

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JOHN DOE 6,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09C-07-085 CLS
)	
BOY SCOUTS OF AMERICA, a)	
Congressionally chartered)	
corporation, authorized to conduct)	
business in Delaware;)	
DEL-MAR-VA COUNCIL INC.)	
BOY SCOUTS OF AMERICA, a)	
Delaware corporation; ROY)	
GERHARD, an individual.)	
)	
Defendants.)	
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JOHN DOE 7,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09C-07-071 CLS
)	
BOY SCOUTS OF AMERICA, a)	
Congressionally chartered)	
corporation, authorized to conduct)	
business in Delaware;)	
DEL-MAR-VA COUNCIL INC.)	
BOY SCOUTS OF AMERICA, a)	
Delaware corporation; ARTHUR)	
SINNOTT, an individual.)	
)	
Defendants.)	

Date Submitted: October 26, 2012
Date Decided: January 28, 2013

On Plaintiffs' Revised Motion to Compel Production of Requested Documents.
GRANTED in part; DENIED in part.

On Defendant Boy Scouts of America's Motion for Protective Order in response to Plaintiffs' Revised Motion to Compel Production of Requested Documents.
GRANTED in part; DENIED in part.

ORDER

Raeann Warner, Esq., Jacobs & Crumplar, P.A. Wilmington, Delaware. Attorney for Plaintiff.

Mark L. Reardon, Esq. Colleen Shields, Esq., Penelope B. O'Connell, Esq., Peter S. Murphy, Esq., Brian D. Tome, Esq. Eckert Seamans Cherin & Mellott, LLC. Wilmington, Delaware. Attorneys for Boy Scouts of America and DelMarVa Council, Inc. Boy Scouts of America.

Scott, J.

Introduction

The motions before this Court pertain to two cases arising from the Child Victim’s Act of 2007.¹ In each case, Plaintiffs seek recovery for alleged sexual abuse by scoutmasters who volunteered in the Boy Scouts of America (“BSA”) organization. Plaintiff John Doe 6 (“Doe 6”) claims that Defendant Roy Gerhard (“Gerhard”) sexually abused him in or about 1968. Plaintiff John Doe 7 (“Doe 7”) claims that he was abused by Defendant Arthur Sinnott (“Sinnott”) during 1970 through 1973. The Court has reviewed the parties’ submissions, including supplemental memoranda,² and heard oral argument. For the following reasons, Plaintiff’s motion to compel is GRANTED, in part, and DENIED in part and Defendants’ Motion for Protective Order is GRANTED, in part, and DENIED in part.

Parties’ Contentions

Plaintiffs seek to compel BSA’s production of all “Ineligible Volunteer Files and Perversion Files”³ (“Files”), from at least 1948 through 1973, in order to

¹ 10 *Del. C.* § 8145.

² As directed by the Court, counsel proffered arguments discussing the rationale behind the Oregon court’s decision, in *Doe 1 v. Corporation of the Presiding Bishop*, Case No. 0710-11295, D.I. 45 (Or. Circ. June 18, 2010), to admit certain Files.

³ Ineligible Volunteer Files “are kept for individuals or perspective registrants against whom allegations/complaints of inappropriate and improper conduct have been made in the last 80 years since the BSA was chartered (incorporated) by the U.S. Congress.” BSA Mot., at ¶3. Counsel for BSA explained that “Perversion Files” are a subset of the Ineligible Volunteer Files

support their claim that BSA had specialized knowledge of the sexual abuse occurring within the organization prior to the Plaintiffs' alleged abuse. Plaintiffs' expert, Gary Schoener, plans to testify about the special knowledge that BSA had and whether such knowledge gave rise to a duty to prevent Plaintiffs' abuse. Plaintiffs requested all Files in BSA's possession, but BSA has directly provided only the Files relating to Sinnott and Gerhard. Plaintiffs have offered to accept Files with redacted victims' names; however, Plaintiffs oppose the redaction of the names of the individuals who reported the misconduct ("reporting individuals") because Plaintiffs wish to determine their roles or positions in the organization.

BSA objects to Plaintiffs' request and moves, in response, for a protective order from this Court. BSA argues that production of the unredacted Files would be unduly burdensome because of the volume of files involved. BSA also insists that producing the unredacted Files would "invade the right of privacy of third parties who are strangers to the underlying cases"⁴ and cause a chilling effect on the reporting system. Plaintiffs assert that the reporting individuals are not subject to the same right of privacy as the victims. BSA contends that Plaintiffs will not face hardship if the Court does not order production of the Files because Plaintiffs

pertaining to sexually related issues, such as adultery or pornography. Not all the allegations in the files have been substantiated.

