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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CLARICE LEOTA HARDY,

Plaintiff,

vs.

CITY OF NOME, and JOHN
PAPASODORA and NICHOLAS
HARVEY in their individual capacities.

Defendants.

Case No. 2:20-cv-00001-HRH

OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

I. INTRODUCTION

Defendant City of Nome, a municipal corporation, ("City of Nome") by and through counsel, Sedor, Wendlandt, Evans & Filippi, LLC, hereby opposes Plaintiff Clarice Leota Hardy's Motion to Compel, dated May 18, 2021.

II. LEGAL STANDARD

A party may obtain discovery that is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties'

resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”¹ A party may also move to compel production when the other party “fails to produce documents.”²

The Federal Rules of Civil Procedure favor liberal discovery.³ District courts “have wide latitude” in managing all aspects of discovery, and “broad discretion is vested in the trial court to permit or deny discovery.”⁴ Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.⁵

The relevance standard “has never been a license to engage in an unwieldy, burdensome and speculative fishing expedition.”⁶ Discovery must be proportional to the needs of the case.⁷ To determine proportionality, Rule 26(b)(1) directs courts to consider “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the

¹ Fed. R. Civ. P. 26(b)(1).

² Rule 34. Fed. R. Civ. P. 37(a)(3)(B)(iv).

³ *Peterson v. Alaska Comm. Systems Group, Inc.*, No. 3:12-cv-TMB, 2013 WL 12205973 at *2 (citing *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993)).

⁴ *Blackburn v. United States*, 100 F.3d 1426, 1436 (9th Cir. 1996) (internal citations omitted); *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (quoting *Goehring v. Brophy*, 94 F.3d 1294, 1305 (9th Cir. 1996)).

⁵ *Travelers Cas. & Sur. Co. of Am. v. Gelbrich*, No. A04-0165 CV-RRB, 2005 WL 1958418, at *1 (D. Alaska Aug. 12, 2005) (quoting *Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) (per curiam)).

⁶ *Basargin v. State Farm Mut. Auto. Ins. Co.*, No. 3:16-cv-00041-HRH, 2017 WL 8677339, at *1 (internal citations omitted).

⁷ *Basargin*, 2017 WL 8677339, at *1 (quoting Fed. R. Civ. P. 26(b)(1)).

parties' resources, the importance of the discovery in resolving the case, and whether the burden or expense of the proposed discovery outweighs its likely benefit." The Court retains discretion to limit "the frequency or extent of discovery" under Rule 26(b)(2)(C) as necessary to prevent undue burden and cost: "Rule 26(b)(2)(C) requires a balancing of the costs and potential benefits of the requested discovery" to determine if discovery is appropriate.⁸

III. RELEVANT FACTS AND PROCEDURAL BACKGROUND

The City of Nome acknowledges Plaintiff reported to Defendant Harvey in 2017 she believed she was involved in an incident with Donald Johnson which she claims to have been a sexual assault. The City of Nome acknowledges Defendant Harvey did not conduct a sexual assault investigation based on his conversations with Plaintiff about the incident. The City of Nome acknowledges Plaintiff reported to Defendant Papasodora in 2018 she had disclosed information to Defendant Harvey that did not result in a sexual assault investigation. The City of Nome acknowledges Defendant Papasodora did not initiate, conduct, or direct a sexual assault investigation based on Plaintiff's disclosure. The City of Nome acknowledges Plaintiff reported her concerns to the Alaska State Troopers, which did investigate the incident involving Plaintiff and Mr. Johnson. The City of Nome acknowledges the Alaska State Troopers referred its investigation to the Nome District Attorney, who declined to file criminal charges against Mr. Johnson.

