

Elizabeth T. Foster, Esq. Attorney at Law, LLC
NJ Bar 009152006
22 E. Quackenbush Ave.
Dumont, New Jersey 07628
(201) 290 - 5761
(201) 215 - 9574 fax
liztlaw@gmail.com
Attorney for Plaintiff

Stacie Percella,
Plaintiff,

SUPERIOR COURT OF NJ
County of Hudson

v.

Civil Div., Law Div.

James Davis, et al.
Defendants

Docket No. HUD L 177-L-18

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO QUASH
SUBPOENA FOR TELEPHONE RECORDS**

Preliminary Statement and Statement of Facts

Defendant City of Bayonne has subpoenaed from ATT 7 years of plaintiff's cell phone records. Ex. A to Percella cert. The subpoena must be quashed because it is overbroad and invades the plaintiff's privacy, and spans a length of time that exceeds the relevant period in this case. The relevant time period in this case is mid 2013 to the date of plaintiff's termination. Yet defendant seeks plaintiff's cell phone records from long before the relevant period began, going back to 2009. During the relevant period, mayoral candidate and then mayor Jimmy Davis was texting the plaintiff with lewd text messages, up until her termination from the City of Bayonne's employment. Percella certification.

Defendant City of Bayonne has no need of plaintiff's phone records, since they are looking for her communications with Jimmy Davis, and they can simply obtain Davis' cell phone records to determine the information available on those records, which would necessarily include the records of communications with the plaintiff (since cell phones make a record of both incoming and outgoing calls). Therefore, defendant City of Bayonne must be seeking the plaintiff's phone records for some other reason. Defendant City of Bayonne likely wishes to find out about plaintiff's communications with someone other than Davis. But defendant does not explain why they require this information or what it has to do with this lawsuit. It seems likely that defendant wishes to obtain plaintiff's phone records in order to discover other personal information about her. This is obviously improper and overreaching. ¹

¹ At least one court has held that where plaintiff believes defendant is requesting the records to discover information about the identity of a "mole" in the defendant's business, such subpoena is improper. See *Howard v. SEADRILL AMERICAS, INC*, slip op., No. 15-2441. Dist. Court, (ED La., Dec. 1, 2016) online

Discovery is Broad, But Not Without Limits

New Jersey court rules favor broad pretrial discovery. *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524, 535 (1996) (citing *Jenkins v. Rainer* 69 N.J. 50, 56 (1976)). See also *Shanley & Fisher, P.C. v. Sisselman*, 215 N.J. Super. 200, 215-216 (App. Div. 1987). A party may obtain discovery which appears reasonably calculated to lead to the discovery of admissible evidence pertaining to the cause of action. *In re: Liquidation of Integrity Ins. Co.*, 165 N.J. 75, 82 (2000). The court rules afford litigants the right to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action R. 4:10-2(a). While not explicitly defined in the court rules, relevant evidence is defined as evidence having any tendency in reason to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 401.

Although discovery should be liberally granted, the scope of pretrial discovery is not limitless. Meandering expeditions which seek irrelevant, oppressive or burdensome discovery are not permitted. Discovery rights should not become instruments with which to annoy, harass or burden a litigant or a litigant's experts. *Gensollen v. Pareja*, 416 N.J. Super. 585, 591 (App. Div. 2010). R. 1:9-2 permits the court on motion made promptly [to] quash or modify the subpoena if compliance would be unreasonable or oppressive and may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed. R. 1:9-2. See also *In re: Grand Jury Proceedings of Guarino*, 104 N.J. 218 (1986); *In re Addonizio*, 53 N.J. 107 (1968); *In re Grand Jury Subpoenas Duces Tecum Served by Sussex County*, 241 N.J. Super. 18 (App. Div. 1989). R. 4:10-3 further

at <https://cases.justia.com/federal/district-courts/louisiana/laedce/2:2015cv02441/167478/64/0.pdf?ts=1480675992>

allows a litigant or the person from whom discovery is sought to obtain relief from the court to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense R. 4:10-3. Trial courts have expansive authority in discovery matters, including directing that discovery not be had; limiting the scope of discovery to certain information; on specified terms and conditions; by prescribed methods; and in the presence of only designated individuals. See R. 4:10-3(a) and 3(d).

Here, evaluating the defendant's need for this information and the plaintiff's right to privacy, the court must reach the inescapable conclusion that the records sought by the subpoena must not be provided, in order that the greater privacy interests of the plaintiff be preserved.

Relevancy

Generally, when ruling on whether to require the production of documents, a trial court must make an initial determination of relevancy to the issues being tried. Plaintiff's phone records will show the phone numbers of family, friends, and anyone else plaintiff contacted. The plaintiff's phone records also implicate privacy interests of her associates whom she calls and who call her. The plaintiff's family is entitled to privacy as are her friends and associates. There is no basis to invade that privacy. Apart from records of communications with Jimmy Davis, which can easily be obtained from another source, Defendant cannot even explain why such information is even relevant to this case.

The Right of Privacy is Well Established Under the Law

Even would-be criminals in New Jersey enjoy the protection of the state Constitution when it comes to privacy: The privacy interest protected by the state constitution is a fundamental right. *In re Martin*, 90 N.J. 295, 318 (1982) (the Court must balance government's

need of information against the individual's right of confidentiality). The right to privacy is one of the "natural and inalienable rights" recognized by the state 9 constitution. *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 96 (1992). As such, governmental interference with the right can be justified only by a compelling state interest. Even if the governmental purpose is legitimate and substantial, the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose. *State v. Saunders*, 75 N.J. 200, 217 (1977).

Courts Protect Telephone Records Because They Are Private

Telephone records, in particular, have been recognized to contain private information. New Jersey courts have long recognized that the state constitution protects New Jersey residents' rights of privacy in records about them and their activities. *State v. Hunt*, 91 N.J. 338 (1982) (records of home telephone use); *State v. Mollica*, 114 N.J. 329 (1989) (records of hotel telephone use). Of course, plaintiffs waive certain privacy rights when bringing a lawsuit. However, an employee plaintiff has "a legally protected privacy interest in the AT&T account" even where the plaintiff's employer had been paying for the phone. *Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F.Supp. 2d 987, 999 (C.D. Cal. 2012). In *Crabtree v. Angie's List Inc.*, No. 1:16-cv-00877-SEB-MJD,2107 BL 28193 (S.D. Ind. Jan. 31, 2017), the court denied defendant Angie's List's motion to compel production of data from employees' personal cell phones. The court rejected the employer's effort to obtain these records, concluding that the information sought by the defendant was available from less expensive, less burdensome, and more convenient sources. Here, the defendant can obtain the materials from the mayor's phone records, without exposing private information that belongs to the plaintiff.

Conclusion

For all of the above stated reasons, plaintiff's motion to quash the subpoena must be granted.

Respectfully Submitted,

/s/Elizabeth T. Foster

Dated: Oct. 30, 2019

Elizabeth T. Foster
Attorney for Plaintiff