POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

| | |
|---|---|
| AIRPORT COMMUNITIES COALITION,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF ECOLOGY AND THE PORT OF SEATTLE,<br><br>Respondents. | PCHB Case No. 01-160<br><br>PORT OF SEATTLE'S REPLY SUPPORTING MOTION TO COMPEL DOCUMENT PRODUCTION |

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

ACC incorrectly claims that the Port is seeking privileged documents or documents of the Port's own making. In fact, the Port is seeking only what is required under Civil Rule 26(b)(5) – any documents, studies, data or calculations upon which the ACC's experts are basing their opinions in this case.

The Port has produced 22 boxes and 23 compact discs and 4 hard diskettes of documents to the ACC. The ACC has not produced a single document. The Board should not countenance ACC's one-sided litigation tactics, where the Port gives ACC all the supportive documents for the Port's experts, but ACC leaves the Port to guess what ACC's experts will rely on as a basis of their opinions.

ACC's only argument is that it is "unduly burdensome" for the ACC to have to produce the documents upon which its experts will rely. ACC has failed to cite a single case supporting this position and, as discussed below, ACC's position is directly contrary to case law. Moreover, even a





FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

cursory examination of the declarations submitted by ACC's witnesses thus far that those experts have relied on a wide range of books, surveys and alleged data that has not been supplied to the Port. Given the many references to studies in ACC's declarations, it is clearly not possible for the Port to obtain these documents by other means. And even if the Port did have some of these documents in its files, or the ability to go do its own research, the law requires ACC to disclose all documents relied on by its experts. Accordingly, the Board should enter an order compelling immediate production all documents on which ACC's experts will rely in forming the opinions they will offer at the hearing on the merits.

## II. ARGUMENT

The Washington courts have strongly endorsed liberal discovery, and strongly condemned litigation tactics designed to make the other party litigate in the dark – not knowing the documents relied on by the other side until trial. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff'd on other grounds,* 104 Wn.2d 613, 707 P.2d 685 (1985); *In re Firestorm*, 129 Wn.2d 130, 150-52, 916 P.2d 411 (1996) (Talmadge, J., concurring). The federal courts have agreed, especially with respect to material that forms the basis of the opinions of testifying experts. *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983) (tangible materials provided to expert by counsel are discoverable if they form the basis for an opinion).

The courts also clearly hold that responsive documents must be produced, whether or not that the same material might be in the possession of the requesting party or available from another source. *Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 79 (E.D. Pa. 1994) (attached); *FDIC v. Renda*, 126 F.R.D. 70, 73 (D.Kans. 1989) (plaintiff entitled to documents in defendant's control, even if plaintiff had certain of the documents requested).

Here, ACC claims that it has already "informed" the Port regarding documents on which ACC's experts expects to rely, and that the Port already has copies of these documents. Even a brief review of the declarations submitted to the Board thus far show that this is incorrect. For example:



**FOSTER PEPPER & SHEFELMAN PLLC**
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

- ACC expert Amanda Azous' declarations contains multiple references to studies and data (e.g., "wetland inventories provided by the Cities of Des Moines, Burien and Normandy Park) that are not in the Port's possession. Even if some books mentioned by Azous might be available in a library, the Port should not be required to guess as to what Ms. Azous relies upon. Further, it is clearly less expensive and burdensome for ACC to simply produce Ms. Azous' documents than for the Port to do independent research and guess what Ms. Azous is relying upon.
- ACC witness Peter Willing's declaration contains a number of statements (including conclusions about modeling, metals concentrations in area creeks, and the efficacy of BMPs) that are not supported with explicit citations to data and calculations. The Port needs the documents and data upon which Mr. Willing is relying in order to test his conclusions.
- ACC witness John Strand contains a number of conclusions about the toxicity of stormwater runoff generally, about tissue screening studies, and about "1997 data." Again, the Port should not be required to guess what Mr. Strand is referring to and go do its own research. The discovery rules require ACC to actually produce all documents upon which Mr. Strand is basing his opinions.
- ACC witness William Rozeboom discusses his calculation of flow rates and makes numerous statements about feasibility of stormwater quality vaults, all of which are presumably based on some data or studies. Again, ACC is required to produce all documents upon which Mr. Rozeboom will be relying for his opinions.

Controlling law, and fundamental fairness, require that ACC must produce all documents and studies upon which its experts will rely at trial. It is clearly not unduly burdensome or expensive to do so, because ACC's experts presumably have these documents at hand. It would be unduly burdensome for the Port to have to guess about the documents on which ACC's experts intend to rely.