The City of Nome maintains the Nome Police Department was not obligated

⁸ Northrup Grumman Corp. v. Factory Mut. Ins. Co., 2012 WL 12875772, at *2 (C.D. Cal. Aug. 29, 2012).

to investigate Plaintiff's disclosures about the incident involving her and Mr. Johnson. The City of Nome asserts that even if Defendant Harvey and/or Defendant Papasodora had initiated an investigation of Plaintiff's disclosures, it would not have resulted in criminal charges against Mr. Johnson. Plaintiff was not entitled to a sexual assault investigation by the Nome Police Department that was conducted to her satisfaction.

The City of Nome denies that the lack of a sexual assault investigation by the Nome Police Department was the result of Plaintiff's race or gender. The City of Nome denies the Nome Police Department had a widespread practice of not investigating reports of sexual assault. The City of Nome denies that it failed to train its law enforcement personnel to conduct sexual assault investigations, or that there was deliberate indifference to Plaintiff's rights.

The City of Nome asserts that the Nome Police Department had the discretion to determine which reported crimes it would investigate and had the discretion to determine how those reported crimes were investigated. The City of Nome was not required to ensure every report of alleged sexual assault was investigated to the fullest extent possible, including any allegations Plaintiff raised with Defendants Harvey and Papsadora.

On November 30, 2020, Plaintiff delivered their First Set of Discovery Requests to the City of Nome via email. These requests included a substantial amount of confidential victim and departmental information. These requests were received during the inception of the holiday season, which incurred several delays between the various agencies required to produce these documents, as well as requiring additional time necessary to complete a review of all available

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correspondence. Further, the City Manager was unable to assist with these responses, as he had been out of state due to a family emergency.

Anticipating a delay, on December 22, 2021, the City of Nome requested a 30-day extension of time to respond to Plaintiff's requests and informed her that they would be able to provide a limited response, complete with a set of objections to their requests, which Plaintiff agreed to. On January 12, 2021, the City of Nome provided its responses and objections to Plaintiff's first set of discovery requests.

Due to a corruption-based PDF error, the City of Nome was unable to upload and produce the responsive documents by the scheduled deadline of January 29, 2021. Upon troubleshooting, on February 2, 2021, the City of Nome was able to successfully transmit the documents (CON 000517-001461) in their possession. These records included all calls for service and reports of investigation for all sexual assaults reported to the Nome Police Department in 2017 and 2018.

On February 18, 2021, Plaintiff sent a letter outlining areas in which she believed the City of Nome failed to adequately respond to her discovery request with a deadline to produce documents by February 23, 2021. On February 19, 2021, the City of Nome responded to Plaintiff's letter by email, acknowledging receipt of the letter, and notifying Plaintiff that her concerns would be addressed in the timeline proposed. On February 22, 2021, the City of Nome followed up with Plaintiff to notify them that they were working on preparing the responsive records and documents for production, and thanked Plaintiff for their patience.

On February 25, 2021, the City of Nome produced the Police Department Operating Procedures Manual, a draft version of which included the original copy responsive to Plaintiff's RFP No.'s 1 and 2, and a set of documents from Defendant
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Nicholas Harvey (CON 001462 - CON 002272). The City of Nome indicated it would require additional time for the remaining responsive documents, and once again asked for an extension until Tuesday, March 16.

On March 16, 2021, Plaintiff wrote again to the City of Nome, citing alleged deficiencies to responses which the City of Nome had previously objected to, and requested a response to discuss the remaining discovery differences by March 19, 2021. The City of Nome responded it was still working on producing additional documents from the Nome Police department, and indicated it expected to produce these documents by the requested deadline, along with addressing Plaintiff's remaining concerns. Counsel for Plaintiff responded, stating:

"... if you cannot commit (by today) to providing us with all of the discovery we have requested, you also let us know when you can be available this week for a phone conference to discuss our remaining differences. You initially agreed to do so, but your email today does neither. Instead, you ask us to continue to wait, until March 19, to learn of your position, thereby delaying any potential conference until next week.

Unless you can assure us that your March 19 letter will be accompanied by a disclosure of all of the documents and information we have requested, please identify times on Monday, March 22, or Tuesday, March 23, that you can be available for a phone conference so we can discuss any unresolved issues."

