IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONALD MELL, III,	)	
	)	
v.	)	C.A. No. 03M-06-030 (JRS)
	)	
NEW CASTLE COUNTY,	)	
	)	
Defendant,	)	
	)	

Date Submitted: May 10, 2004
Date Decided: August 4, 2004

MEMORANDUM OPINION

Upon Consideration of Plaintiff's Motion to Enforce a Settlement Agreement.
GRANTED in part and DENIED in part.

Richard H. Cross, Jr., Esquire, Wilmington, Delaware. Attorney for the Plaintiff.

Timothy P. Mullaney, Sr., Esquire, New Castle, Delaware. Attorney for Defendant.

SLIGHTS, J.

I. Introduction

This matter is before the Court on a complaint for a writ of mandamus. Plaintiff, Donald C. Mell, III ("Mell"), seeks to compel New Castle County ("the County") to respond to his Freedom of Information Act ("FOIA) request.[1] On September 9, 2003, the Court granted in part the County's motion for summary judgment on all but one of the claims raised in Mell's complaint. The Court concluded that many of the documents Mell sought were the subject of pending litigation in the Court of Chancery and, therefore, not available under FOIA.[2] The Court denied the motion, however, with respect to Mell's request for information regarding specifically identified funds ($230,000) allegedly earmarked by the County for the payment of legal fees.[3] As to the documents related to those funds, the Court concluded that the record was inadequate to determine whether the funds were related to the subject matter of the Chancery litigation. The Court ordered discovery to proceed on this issue. Mell did not seek to appeal the Court's interlocutory order and the matter remained pending in this Court.

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[1]DEL. CODE ANN. tit. 29, § 10001, *et. seq.* (2004) (hereinafter, all references to FOIA shall be "Section ___").

[2]*See Mell v. New Castle County*, 835 A.2d 141 (Del. Super. Ct. 2003). *See also* Section 10002(g)(9) (2003) ("any records pertaining to pending or potential litigation . . . shall not be deemed public.").

[3]*Id.*

In December, 2003, argument was scheduled on the County's second motion for summary judgment regarding the only issue remaining in the case - - the propriety of the County's refusal to respond to Mell's FOIA request regarding the $230,000. Immediately prior to the argument, the parties purportedly negotiated a settlement of the entire controversy. When the Court took the bench, the parties took advantage of the Court's record to memorialize the terms of their settlement. In February, 2004, the Court was advised by Mell that the County was not performing its obligations under the settlement and this motion to enforce settlement followed.

The motion requires the Court to determine whether there was a meeting of the minds between the parties when they negotiated the terms of the settlement, and whether the secrecy that cloaks a grand jury investigation necessarily will modify the County's responsibilities under the settlement agreement by limiting the information it may produce to Mell *vel non* the parties contemplated such limitations at the time the agreement was reached.

For the reasons that follow, Mell's motion to enforce the settlement agreement is **GRANTED in part and DENIED in part.**

II. Facts

This litigation began in June of 2003 when Mell filed a complaint for a writ of mandamus that would compel the County to comply with his March, 2003 FOIA

requests. Mell requested that the County produce: (1) invoices of legal counsel that represented County employees in connection with a Federal Investigation, and (2) documents related to a $230,000 transfer of funds from the County's Executive Contingency Fund to the County's Legal Department ("the $230,000 transfer"). The County responded with a motion to dismiss for failure to state a claim, which the Court converted into a motion for summary judgment. The County argued that documents related to the legal invoices and the $230,000 transfer requested by Mell both were the subject of pending litigation in the Court of Chancery and, therefore, not accessible through FOIA.

In September, 2003, the Court granted in part and denied in part the County's motion for summary judgment. The Court determined that invoices of legal counsel that represented County employees in a Federal Investigation were the subject of pending litigation in the Court of Chancery in which the plaintiffs sought, *inter alia*, to enjoin the payment of those fees. Consequently, the Court concluded that the invoices were not subject to FOIA. The record as it existed at the time, however, was not adequate to allow the Court to conclude, as a matter of law, that the documents related to the $230,000 transfer were also related to the Chancery litigation. As to these requests, the County's motion for summary judgment was denied with leave to re-file after discovery.

In October, 2003, the County renewed its motion for summary judgment. Oral argument was scheduled for December 3, 2003. At the start of the proceedings, the parties stated that they had reached a settlement agreement. The terms of that agreement are now in dispute and give rise to this controversy.

