IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALVIN KENNEDY and,)
ELIEZER FELICIANO,)
)
Plaintiff,)
)
vs.)
)
MUNICIPALITY OF ANCHORAGE,)
)
Defendant.)
) Case No. 3AN-10-08665 CI

DECISION AND ORDER

I. INTRODUCTION

Anchorage Daily News and KTUU-TV ("Press Intervenors") intervened in this case for the limited purpose of obtaining access to certain records, more specifically, the Brown Report and its attachments. Press Intervenors argue that although the Brown Report is the subject of a protective order issued by this court, the protective order no longer applies to the Brown Report because, after it was produced, it became a matter of public record.[1] The Municipality of Anchorage adamantly opposes this argument. The MOA maintains that the federal court,

[1] Memo. in Supp. of Anchorage Daily News and KTUU-TV Mot. to Allow Public Access to Judicial R. at 3 (citing Second Protective Order, ¶14).

where a separate case[2] and protective order regarding the Brown Report exist, is better suited to judge whether access to the documents should be granted.[3] The court held a hearing on the motion for access on February 14, 2017. Having heard the arguments of each interested party, the court affirms that its previous orders restricting access to the Brown Report were not erroneous or ill-advised. The circumstances have changed since the issuance of those orders, but their effect remains the same. Accordingly, the Press Intervenors' motion for access to certain records is denied.

II. FACTS

The facts relevant to this decision are fairly straightforward and undisputed. Alvin Kennedy and Eliezer Feliciano, two minority former Anchorage Police Department detectives, brought suit against MOA in 2010. Kennedy and Feliciano claimed that APD created a hostile work environment and retaliated against them after they filed discrimination complaints with the Municipality of Anchorage Office of Equal Opportunity. The case went to trial in March 2014, resulting in a hung jury on the retaliation claim and a defense verdict on the hostile work environment claim. The court granted a new trial on the hostile work

[2] *Henry v. Municipality of Anchorage, et al.*, Case No. 3:15-cv-00187-RRB.

[3] MOA's Opp'n to ADN and KTUU Mot. for Access at 6.

environment claim. The second trial took place in January and February 2017, and resulted in a plaintiffs' verdict on all claims.

The facts at the first trial were dramatically different from the facts at the second trial. One difference, the most notable for purposes of this decision, was the existence of the Brown Report. Between the first and second trial, MOA hired Lt. Col. John "Rick" Brown, a retired Pennsylvania police officer, to conduct an independent investigation of Lt. Anthony Henry. Prior to the first trial, Mark Mew, the then APD police chief, knew that there were potential serious problems with Henry, MOA's "star" witness who would testify in the first trial about an 18 month full-time investigation he conducted of the Metro Drug Unit to determine what went wrong such that APD disbanded the unit. Rather than conduct an investigation of Henry prior to the first trial, Mew delayed the investigation so that MOA could present Henry as a credible witness.

As a result of the Brown Report, MOA fired Henry and disciplined Mew by ordering him suspended for two weeks without pay. This changed the course of the second trial because MOA's "star witness" had now become a hostile witness. On the second day of the second trial, the issue of public access to the Brown

Report was discussed.[4] The parties[5] addressed whether the Brown Report should be allowed into evidence and whether it would be covered by the protective order previously issued by this court.[6] After considering the interests of each party involved, the court ultimately allowed portions of the Brown Report into evidence[7] for the non-hearsay purpose of comparator evidence.[8]

At that time the court made several comments on the record before coming to its final decision. The court acknowledged the existence of the protective order in this case and the protective order issued by the federal court, but recognized that

---

[4] Electronic Recording of *Kennedy v. Municipality of Anchorage*, January 31, 2017, at 1:30:59 p.m.- 2:36:36 p.m.

[5] The court heard arguments from plaintiffs, defendant, and counsel for Lt. Anthony Henry who was allowed to intervene for the limited purpose of discussing the status of the Brown Report.

[6] This court issued a Protective Order on August 31, 2011, prior to the Brown Report coming into existence. Before the start of the second trial, this court issued the Second Protective Order on July 5, 2016. The Brown Report was the subject of the Second Protective Order.

