

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA.

BARBARA G. HERSKOVITZ,

Plaintiff,

vs.

LEON COUNTY, FLORIDA, a
Political Subdivision of the State
of Florida,

Defendant.

FILED
CLERK OF COURT
LEON COUNTY, FLORIDA
DATE: 10-10-98
BY: [Signature]
CASE NO. 98-22
CIVIL DIVISION

**ORDER AFTER IN CAMERA INSPECTION GRANTING IN PART AND
DENYING IN PART DEFENDANT'S ASSERTION OF EXEMPTIONS**

This case is before me after an in camera inspection of some 9,000 documents contained in three separate boxes which the Defendant claims are exempt from the public records law (Chapter 119, F.S.). Upon a review of the documents produced, the pleadings, and the testimony presented at a hearing, I make the following findings of fact and conclusions of law:

1. On November 3, 1997, the Plaintiff's attorney requested of the Defendant, in writing, production of certain documents¹ by November 10, 1997, and further requesting that if the Defendant claimed any documents as being exempt from inspection, that they be identified in writing with the particular statutory basis for the exemption set forth with particularity. A

¹The Defendant argued at the hearing that since the letter was written in the name of her attorney, that the Plaintiff did not have standing to pursue this action. Based upon the representation of counsel, however, at the hearing that the November 3rd letter was in a representative capacity on behalf of the Plaintiff, I determine that the Plaintiff does, in fact, have standing to pursue remedy under Chapter 119.

similar request was made in subsequent correspondence.

2. By letter dated November 10, 1997, the County responded, assuring intent to comply with the request but stating that because of the breadth of the request, the number of entities involved and the need to review the records, it would not be possible to comply by November 10, 1997, as requested. The letter, written by County Attorney, Herbert Thiele, also stated that the County would be asserting attorney/client and attorney work product exemptions "and any other relevant and appropriate exemptions applicable to the request".

3. In a letter of December 23, 1997 the county responded further confirming that certain files had been produced for inspection, that other files, specifically those from Commercial Risk Management, had been received, would be reviewed, and produced at a later date. The letter also confirmed that certain documents were being claimed as exempt from production and inspection including medical records pursuant to Section 119.07(3)(v), F.S., and also "correspondence, investigation materials, claims negotiation information, research information, adjuster or attorney's notes, or other similar information," relying upon Section 119.07(3)(l), F.S., the attorney/client and work product privilege provided in the Florida Rules of Court and Florida Rules of Civil Procedure, and Section 624.311(2), F.S.

4. The Plaintiff took exception to the Defendant's assertion that Section 624.311(2), F.S. would apply to any document withheld, and questioned the asserted scope of attorney/client or work product privilege claimed and maintained that the Defendant needed to be more precise in identifying the documents claimed as exempt, and the basis for that exemption. The Plaintiff also contended that the delay in producing documents was unreasonable. This suit followed.

5. At the initial hearing, I took testimony concerning the nature and extent of the efforts

by the Defendant to comply with the public records request. Given the nature and the volume of the materials requested, their location, and the need for close supervision by some knowledgeable person of the review of those records for possible exemptions, I find that the county's delay in producing the requested documents was not unreasonable.

6. For similar reasons, it would not be unreasonable in these types of cases to charge a reasonable special fee for the supervisory personnel necessary to properly review the materials for possible application of exemptions. As noted in a previous letter to the parties, however, I conclude that an intention to charge a fee must be communicated to the person requesting the inspection before the work is undertaken. If the agency gives the requesting party an estimate of the total charge, or the hourly rate to be applied, the party can then determine whether it appears reasonable under the circumstances. If not, suit can be filed and the issue of the reasonableness of the fee can be determined at the outset. It would also allow the requesting party an opportunity to perhaps limit the scope of request or view the documents produced after a limited search and then make an assessment of the reasonableness of the charge.

7. Of course, an argument can be made that under no circumstances should an agency be allowed to charge for its costs in determining what it claims to be exempt from a production request. This appears, however, to me to be a matter of semantics because, as a practical matter, the search for and the production of the documents inherently would include a review of those records for the possible exemptions.

