

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TIMOTHY GRIFFIN AND)
JULIE GRIFFIN, INDIVIDUALLY)
AND AS CO-ADMINISTRATORS)
OF THE ESTATE OF)
BRETT GRIFFIN,)

Plaintiffs,)

v.)

C.A. No. 09C-04-067 JAP

THE SIGMA ALPHA MU)
FRATERNITY, INDIVIDUALLY)
AND T/A DELTA LAMBDA)
CHAPTER AT THE UNIVERSITY)
OF DELAWARE, ET AL,)

Defendants.)

MEMORANDUM OPINION

Appearances:

Bruce L. Hudson, Esquire, Law Office of Bruce L. Hudson, Wilmington,
Delaware, Attorney for the Plaintiffs.

R. Stokes Nolte, Esquire, Reilly Janiczek & McDevitt, P.C., Wilmington,
Delaware, Attorney for Sigma Alpha Mu.

David C. Malatesta Jr., Esquire and Jon F. Winter, Esquire, Kent &
McBride, P.C., Wilmington, Delaware, Attorneys for Jason Matthew
Aaron.

Dennis D. Ferri, Esquire and Allyson M. Britton, Esquire, Morris James
LLP, Wilmington, Delaware, Attorneys for Michael Jeremy Bassett.

Arthur D. Kuhl, Esquire, Reger Rizzo & Darnall LLP, Wilmington,
Delaware Attorney for Daniel P. Okin.

Robert K. Pearce, Esquire, Ferry, Joseph & Pearce, Wilmington, Delaware, Attorney for Daniel P. Okin.

Stephen P. Casarino, Esquire, Casarino, Christman & Shalk, P.A., Wilmington, Delaware, Attorney for Matthew P. Siracusa.

Kevin J. Connors, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, Attorney for Christopher Squeo.

Michael A. Pedicone, Esquire, Michael A. Pedicone, P.A., Wilmington, Delaware, Attorney for Daniel Zachary Troper.

Scott L. Silar, Esquire, Margolis Edelstein, Wilmington, Delaware, Attorney for Matthew D'Amour.

Roger A. Akin, Esquire, City Solicitor's Office, City of Newark, Newark, Delaware.

Ralph K. Durstein, Esquire and Judy O. Hodas, Esquire, Department of Justice, Wilmington, Delaware.

Presently before the court is a motion by the City of Newark which requires this court to consider and apply the so-called law enforcement privilege. The City seeks to prevent disclosure to parties in this civil case of information gathered by its law enforcement officers in connection with a criminal investigation into the death of Brett Griffin.

Facts

According to the Complaint, in 2008 Brett Griffin, a freshman at the University of Delaware, accepted a "bid" to become a member of Sigma Alpha Mu national fraternity. That bid was extended by the local chapter of Sigma Alpha Mu. As part of the process leading to full membership, Mr. Griffin was required to attend a so-called "Big Brother Night" at which time Mr. Griffin and other aspiring members would learn the names of their "big brothers." A big brother is a fraternity member who mentors an aspiring member during the process leading to initiation into the fraternity.

The Big Brother Night at the local chapter consists of rituals, many, if not all, of which involve consumption of alcohol, often in excessive amounts. Mr. Griffin was apparently one of those who consumed excessive amounts of alcohol. Around 3 a.m. on the morning of November 8, he was found unresponsive, pale and with slightly blue lips. Emergency medical assistance was summoned, and Mr. Griffin was taken to Christiana Hospital, where he died of acute alcohol consumption.

The Newark Police Department investigated this matter, conducting many interviews of those present, photographing the scene, as well as collecting other evidence. The police investigation led to comparatively minor criminal charges being brought against several individuals in attendance at the ill-fated function. Those criminal charges have all been resolved.

Mr. Griffin's parents have brought a survival and wrongful death action against the national fraternity, the local chapter and several members of the local chapter. They have issued a subpoena duces tecum to the City of Newark seeking production of notes and recordings of interviews conducted by the Newark police as well as photographs and videotapes taken by them. They also seek production of the telephone call placed to the 9-1-1 dispatcher on November 8. Defendant Sigma Alpha Mu has made a similar discovery request. All requesting parties have limited their requests so as to exclude the thought processes of the investigating officer.

The City of Newark filed an objection to the subpoenas. At this court's direction, the City submitted responsive materials to the court for an *in camera* inspection. Because this court's ruling might be of significance to other police agencies in this state, the court invited the Delaware Department of Justice to file an amicus brief. The Attorney General subsequently filed such a brief.

Analysis

The court has reviewed the materials submitted by the City and has reviewed portions of the depositions of some of the witnesses. After comparing these, the court concludes that Plaintiffs have a genuine need for the investigative materials.