The County maintains that it agreed to produce only the documents related to the $230,000 transfer as these were the only documents still in dispute after the Court's decision on the first dispositive motion. The County also maintains that its agreement to produce this information was subject to all available privileges and other limitations on disclosure (*e.g.* attorney-client privilege, work product immunity, exceptions to FOIA and the Federal Rules of Criminal Procedure governing grand jury secrecy). With respect to the FOIA exceptions, the County has identified two: Section 10002(g)(9), which states that "any records pertaining to pending or potential litigation . . . shall not be deemed public;'" and Section 10002(g)(6), which states that "any records specifically exempted from public disclosure by statute or common law . . . shall not be deemed public." With respect to grand jury secrecy, the County cites Rule 6(e) of the Federal Rules of Criminal Procedure ("Rule 6(e)")[4], which prohibits

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[4]FED. R. CRIM. P. 6(e) (2004) (barring disclosure of grand jury matter by certain parties and setting forth specific exceptions). *See also In re Grand Jury Matter*, 682 F.2d 61, 63 (3d Cir. 1982) ("Rule 6(e) of the Federal Rules of Criminal Procedure is intended to preserve [the] norm of secrecy by preventing the disclosure of matters occurring before a grand jury.") (citations omitted).

disclosure of certain matters presented before a grand jury.

Mell maintains that the County agreed to produce all documents responsive to his FOIA requests redacted only to the extent mentioned on the record, namely, to protect information subject to the attorney-client privilege or work product immunity. He contends that the County has taken an overly broad view of the protections afforded by these doctrines and by doing so has sought to deny him access to information which had been promised as part of the settlement.

Mell also contends that the County's grand jury secrecy argument is misplaced. He argues that Rule 6(e) is not a "statute" for purposes of Section 10002(g)(6) and that the information he requested - - the identity of County employees and others for whom legal fees have been paid - - is not matter presented before the grand jury and not, therefore, subject to protection under the Federal Rules of Criminal Procedure.

III. Discussion

A. Was There a Meeting of the Minds?

Before the Court can determine whether to enforce the settlement agreement, it must first determine whether a settlement agreement was made. This requires the Court to explore whether the parties reached a meeting of the minds on December 3, 2003, when the purported settlement agreement was read into the record. At the heart of this exercise, of course, is the transcript of the words used by the parties to express

their agreement. If the words employed by the parties to describe the settlement clearly and unambiguously reflect their intent to resolve this litigation, and describe the manner by which the resolution was to be accomplished, the Court will enforce those terms regardless of whether a party may now have second thoughts.[5]

When interpreting contracts, the Court must strive "to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted."[6] In so doing, the Court looks first to the entire agreement of the parties to determine if their intent can be discerned from the contract language.[7] In this regard, the Court will interpret the terms of the agreement according "to the meaning that would be ascribed by a reasonable third party."[8] "[W]here the language . . . is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids."[9] If, however, the terms are "'fairly susceptible of different

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[5]Neither party has advanced the argument that their attorney lacked the authority to settle the case. Accordingly, the Court will presume that such authority existed at the time the settlement agreement was read into the record on December 3. *See Shields v. Keystone Cogeneration Sys., Inc.,* 620 A.2d 1331, 1335 (Del. Super. Ct. 1992)("an agreement entered into by an attorney is presumed to have been authorized by his client ....").

[6]*Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003)(citations omitted).

[7]*Id.* (citations omitted).

[8]*Id.* (citations omitted).

[9]17A AM. JUR. 2D *Contracts* § 330 (2004).

interpretations,'" they are ambiguous.[10] Ambiguity may exist if the terms of the contract are inconsistent or when there is a reasonable difference of opinion as to the meaning of words or phrases.[11] When ambiguity exists, the Court may use extrinsic evidence to ascertain the parties' intent at the time of contracting.[12] Extrinsic evidence includes "'overt statements and acts of the parties, the business context, prior dealings between the parties, business custom and usage in the industry.'"[13]

The Court begins its analysis by noting that the parties themselves *thought* they had reached a settlement as reflected in the opening remarks of counsel to the Court.[14] After announcing that a "settlement" had been reached, the parties then undertook to set forth the terms of the Agreement. The County took the lead.[15] The County's attorney described what documents would be provided, and then mentioned the need

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[10] *Comrie*, 837 A.2d at 13 (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

[11] 17A AM. JUR. 2D *Contracts* § 331 (2004).

[12] *Comrie*, 837 A.2d at 13 (citations omitted).

