

William L. Crowley
Natasha Prinzing Jones
Thomas J. Leonard
BOONE KARLBERG P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807-9199
Telephone: (406)543-6646
Facsimile: (406) 549-6804
bcrowley@boonekarlberg.com
npjones@boonekarlberg.com
tleonard@boonekarlberg.com

Attorneys for City and Library Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MICHAEL E. SPREADBURY,

Plaintiff,

v.

BITTERROOT PUBLIC LIBRARY,
CITY OF HAMILTON, LEE
ENTERPRISES, INC., BOONE
KARLBERG P.C., DR. ROBERT
BROPHY, TRISTA SMITH, NANSU
RODDY, JERRY STEELE, STEVE
SNAVELY, STEVEN BRUNER-
MURPHY, RYAN OSTER,
KENNETH S. BELL, and JENNIFER
LINT,

Defendants.

Cause No. CV-11-064-M-DWM-JCL

**DEFENDANTS CITY'S AND
PUBLIC LIBRARY'S RESPONSE
TO PLAINTIFF'S OBJECTION TO
FINDINGS AND
RECOMMENDATION**

INTRODUCTION

This is a response to Plaintiff's objections [Doc. 195] to the Findings and Recommendations of the U.S. Magistrate Judge [Doc. 189]. The Findings and Recommendations determine that Plaintiff's motions to quash and suppress and for contempt (Docs. 176-178) should be denied. Plaintiff's objections are without merit and should be rejected by the Court. *McDonald Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

BACKGROUND

Plaintiff alleges the City and Library defendants have caused him to suffer severe emotional distress resulting in "permanent damage to his lifestyle and professional life" and the destruction of his established course of life. Plaintiff seeks compensatory damages, including lost earnings in the amount of \$2.2 million and emotional distress in the amount of \$3 million. [Doc. 189, p. 3.] As to these matters, Plaintiff has not answered written discovery requests served on him. He has not answered the Library's interrogatory no. 4 addressed to Plaintiff's emotional distress, including the identity of people with knowledge and material documents. Likewise, his responses to the Library's interrogatory nos. 6 and 7 did not identify any health care professionals who examined or treated him. With regard to his work and employment history, Plaintiff's answer to Snavelly's

interrogatory no. 6 reads, “I am not applying for a position. I am redressing injury caused by defendants, including defendant law firm, Boone Karlberg. Information is irrelevant to this case: If the defense can establish relevancy with respect to sitting on public property, I will convey the information.” With this in mind, the Court has ordered Plaintiff twice to answer the discovery served on him. [Docs. 68 and 100.]

Given Plaintiff’s refusal to cooperate in discovery directed at his damage claims, subpoenas were issued in an attempt to gather relevant information. Additionally, a protective order relating to Plaintiff’s records was proposed to, and firmly rejected by, Plaintiff. [Doc. 143-3, pp. 1-3.]

Based, in part, on Plaintiff’s “Linked In” site, Subpoenas were issued to Riverfront Mental Health Center in Hamilton, Montana, the Social Security Administration Office of Disability, Adjudication and Review, Lehigh University, the University of Montana, the Montana Office of Public Education, RLK Hydro, Inc., and Geotechnics, Inc., as well as FEMA. To date, documents have been received from Riverfront Mental Health Center, the Social Security Administration, Lehigh University, the Montana Office of Public Education, and RLK Hydro, Inc. Further, Geotechnics, Inc. has responded that it has no record of Plaintiff ever being employed by it.

DISCUSSION

A. Relevance.

According to Plaintiff, defense counsel is too arrogant to understand that chasing rabbit holes will not improve the Defendants' case. Plaintiff argues that the information sought by the subpoenas is irrelevant and the Defendants will not be allowed to use the information received in this action. [Doc. 195, p. 4.] However, Plaintiff is mistaken.

To begin with, Plaintiff's argument does not recognize the different standards which apply to discovery and the admission of evidence at trial. Defendants are entitled to discovery of any information which appears reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1), Fed. R. Civ. P. In any event, the information sought is relevant to Plaintiff's damage claims, including alleged lost earnings, emotional distress, permanent damage to lifestyle and professional life, and alleged destruction of an established course of life.

According to Plaintiff, he has been adjudged disabled for purposes of Social Security benefits. [Doc. 136-1 (Notice of Social Security Decision), Doc. 195, p.2.] For example, in his objection, Plaintiff argues the information sought is "not needed in aforementioned due to establishment of full disability, loss of work ability due to defense actors . . .". [Doc. 195, p.5 (emphasis added).]

