[11] DEL. CODE ANN., tit. 29, § 10001 (2003).

body"[12] are not relevant to the determination of whether that party is entitled to access public records under FOIA.[13] Accordingly, discovery directed to the requesting party in order to elicit his purpose in seeking information under FOIA rarely will lead to admissible evidence. Such discovery, therefore, typically is not appropriate.[14] This general rule is consistent with the notion that it is the public body's burden, in the first instance, to establish the factual and legal bases for its refusal to provide information in response to a FOIA request.[15] The citizen initiating the FOIA request need not demonstrate that his request is proper unless and until the public body to whom the request is directed raises legitimate concerns regarding the *bona fides* of the request.[16] Simply stated, the public body rarely will require to discovery to support its denial of a FOIA request.

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[12] FOIA contemplates that requests for information will be directed to a "public body," defined by the statute as "any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State...." *See* DEL. CODE ANN., tit. 29, §§ 10002(a), 10003(a).

[13] *See Del. Op. Atty. Gen.* 06-IB09 (2006)("To inquire into a requestor's purpose would turn FOIA into a battleground for disputes.... The inevitable delays of such a system would frustrate the statute's purpose of 'easy access to public records.'"). *See also U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989)(holding that applicability of FOIA will "turn on the nature of the requested document and its relationship to the basic purpose of [FOIA] to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested.").

[14] *See U.S. Dept. of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 489 (1994).

[15] *See Guy v. Judicial Nom. Comm'n,* 659 A.2d 777, 781 (Del. Super. Ct. 1995).

[16] *Id.*

B. The Pending or Potential Litigation Exception

The enumerated statutory exceptions to FOIA, including the "pending or potential litigation" exception, pose a barrier to the public's right to access and are, therefore, narrowly construed.[17] Nevertheless, even when construing statutory language narrowly, the court "cannot ignore the plain meaning of the words of the statute."[18] The statutory provision applicable here provides: "For purposes of this chapter, the following records shall not be deemed public [and shall, therefore, be excepted from FOIA]: [a]ny records pertaining to pending or potential litigation which are not records of any court."[19] The rationale for this exception is easy to discern with respect to "pending litigation." As this court has observed:

> The pending litigation exception to FOIA addresses a practical reality: when parties to pending litigation against a public body seek information from that public body relating to the litigation, they are doing so not to advance 'the public's right to know,' but rather to advance their own personal stake in the litigation. Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure.[20]

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[17] *See Chem. Indus. Council of Delaware, Inc. v. State Coastal Zone Indus.,* 1994 WL 274295, at *12 (Del. Ch. May 19, 1994).

[18] *Bd. of Educ. of Town of Ridgefield v. Freedom of Information Comm'n*, 585 A.2d 82, 85 (Conn. 1991)(construing Connecticut's equivalent to the "pending or potential litigation" exception).

[19] DEL. CODE ANN., tit. 29, § 10002(g)(9) (2003).

[20] *Mell,* 835 A.2d at 147.

The exception is somewhat more complicated in its application, however, when dealing with "potential litigation." As the Attorney General has recognized, "[i]n our litigious society, a governmental agency always faces some threat of suit. To construe the term 'potential litigation' to include an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA]."[21] To address this dynamic, the Attorney General has adopted a two pronged test to determine if the "potential litigation" exception would justify a refusal to supply information in response to a FOIA request: (1) litigation must be likely or reasonably foreseeable; and (2) there must be a "clear nexus" between the requested documents and the subject matter of the litigation.[22] This test strikes a balance between the need to construe the exceptions to FOIA narrowly and the need to give effect to the actual words of the statute which provide for the exception. Accordingly, the test will be adopted here.

When determining whether litigation is "likely or reasonably foreseeable," the public body should look for objective signs that litigation is coming.[23] For instance,

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[21] *Del. Op. Atty. Gen.*, 02-IB12 at 4 (May 21, 2002)(quoting *Claxton Ent. v. Evans County Bd. Of Comm'r*, 549 S.E.2d 830, 834 (Ga. App. 2001)).

[22] *Del. Op. Atty. Gen.*, 02-IB30 at 2 (Dec. 2, 2002).

