

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH A. ARIETTA, DONALD EARL
CUMMINGS, JOSEPH F. O'HARA,
EDWARD J. KUCHAR, KATHLEEN R.
KUHNS, PHILLIP T. PONGRACZ,
KAREN PONGRACZ, MARY ANN
YORINA,

Plaintiffs-Respondents,

v.

CITY OF ALLENTOWN, JOSEPH
BLACKBURN, RONALD S. MANESCU,
ROY AFFLERBACH,

Defendants,

ALLENTOWN WOMEN'S CENTER,

Petitioner.

Hon. James McGirr Kelly

Civil Action No.: 04-0226

MOTION TO QUASH THIRD-PARTY SUBPOENA

Pursuant to Rule 45(c)(3)(A) of the Federal Rules of Civil Procedure, Allentown Women's Center moves this Court to quash the third-party subpoena issued by Plaintiffs in this matter seeking the production of documents and other objects. The Women's Center also asks the Court to order Plaintiff to pay the Women's Center's attorney's fees incurred in bringing this Motion before the Court. The grounds supporting this Motion are set forth in the accompanying Memorandum of Law.

Respectfully submitted,

Dated: February 9, 2004

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*Pending admission to Eastern District of
Pennsylvania at 1pm, February 10, 2004

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2004, I caused to be served a true and correct copy of the foregoing Motion to Quash Third-Party Subpoena and accompanying Memorandum of Law in Support of Petitioner's Motion to Quash Third-Party Subpoena and Verification of Jennifer Boulanger upon the following by Federal Express Overnight, Postage Prepaid:

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ORDER

Upon consideration of Allentown Women's Center's Motion to Quash Third-Party Subpoena and all responses thereto, it is hereby ORDERED that Plaintiff's Subpoena to the Allentown Women's Center is quashed in its entirety and that Plaintiff pay Allentown Women's Center's attorney's fees incurred in bringing this Motion before the Court.

BY THE COURT

Dated: _____, 2004

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**MEMORANDUM IN SUPPORT OF PETITIONER’S
MOTION TO QUASH THIRD-PARTY SUBPOENA**

Respondents (hereinafter “protestors”), Plaintiffs in the underlying action, seek to enjoin the City of Allentown and Allentown officials (hereinafter “the City”) from setting reasonable time, place, and manner restrictions on protests in the narrow public street adjacent to the medical facility of Petitioner, the Allentown Women’s Center. Following a hearing on the protestors’ motion for a temporary restraining order/preliminary injunction on January 28, 2004, at which the protestors called no witnesses and took no direct testimony, this Court recessed the hearing until February 10, 2004.

On February 4, 2004, a full week after the initial hearing and only four business days before the hearing was to reconvene, the protestors issued a third-party subpoena to the

Allentown Women's Center. The Women's Center hereby petitions this Court for an Order quashing this subpoena on the grounds that it is procedurally deficient, that it seeks irrelevant and privileged information, that the information it seeks is overbroad, that it seeks information that could be used to harass the Women's Center and its patients and to invade its patients' privacy, and that producing the requested information and items would be unduly burdensome for Petitioner.

The subpoena commands the custodian of records to appear at the hearing with the following documents:

1. Records indicating the number of patients aborted [sic] or otherwise treated at the Allentown Womens [sic] Center in Calendar year 2003 and 2004;
2. All video tapes of the Allentown Womens [sic] Center, including those taken by the Executive Director, escorts and security cameras;
3. Records reflecting payments to the City of Allentown with respect to police protection;
4. Correspondence, memoranda and e-mails, by and between Allentown Womens [sic] Center and Mayor Roy C. Afflerbach;
5. Records of complaints/reports by the Allentown Womens [sic] Center to the Allentown Police Department with respect to the activities of pro-life advocates/protestors;
6. Copy of Lease for the premises which the Allentown Womens [sic] Center leases;
7. All internal reports of the Allentown Womens [sic] Center concerning the activities of the pro-life advocates/protestors for December 2003 and January and February 2004.

The City never received any prior notice of the subpoena for these documents and things for inspection. Furthermore, the subpoena received by the Women's Center does not include proof or declaration of service, nor does it include the text of subdivisions (c) and (d) of Rule 45 of the Federal Rules of Civil Procedure.

The Women's Center now moves this Court to quash the subpoena and award attorneys fees and lost earnings to the Women's Center.

STATEMENT OF THE CASE

On December 2, 2003, the Allentown Women's Center, a women's health care facility, moved to a new location at 1409 Union Boulevard in Allentown. Soon after the move, local anti-abortion protestors learned of the new location and began protesting the Women's Center. The protestors sought to protest in the back of the Women's Center, where the door to the Women's Center exits onto two feet of private property that directly abuts a narrow street, Keats Street. On the other side of Keats Street, there is a private parking lot. There is no sidewalk on either side of Keats Street, just private property.

