

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF)
SECURITIES, ex rel. IRVING L.)
FAUGHT, Administrator,)

Plaintiff,)

vs.)

ACCELERATED BENEFITS)
CORPORATION, et al.,)

Defendants,)

Case No. CJ-1999-2500

Judge Thomas E. Prince

ACHERON PORTFOLIO TRUST,)

vs.)

H. THOMAS MORAN II, Conservator)
of certain assets of Accelerated Benefits)
Corporation, ET AL.,.)

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

MAY - 8 2015

TIM RHODES
COURT CLERK

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ACHERON'S REPLY IN SUPPORT OF MOTION TO COMPEL

On April 17, 2015, the same day ASG filed its response to Acheron's initial motion to compel, Acheron received ASG's supplemental responses to certain discovery requests. A table summarizing which discovery issues have been resolved and which remain in dispute is attached as Exhibit 21. In addition, Acheron submits the following brief in reply to certain arguments raised in ASG's response brief.

- 1. Acheron's prior attempts to renegotiate the Option Purchase Agreement are irrelevant to the present litigation.***

ASG's response brief makes much of the fact that Acheron has previously attempted to renegotiate and accelerate the Option Purchase Agreement and that Acheron's proposals were not approved by the Court. *See* Resp. Br., at 4-7. That history is irrelevant to the

present litigation. The issues involved in that litigation—whether Acheron’s proposal was in the best interest of the original ABC Investors, for whose benefit the Conservatorship was established—are not related to the issues in this case. Here, the question is whether ASG has been satisfactorily performing its duties and obligations under the Service and Escrow Agreement (it has not), and whether Mr. Moran has allowed his inherent conflict of interest to interfere with his obligations as Conservator (apparently so). Moreover, ASG’s failure to perform its obligations under the Service and Escrow Agreement—particularly its failure to timely identify policy maturities—has a direct, negative impact on the performance of the ABC Portfolio, which harms both Acheron and the ABC Investors.

2. *The insureds’ personal information is discoverable.*

Under the Oklahoma Discovery Code, information that is relevant to the subject matter involved in the litigation and not privileged is discoverable. *See* 12 Okla. Stat. § 3226(B)(1)(a). In its response brief, ASG does not argue that the insureds’ personal information is irrelevant to the subject matter involved in this case. And, curiously, ASG does not claim the information is privileged. *See* Resp. Br., at 12 (“ASG does not claim that this statute creates a privilege in favor of ASG.”). Nonetheless, ASG refuses to produce the requested information based upon a general anti-disclosure provision contained in the Oklahoma Viatical Settlements Act, 36 Okla. Stat. § 4055.6(B).

ASG bases its refusal to produce relevant, non-privileged information on the canon of statutory construction that holds “[w]here a matter is addressed by two statutes—one specific and the other general—the specific statute, which clearly includes the matter in controversy and prescribes a different rule, governs over the general statute.” Resp. Br., at 13 (quoting *Hall v. Globe Life & Ace. Ins. Co. of Okla.*, 1999 OK 89, 5, 998 P.2d 603,605).

But that canon only comes into play when the statutes in question are “irreconcilably conflicting.” *Adirondack Med. Ctr. vs. Sebelius*, 740 F.3d 692, 699 (D.C. Cir. 2014) (“The canon is impotent, however, unless the compared statutes are ‘irreconcilably conflicting.’” (quotation omitted)). “If possible, statutes are to be construed so as to render them consistent with one another.” *Sharp v. Tulsa County Election Bd.*, 1994 OK 104, 890 P.2d 836, 841.

The Discovery Code is not in irreconcilable conflict with 36 Okla. Stat. § 4055.6(B). As noted in Acherons’ motion and initial brief, § 4055.6(B) specifically excepts from its prohibition disclosures that are “otherwise allowed or required by law.” This must include “mandated disclosure for use in a court proceeding.” *Cf. In re F.E.F.*, 594 A.2d 897, 904 (Vt. 1991); Okla. Admin. Code § 365:25-11-8(a) (requiring viatical settlement providers and brokers to give notice to the insureds if they are served with a subpoena for certain information).¹ Furthermore, ASG’s proposed rule would frustrate the Court’s truth-seeking function. If the legislature had intended to categorically exempt the insureds’ personal information from disclosure in the face of court process, it would have done so clearly and created an evidentiary privilege, not enacted a mere anti-disclosure statute with a broad carve-out for disclosures “otherwise allowed or required by law.”