The City of Nome responded, providing times available and a date for which to discuss these responses, and in that same correspondence, confirmed it would not be disclosing all documents and information Plaintiff sought in her discovery requests.

On March 19, 2021, the City of Nome provided documents responsive to Plaintiffs RFP No. 2. These included forms, procedures, informational documents, training documents, and investigative guidelines pertaining to sexual assault and abuse (CON 002273-002334), as well as the City of Nome's supplemental discovery response. On April 2, 2021, Defendant City of Nome produced the remainder of reports responsive to Plaintiff's RFPs 3, 4, and 5. This response included incident reports, arrest booking documents, investigation notes, supplemental documents, and calls for service for sexual assault incidents from 2012 through 2016. (CON 002335-003050).

On March 29, 2021, the City of Nome, after consultation with its IT manager, asked Plaintiff to suggest search terms for the email accounts of Defendants Nick Harvey and John Papasodora. The City of Nome also advised Plaintiff it was disclosing the remainder of the reports of sexual assault responsive to RFPs 3 & 4.

On April 2, 2021, the City of Nome followed up with Plaintiff regarding search terms for the email accounts of Defendants Papasodora and Harvey. On April 15, 2021, the City of Nome followed up again with Plaintiff regarding potential search terms for the email accounts. On April 16, 2021, Plaintiff responded to the requests for search terms, indicating she was going to send a proposal to resolve the issue.

On April 19, 2021, Plaintiff responded to the City of Nome's request for search terms for the email accounts of Defendants Harvey and Papasodora. Plaintiff indicated she is seeking "emails between John Papasodora and Nicholas Harvey." She indicated: "a few examples of the relevant evidence they might contain are whether the former chief knew about Harvey's inaction on Ms.

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Hardy's case, as well as Harvey's alleged inaction on other sexual assault cases; whether Papasodora knew of Harvey's animus toward women or Alaska Native women; whether either of them shared that animus; and whether Papasodora condoned Harvey's inaction, either because of that animus or otherwise." Plaintiff refused to provide search terms to the City of Nome.

Plaintiff insisted on production of all emails or text messages between Defendants Papasodora and Harvey sent or received during Defendant Harvey's employment with NPD, as outlined in RFP 10. The City of Nome determined that it would not produce all of the emails or text messages between Defendants Papasodora and Harvey sent or received during Defendant Harvey's employment with NPD, as requested in RFP 10. Instead, on May 4, 2021, the City of Nome produced the emails between Defendants Papasodora and Harvey based on the search terms "Hardy," "Clarice," and "Bun," which is responsive to Interrogatory 4 and RFP 11 (CON 003051 - 003095).

The City of Nome has produced over 3000 pages of documents to Plaintiff thus far. Many of the delays in the response of the City of Nome have been attributable to COVID-19 related issues in the City of Nome. The City of Nome recognizes its obligations to provide documentation of relevant facts to Plaintiff and believes it has done so.

IV. DISCUSSION

The City of Nome has provided a substantial amount of discovery to Plaintiff that is proportional to the discovery she is entitled to. Plaintiff is not entitled to production of the discovery she seeks through her motion to compel. She is engaged in a fishing expedition that is not relevant to her claims or defenses.

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A. Plaintiff Hardy is not entitled to audits which have not been conducted by or commissioned by the City of Nome.

The City of Nome acknowledges the public discussions of audits of the Nome Police Department related to its handling of sexual assault investigation. The City of Nome did not commission or complete an audit of the Nome Police Department regarding its handling of sexual assault investigations. The Nome Police Department began to audit some of its prior sexual assault investigations, but that audit focused on individual sexual assault investigations.

