IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOSEPH ESPOSITO and JOHN J. PETRUCCI, JR.,	:	
Plaintiffs	:	Case No. 4:04-CV-475
v.	:	(Judge Jones)
LEONARD GALLI, DANIEL MIMNAUGH and DAVID J. SWARTZ,	:	
Defendants.	:	

MEMORANDUM AND ORDER

February 4, 2005

Pending before the Court is a Motion to Quash a Subpoena and for a Protective Order ("the Motion") (doc. 35), filed by the defendants Daniel Mimnaugh ("Mimnaugh") and David J. Swartz ("Swartz") (together, "Defendants") on October 25, 2004. For the reasons that follow, the Motion shall be granted in part and denied in part.

PROCEDURAL HISTORY:

The procedural chronology of this case has been set forth in the Court's September 27, 2004 Order and is well known to the parties. The following brief recitation of that history is sufficient for purposes of the Court's review of the

pending Motion.

The plaintiffs, Joseph Esposito ("Esposito") and John J. Petrucci, Jr. ("Petrucci") (together, "Plaintiffs") initiated this action by filing a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Pennsylvania on March 5, 2004. In addition to Mimnaugh and Swartz, Plaintiffs' Complaint names Leonard Galli ("Galli") as a defendant. Galli is not, however, a party to the pending Motion.

In a memorandum dated March 31, 2004, Chief Counsel Barbara L. Christie requested an investigation by the Pennsylvania State Police's ("PSP") Bureau of Integrity and Professional Standards ("BIPS") of the factual circumstances cited in the complaint for the purpose of "developing legal theories that can be advanced in defense of said claim and to make a proper evaluation as to any liability to which the Department may be exposed with respect to this claim." (See Rec. Doc. 47, Ex. PSP-1). Upon completion of the investigation, counsel for Plaintiffs issued a subpoena on the PSP through which they requested the production of the BIPS investigation. PSP objected by letter to the production of this material pursuant to the attorney work product doctrine.

After an unsuccessful attempt to resolve PSP's objections via an October 15, 2004 telephonic conference with the Court, Defendants filed the instant Motion to

Quash the Subpoena and for a Protective Order to shield the BIPS report on October 25, 2004. On February 2, 2005, a hearing was held on Defendants' Motion during which we ordered an *in camera* inspection of the BIPS Report Number IAD-2004-0256. The Motion has been briefed by the parties and is therefore ripe for disposition.

FACTUAL BACKGROUND:

The factual details of this case have been set forth in their entirety in prior orders, and accordingly we will restate them only in an abbreviated form. After a public meeting and official vote, the Exeter borough council ("Borough") lent one of its employees money to pay off an unpaid judgment and the loan was paid off on January 29, 2002. (See Compl. at ¶¶ 10-13).

In early 2002, Galli, a police officer for the Borough who had an unquestioned distaste for Plaintiffs, approached his co-defendants, who are Pennsylvania State Troopers, and pressured them into charging Plaintiffs with crimes related to the loan to the Borough employee. See id. at ¶¶ 16-17. On April 2, 2002, Mimnaugh, as affiant, charged Plaintiffs with Misapplication of Entrusted Property and Property of Government of Financial Institutions, a violation of 18 Pa.C.S. § 4113(a), and with Criminal Conspiracy, a violation of 18 Pa.C.S. § 903(a)(1). See id. at ¶ 18.

A preliminary hearing on the cases was held before Judge William Amesbury on May 23, 2002. Id. at ¶ 19. The charges against Plaintiffs were dismissed for failure to prove a prima facie case. Id. at ¶ 19.

DISCUSSION:

Defendants assert that BIPS Report Number IAD-2004-0256 ("BIPS 2004-0256") constitutes attorney work product and that none of the exceptions to the attorney work product doctrine are applicable to the case sub judice. Defendants accordingly request that we issue an order quashing the subpoena issued upon the PSP by Plaintiffs dated September 30, 2004, and that we issue a protective order to shield production of the documentation contained in the BIPS 2004-0256. (See Defs.' Rep. Br. Supp. Mot. Quash Sub. at 5).

In response, Plaintiffs argue that Defendants in the instant lawsuit are three individuals, two of whom are employed by the PSP, as opposed to the PSP or the Commissioner. As neither the PSP nor the Commissioner are parties to this case and as the PSP is the mere employer of a party, Defendants are not entitled to invoke the work product exclusion and to withhold the BIPS 2004-0256. (See Pls.' Br. Opp. Defs.' Mot. Quash Sub. at 3-6). Moreover, Plaintiffs maintain that the documents at issue were neither prepared by any party's attorney, nor prepared at the direction of any party or any party's attorney.

Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 26(b)(3), captioned "Trial Preparation: Materials," provides that:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Supreme Court, in Hickman v. Taylor, 329 U.S. 495 (1947), recognized that the work-product doctrine "protects from discovery materials prepared or collected by an attorney 'in the course of preparation for possible litigation.'" In re Grand Jury Investigation, 599 F.2d 1224, 1228 (3d Cir. 1979)(quoting Hickman, 329 U.S. at 505). The Third Circuit Court of Appeals has instructed that the burden of demonstrating that a document is protected as work-product rests with the party asserting the doctrine. Conoco, Inc. v. United States DOJ, 687 F.2d 724, 730 (3d Cir. 1982).

After a thorough *in camera* inspection of the BIPS 2004-0256, we find that it generally falls within the ambit of attorney work product protection and is

therefore not discoverable for the reasons that follow. We do find however that two letters therein are fully discoverable, one written to Trooper Mimnaugh and the other written to Trooper Swartz from Captain Ronald P. Petyak on August 23, 2004, indicating that the action taken was justified and that no disciplinary action is anticipated regarding either of the Defendants. The remainder of the BIPS 2004-0256 consists of material which can be obtained by Plaintiffs via diligent investigation, or is quite likely already in Plaintiffs' possession and control, except for a four page "General Investigation Report" contained within the larger submission. Accordingly, we view the dispute between the parties as one which in the main concerns this four page document and the potential application of the attorney work product doctrine thereto, which we will now address in detail.

Although Plaintiffs assert that the attorney work product doctrine is inapplicable to the BIPS 2004-0256 as neither the PSP nor the Commissioner are parties to the instant lawsuit, Defendants counter by maintaining that although counsel from the Office of Attorney General ("OAG") entered her appearance as counsel of record for Defendants, that the PSP Chief Counsel also represents Defendants inasmuch as that office represents all PSP officers in matters of this type. Although Plaintiffs would have us believe that the PSP is a detached third party, the evidence reflects that the OAG and PSP counsel are working in concert

in this matter and do so in other similar matters in which members of the PSP are sued in their official capacities. In the hearing before the Court on February 2, 2005 concerning the instant Motion, PSP's Chief Counsel, Barbara L. Christie ("Chief Counsel Christie") testified extensively on the steps taken after a civil lawsuit is filed against a member of the PSP, as well as regarding the relationship between the PSP and OAG.

In this case, Chief Counsel Christie testified that the PSP received notice of a complaint which was filed on March 5, 2004 against Defendants. By a memorandum dated March 31, 2004 and addressed to Major Skurkis, Chief Counsel Christie requested an investigation by the PSP BIPS of the factual circumstances cited in the complaint for the purpose of "developing legal theories that can be advanced in defense of said claim and to make a proper evaluation as to any liability to which the Department may be exposed with respect to this claim." (See Rec. Doc. 47, Ex. PSP-1). Chief Counsel Christie further explained that this information is being "requested in anticipation of litigation and is considered to be 'attorney work product.' Consequently, this information should not be released to any individual outside the Pennsylvania State Police with the exception of any Commonwealth attorney who is representing the Department in the defense of claims relating to the above-referenced matters." Id. at ¶ 2. Chief Counsel Christie

testified that the above-referenced investigation is conducted after a civil action is filed for the purpose of defending against the action and to determine whether the individuals against whom the complaint was filed will be represented and indemnified by the Commonwealth.

There are specific procedures that must be taken and followed when legal action is instituted against departmental personnel with the PSP. (See Rec. Doc. 47, PSP-4, PSP-5). When an action is commenced against state actors as a result of conduct which occurs within the scope of their official duties, 42 Pa.C.S. § 8525 requires the Commonwealth to provide representation in defense of that action.[1] In addition, Chief Counsel Christie testified that after it is determined that the defendant members of the PSP were acting within the scope of their employment at the time of the alleged incident at issue, as has occurred in this case, the OAG undertakes representation of the defendants and Chief Counsel Christie assigns a liaison attorney to work directly with the OAG. Moreover, as Defendants point out, when state actors are Pennsylvania State Police Troopers ("PSPT"), Article 27,

[1] "When an action is brought under this subchapter against an employee of the Commonwealth government, and it is alleged that the act of the employee which gave rise to the claim was within the scope of the office or duties of the employee, the Commonwealth through the Attorney General shall defend the action, unless the Attorney General determines that the act did not occur within the scope of the office or duties of the employee." 42 Pa.C.S. § 8525; see also Rec. Doc. 47 at PSP-4.

§ 3 of the PSP/Pennsylvania State Trooper Association Collective Bargaining Agreement requires the Commonwealth to indemnify the Troopers from any judgment that might be rendered against them. Thus it is notable that despite not being a named defendant in the instant case, the PSP has monetary exposure in the event of an adverse verdict, and possesses the ultimate authority with respect to authorizing any proposed settlement.