⁴ Def. BSA Mot., at ¶¶3,6.

have already had access to many Files, including the Files concerning Gerhard and Sinnott. Furthermore, BSA has stated that

[i]n these cases, the BSA will stipulate that the organization was on notice that some individual who seek involvement with youth activities, including the scouting programs, sometimes sexually abused children.⁵

Standard of Review

In reviewing Plaintiffs' motion to compel and BSA's motion for protective order, the Court is guided by Delaware Superior Court Rules 26(b) and 26(c). Rule 26(b) grants discretion to the trial court to regulate discovery.⁶ Although the scope of discovery is broad,⁷ the Court shall limit the frequency or extent of use of discovery methods in certain circumstances, such as when the Court determines that discovery is unduly burdensome or obtainable from another less burdensome source.⁸

Upon a motion for protective order and when there is "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..."⁹

⁵ BSA Mot., at ¶4.

⁶ *Spanish Tiles, Ltd. v. Hensey*, 2007 WL 1152159, *2 (Del. Super.).

⁷ Del. Super. Ct. R. 26(b)(1); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Stauffer Chem. Co.*, 1990 WL 177572, *3 (Del. Super.).

⁸ See Del. Super. Ct. R. 26(b).

⁹ Del. Super. Ct. R. 26; *Anderson v. Airco, Inc.*, 2004 WL 2828208, *1 (Del. Super.).

Discussion

Plaintiffs in other states alleging sexual abuse by scoutmasters have also encountered opposition from BSA regarding the discovery of Ineligible Volunteer Files.¹⁰ In determining whether to order the production of Files or to grant protective orders to BSA, courts have considered the relevancy of Files unrelated to the specific perpetrators in each case and the right to privacy of third parties.¹¹

To remedy the third-party privacy dilemma, courts have instructed parties to draft confidentiality restrictions and compelled BSA to produce certain files by redacting a combination of the victims', reporting individuals', and/or the perpetrators' names. In *T.S. v. Boy Scouts of America*, 138 P.3d 1053 (Wash. 2006), BSA petitioned the Washington Supreme Court for reversal of a trial court order requiring the production of the Files. The plaintiffs alleged abuse by their scoutmasters in the 1970s and 1980s.¹² The plaintiffs sought the production of the files in order to demonstrate whether "BSA was aware (or should have been aware) of the extent of the pedophilia threat during the period at issue here (1971 to 1983)

¹⁰*E.g.*, *Doe v. Corp. of the Presiding Bishop*, 2012 WL 2061417 (D. Idaho); *Doe v. Corp. of the Presiding Bishop*, 280 P.3d 377 (Or. 2012); *T.S. v. Boy Scouts of America*, 138 P.3d 1053 (Wash. 2006); *Juarez v. Boy Scouts of America, Inc.*, 81 Cal. App. 4th 377 (Cal Ct. App. 2000).

¹¹ The third parties are those individuals whose names are in the files as individuals reporting the misconduct, victims, and perpetrators.

¹² *Id.* at 1054.

and whether BSA's policies and procedures were timely and effective responses to the threat."¹³ The trial court ordered BSA to

produce those files (not already in plaintiffs' counsel's possession and identified in plaintiffs' response) for inspection and copying by plaintiffs' counsel, and all alleged victims' names shall be redacted from the documents copied. Alleged perpetrators' names shall also be redacted, and identifying numbers or codes may be substituted for such names...Counsel shall cooperate in drafting an appropriate protective order limiting the view of these documents to counsel and their designated assistants...¹⁴

The Washington Supreme Court affirmed the trial court's order because BSA had not shown that the trial court applied the incorrect legal standard by not utilizing a balancing test regarding a qualified First Amendment associational privilege against discovery requests.¹⁵

In *Doe 1 v. Corporation of the Presiding Bishop*, 280 P.3d 377 (Or. 2012), Plaintiffs alleged that they were abused by their scout-leader in the 1980s.¹⁶ The trial court ordered BSA to produce all unredacted Files from 1965 to 1985, subject to a protective order requiring confidentiality of the Files.¹⁷ The trial court subsequently admitted the Files into evidence and issued another order allowing

¹³ *Id.* at 1055.

¹⁴ *Id.* at 1055-56.

¹⁵ *Id.* at 1060.

¹⁶ A plaintiff in the case alleged that his abuse ended in 1985. *Doe 1 v. Corporation of the Presiding Bishop*, Case No. 0710-11294 at 3, n.2 (Or. Circ. June 18, 2010).