Contrary to Plaintiff's argument, the documents received in response to the subpoenas contain information relevant to Plaintiff's damage claims. Certainly they are reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1), Fed. R. Civ. P. *See Morris v. Sequa Corp.* 275 F.R.D. 562, 568 and 570 (N.D. Ala. 2011) (as Plaintiff put his medical condition at issue, Plaintiff's medical records and Social Security application are relevant to the subject matter of the action and Plaintiff's claims); *Prescott v. County of Stanislaus*, 2011 WL2119036*1 (E.D. Cal. 2011) (mental health records are relevant as they shed light on the nature, depth and degree of plaintiff's mental health issues.

For example, the documents received from Riverfront Mental Health Center establish Plaintiff was diagnosed with a serious mental illness in 1998. He has received institutional and out-patient care for his mental illness ever since. As the records establish, Plaintiff's mental illness, and not the actions of the Defendants, have caused Plaintiff's emotional distress and his inability to work full time in a competitive situation. His mental illness has also caused disruption of his personal relationships. Further, the records shed light on Plaintiff's explosiveness and his inability to accept any disagreement with his views. In this regard, neither Plaintiff's mental illness nor the injuries alleged by him in this action were caused by the Defendants. *See Prescott, supra*, *1.

Similarly, the Lehigh University records establish Plaintiff received a Bachelor of Arts degree. However, he simply was not a very good student. Further, the documents produced by the Social Security Administration establish that Plaintiff's mental illness and his separate personality disorders are a severe medically-determinable disability which prevent Plaintiff from engaging in substantial, gainful employment. Plaintiff's illness and personality disorders give rise to interpersonal difficulties with people, leading to employment and relationship problems, and they were not caused by the Defendants. Simply stated, Plaintiff does not work well with others. In this connection, the City and Library Defendants offer to provide the records of Lehigh University, Riverfront Mental Health Center and the Social Security Administration to the Court for its inspection.

In response to the Subpoena issued to "OPI," the state agency produced documents establishing that Plaintiff held a Class V teaching license for the period July 1, 1998 to June 30, 2001, and a Class II teaching license for the periods July 1, 2001 to June 30, 2011. Subsequently, Plaintiff allowed his teaching license to lapse. With this in mind, the Social Security Administration records show that Plaintiff's inability to perform a sustained teaching job is not due to the actions of the Defendants. In any event, the "OPI" records show Plaintiff's failure to mitigate damages.

In the past, Plaintiff has alleged that the Defendants cost him his job at FEMA. He has also alleged that he held or holds National Security clearance through FEMA. [Doc. 130.] As a result, a Subpoena was issued to FEMA. To date, the City and Library Defendants are waiting for documents to be produced. It is understood that FEMA is working on them. Still, the documents produced by Riverfront Mental Health Center and the Social Security Administration establish that Plaintiff's contract job with FEMA was limited and sporadic. The FEMA documents are also relevant to Plaintiff's credibility. It is questionable whether Plaintiff has ever held National Security clearance as alleged by him. His contract job with FEMA was limited.

In summary, the Subpoenas to which Plaintiff objects were the result of his refusal to cooperate in discovery in this action. The City and Library Defendants were forced to seek information by subpoena. Further, the information sought is relevant to Plaintiff's claims in this action.

B. Social Security Numbers.

According to Plaintiff, his Social Security Number was unlawfully obtained and used in the subpoenas. [Doc. 195, pp.3-4.] However, Plaintiff's Social Security Number was not improperly obtained. It came from his own Voluntary Petition for Chapter 7 Bankruptcy signed by him on November 3, 1998, and filed in Case No. 98-33234-7, United States Bankruptcy Court, District of Montana.

Plaintiff's ire is misplaced when he, himself, has placed his Social Security Number in the public domain.

Further, Plaintiff's Social Security Number was not improperly used. There was nothing improper in using Plaintiff's date of birth or Social Security Number as an identifier in the subpoenas issued to non-parties to identify the documents sought. Those non-parties are highly likely to already have the numbers. Further, the City and Library Defendants did not file the information with the Court. Rule 5.2(a), Fed. R. Civ. P. In this connection, *Myles v. Dierberg's Market, Inc.*, 2009 WL3414903*2 n 2 (E.D. Miss. 2009) reads as follows:

There is no prohibition against plaintiff's inclusion of Social Security numbers on the attachments to his Rule 45 subpoenas, and such inclusion may be necessary in order to obtain the documents requested. Such information should not be filed with the Court, however, unless it has first been redacted. The Clerk of the Court has redacted the personal data information from the documents attached to plaintiff's motion for leave.