For example, investigators reviewed the work that had been done on prior reports of sexual assault investigations and determined what, if any, additional investigative steps needed to be taken to complete the investigations. This process resulted in additional investigative steps and the referral of reports of investigation to the Nome District Attorney's Office for review of potential criminal charges. The process did not result in a written form of audit report to the City of Nome. Former Chief Robert Estes did report to the City of Nome the preliminary results of the audit of the sexual assault investigations between 2015 and 2018, but there is not a report reflecting this audit which could be disclosed.

The City of Nome has disclosed all of the calls for service and reports of sexual assault from the Nome Police Department from 2012 through 2018. Plaintiff has not sought, nor is she entitled to, investigative reports of sexual assaults after 2018.

B. The City of Nome has disclosed the personnel records Plaintiff is entitled to receive.

The City of Nome has disclosed the entire personnel file of Defendants Harvey (CON 000093-000357) and Papasodora (CON 000363-000514). These records contain the answers to Plaintiff's questions about the employment, any discipline, and the termination of employment of Defendants Harvey and Papasodora. The City of Nome is not in possession of any additional personnel records regarding Defendants Harvey and Papasodora. The personnel records produced contain the documents responsive to Interrogatories 1 and 8, and RFPs 16, 23, 24, 25, and 26.

With respect to the records sought in RFP 20, related to former Nome Police Department Chief Robert Estes, the City of Nome has objected to production of Mr. Estes' personnel records because they are confidential and not relevant for purposes of discovery. Mr. Estes is not a party to this litigation and the confidentiality of his personnel records should be protected. Plaintiff is aware of the public discussion Mr. Estes had with the City Council regarding sexual assault investigations. Plaintiff has failed to establish she is entitled to production of Mr. Estes' personnel records.

C. The City of Nome has fulfilled its obligation to produce email communications between Defendants Harvey and Papasodora.

The City of Nome objected to RFP 10 because it is overly broad and not proportional to the relevant evidence Plaintiff is entitled to. Defendants Papasodora was employed by the Nome Police Department from 2009 through 2018. Defendant Harvey was employed by the Nome Police Department from 2008 through 2018. In RFP 10, Plaintiff seeks all email communications between

Defendants Harvey and Papasodora sent or received during Defendant Harvey's employment with the Nome Police Department.

The City of Nome has disclosed all of the emails between Defendants Harvey and Papasodora that reference Plaintiff. The City of Nome is willing to produce additional emails based on reasonable search terms proposed by Plaintiff. The City of Nome objects to and does not believe it is obligated to produce all of the email communications between Defendants Harvey and Papasodora during the entire period of Defendant Harvey's employment with the Nome Police Department.

Plaintiff is not entitled to production of all of the email communications between Defendants Harvey and Papasodora. She is not entitled to review email discussions of personnel matters, other law enforcement investigations that are not relevant to her claims. Plaintiff is not entitled to production of a decade of email communications that would create an undue burden on the City of Nome to review and redact confidential matters which are not relevant to Plaintiff's claims. If Plaintiff is ordered to propose reasonable search terms, the City of Nome will promptly disclose additional emails between Defendants Harvey and Papasodora, and discovery-related costs incurred in the production of these documents.

D. The City of Nome does not have any additional information to disclose regarding Interrogatories 14 & 15.

In Interrogatories 14 & 15, Plaintiff seeks information regarding any investigation Defendant Papasodora undertook when he learned Defendant Harvey had not initiated an investigation of Plaintiff's disclosure of the incident involving Mr. Johnson. The City of Nome disclosed the records in its possession

(CON 000058-000065). Additional information regarding Interrogatories 14 & 15 is not in the possession of the City of Nome. However, Defendant Papasodora provided this information to Plaintiff in his responses to the interrogatories Plaintiff submitted to him. The City of Nome cannot be compelled to produce information or additional records that are not in its possession.

E. The City of Nome disclosed communications between the Nome Police and the City of Nome regarding sexual assault investigations.

