UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Clerk, U.S. District Court
Southern District of Texas
ENTERED

DEC 1 6 2004

Michael N. Milby, Clerk of Court

BARBARA McCRAW FULLER, et al.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION NO. H-04-3580
	§	
CITY OF HOUSTON, TEXAS, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Plaintiff Barbara McCraw Fuller, individually and as representative of the estate of Edward T. McCraw and Doris McCraw, has brought a section 1983 complaint against the City of Houston and police officer Brent W. Foltz alleging that excessive force by officer Foltz caused the death of Edward T. McCraw. Before the court[1] is defendant City of Houston's motion for protective order (Dkt. No. 11), and opposing response from plaintiff Fuller, which includes a request for "protection" (Dkt. No. 12). For the reasons explained below, the City of Houston's motion for protective order is GRANTED in PART and DENIED in PART, and Fuller's request for protection is DENIED.

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[1]This motion was referred to this magistrate judge for determination pursuant to 28 U.S.C. § 636(b)(1) (Dkt. No. 13).

I. Motion for Protective Order

Defendant City of Houston requests the court to enter a protective order covering all internal Houston Police Department files, investigative reports and files, and personnel files, limiting disclosure to only the parties involved in this lawsuit, citing the "sensitive nature" of the documents and the non-disclosure provisions of section 143.089 of the Texas Local Government Code.[2] Dkt. No. 11, ¶¶ 3, 9. Federal Rule of Civil Procedure 26(c), dealing with protective orders, was not explicitly invoked by the parties, but it is nevertheless applicable. It provides that the court:

> may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters....

FED. R. CIV. P. 26(c).

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[2] Section 143.089(g) provides that:

> A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

TEX. LOC. GOV'T CODE § 143.089(g).

A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal. *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 683-84 (5th Cir. 1985). However, limits may be imposed under Rule 26(c) if the party from whom discovery is sought shows "good cause;" if so, then the presumption of free use dissipates, and the court may exercise its sound discretion to restrict what materials are obtainable, how they can be obtained, and what use can be made of them. *Id.* at 684. The burden is on the movant to show the necessity of a protective order. *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978).

Section 143.089(a) mandates that the civil service commission maintain a personnel file on police officers and fire fighters, including documents relating to any misconduct in those cases where the fire or police department took disciplinary action. *See* § 143.089(a)(2); *see also City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 948 (Tex. App.–Austin 1993). Subsection (g) of section 143.089 authorizes, but does not require, city fire and police departments to maintain for their use a separate and independent personnel file on a police officer or fire fighter. *City of San Antonio*, 851 S.W.2d at 949. A distinction is thus drawn between "a" files, or "civil service files," and "g" files, also referred to as an "internal affairs file" or "personnel file." *See Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 115-16 (Tex. App.–Austin 2003); *In re Jobe*, 42 S.W.3d 174, 176 n.1 (Tex. App.–Amarillo 2001). Only the latter type

of file is exempt from public disclosure or inspection under the Texas Public Information Act ("TPIA"). *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556, 562-63 (Tex. App.–San Antonio 2000). Most of the cases construing section 143.089 deal with requests for public information under the TPIA or the Texas Open Records Act, rather than traditional discovery disputes in civil suits. *See, e.g., Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 115 (Tex. App.–Austin 2003) (city sought declaratory judgment that certain information kept by police department is confidential and not subject to disclosure under the TPIA).

One exception to this is *In re Jobe*, 42 S.W.3d 174 (Tex. App.–Amarillo 2001), where traditional discovery was central. In that case, a claim for intentional infliction of emotional distress was brought against a city police officer. *Id.* at 176. Discovery was sought of the officer's "g" file. The *Jobe* court held that in a civil case, the material place in a "g" file is privileged, unless it is a letter, memorandum, or document from the employing department relating to an officer's misconduct that resulted in disciplinary action against the officer, in which case it must be placed in the public "a" file. *Id.* at 181.

Federal courts have occasionally imposed protective orders concerning police personnel files in section 1983 actions. *See, e.g., Carter v. Anderson*, 2004 WL 2208488, at *7 (N.D. Tex. 2004) (requiring *in camera* review of police personnel files

maintained under section 143.089(g)); *Frierson v. City of Terrell*, 2003 WL 22480050, at *1-*2 (N.D. Tex. 2003) (officer's personnel file ordered produced with the officer's personal identifying information redacted). Thus, good grounds exist to protect personal and private information which may be contained within an officer's personnel file.

Here, however, the City of Houston seeks to extend protection to non-personnel files as well. The plaintiffs rightly contend that the defendant's proposed protective order is overly broad. Confidentiality concerns relating to personnel files do not automatically translate to other types of files, such as Internal Affairs files, offense reports, training files, and investigative reports. *See Morales v. Ellen*, 840 S.W.2d 519, 524 (Tex. App.–El Paso 1992) (distinguishing confidential information in a personnel file from disclosable information in an investigative file documenting charges of sexual harassment against a police officer). Here the defendant does not explain why information outside of the personnel file should be protected. The confidentiality concerns of section 143.089 apply to personnel files, and is geared toward protecting the officer's personal privacy, not all other aspects of his or her professional life. Therefore, the defendant has failed to meet its burden to show good cause why the information in the other types of files should not be disclosed.

II. Plaintiff's Request for Protection

Fuller requests the City of Houston be ordered to produce its initial disclosure documents "forthwith," and that she be given additional time to designate expert witnesses and to respond to the defendant's motion to dismiss. Dkt. No. 12, ¶ 8. In the Rule 16 scheduling order, this court gave the plaintiffs until January 3, 2005 to designate expert witnesses. (Dkt. No. 9). But plaintiffs have not yet made a formal request for the personnel files at issue; the initial disclosure requirements of Rule 26 permit a party the option to provide a "description by category and location" of relevant documents, rather than the documents themselves. FED. R. CIV. P. 26(a)(1)(B). Defendant has apparently availed itself of this description option, and so no document production is yet due. In any event, the documents at issue should have no bearing on the plaintiffs ability to designate experts and respond to the defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim.

III. Conclusion

The City of Houston's Motion for Protective Order is GRANTED in PART and DENIED in PART. Plaintiffs are entitled to discover police officer personnel files maintained under section 143.089(g) subject to the following conditions: (1) the officer's personal identifying information (i.e., social security numbers, names of family members, dates of birth, financial account numbers, home addresses and telephone

numbers) may be redacted; and (2) such personnel files are not to be disclosed to anyone for any purpose other than this lawsuit. All other relief requested by defendant is DENIED.

Lastly, Fuller's request for additional time to designate expert witnesses and respond to defendant's motion to dismiss is DENIED.

Signed on December 16, 2004, at Houston, Texas.

Stephen Wm. Smith
United States Magistrate Judge