With respect to ASG’s alternative contention that § 4055.6(B) does create an evidentiary privilege (or something like it), ASG only addressed two of the five cases cited by Acheron and failed to point to any case that found a statute with the broad carve-out present here to create an evidentiary privilege or otherwise prohibit discovery of relevant

¹ Acheron is not relying on the above-cited regulation as positively authorizing disclosure of the information requested in this case, and whether ASG is a licensed viatical settlement provider or broker is beside the point for purposes of this motion. Rather, the point here is that the regulation explicitly contemplates that disclosure may be required by a subpoena, which suggests very strongly that the statute implicitly contemplates other court process (i.e., discovery requests) can likewise compel disclosure of the insureds’ personal information.

evidence in the course of litigation. ASG draws circumstance-specific distinctions between two cases and this one but fails to refute the general proposition that a statute does not create an evidentiary privilege unless there is clear legislative intent to do so. Such legislative intent can be explicit or, perhaps in limited circumstances, implicit, but it must be clear. Absent legislative intent to create a privilege, a general confidentiality statute, like 36 Okla. Stat. § 4055.6(B), does not prohibit disclosure of information through discovery. If confidential information needs to be protected, the Court can enter a protective order with whatever conditions it determines appropriate. *See* 12 Okla. Stat. § 3226(C)(1). In addition to the cases cited in Acheron's initial motion and brief, see *Seabolt v. City of Muskogee*, No. CIV-07-255-JHP, 2008 WL 2977865 (E.D. Okla. July 30, 2008) (unpublished order finding prosecutor's file in prior criminal case to be discoverable, even though an Oklahoma statute authorized the prosecutor to keep them as confidential, and citing additional cases on point) (attached as Exhibit 22).

3. *The methodology ASG utilizes to identify policy maturities is central to Acheron's theory of the case.*

ASG contends that how it learned of policy maturities is largely irrelevant to Acheron's claims and that it would be unduly burdensome to comply. ASG is wrong and erroneously tries to make this case about 13 policies instead of ASG's performance as a whole. Acheron believes that ASG says one thing and does another with respect to identifying policy maturities. As noted in Acheron's initial motion, ASG has publicly acknowledged that changes to the Social Security Death Master File have rendered it unreliable for identifying policy maturities, that additional tracking methods are needed, and that ASG employs such additional tracking methods. *See* Acheron Mot., at 5 & Ex. 8. Interrogatory No. 25 and Request for Production No. 12 are targeted at determining exactly

what additional methods, if any, ASG uses to identify policy maturities. If ASG does not use additional tracking methods to identify policy maturities for the ABC Portfolio, then it would, by its own standard, be failing to use the reasonable efforts required by the Service and Escrow Agreement.

In its supplemental discovery responses of April 16, 2015, ASG offered to reconsider its objections to Interrogatory No. 25 if Acheron agrees to (i) limit its request to include only information ASG maintains in readily accessible electronic form, and (ii) to the entry of an amended agreed protective order. Acheron's counsel will attempt to discuss this proposal further with ASG's counsel prior to the upcoming hearing. However, it is difficult for Acheron to agree prospectively to limit a discovery request without knowing how much information will be included in whatever partial set of responsive documents ASG would produce.

Conclusion

For these reasons and those advanced in Acheron's initial motion to compel and supporting brief, the Court should grant Acheron's motion to compel and order ASG to (i) produce the personal information of the insureds in the ABC Portfolio so that Acheron can search for additional policy maturities; (ii) produce un-redacted and complete files for 128 insureds ASG does not appear to have successfully contacted since before 2008; (iii) explain how ASG has identified each policy maturity since May 24, 2006 and produce supporting documentation; and (iv) supplement the discovery responses ASG has previously agreed to supplement. Acheron also requests the Court award Acheron the reasonable costs and attorney's fees incurred in bringing the present motion, and any other relief the Court determines to be proper.



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CERTIFICATE OF SERVICE

This certifies that on the 8th day of May, 2015, I sent a copy of the foregoing document via first class mail to:

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Status of Discovery Issues

The following table identifies the discovery issues raised in Acheron's motion to compel and indicates whether they have been resolved since that motion was filed. The order in which the issues are presented here corresponds to the order the issues were discussed in Acheron's initial motion and brief.

Request Number	Summary of Request	Status
Interrogatory No. 24	Insureds' personal information	Not produced
Interrogatory No. 25	Describe how ASG identified each policy maturity since 2006	Not produced ASG has proposed a potential compromise, which Acheron is considering
Request for Production No. 12	Documents evidencing policy maturities since 2006	Not produced
Miscellaneous/party agreement	128 select viator files	Not produced
Request for Production No. 11	Correspondence w/insurance carriers since 2008 re: disability status of insureds	Some responsive correspondence had been produced before Acheron filed its motion to compel. On April 16, 2015, ASG supplemented its production with additional documents. Acheron is reviewing to ensure all documents responsive to the request, as amended by counsels' agreement, have been produced.
Interrogatory No. 7	Identity of third-party databases ASG uses to provide policy management services	ASG has agreed to supplement its answer to this interrogatory pending entry of an amended agreed protective order. The terms of the proposed protective order have not yet been resolved.
Interrogatory No. 14	Identity of policies since 2006 where ASG has sought to continue disability premium waiver and description of steps taken to accomplish same.	ASG supplemented its answer to this Interrogatory on April 16, 2015. Acheron is reviewing the supplement to ensure it is complete.