8. An issue remains as to how detailed or specific the Defendant must be in identifying documents claimed to be exempt, and the statutory basis for claiming the exemption. This is a little tricky because of the nature of the attorney/client privilege or the insurance claim

negotiation privilege. Sometimes a description of the document claimed to be exempt would divulge the legal strategy, mental impressions, etc. of the attorney. On the other hand, if the identification is too vague or general, it is impossible for the requesting party, or the Court, later, to ascertain what document is claimed exempt, and under what exemption. Certainly a "special services" fee would be greater if a defendant were to, for example, identify each individual document.

It would seem to me that something along the lines of what the Defendant has done in response to my request for organizing the documents for in camera inspection would be reasonable where there has been a request for specificity. Under either analysis, however, the additional time expended in organizing, indexing, and identifying documents was done at my request and is thus not chargeable to the Plaintiff.

9. As to the specific documents that were reviewed in camera and the exemptions claimed to apply:

A. Medical Records: The Plaintiff has indicated by letter and by pleading that medical records or medical information relative to any files other than that of the Plaintiff is not requested. A good bit of what I reviewed falls into this category. There were some medical records of the Plaintiff in the documents that were produced and should be produced for inspection and examination by Plaintiff.

B. Attorney Client/Work Product: The attorney/client or attorney work product exemption has been properly raised for the most part. Each of the separate files contain a significant amount of correspondence by attorneys which invariably discusses a legal theory, a mental impression or a strategy concerning the case. There are also handwritten and typed notes

of attorneys concerning mental impressions of various aspects of the case. Although portions of correspondence may contain material that would not fall within this exemption, it is difficult and impractical to produce the correspondence with the exempt portions redacted as the same is integral to the entire letter.

The same cannot be said for the legal bills. Although some portion of the statements for services rendered arguably suggest strategy, mental impressions, etc., the overwhelming majority of the specific entries on the bills do not. Strictly for illustrative purposes, I note that the 10/29/96 statement regarding W.B. was six pages long. Of the 15 entries on page 1, four might be considered as falling within the exemption. On page 2, of 25 entries, three might be valid. On page 3, of 24 entries, none would be considered valid. On page 4, of 22 entries, only two would be considered valid. On page 5, of 25 entries, none were valid, and on page 6, of 5 entries, none were valid.

Obviously, an entry on a statement which identifies a specific legal strategy to be considered or puts a specific amount of settlement authority received from the client, would fall within the exemption. On the other hand, a notation that the file was opened, or that a letter was sent to opposing counsel, would not.

C. Insurance Claim Negotiations: Section 624.311(2), F.S. reads:

"The records of insurance claim negotiations of any state agency or political subdivision are confidential and exempt from Section 119.07(1) until termination of all litigation and settlement of all claims arising out of the same incident."

The Plaintiff says, first, that this Section does not apply because the workers compensation program of the state cannot be defined as "insurance". Secondly, the Plaintiff says that the documents withheld cannot relate to "negotiations" because that implies that something

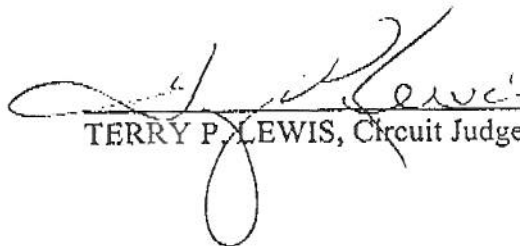
is done between adverse parties, and would not include correspondence between an employer or its agent, and its attorney, for example. I disagree on both counts.

As to whether the self-insured status for workers compensation is really insurance, I find that a rose is a rose and that the County's self-insured workers compensation program is the legal equivalent of "insurance" for the purposes of the exemption found in Section 624.311(2), F.S. I also conclude that "records of insurance claim negotiations" should be given the construction that the plain language implies, i.e., those records which a state agency's adjuster would normally keep. Such records would include correspondence, investigative reports, etc. In other words, whatever the agency or its agent maintained in connection with an insurance claim is exempt from disclosure "until termination of all litigation and settlement of all claims arising out of the same incident."

It is therefore **ORDERED AND ADJUDGED** that the County shall produce for examination by Plaintiff, within ten days of this Order, all medical records or medical information files of the Plaintiff and all legal bills or statements for legal services rendered contained in those files produced to me for review.

The Court reserves jurisdiction to consider the issue of costs and attorneys fees.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 9th day of June, 1998.


TERRY P. LEWIS, Circuit Judge