Ordinarily, materials gathered by a police agency during the course of a criminal investigation are not subject to disclosure to third parties. Over time, this privilege has come to be known as the "law enforcement privilege."¹ Two years ago this court upheld the existence of such a privilege and defined its parameters even though it did not use the phrase "law enforcement privilege." In *Brady v. Suh*² it held that:

This Court has consistently held the State has a strong interest in protecting the confidentiality of communications it receives during criminal investigations. The privilege has been traditionally upheld because disclosure of such materials would be "prejudicial to the public interest" and the State's ability to conduct productive criminal investigations. Accordingly, a reviewing court should maintain a strong presumption that the privilege of the State will apply.³

Although the law enforcement privilege protects the state's strong interest in maintaining the confidentiality of criminal investigations, the privilege is not absolute. Courts have repeatedly recognized that a litigant's need for information gathered by the police sometimes outweighs the state's interest in protecting the confidentiality of that information. In determining whether to apply the privilege, the court

¹ E.g. *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (using term "law enforcement privilege").

² 2009 WL 6312181 (Del. Super.).

³ *Id.* at *3.

must balance "the government's interest in confidentiality against the litigant's need for the documents."⁴

In 1973 then District Judge Edward Becker developed criteria for balancing these competing interests in *Frankenhauser v. Rizzo*.⁵ These criteria, which have come to be known as the *Frankenhauser* factors, have been widely adopted by other courts.⁶ Those factors are:

(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.⁷

The applicable *Frankenhauser* factors demonstrate that no harm will be done by the release of this information, which the court believes is necessary for a fair understanding of what happened on the night of November 7-8.

⁴ *Coughlin v. Lee*, 946 F.2d 1152, 1160 (5th Cir.1991); *Dellwood Farms v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1991).

⁵ 59 F.R.D. 339 (E.D. Pa. 1973), abrogated on other grounds, *Startzell v. City of Philadelphia*, 2006 WL 2945226 (E.D. Pa.).

⁶ *Al-Kidd v. Gonzales*, 2007 WL 4391029 (D. Idaho) (describing *Frankenhauser* as "most often relied upon decision"); *Rhodenizer v. City of Richmond Police Dept.*, 2009 WL 3334744 (E.D. Va.) (describing *Frankenhauser* as the "leading case ... which is cited frequently for its thorough analysis").

⁷ 59 F.R.D. at 344.

1. *The extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information*

There is little reason to believe that the disclosure of this information will discourage citizens from giving statements to the police in future cases. Witness statements are routinely turned over to the defendant in criminal cases which, in the court's view, far outweighs any chilling effect arising from turning them over to plaintiffs in a civil matter. Moreover, the instant plaintiffs' need for these statements far outweighs any negligible future chilling effect their production might cause.⁸

2. *The impact upon persons who have given information of having their identities disclosed*

There is little or no impact upon the persons who give statements to the police. No one giving a statement is a confidential informant; indeed, their identities are well known as each of the witnesses was present at the scene at some point during the night of November 7-8.

3. *The degree to which governmental self-evaluation ... will be chilled by disclosure*

This is not an issue here.

⁸ See *Register v. Wilmington Medical Center*, 377 A.2d 8 (Del. Supr. 1977).

4. *Whether the information sought is factual data or an evaluative summary*

The information sought here does not inquire into the thought processes of the investigating officers.

5. *Whether the party seeking the discovery is an actual or potential defendant in a criminal proceeding*

This is not the case here.

6. *Whether the police investigation has been completed*

The investigation has been completed.

7. *Whether any intradepartmental disciplinary proceedings have arisen*

This criterion is not applicable here.

8. *Whether plaintiff's suit is non-frivolous*

Plaintiffs' claims are not frivolous.

9. *Whether the information sought is available through other sources*

Given the lapses of memory of some of the witnesses, it appears the requested information is not available from other sources.

10. *The importance of the information to Plaintiffs' case*

Perhaps the central factual issue in this case is what occurred at Big Brother Night.

There are other factors which move the court to order production.

1. There are no statements from confidential informants, and there is no reason to believe that the persons interviewed will be put at risk or harmed by release of this information.
2. There are no on-going criminal prosecutions relating to this investigation and therefore release of this information will not prejudice the rights of any criminal defendant.
3. Nothing in the information sought reveals any confidential investigative techniques.
4. Nothing in the information sought reveals any information about possible future investigations or other on-going investigation.

The City shall produce the requested information to counsel for Plaintiffs and Sigma Alpha Mu within 21 days of this order. Those parties shall each pay half of the City's cost of production. The remaining defendants may obtain copies from counsel for Sigma Alpha Mu upon informal request. With one exception, the materials provided shall be subject to a confidentiality order negotiated by the requesting parties and the City. Until that order is negotiated, counsel shall treat the documents as for reserved for attorneys' eyes only. The sole exception to the confidentiality order shall be the recording of two 9-1-1 calls. The court

finds that this is not confidential, except that portion of one of the two calls during which the caller recites his cell phone number.

The court has no opinion as to who, if anyone, is responsible for this tragedy. However, if it had any say in the matter (and it does not) it would make the recording of these calls required listening for fraternity and sorority members.

Dated: April 26, 2011


John A. Parkins, Jr.
Superior Court Judge

cc: Prothonotary

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