The City of Nome disclosed communications between Defendant Papasodora and the City of Nome regarding Plaintiff's alleged sexual assault. Plaintiff seeks production of all other communications between Defendant Papasodora and the City of Nome regarding sexual assaults. This request is overly broad and not relevant to Plaintiff's claims. In this request, Plaintiff is casting an overly broad net which would result in an unduly burdensome impact on the City of Nome. If Plaintiff were compelled to propose reasonable search terms for Defendant Papasodora's email account, the City of Nome believes an order to produce emails responsive to such reasonable search terms would be appropriate.

F. Plaintiff is not entitled to production of all calls for service and reports of investigation for all assaults reported to the Nome Police Department.

In RFP 3, Plaintiff seeks production of all calls for service to the Nome Police Department between 2012 and 2018 for all alleged assaults or alleged sexual assaults. The City of Nome has produced all of the calls for service and reports of investigation for alleged sexual assaults reported to the Nome Police Department between 2012 and 2018 (CON 000517-001461). The City of Nome objects to the

production of all calls for service for alleged assaults reported to the Nome Police Department between 2012 to 2018 because the request does not seek production of relevant records, it seeks disclosure of confidential information, and it is overly burdensome.

The City of Nome has produced adequate records to permit Plaintiff to compare how the Nome Police Department responded to all alleged sexual assaults over a seven-year period (2012 to 2018). Plaintiff has failed to establish she is entitled to production of all of the calls for service for alleged assaults over the same period. The sole focus of Plaintiff's claims in this matter relate to sexual assault and not to other forms of assault. Plaintiff has not alleged or argued the Nome Police Department was inadequately resourced or trained to deal with other forms of assault. This request must be denied.

G. Plaintiff is not entitled to production of training records for all Nome Police Department staff.

The City of Nome is not in possession of centralized training records for the staff of the Nome Police Department. The City of Nome has disclosed the training records for Defendants Harvey and Papasodora through the disclosure of their personnel records. The City of Nome has disclosed the Operating Procedures Manual (OPM) and the sexual assault investigation forms and resources for the Nome Police Department (CON 001462-002334). Plaintiff has received responses from Defendant Papasodora regarding the format and content of training provided to Nome Police Department staff during his nine years as Chief.

To fulfill Plaintiff's request for training records on sexual assault investigations for all law enforcement personnel employed by the Nome Police

Department, the City of Nome would have to individually review the personnel file of each individual law enforcement officer. This is unduly burdensome and is not proportional to Plaintiff's claims. Plaintiff is already in possession of the training records of Defendants Harvey and Papasodora, as well as the OPM and sexual assault investigation recourses of the Nome Police Department.

Plaintiff also received information from Defendant Papasodora regarding the sexual assault investigation training of law enforcement officers during his tenure as Chief. Plaintiff is also uniquely positioned to understand what training occurred at the Nome Police Department because she was employed there for years. The City of Nome notes the Nome Police Department employed officers certified by the Alaska Police Standards Council, which ensures peace officers are adequately trained on all aspects of law enforcement, including responses to reported sexual assaults. Plaintiff has received sufficient information and records to pursue her claim that the City of Nome allegedly failed to adequately train law enforcement officers on sexual assault investigations.

V. CONCLUSION

The City of Nome has not failed at every turn to engage with Plaintiff to work through disagreements regarding discovery. As outlined in this opposition, the City of Nome has diligently worked to produce a substantial number of records in response to Plaintiff's significant discovery requests. The City of Nome has worked in good faith to provide what it believes it is required to produce under its discovery obligations.

A proposed order accompanies this opposition.

Respectfully submitted this 28th day of May, 2021.

SEDOR, WENDLANDT, EVANS & FILIPPI, LLC
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct
copy of the foregoing was served this
28th day of May, 2021 electronically by
ECF on:

Kendri M. M. Cesar
Stephen Koteff
Joshua Decker
Stephen L. Pevar
Mark Carter
Laura L. Farley
Joseph W. Evans

/s/Riza Smith.
Certification signature