[13] *Id.* (quoting *Supermex Trading Co., Ltd. v. Strategic Solutions Group*, 1998 WL 2298530, at *3 (Del. Ch. 1998)).

[14] *See* D.I. 29 at 2 (transcript of December 3, 2003 oral argument) (The County's attorney represented: "I believe we've settled the issue.").

[15] *Id.* at 2-3. (The County's attorney declared: "the representations the County's making is that we're going to give [the plaintiff] the check register from the time of the transfer of the $230,000 until the present time of the last year's budget, all the monies that was spent, who it went to and what firms and what case.").

to redact the documents, including legal invoices, to protect privileged information.[16] Despite ample opportunity to do so, the County attorney never once mentioned a concern about producing information that might be subject to the pending litigation exception to FOIA. Nor did he mention grand jury secrecy. While it may well be true that counsel assumed that the County's obligation to produce documents would be subject to the limitations of the Court's prior rulings in this case, such extrinsic evidence has no place in the Court's analysis when the terms of the Agreement are clear and unambiguous.[17]

Because the parties specifically addressed the information that was to be provided in the documents and the information that was to be redacted from the documents, a reasonable third party would interpret the terms of the Agreement laid out before the Court to be integrated and complete. Additional terms, such as terms that would allow further reactions, absent compelling legal reasons, will not be

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[16]*Id.* at 4 (The County's attorney stated: "the invoices which . . . show the bill that'll be redacted, they show the amount of money that was spent[,]" to which the plaintiff's attorney responded: "The only other thing I understood was that [the County will] redact that information . . . [to the extent it] is covered under some attorney/client privilege....").

[17]The County's argument that it was reasonable for counsel to assume that the prior rulings of this Court implicitly would be incorporated into the settlement agreement is misplaced. At the time the settlement was reached, Mell had a right to appeal the Court's interlocutory order granting, in part, the County's first motion for summary judgment. The issues litigated in that motion, therefore, were still on the table and subject to negotiation as part of the resolution of the larger dispute. This is precisely what the parties represented had been achieved on the morning of December 3, 2003.

implied or enforced.

B. Does Grand Jury Secrecy Trump the Parties' Agreement?

Section 10002(g)(6) provides that "any records specifically exempted from public disclosure by statute or common law . . . shall not be deemed public."[18] According to the County, even if the Court concluded that the settlement agreement did not incorporate FOIA's "pending litigation" exception, the Court is obliged to enforce FOIA's "statutory exemption" because the parties could not, as a matter of law, agree that the County would produce documents that it was statutorily precluded from producing. The "statute" upon which the County relies is Rule 6(e) of the Federal Rules of Criminal Procedure, which prohibits disclosure of matters presented before a grand jury.[19] According to the County, if Rule 6(e) is deemed to be a "statute" for purposes of Section 10002(g)(6), then information that might otherwise be available to the public would not be accessible through FOIA under the cloak of grand jury secrecy.

Mell raises two arguments in response. First, he argues that Rule 6(e) is not a "statute." Second, he contends that the information he has requested from the County - - the names of the clients for whom legal services were rendered and paid

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[18]Section 10002(g).

[19]FED. R. CRIM. P. 6(e) (2004).

for - - is not "matter presented before a grand jury" and is not, therefore, subject to Rule 6(e). The Court will address each argument in turn.

In an opinion rendered at the County's request, the Attorney General of the State of Delaware concluded the "Rule 6(e) of the Federal Rules of Criminal Procedure is a statute that specifically exempts the disclosure of grand jury [matters] under Delaware's FOIA."[20] The Court agrees.[21] FOIA's purpose is "to ensure government accountability, inform the electorate and acknowledge that public entities, as instruments of government, should not have power to decide what is good for the public to know."[22] Against this backdrop, however, particular exceptions are necessary to keep specific information out of the limelight.[23] It is widely recognized

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[20]*See* D.I. 28, Ex. 2. ("The exemption under FOIA 'encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal the identities of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.'") (quoting *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 868 (D.C. Cir. 1981)).

[21]Mell mistakenly relies on the *Detroit Free Press, Inc. v. City of Warren* for the proposition that Rule 6(e) is not a "'statute' barring disclosure." 645 N.W. 2d 71 (Mich. App. 2002). The Court of Appeals of Michigan relied on the plain language of the exemption, which protects "[r]ecords or information specifically described and exempted from disclosure *by statute*." *See id.* at 171 (citations omitted); MICH. COMP. LAWS ANN. § 15.243(1)(d) (2004) (emphasis added). The exception set forth in Section 10002(g)(6), however, is broader and includes "[a]ny records specifically exempted from public disclosure by statute *or common law*." DEL. CODE ANN. tit. 29, §10002(g)(6) (2003). (emphasis added).