¹⁷ *Doe 1*, 280 P.3d at 380.

the release, to the press and to the public, of redacted versions of the files.¹⁸ In the same order, the trial court conditioned its vacation of the protective order upon the redaction of the victims' and reporting individuals' names.¹⁹ Thereafter, upon petitions for writs of mandamus, the Oregon Supreme Court found that the relevant state constitutional provision did not actually require the trial court to release the Files to the public.²⁰ Nevertheless, the Supreme Court found that the trial court did not abuse its discretion by vacating its earlier protective order and requiring release of the exhibits in redacted form.²¹

Where a plaintiff alleged abuse from 1967 to 1970, in *Doe v. Corp. of the Presiding Bishop*, 2012 WL 2061417 (D. Idaho), BSA argued that only the perpetrator's File was relevant.²² The court determined that other Files, unrelated to the perpetrator, were relevant to the broader issue of whether BSA failed to warn the plaintiff based on knowledge of child sex abuse in scouting.²³ The court ordered BSA to produce files from 1950 to 1972, subject to a protective order.²⁴ The court also ordered the parties to determine the terms of the protective order and to include "that the following names be redacted before the documents are produced: (1) the alleged victim; (2) the alleged perpetrator; and (3) the people

¹⁸ *Id.* at 381.

¹⁹ *Id.*

²⁰ *Id.* at 391.

²¹ *Id.*

²² *Id.* at *2.

²³ *Id.*

²⁴ *Id.* at *3.

who reported the alleged abuse.”²⁵ In response to the plaintiff’s request for Files dating back to 1910, the court stated that

the Court will limit the time period to 1950 through 1972 (seventeen years before the first alleged abuse and two years after the last) for requests seeking documents that could show defendants’ alleged knowledge regarding child sex abuse within scouting. The Court will typically use a more restrictive time period—1962 to 1972—for requests seeking documents that could show what the defendants did with this knowledge.²⁶

In response to BSA’s argument that production of the files would be unduly burdensome, the court stated that

[t]he Boy Scouts indicate that there are roughly 800 perversion files, ranging in size from three pages per file to some that are six inches thick. Plaintiff, however, points out that all the IV files are contained in a locked filing cabinet in a ‘small office in BSA’s Dallas headquarters.’ [] All things are relative, but the Court does not view a production of the perversion files as unduly burdensome. Further, these documents have been produced in other litigations, which leads the Court to believe that the files must have been vetted to some degree and therefore will be (or should be) more efficiently and easily produced in subsequent rounds.²⁷

On the other hand, one court has denied a plaintiff’s motion to compel the Files based on the constitutional right to privacy of third parties.²⁸ In *Juarez v. Boy Scouts of America, Inc.*, 81 Cal. App. 4th 377 (Cal. Ct. App. 2000), BSA produced the File for the perpetrator in the case, but would not produce other Files

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Juarez v. Boy Scouts of America, Inc.*, 81 Cal. App. 4th 377 (Cal. Ct. App. 2000).

containing information about persons who were not parties to the case.²⁹ In addition, BSA admitted that molestation could and did occur before the plaintiff was molested.³⁰ Upon review of the trial court's order prohibiting the Files to be produced in discovery, the appellate court recognized that the information contained in the files was constitutionally protected.³¹ The court reasoned that it was "not enough to show the matters encompassed by the right of privacy are merely relevant to the issues of ongoing litigation. There must be a careful balancing of the *compelling public need* for discovery against the fundamental right to privacy."³² Consequently, the court determined that the plaintiff failed to demonstrate that the information was directly relevant to any disputed issue in the case and that the plaintiff did not present a compelling need for the information.³³

After reviewing the aforementioned cases concerning Ineligible Volunteer Files and weighing the competing interests, the Court hereby orders that BSA produce the Ineligible Volunteer Files from 1948 to 1973.³⁴ The Court finds that the unrelated files are relevant to whether BSA had special knowledge of the abuse occurring prior to the abuse alleged in Plaintiffs' complaints; even so, the Court

²⁹ *Id.* at 390.

³⁰ *Id.* at 392.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 1948 is twenty years prior to Doe 6's alleged abuse and 1973 is the year in which Doe 7's alleged abuse ended.

shares the court's concern in *Juarez* that there is a privacy interest in the names of third parties contained in the Files. Therefore, BSA may redact the reporting individuals', perpetrators', and the victims' names. BSA may also respond based on the digitally-stored files associated with the Sacramento, CA and Seattle, WA court orders. Lastly, BSA must produce the Files, in accordance with this Order, pursuant to a joint-confidentiality agreement.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.