[7] The court admitted two e-mails from Mark Mew to Lt. Col. John "Rick" Brown as substantive evidence of admissions by MOA. The e-mails were attachments to the Brown Report. The Brown Report itself and the remaining two thousand or more pages of attachments were not admitted as substantive evidence.

[8] *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751,761 (Alaska 2008).

it had no obligation to respect the protective order issued by the federal court.[9] The court weighed the *Jennings*[10] factors, Henry's privacy interests, and considered Administrative Rule 37.6(b). The court determined that the need for disclosure in this case outweighed the risk of intrusion into Henry's privacy interests. Before hearing arguments from the parties, the court stated its intention to affirm its prior ruling that the Brown Report could be admitted for the non-hearsay purpose of showing disparate treatment of officers.[11]

After hearing arguments from the three parties present, the court affirmed its prior ruling. The Brown Report would be admitted into evidence, not for the truth of the matter asserted, but for the limited non-hearsay purpose of showing disparate treatment. The court cited to Administrative Rule 37.6(b) to limit public access to the Brown Report. In doing so, the court stated that the document could be admitted, it could be reviewed by the jury, but it would not be allowed to get

---

[9] Electronic Recording of *Kennedy v. Municipality of Anchorage*, January 31, 2017, at 1:40:35 p.m.

[10] *Jones v. Jennings*, 788 P.2d 732 (Alaska 1990).

[11] Electronic Recording of *Kennedy v. Municipality of Anchorage*, January 31, 2017, at 1:41:30 p.m. (citing *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751 (Alaska 2008) (explaining that the Brown Report is very significant and relevant evidence of the difference between how white officers are treated versus how minority officers are treated).

out in the public. This accommodation allowed the court to protect all interests involved: Henry's privacy rights, plaintiffs' right to present their case, and MOA's interest in minimizing the impact of alleged personnel rules violations.

For the remainder of the second trial, the Brown Report was used in accordance with this court's ruling, for a limited non-hearsay purpose. On March 7, 2017, the jury returned a verdict in favor of the plaintiffs. And on May 22, 2017, this court issued a final judgment in favor of each plaintiff. After the conclusion of the second trial, and in accordance with the Second Protective Order, this court returned all documents and exhibits to the party that produced them.[12] On October 19, 2017, after retrieving all documents from this court covered by the first and second protective orders, MOA filed a Motion to Enforce Protective Orders in order to have all confidential documents returned to it. On December 7, 2017, Press Intervenors filed a Motion for Limited Intervention and a Motion for Access to Judicial Records. On December 13, 2017, this court granted MOA's Motion to Enforce Protective Orders. Plaintiffs were ordered to "return

[12] Second Protective Order, ¶13. Paragraph 13 states that, "[w]ithin 30 days of the end of this litigation, all documents produced under this protective order and all copies of those documents shall be accounted for and returned to the party which produced them for destruction." *Id.*

all the items to the Municipality in accordance with the terms of the Protective Orders within fifteen (15) days."

Rather than comply with this court's order, Kenneth Legacki, counsel for plaintiffs, filed the Brown Report and attachments under seal with this court. Legacki argues that "plaintiffs are caught in the middle between this [c]ourt's order to return documents that have been subject to the Protective Order, and the Media's motion."[13] This court granted Press Intervenors request for limited intervention and scheduled a hearing on the motion for access to records.

III. DISCUSSION

Each interested party mischaracterizes the nature and the importance of the Brown Report to the underlying litigation. In their motion for access, Press Intervenors paint the picture that the Brown Report was the sole factor that led to the plaintiffs recovering over $2,231,563 in the second trial.[14] However, this was

---

[13] Non-Opposition to KTUU and ADN's Mot. for Access to Judicial R. and Notice of Filing Brown Report and Attachments Under Seal at 3.