[22]*Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

[23]*See Board of Managers of Delaware Justice Information System v. Gannett Co.*, 808 A.2d 453, 458 (Del. Super. Ct. 2002) (citations omitted).

that Rule 6(e) codifies an important policy at common law: the secrecy of grand jury proceedings.[24] Maintaining the confidentiality of grand jury proceedings protects several interests:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be a risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.[25]

According to Section 10002(g)(6), records protected by "statute or common law" are exempt from public disclosure. Because Rule 6(e) is the embodiment of a well-established principle at common law, it clearly falls within this exception.

Mell also maintains that the information requested is not matter presented before a grand jury. According to this argument, *even if* the Court found that Rule 6(e) was encompassed within Section 10002(g)(6), Mell's FOIA request would not

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[24]*Douglas Oil Company of California v. Petrol Stops Northwest*, 441 U.S. 211, 218-19, (1979)("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."); *Id.* at fn. 9 (discussing the history of grand jury secrecy); *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962) ("The proceedings before a grand jury are protected against disclosure by the common law policy of secrecy.").

[25]*Douglas Oil,* 441 U.S. at 218-19.

be prohibited under this section because the rule does not preclude the disclosure of the identity of grand jury witnesses. Delaware case law interpreting the rule, however, is clear on the subject: Rule 6(e) "encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal the 'identities of witnesses.'"[26] Mell attempts to counter this settled authority by asserting that his request does not ask for the names of witnesses appearing before the grand jury, only "the basic information such as the client for whom services are being rendered and the general nature of the representation."[27] This argument, while clever, is not persuasive. The legal invoices which are the subject of Mell's request reveal the names of the clients, the nature of the representation and the dates on which legal services were rendered. From these documents one can easily deduce the names of witnesses that have testified before the grand jury in the Federal Investigation. This information is protected from disclosure by Rule 6(e) and the County has no ability to avoid the prohibitions of the rule, even if it may be contractually obligated to do so.[28]

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[26]*In re Grand Jury Proceedings*, 806 F. Supp. 1176, 1178 (D. Del. 1992) (citing *Fund for Constitutional Gov't.*, 656 F.2d at 859).

[27]Plaintiff's Brief at 3.

[28]*In re Grand Jury Matter*, 682 F.2d at 66 (holding that "an agreement . . . cannot be the basis for breaching the secrecy mandate of Rule 6(e).").

C. Redactions of Privileged Information

The attorney-client privilege is defined in Rule 502 of the Delaware Rules of Evidence as a confidential "communication made in furtherance of the rendition of professional legal services to the client."[29] "The work product doctrine protects 'the privacy of lawyers in their work and encourages . . . freedom . . . from interference in the task of preparing their clients' cases for trial.'"[30] As evidenced by the December, 2003 transcript, the parties contemplated that information protected by the attorney-client privilege and the work product immunity would be redacted from the invoices. In accordance with the parties' request, the Court has conducted an *in camera* review of the invoices and has highlighted appropriate redactions under the attorney-client privilege, the work product immunity and Rule 6(e).

V. Conclusion

The Court has concluded that the parties reached an enforceable settlement agreement on December 3, 2003, pursuant to which the County must produce all documents responsive to Mell's FOIA requests. The documents will be redacted to protect information subject to the attorney-client privilege, the work product

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[29]DEL. R. EVID. 502 (2004).

[30]*E.I. DuPont de Nemours & Co. v. Admiral Ins. Co.*, 1992 WL 423944, at *3 (citation omitted).

immunity or Rule 6(e) of the Federal Rules of Criminal Procedure.[31]

Based on the foregoing, the motion to enforce settlement agreement is **GRANTED** to the extent that the Court has rejected the County's arguments that the "pending litigation" exception to FOIA applies to protect certain documents and that the Court's prior rulings limit the scope of documents to be produced. The motion is **DENIED** to the extent that Mell seeks information protected by the attorney-client privilege, the work product immunity or Rule 6(e) of the Federal Rules of Criminal Procedure.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary.

[31]As stated, the Court has reviewed the invoices *in camera* and has made appropriate redactions as requested by the parties. The County shall incorporate the redactions and produce the invoices forthwith.