During her cross-examination testimony, Chief Counsel Christie acknowledged that neither the PSP nor the Commonwealth are named defendants in the instant lawsuit, and that neither Defendant Mimnaugh nor Defendant Swartz directed the "attorney work product" investigation to be conducted. As a result, a strict interpretation by us of Fed.R.Civ.P. 26(b)(3) could lead to the conclusion that the entire BIPS 2004-0256 is discoverable, as it was technically not prepared in anticipation of litigation by or for another "party" or by or for that other "party's" representative. This interpretation would however ignore the salient facts essential to our analysis, including that the PSP is at least a *de facto* party in interest, if not an actual named party. Moreover, the BIPS investigation at issue was prepared by a member of the PSP, at the direction of Chief Counsel Christie, after service of the complaint and with the objective being to defend against the present action. While a BIPS investigation may have multiple purposes, unquestionably its primary role

here was in aid of litigation the PSP knew had already been initiated against two of its troopers. Plaintiffs seek to have us elevate form over substance, but we decline to do so. The PSP is not a disinterested third party to this action. Rather, it is accepted protocol that, as noted, the OAG and the PSP's Chief Counsel work collaboratively in defending actions against a PSP trooper who has been sued in his or her official capacity. If we were to determine that reports such as the one at issue are discoverable as a matter of course, then clearly the PSP's efforts to conduct an investigation into the merits of complaints filed against members of the PSP in aid of defending these actions would be chilled.

Based upon the reasons stated herein and after a careful *in camera* inspection of the BIPS 2004-0256, we hold that it generally falls within the ambit of attorney work product protection and is therefore not discoverable. As noted, we will except from this ruling the two letters written on August 23, 2004 to both Trooper Mimnaugh and Trooper Swartz from Captain Ronald P. Petyak, indicating that the actions taken were justified and that no disciplinary action was anticipated. These are fully discoverable and shall be produced to Plaintiffs.

We do note that as Defendants point out, the United States District Court for the Eastern District of Pennsylvania recently considered the application of the attorney work product doctrine to a dispute involving the production of discovery

materials. The court in U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC, 2004 WL 1950318 (E.D. Pa. Aug. 31, 2004), stated that "Rule 26(b)(3) establishes two tiers of protection: first, work product prepared in anticipation of litigation by an attorney or his agent is discoverable only upon a showing of need and hardship; second, 'core' or 'opinion' work product that encompasses 'mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation' is 'generally afforded near absolute protection from discovery.'" In re Cendant Crop. Sec. Litigation, 343 F.3d 658, 663 (3d Cir. 2003)(quoting In re Ford Motor Co., 110 F.3d 954, 962 n.7 (3d Cir. 1997)). "If litigation is not imminent, or if the materials at issue were prepared in the ordinary course of business, they are generally not protected by either the attorney client privilege or the Work Product Doctrine." U.S. ex rel. Hunt, 2004 WL 1950318 at *1; see also Schmidt, Long & Assoc., Inc. v. Aetna U.S. Healthcare, Inc., 2001 WL 605199 (E.D. Pa. May 31, 2001). Accordingly, the three exceptions to the attorney work product doctrine are the following: (1) materials prepared prior to litigation becoming imminent; (2) materials prepared during the ordinary course of business; and (3) when a showing of substantial need or hardship by the party seeking the material is made.

At the hearing Plaintiffs' counsel indicated with commendable candor that

he will not make an argument asserting that there is substantial need for the BIPS 2004-0256 or that hardship will result from its nondiscoverability at this time, as he has not yet deposed Defendants. The Court explained on the record that Plaintiffs' counsel may reserve the right to argue hardship or substantial need pursuant to Fed.R.Civ.P. 26(b)(3) after completing depositions in this case. Plaintiffs' counsel may consequently renew his request to discover the BIPS 2004-0256 if it becomes necessary after his completion of additional discovery.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Defendants' Motion to Quash the Subpoena and for a Protective Order (doc. 35) is denied in part and granted in part.

    A. Defendants' Motion is denied to the extent that two letters written on August 23, 2004, one written to Trooper Mimnaugh and the other written to Trooper Swartz from Captain Ronald P. Petyak are fully discoverable and shall be produced to Plaintiffs.

    B. Defendants' Motion is granted to the extent that the remainder of the BIPS 2004-0256 constitutes attorney work product and is therefore not discoverable.

2. Plaintiffs' counsel may renew his request to discover the BIPS 2004-0256 under Fed.R.Civ.P. 26(b)(3) as it relates to substantial need and hardship if it becomes necessary after his completion of additional discovery.

s/ John E. Jones III
John E. Jones III
United States District Judge