[14] Memo. in Supp. of Mot. for Access to Judicial R. at 13. Press Intervenors state that:

> The Brown Report was used in this trial from the outset. It was referred to in opening arguments, offered and admitted as an exhibit in the trial, used in the examination of witnesses, and provided to the jury for use in its deliberations that led to verdicts against the Municipality. And instead of recovering nothing, as was the case in the first trial, the Plaintiffs in the retrial obtained jury verdicts

not the case; the Brown Report was one of many distinguishable factors between the two trials.[15] In its opposition to Press Intervenors' motion for access, MOA attempts to minimize the importance of the Brown Report by explaining that it is unrelated to the underlying litigation.[16] However, this was also not the case; the Brown Report did not exist prior to the first trial solely because of MOA's actions of delaying an investigation of Henry until after the trial concluded.[17] Plaintiffs

---

> awarding them a total of over $2,231,563, before assessment of attorney fees.

Id.

[15] *Compare* Memo. in Supp. of Mot. for Access to Judicial R. at 13, 29-30 (mischaracterize the Brown Report as the only distinguishing factor between the first and second trial), *with* Order dated July 5, 2017, at 4 (explaining that the facts at the first trial were dramatically different from the facts at the second trial).

[16] Municipality's Opp'n to ADN and KTUU Mot. for Access at 3-4. MOA states that:

> The Brown Report (and related attachments) came into existence in this case towards the end of the prolonged litigation. This case was filed in 2010. Meanwhile, the report was not even requested until October 3, 2014, when Col. Brown was retained, or issued until March 15, 2015 . . . The report itself was not even disclosed in this case until 2016.

Id.

[17] *Compare* MOA's Opp'n to ADN and KTUU Mot. for Access at 3-4 (mischaracterizing the delay in the existence of the Brown Report as proof of it not being related to the underlying litigation), *with* Order dated July 5, 2017, at 11 (explaining that MOA delated the investigation into Henry so that it could present Henry as a credible witness at the first trial to testify adversely about plaintiffs).

mischaracterize the Brown Report as a matter of public record and not subject to the Second Protective Order issued by this court.[18] This is contrary to this court's prior ruing and orders.[19] And finally, Henry mischaracterizes the Brown Report as an issue solely for the federal court, and not this court, to decide.[20] This court has previously termed that characterization to be erroneous.[21]

A. This Court's Previous Ruling Still Stands: Public Access to Brown Report Is Not Allowed.

On January 31, 2017, this court made its ruling on the admissibility of and public access to the Brown Report. At that time, the court ruled that it would admit the Brown Report into evidence for the limited non-hearsay purpose of showing disparate treatment of officers. The court looked to the factors in *Jones v. Jennings*[22] to weigh the privacy interests involved versus the interest in disclosure.

---

[18] Declaration of Kenneth Legacki at 3.

[19] Electronic Recording of *Kennedy v. Municipality of Anchorage*, January 31, 2017, at 2:33:19 p.m., *See also* Second Protective Order ¶13, *See also* Order on Mot. to Enforce Protective Orders.

[20] Opp'n to Mot. and Memo. for Access to Judicial R. at 1.

[21] Electronic Recording of *Kennedy v. Municipality of Anchorage*, January 31, 2017, at 1:40:35 p.m.

[22] 788 P.2d 732 (Alaska 1990).

After weighing the *Jennings* factors, the court looked to Administrative Rule 37.6(b) to determine whether public access to the Brown Report should be limited.

Jennings requires the court to conduct the following inquiry:

> (1) does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed?
> (2) is disclosure nonetheless required to serve a compelling state interest?
> (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality?[23]

Under this analysis, the court found that Henry did have a legitimate expectation that the material or information in the Brown Report would not be disclosed. It also found that the state's interest in maintaining and preserving our system of government by ensuring openness required disclosure of the Brown Report. And to ensure that disclosure occurred in the manner which was least intrusive with respect to Henry's right to confidentiality, the court limited the admission of the Brown Report to a non-hearsay purpose.

As an additional protection of the privacy interests involved, the court decided to limit public access to the Brown Report under Administrative Rule 37.6. Administrative Rule 37.6(b) provides that:

---

[23] *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990).

> The court may limit public access as described above if the court finds that the public interest in disclosure is outweighed by a legitimate interest in confidentiality, including but not limited to
>
> (1) risk of injury to individuals;
> (2) individual privacy rights and interests;
> (3) proprietary business information;
> (4) the deliberative process; or
> (5) public safety.