## III. CONCLUSION

ACC has refused to produce any documents. In particular, no documents or data relied on by ACC's experts has been produced. In order to prevent serious prejudice to the Port's trial preparation,



FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

the Board should order that any and all documents relied upon, or which will be relied upon, by designated expert witnesses in forming the bases for their opinions must be produced immediately. That order should require production of any data obtained from sampling in the field, or samples taken in response to regulatory requirements imposed by an agency with competent regulatory jurisdiction; any calculations, models, modeling reports, reports produced by others, scientific treatises or publications, journals, manuals, rules, regulations, laws, regulatory guidance, or any other information upon which a witness formed conclusions, made projections, founded assumptions or that otherwise formed the bases for a witness' opinion;

Respectfully submitted this 18th of January 2002.

PORT OF SEATTLE

Roger A Pearce for

Linda J. Strout, General Counsel, WSBA No. 9422
Traci M. Goodwin, Senior Port Counsel, WSBA No. 14974

FOSTER PEPPER & SHEFELMAN PLLC

Roger A Pearce

Roger A. Pearce, WSBA No. 21113
Steven G. Jones, WSBA No. 19334

MARTEN & BROWN LLP

Roger A Pearce for

Jay J. Manning, WSBA No. 13579
Gillis E. Reavis, WSBA No. 21451

Attorneys for Port of Seattle

AR 004681



FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

United States District Court,
E.D. Pennsylvania.

**FORT WASHINGTON RESOURCES, INC., Plaintiff,**
**v.**
**Robert H. TANNEN, PH.D., Defendant/ counterclaimant,**
**v.**
**Kirk PENDLETON, Counterclaim defendant, and**
**Fort Washington Resources, Inc., Plaintiff/ counterclaim defendant.**

**No. 93-CV-2415.**

Feb. 28, 1994.

Defendant filed motion for protective order, and plaintiff and counterclaim defendant filed cross motion to compel production of defendant's tax returns. The District Court, Joyner, J., held that: (1) defendant failed to meet burden of showing good cause for protective order, and (2) defendant's tax returns were relevant and discoverable.

Motion for protective order denied; motion to compel production of documents granted.

West Headnotes

**[1] Federal Civil Procedure ⚿1271**
170Ak1271

To obtain protective order, party seeking protective order bears burden of showing good cause.

**[2] Federal Civil Procedure ⚿1271**
170Ak1271

To obtain protective order, party seeking protective order must show "particular need."

**[3] Federal Civil Procedure ⚿1271**
170Ak1271

Burden of showing "particular need" for protective order is not met by recitation of expense and burdensomeness which are merely conclusory statements.

**[4] Federal Civil Procedure ⚿1615.1**
170Ak1615.1

Defendant failed to meet burden of showing good cause for protective order, where his assertion that producing documents would take too much time and expense was unsupported by necessary particularized facts and details regarding amount of time or expense which would be involved and why such amounts were unduly burdensome.

**[5] Federal Civil Procedure ⚿1574**
170Ak1574

Defendant had to produce requested relevant documents regardless of their existence in possession of plaintiff or of their accessibility through subcontractor.

**[6] Federal Civil Procedure ⚿1574**
170Ak1574

It is not bar to discovery of relevant material that same material may be in possession of requesting party or obtainable from another source. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

**[7] Internal Revenue ⚿4482**
220k4482

There is public policy favoring nondisclosure of income tax returns as confidential communications between taxpayer and government, but that policy must be balanced with public policy favoring liberal discovery.

**[8] Federal Civil Procedure ⚿1615.1**
170Ak1615.1

In order to obtain production of tax returns in discovery, party seeking discovery bears burden of demonstrating relevance.

**[9] Federal Civil Procedure ⚿1603**
170Ak1603

If relevant, tax returns will be discoverable unless party resisting discovery meet its burden of proving there is no compelling need for tax returns because information available in tax returns can be obtained from other sources.

**[10] Federal Civil Procedure ⚿1603**

170Ak1603

Defendant's tax returns were discoverable, where they were relevant to issue of whether defendant was paid all money he was due under contract, and defendant did not show alternative source from which plaintiff could obtain that relevant information.

***79** Allan C. Preziosi, Lightman & Associates, Philadelphia, PA, for Fort Washington Resources, Inc. and Kirk Pendleton.

Laurence I. Tomar, Elizabeth A. Hunter, Law Office of Laurence I. Tomar, Yardley, PA, for Robert H. Tannen.

MEMORANDUM AND ORDER

JOYNER, District Judge.