[23] *Id.* at 3 ("The potential litigation exception applies only when there is a 'realistic and tangible threat of litigation' based on 'objective factors....'")(citation omitted).

a written demand letter in which a claim is asserted, or action is demanded, may give rise to a proper inference that litigation will soon follow.[24] Other indicators of "potential litigation" might include "previous or preexisting litigation between the parties or proof of ongoing litigation concerning similar claims or [] proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue."[25] In any event, whatever the indicator, the public body must be able to point to a "realistic and tangible threat of litigation ... characterized with reference to objective factors" before it may avail itself of the "potential litigation" exception to FOIA.[26]

Setting the standard by which the public body may ultimately prevail on a "potential litigation" defense to a FOIA request does not necessarily answer the question of when, if ever, the public body may seek discovery from the requesting party to determine if litigation is in the works. While courts generally hold that the requesting party's motives are irrelevant in the FOIA analysis, this is not so when the requesting party seeks information from a public body to advance that party's private

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[24] *See, e.g., Bd. of Educ. of the Town of Ridgefield*, 585 A.2d at 86 (demand letter constituted objective evidence of potential litigation); *Claxton Ent.*, 549 S.E.2d at 834 (same).

[25] *Claxton Ent.,* 549 S.E.2d at 834-35.

[26] *Id.*

interest in litigation.[27] The relevancy of the requesting party's motives in such circumstances is the same whether litigation is "pending" or simply a "potential" course of action. Thus, when a public body has reasonable, objective and articulable grounds to believe that the requesting party is preparing for litigation, it is appropriate to allow the public body to seek to confirm the requesting party's intentions in order to determine if the "potential litigation" exception is applicable. This is not to say that the public body is entitled to discover the specifics of the "potential litigation," such as potential theories of recovery, potential evidence or witnesses in support of the claim, or potential parties to the claim. Rather, when the public body is able to convince the court that "potential litigation" may be the sole or primary purpose of the FOIA request, the court may determine that it is appropriate to allow the public body to propound discovery to the requesting party for the mere purpose of ascertaining whether that party was intending to pursue litigation against the public body, or one of its employees or representatives, at the time the FOIA request was made.

In this case, the defendant has produced correspondence from the ACLU, some addressed to inmates in the custody of the DOC, that suggest that the ACLU may be contemplating litigation against the DOC based on alleged inadequate medical care

[27] *See Mell,* 835 A.2d at 147.

at DOC facilities. In one letter, the attorney for the ACLU involved in this litigation informs an inmate: "The ACLU is currently in the initial stages of collecting and analyzing information from Delaware inmates who suffer from inadequately treated medical conditions, and we are conferring with colleagues about the feasibility of collective legal action or other forms of advocacy."[28] In another form letter apparently sent to several inmates, the ACLU states: "We will seriously consider bringing a class action lawsuit on behalf of Delaware prisoners, seeking improvements in the medical and mental care system in the State's prisons and jails."[29] This same letter goes on to advise inmates regarding the proper means by which to perfect a "medical grievance" within the prison system.[30]

The Court is satisfied that the ACLU's letters to inmates give rise to reasonable, objective and articulable grounds to believe that the ACLU may be preparing for litigation, and that the litigation may implicate the same issues that are the subject of the ACLU's FOIA request to the DOC. Although perhaps inadequate to carry DOC's ultimate burden to prove the "potential litigation" defense, these letters suggest that there may be more in the works than "unrealized or idle threats of

[28]D.I. 14, Ex. C.

[29]*Id.*

[30]*Id.*

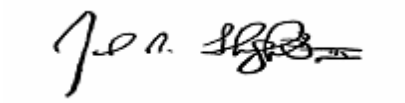
litigation."[31] Limited discovery on this subject may lead to admissible evidence. Accordingly, the Court will direct the ACLU to provide a verified response to the defendant's interrogatories number six and seven, but only to the extent that these interrogatories ask the ACLU to identify whether it has been engaged by a client to investigate and/or pursue a potential claim against the defendant, DOC, or CMS (or their agents or representatives) for alleged inadequate medical care within the DOC's facilities. The ACLU shall also provide a verified statement as to whether it currently intends, in its own right, to pursue such a claim. The ACLU will not, however, be compelled to answer any of the remaining discovery which sought the identity of such clients, the evidence supporting the claim(s), or the specifics of communications with client(s) or potential clients. Such information is not relevant to the limited question of whether or not the "pending or potential litigation" exception applies here, nor would it lead to the discovery of admissible evidence.

VI.

Based on the foregoing, the ACLU's motion for protective order is **GRANTED in part and DENIED in part.**

[31] *Del. Op. Atty. Gen.* 02-I812 at 4 (May 21, 2002)(citation omitted).

IT IS SO ORDERED.



Judge Joseph R. Slights, III

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