As the court has previously noted, the privacy rights involved with the Brown Report are not limited to Henry. The Brown Report contains information about other individuals within APD, victims, and confidential informants. As MOA correctly states, "the underlying situations discussed in the report involve sensitive subject – including sexual assault allegations and illegal activities."[24] Allowing public access to the Brown Report, even a redacted version, would compromise the privacy rights and interests of each of those individuals. In this court's view, that is a legitimate interest in confidentiality that far outweighs the public's interest in disclosure of the Brown Report.

That analysis, conducted during the second trial, resulted in the ruling by this court that the Second Protective Order remained in place, the Brown Report was admitted into evidence for a non-hearsay purpose, and the Brown Report was not to be accessible by the public under Administrative Rule 37.6(b).

---

[24] MOA's Opp'n to ADN and KTUU Mot. for Access at 8.

Now, a year after the second trial, Press Intervenors urge this court to "simply recognize that based on the facts known at this time, disclosure of these documents is appropriate and further concealment is unjustified."[25] But the facts known at this time are the same facts known to the court at the time of its prior ruling. The court's decision on January 31, 2017, to restrict public access to the Brown Report was not erroneous or ill-advised. The court conducted the same analysis it did over a year ago, and it has come to the same result. The previous order restricting access is valid and proper.

B. This Court Will Not Order The Parties to Violate a Protective Order Issued by The Federal Court.

On January 31, 2017, this court stated on the record that it was not obligated to respect the protective order issued by the federal court.[26] And that statement remains true. Although Press Intervenors and plaintiffs recognize that this court is not bound by the protective order issued by the federal court, they seem to overlook a major change in circumstances between the time of the second trial and today.

---

[25] Memo. in Supp. of Mot. for Access to Judicial R. at 2.

[26] Electronic Recording of *Kennedy v. Municipality of Anchorage*, January 31, 2017, at 1:40:35 p.m.

At the time of the second trial, and up until December 2017, a copy of the Brown Report was in this court's possession. Pursuant to the Second Protective Order, after the end of the litigation all documents produced under the protective order were returned to the party that produced them. This procedure required the court to return the Brown Report to MOA. Thus, this court no longer had a copy of the documents requested by Press Intervenors.[27]

This change in circumstances is significant to the motion for access to the Brown Report. If this court had determined that public access to the Brown Report was warranted, and if this court had a copy of the Brown Report, it could allow public access to the report with no concern for the protective order issued by the federal court. But that is not the case. Because this court does not have its own copy of the Brown Report, allowing public access to that report would require this court to order MOA to produce the documents. And while this court is not bound by the federal protective order, MOA is a party to the federal case and is bound by that protective order. Therefore, under the federal protective order

[27] Once the Brown Report was returned to MOA this court should not have had a copy in its possession. However, after Press Intervenors filed their motion for access, Kenneth Legacki filed his copy of the Brown Report with this court under seal rather than return it to MOA, as ordered by this court. The court will not reward Legacki for his questionable conduct and rather issues this decision based on the fact that the court should not now have a copy of the Brown Report in its possession.

MOA cannot produce the Brown Report. In order for this court to grant public access to the Brown Report, it would have to order MOA to violate a federal court order, which this court will not do.

IV. CONCLUSION

For the reasons set forth above, the court denies Press Intervenors' Motion for Access to Judicial Records. The same documents sought by Press Intervenors currently exist in the case pending before the federal court. And as opposed to the motion before this court, Press Intervenors' request could be filed during the course of the case before the federal court. The United States District Court for the District of Alaska, which is intimately involved with the Brown Report through the Henry litigation, can decide for itself whether the Brown Report should be made public.

Dated this 14th day of February, 2018, at Anchorage, Alaska.

FRANK A. PFIFFNER
Superior Court Judge

I certify that on 2-15-18 a copy of the above was delivered to:

K. Legacki, L. Johnson, ~~P. Weiss,~~ ~~D.J. McKay, M. Brown~~

B. Cavanaugh, Judicial Assistant

I certify that on 2-14-18 a copy of the original was personally handed to each of the following: D.J. McKay, P. Weiss, M. Brown
Secretary/Deputy Clerk