Defendant has filed a Motion for Protective Order to protect him from having to expend great time and money to go through his correspondence and determine which documents pertain to the project he was involved in with Plaintiff and Counterclaim Defendant. Plaintiff and Counterclaim Defendant has filed a Cross-Motion to Compel Documents which were requested in its First Request for Production of Documents. For the following reasons, the Motion for Protective Order will be denied and the Motion to Compel will be granted.

*MOTION FOR PROTECTIVE ORDER*

[1][2][3] To obtain a protective order, the party seeking the protective order bears the burden of showing good cause *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.19 *cert. denied* 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987); *Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co.* 136 F.R.D. 385, 391 (E.D.Pa.1991). There must be a showing of "particular need." *Cipollone,* 785 F.2d at 1121. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Id.* (citing *United States v. Garrett,* 571 F.2d 1323, 1326 n. 3 (5th Cir.1978)). The burden is not met by "the recitation of expense and burdensomeness [which are] merely conclusory" statements. *Panola Land Buyers Ass'n v. Shuman,* 762 F.2d 1550, 1559 (11th Cir.1985).

[4] Defendant has failed to meet the burden of showing good cause. His assertion that producing the documents would take too much time and expense is unsupported by the necessary particularized facts and details regarding the amount of time or expense and why such amounts are unduly burdensome. Accordingly, a protective order will be denied.

*MOTION TO COMPEL*

[5][6] Discovery may be had if the material sought is "relevant to the subject matter" and if it is "not privileged." Fed.R.Civ.P. 26. "Relevant matter encompasses any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case." *Leksi, Inc. v. Federal Ins. Co.,* 129 F.R.D. 99, 104 (D.N.J.1989) (citing *Hickman v. Taylor* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). "The question of relevancy is to be more loosely construed at the discovery stage than at the trial." *Id.* (citing 8 Wright & Miller *Federal Practice and Procedure* 2008). After a review of the complaint and answer in conjunction with this motion and the opposition to the motion, we have determined that the materials requested are relevant to the issues in the case, specifically to the contract between the parties and the purported breaches thereof. Further, it is not a bar to the discovery of relevant material that the same material may be in the possession of the requesting party or obtainable from another source. *Federal Deposit Ins. Corp. v. Renda,* 126 F.R.D. 70, 72 (D.Kan.19 *aff'd, Federal Deposit Ins. Corp. v. D* 1992 WL 43488, 1992 U.S.App. LEXIS 4207 (10th Cir. Mar. 3 1992). Thus, Defendant must produce the requested documents regardless of their existence in the possession of Plaintiff or of their accessibility through the sub-contractors.

***80** [7][8][9] Defendant specifically asserts that his income tax returns are not relevant and should not be compelled. While, there is a public policy favoring the non-disclosure of income tax returns as confidential communications between a taxpayer and the government *DeMasi v. Weis* 669 F.2d 114, 119 (3d Cir.1982), this must be balanced with the public policy favoring liberal discovery *Sharp v. Coopers & Lybra* 83 F.R.D. 343, 352 (E.D.Pa.1979). To determine whether tax returns in a given case are discoverable, courts have applied

a two part test. First, the party seeking discovery bears the burden of demonstrating relevance. If relevant, the tax returns will be discoverable unless the party resisting discovery meets its burden of proving there is no compelling need for the tax returns because the information available in the tax returns can be obtained from other sources. *Terlescki v. E.I. duPont de Nemours & C* Civ. No. 90-6854, 1992 WL 75015, at * 1, 1992 U.S.Dist. LEXIS 4213, at * 2-3 (E.D.Pa. April 7, 1992).

[10] Defendant's tax returns are relevant to the issue of whether or not Defendant was paid all money he was due under the contract. In *Terlescki,* it was alleged that the plaintiff was not paid $75,000 due on an employment contrac *Id.* at * 1, 1992 U.S.Dist. LEXIS 4213, at * 1. The court found that was sufficient for defendant to establish relevance *Ic* at * 1, 1992 U.S.Dist. LEXIS 4213, at * 3. In the instant case, Plaintiff has established that Defendant put into question whether or not he was paid the full amount due to him under the contract. Thus, it has met its burden and established relevance. I *Terlescki,* however, the tax returns were not compelled because it was shown that the information could be obtained from his W-2 forms and pay stubs which had already been produced. *Id.* at * 2, 1992 U.S.Dist. LEXIS 4213, at * 5. In the instant case, the burden has not been met, as Defendant has not shown an alternative source from which Plaintiff can obtain the relevant information.

Accordingly, Defendant must produce documents responsive to Plaintiff and Counterclaim Defendant's First Request for Production of Documents.

An appropriate Order follows.

END OF DOCUMENT