Interrogatory No. 15	Identity of policies since 2006 where ASG applied for a disability premium waiver.	ASG purported to supplement its answer to this interrogatory on April 16, 2015, but ASG did not actually identify any policy for which it applied for a disability premium waiver that was not previously in effect. Acheron is in the process of reviewing the documents ASG produced on April 16, 2015 to determine whether those documents reflect information responsive to this request.
Interrogatory No. 28	Dates ASG sought to obtain medical records for each insured	Not produced. ASG's counsel agreed that ASG would supplement its answer to this interrogatory in a telephone conference held on February 23, 2015. That supplementation was supposed to occur by the end of February. This interrogatory was not addressed by ASG's response brief or its April 16, 2015 supplemental production.



2008 WL 2977865

Only the Westlaw citation is currently available.
United States District Court,
E.D. Oklahoma.

Dallas SEABOLT, Plaintiff,
v.
CITY OF MUSKOGEE and Mark Ridley,
Defendants.

No. CIV-07-255-JHP. | July 30, 2008.

Attorneys and Law Firms

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**OPINION AND ORDER DENYING MOTION TO
QUASH AND REQUEST FOR PROTECTIVE
ORDER**

STEVEN P. SHREDER, United States Magistrate Judge.

*1 This is an action pursuant to 42 U.S.C. § 1983. The Plaintiff alleges he was detained beyond the lawful scope of a traffic stop so a canine sniff of his vehicle could be conducted, which resulted in the discovery of incriminating evidence, a conviction for possession of methamphetamine and a two-year period of incarceration before his conviction was reversed by the Oklahoma Court of Criminal Appeals. The Plaintiff sought to compel the production of the prosecutor's file in his state court case (*State of Oklahoma v. Dallas Seabolt*, Case No. CF-2004-179, in the District Court of Muskogee County) by issuing a *subpoena duces tecum* to the Muskogee County District Attorney's Office. The district attorney (who is not a party to this action) responded with a District Attorney's Office Motion to Quash and Request for Protective Order [Docket No. 34], wherein he objects to producing the prosecutor's file because it is confidential under the Oklahoma Open Records Act (the "ORA"). See 51 Okla. Stat. §§ 24A.1-24A.28. The motion was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A), and an *in camera* review of the prosecutor's file was ordered. For

the reasons set forth herein, the district attorney's Motion to Quash and Request for Protective Order [Docket No. 34] is hereby DENIED.

The district attorney is undoubtedly authorized by the ORA to maintain the confidentiality of the prosecutor's file in Case No. CF-2004-179. See 51 Okla. Stat. § 24A.12 ("Except as otherwise provided by state or local law, the Attorney General of the State of Oklahoma and agency attorneys authorized by law, the office of the district attorney of any county of the state, and the office of the municipal attorney of any municipality may keep its litigation files and investigatory reports confidential."). See also *Oklahoma Attorney General Opinion*, 1999 OK AG 58, ¶ 8 ("It is important to note that Section 51 O.S. 24A.12 states that such files 'may' be kept confidential. It is within the discretion of the office involved."). And his decision to do so is not without weight even in this Court. See, e.g., *Kelly v. City of San Jose*, 114 F.R.D. 653, 656 (N.D.Cal.1987) ("[F]ederal courts generally should give some weight to privacy rights that are protected by state constitutions or state statutes."). Nevertheless, inasmuch as the information contained in the prosecutor's file would appear to be relevant to the Plaintiff's claims herein, see, e.g., *Abdell v. City of New York*, 2006 WL 2664313, at *7 (S.D.N.Y. Sept. 14, 2006) ("[C]ourts have regularly held that in cases of alleged police misconduct, plaintiffs have a substantial need to discover statements that the officers made to prosecutors.") [citations omitted], it is subject to discovery unless it is protected by an evidentiary privilege. See Fed.R.Civ.P. 26(b)(1) ("Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense[.]") [emphasis added].