C. Application of Federal Law.

According to Plaintiff, the Findings and Recommendations do not follow circuit precedent or federal statutes, and the Court has made up rules. [Doc. 195, pp. 2-3.] However, the argument is without merit.

As the Findings and Recommendations establish [Doc. 189, pp. 6-7], a party in litigation waives any privilege by asserting claims which the opposing party cannot adequately dispute or defend unless it has access to the privileged

materials. *See, e.g., Bittaker v. Woodford*, 331 F.3d 715, 716-717 (9th Cir. 2003). With this in mind, the subpoenas seek information pertaining to Plaintiff's health, education and past employment which appears "reasonably calculated to lead to the discovery of admissible evidence" in connection with Plaintiff's claims and the City Defendant's defenses. Rule 26(b), Fed. R. Civ. P. In addition, contrary to Plaintiff's argument, the federal statutes cited by him do not operate to preclude the City from obtaining legitimate discovery. [Doc. 189, pp. 7-9.]

For example, the form and content of the subpoena issued to Riverfront Mental Health Center are appropriate. Rule 45(a)(1), Fed. R. Civ. P. The subpoena is HIPAA compliant. It contains the necessary core elements. 45 C.F.R. 164.508(c)(1). Also, while Plaintiff argues the subpoena was issued without court approval, such approval is not required. Rule 45(a)(3), Fed. R. Civ. P. Moreover, while HIPAA generally prohibits the disclosure of private medical information, it permits disclosure in certain circumstances, including when it is allowed under 45 C.F.R. 164.512(e). Under this latter section, disclosure is permitted in judicial proceedings in response to a subpoena when the entity is assured the subpoenaing party has made reasonable efforts to obtain a release. Such efforts are shown by a subpoena which allows time for objection and none was made before the expiration of the time allowed. *Prescott, supra*, *3. Similarly, Plaintiff was provided notice of the subpoenas, and such notice must be provided before its

return date. Rule 45, Fed. R. Civ. P. Advisory Committee Note (2007 Amendment); *see, e.g., Morris, supra*, 275 F.R.D. at 565. In summary, the Riverfront Subpoena is HIPAA compliant, and no law has been violated.

D. Court's Protective Order.

According to Plaintiff, the Court is abusing a disabled *pro se* litigant because the Court has allowed police reports to be filed under seal. [Doc. 195, pp. 3-4.] Fundamentally, allowing police reports to be filed under seal in connection with a summary judgment motion has nothing to do with the subpoenas to which Plaintiff objects. In any event, Plaintiff's allegation of abuse is simply not supported by the record. For example, remembering that Plaintiff steadfastly refused to enter a protective order relating to his records, the Findings and Recommendations of the U.S. Magistrate Judge nevertheless entered a protective order which prohibits the City Defendants from disclosing personal information obtained via the subpoenas outside the bounds of this litigation, and the City Defendants are required to move the Court to file under seal any document containing personal information obtained through the subpoenas. [Doc. 189, pp. 9-10.] While Plaintiff does not recognize it, these actions, like the City Defendants' offer of a protective order, were done to protect Plaintiff.

CONCLUSION

Plaintiff's objections are without merit. Simply stated, Plaintiff cannot seek millions of dollars in damages while hiding the information relevant to his claims.

DATED this 3rd day of January, 2012.

/s/ William L. Crowley
William L. Crowley
BOONE KARLBERG P.C.
Attorneys for City and Library
Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and contains approximately 2,009 words, excluding the parts of the brief exempted by L.R. 7(d)(2)(E).

DATED this 3rd day of January, 2012.

/s/ William L. Crowley
William L. Crowley
BOONE KARLBERG P.C.
Attorneys for City and Library Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on the 3rd day of January, 2012, a copy of the foregoing document was served on the following persons by the following means:

- 1, 3 CM/ECF
- _____ Hand Delivery
- 2 Mail
- _____ Overnight Delivery Service
- _____ Fax
- _____ E-Mail

1. Clerk, U.S. District Court
2. Michael E. Spreadbury
 700 South Fourth Street
 Hamilton, MT 59840
3. Jeffrey B. Smith
 Garlington, Lohn & Robinson, PLLP
 350 Ryman Street
 P.O. Box 7909
 Missoula, MT 59807-7909

/s/ William L. Crowley
William L. Crowley
BOONE KARLBERG P.C.
Attorneys for City and Library Defendants