

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

877 90773

JAMES W. H. ...
...

JERRY HART and ANDRE DYER

PLAINTIFFS

v.

No. 4-02-CV-00576 JMM

CITY OF LITTLE ROCK

DEFENDANT

RESPONSE OF THE CITY OF LITTLE ROCK TO PLAINTIFFS' MOTION FOR
PERMANENT INJUNCTION AND TO SEAL THE RECORD

The City of Little Rock responds to the motion and states:

1. The plaintiffs have not provided any proof that warrants a permanent injunction against the dissemination of their personnel files as requested in the motion.

2. In terms of requests for information pursuant to the Arkansas Freedom of Information Act, there are already safeguards and provisions in place that would prohibit such disclosures without notice to the plaintiffs, Ark. Code Ann. § 25-19-105(c) (Michie Supp. 2003); further, in 2003 the General Assembly passed a new amendment to the Act which would preclude the release of home addresses for any appointed municipal employee, an amendment that would expand the protections already in place and cover the plaintiffs, Ark. Code Ann. § 25-9-105 (b)(13) (Michie Supp. 2003).

3. There was no testimony presented at trial that the subpoena issued in this case sought information that was not subject to a subpoena, but merely that the City should be held liable for not strictly complying with the terms of the subpoena.

4. In a divorce action, for example, the type of information included in this file would certainly be relevant to the parties to the divorce; or, in an action involving an individual civil judgment against either of the plaintiffs such information, including access to Social Security numbers, would be relevant; yet, a permanent injunction from this Court would impede state and federal constitutional rights of parties adverse to

plaintiffs from seeking legal redress since only this Court could lift such an injunction, and then only after litigation is filed specifically for that purpose.

5. In addition, there is testimony in this record that the City Human Resources Department no longer releases information pursuant to a subpoena without first contacting the City Attorney's office even though the use of a subpoena for such records is a relatively rare event. *See* Dep. of Stacey Witherell, attached as Ex. O to Plaintiffs' Response to City Motion for Summary Judgment.

6. For such an infrequent event, a federal court permanent injunction is inappropriate and it is overly broad; further, an injunction should not be issued unless there is no adequate remedy at law, and in this case a jury verdict has been rendered which plaintiffs' counsel have suggested will recompense the plaintiffs; further, there are both state and federal procedural rules that provide for quashing subpoenas, or seeking limited review of these files in either state and federal court. RULE 45, ARK. R. CIV. P.; RULE 45, FED. R. CIV. P.

7. There are a number of matters where a permanent injunction against the release of this information could be counterproductive to legitimate law enforcement activities; for example, if the plaintiffs should ever be the subject of a federal criminal or civil investigation, the presence of such an injunction would be problematic; or, if the plaintiffs were ever the subject of a regulatory investigation such as that conducted by the Arkansas Commission on Law Enforcement Standards, the presence of an injunction would interfere with a State's rights pursuant to the 10th Amendment to certify its law enforcement officers. *See, e.g.,* Ark. Code Ann. § 12-9-104 (Michie Repl. 1999).

8. To the extent that an injunction might be appropriate for the release of personnel records in a state or federal criminal proceeding where the officers are only serving as witnesses, the City is not particularly concerned that some order be in place,

however, in light of the modifications to the Arkansas Freedom of Information Act, and the new City policy in place, the City believes that an injunction is inappropriate.

9. The City avers that when it has been properly notified of requests for personnel files, or internal affairs files, with the exception of this one instance, it has resisted the blanket release of such files and has filed motions to quash a subpoena, or has arranged with the counsel in the trial to do so.

10. The Court should also note that the only issue before the Court in this case involves basic Human Resources files and that the injunction could not be directed at any other personnel file maintained on the plaintiffs in other portions of the City so its utility may be limited.

11. As to the desire to seal this records as to Plaintiffs' Exhibits No. 2 and 3, to the extent that the request is only for an order to seal these records as a part of this trial record the City has no strong objection provided:

A. Such an order extends also to the personnel records of Ms. Stacey Witherell which were also sought by plaintiffs counsel as a part of discovery and are included in the City Attorney litigation file;

B. Such an order extends to deposition exhibits that are a part of the City Attorney litigation file where plaintiffs' counsel attached these personnel files as exhibits and subjected them to disclosure under Arkansas Freedom of Information Act;

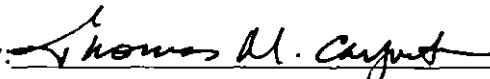
C. Such an order does not hamper counsel for either party from the preparation or presentation of any argument, brief, appendix, or record, on appeal should the final judgment in this case be appealed and there is a need for appellate counsel to refer to these matters in detail.

13. Since the City has already taken steps to prohibit the disclosure of these matters without notice to the City Attorney's office, if any kind of injunction is entered the Court should not treat it as a success on the merits by plaintiffs in this action.

14. Finally, although the City has outlined some ideas for an order to seal records should the Court wish to put one into place in this matter, in light of the District Court opinion in *Kallstrom v. City of Columbus*, 165 F.Supp.2d 696 (S.D. Ohio 2001), the Court should note that the information in the current exhibits does not include current home addresses, accurate past home addresses, current names of family members, and thus does not include the kind of sensitive information for undercover police officers that led the Sixth Circuit to believe that some kind of *sua sponte* constitutional privacy protection was due in order to preserve the anonymity of undercover police officers.

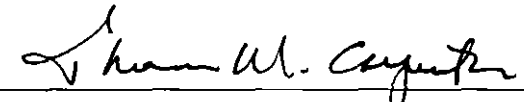
Respectfully submitted,

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By: 
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Certificate of Service

I, Thomas M. Carpenter, do hereby certify that a true and correct copy of the foregoing RESPONSE OF THE CITY OF LITTLE ROCK TO PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION AND TO SEAL THE RECORD was served on opposing counsel, to Patrick R. James, Esq., and to Samuel A. Perroni, Esq., PERRONI & JAMES, 801 West Third Street, Little Rock, Arkansas, on September 26, 2003, in accordance with Fed. R. Civ. P. 5.


Thomas M. Carpenter