*2 The undersigned Magistrate Judge concludes that the prosecutor's file in Case No. CF-2004-179 is not protected by any evidentiary privilege. The ORA itself distinguishes between matters that are privileged and those that are merely confidential. See, e.g., 51 Okla. Stat. § 24A.5 ("All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours [except] records specifically required by law to be kept confidential including ... records protected by a state evidentiary privilege such as the attorney-client privilege, the work product immunity from discovery and the identity of informer privileges [and] records of what transpired during meetings of a public body lawfully closed to the public such as executive sessions authorized under the Oklahoma Open Meeting Act[.]"). In any event, it is federal law that is controlling in this case. See, e.g., *Kelly*, 114 F.R.D. at 655 ("[I]n a civil rights case brought under federal statutes questions of privilege are resolved

by federal law.”) [citations omitted]. See also *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1369 (10th Cir.1997) (recognizing the need to apply federal common law of privilege in a case involving a federal question even where state law may be involved); *Everitt v. Brezzel*, 750 F.Supp. 1063, 1065 (D.Colo.1990) (“Discovery in the federal courts is governed by federal law as set forth in the Federal Rules of Civil Procedure, whether federal jurisdiction is based on the existence of a federal question or on diversity of citizenship.”), citing *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) and *Hanna v. Plumer*, 380 U.S. 460 (1965). See generally Fed.R.Evid. 501 (“[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”). And the district attorney has presented nothing to suggest that what is merely confidential under state law should be considered privileged under federal law. See, e.g., *Van Emerik v. Chemung County Department of Social Services*, 121 F.R.D. 22, 25 (W.D.N.Y.1988) (“A non-disclosure or ‘confidentiality’ provision in a statute may not always create an evidentiary privilege, especially if the legislature did not ‘explicitly create an evidentiary privilege.’ Merely asserting that a state statute declares that the records in question are ‘confidential’ does not make out a sufficient claim that the records are ‘privileged’ within the meaning of Fed.R.Civ.P. 26(b)(1) and Fed.R.Evid. 501.”), quoting *American Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1339, 1342 (5th Cir.1981).

Nor has the district attorney presented anything to suggest that the prosecutor’s file is otherwise in need of protection. See, e.g., *Hernandez v. Longini*, 1997 WL 754041, at *3 (N.D.Ill. Nov. 13, 1997) (“WSCA asserts that any benefits that Longini may receive from the documents he seeks are outweighed by WSCA’s interest in maintaining the confidentiality of its files. However, WSCA provides no specifics as to what confidences may be jeopardized, or what interests of justice may be infringed, by disclosure of these files to Longini. WSCA cannot rely on these conclusory assertions to overcome Longini’s proffered need to discover this information[.]”). He is not a party to this action. See, e.g., *Doubleday v. Ruh*, 149 F.R.D. 601, 606 (E.D.Cal.1993) (“[A] public prosecutor-having completed his investigation ... is [not] entitled to rely upon the work product doctrine when the fruits of his investigation become relevant to civil litigation to which he is not a party. The district attorney is not an ‘attorney’ who represents a ‘client’ as such.”) [quotation omitted]; *Schultz v. Talley*, 152 F.R.D. 181,

184 (W.D.Mo.1993) (finding the district attorney cannot assert work-product privilege because he is not a party to the present suit); *Hernandez*, 1997 WL 754041, at *2 (“Courts have expressly found the privilege unavailable when a prosecutor in a prior criminal investigation later objects to discovery of her work product by a litigant in a related civil lawsuit[.]”). Further, there will be no interference with any ongoing investigation, as the proceedings against the Plaintiff in Case No. CF-2004-179 are complete. See *Ostrowski v. Holem*, 2002 WL 31956039, at *4 (N.D.Ill. Jan. 21, 2002) (“[B]ecause the underlying criminal case has been closed ... there are no concerns with interfering with an ongoing criminal investigation.”). Finally, the undersigned Magistrate Judge has reviewed the prosecutor’s file, and it contains only information about the Plaintiff and statements from the officers involved in his arrest, i.e., there are no sensitive matters that would justify any protection from disclosure. See, e.g., *Klein v. Jefferson Parish School Board*, 2003 WL 1873909, at * 5 (E.D. La. April 10, 2003) (“[T]he Courts in camera review of the notes at issue reveal that the notes do not include anything more than the facts and circumstances of the criminal matter as provided by several witnesses [T]he notes [do not] reveal any broad pronouncements that would tend to show how that office’s decisions are made or its policies are formulated.”). See also *Kelly*, 114 F.R.D. at 662 (“[L]aw enforcement usually will have a much greater interest in preserving the confidentiality of names of citizen informants in on-going criminal investigations than in keeping secret the factual information provided by percipient witnesses to events that are long since past[.]”).

*3 In summary, the prosecutor’s file in Case No. CF-2004-179 is discoverable by the Plaintiff because it is relevant to his claims herein and it is unprivileged. See Fed.R.Civ.P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense[.]”). There is nothing in the file in need of protection from disclosure, so a protective order need not be issued. Consequently, all relief requested in the District Attorney’s Office Motion to Quash and Request for Protective Order [Docket No. 34] is hereby DENIED. The district attorney is hereby directed to provide the Plaintiff’s attorney with a copy of the prosecutor’s file in Case No. CF-2004-179 forthwith.

IT IS SO ORDERED.