The protestors sought a permit from Defendant City of Allentown to protest in Keats Street. The City denied the permit, spurring this lawsuit. In the lawsuit, Plaintiffs have raised claims that the denial of the permit violates their First Amendment rights to freedom of speech, assembly, and religion. The City has filed a brief arguing that the permit denial was narrowly tailored to serve their substantial government interest in public safety on a public street, as the only public property available behind the Women's Center is Keats Street, a thirty-five mile-per-hour street that is used as a thoroughfare and would be extremely dangerous if used as a protest site. The City has also argued that, in issuing permits to the protestors for other neighborhood streets, it has left open ample channels for the protestors to communicate their message.

This Court heard the protestors' motion for a temporary restraining on Wednesday, January 28, 2004, and continued the matter to Tuesday, February 10, 2004. On February 4, 2004, the Women's Center, not a party to this action, received the above-described subpoena

from the protestors asking for the custodian of records to attend the February 10 hearing and to bring a number of documents and other items.

ARGUMENT

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE IT IS PROCEDURALLY DEFECTIVE

Rule 45 of the Federal Rules of Civil Procedure sets forth very specific requirements for issuing a subpoena. The Rule provides, in relevant part:

(a)(1) Every subpoena shall . . .
(D) set forth the text of subdivisions (c) and (d) of this rule.

(b)(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. . . . Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

The subpoena received by the Women's Center did not comply with these provisions.

The subpoena did not include the text of subdivisions (c) and (d) of Rule 45. Prior to issuing the subpoena, the protestors gave no notice at all to the City, let alone notice that complied with Rule 5(b).¹ Furthermore, the subpoena contains no proof or declaration of service.

The technical rules for serving a subpoena are not merely hortatory; instead, they are there to prevent misuse of the subpoena power. As this Court has said in a virtually identical case in which the party issuing the subpoena gave no prior notice to the other party:

the injury resulting from attorney misuse of the subpoena power is not limited to the harm it inflicts upon the parties. Rather, misuse of the subpoena power also compromises the integrity of the court's processes. Under Rule 45, an attorney, as an officer of the court, is delegated the power to command a non-litigant to produce documents in a lawsuit to which he or she is a stranger. With the power

¹ The Women's Center received a vaguely worded letter dated January 14, 2004, from the protestors' counsel advising the Women's Center that at some future date in some unspecified legal action the protestors might seek to subpoena them to assist in the protestors' defense to citations. This letter, sent only to the Women's Center and not mentioning a subpoena or the present civil action, does not constitute adequate notice under Rule 45.

to coerce production goes the increased responsibility and liability for the misuse of the power. When the power is misused, public confidence in the integrity of the judicial process is eroded. Therefore, the failure to [abide by the rules] also cause[s] injury to the public.

Spencer v. Steinman, 179 F.R.D. 484, 489 (E.D. Pa. 1998) (internal citations and quotations omitted).

Because the protestors have misused the subpoena power of this Court by failing to include required information, failing to give prior notice to Defendants of the subpoena, and failing to include proof or declaration of service, this Court should quash the subpoena in its entirety. *See Anderson v. Gov't of Virgin Islands*, 180 F.R.D. 284, 290 (D.V.I. 1998) (holding that subpoenas suffering from serious deficiencies under Rule 45 may be quashed in their entirety).

Furthermore, Rule 45(c)(1) authorizes the imposition of lost earnings and reasonable attorneys fees as a result of imposing an undue burden in responding to a subpoena. This Court has imposed such sanctions for violations such as the ones at issue here. *Spencer*, 179 F.R.D. at 489 (“Rosen is directed to pay the counsel fees incurred by Steinman in bringing the violation of Rule 45 [by not giving prior notice of the subpoena] to the attention of the Court.”). Petitioner Allentown Women’s Center is entitled to an award of reasonable attorney’s fees and lost earnings of their staff to compensate them for the undue burden of responding to this grossly deficient subpoena.

II. THE DOCUMENTS AND ITEMS REQUESTED IN THE SUBPOENA CONTAIN IRRELEVANT AND PRIVILEGED MATTER, THE PRODUCTION OF WHICH WILL COMPROMISE THE SAFETY AND PRIVACY OF THE WOMEN'S CENTER'S STAFF AND PATIENTS AND UNDULY BURDEN THE WOMEN'S CENTER.

A. Items 1, 5, and 7 and Portions of Items 2 and 6 Are Completely Irrelevant to this Lawsuit.

Beyond the subpoena's defects in service and form, this Court should quash the subpoena with respect to items 1, 5, and 7 in their entirety and with respect to portions of items 2 and 6 because these requests are not relevant. *See* Fed. R. Civ. P. 26(b)(1) (privileged or irrelevant matter generally not discoverable). "In considering a motion to quash, this court first inquires as to whether the subpoena requests documents relevant to this case within the meaning of Fed. R. Civ. P. 26(b)(1)." *Williams v. Claims Overload System*, C.A. 97-6851, 1998 WL 254960 (E.D. Pa. May 6, 1998).

Specifically, Item 1 requests information about the number of "patients aborted or otherwise treated" at the Women's Center. The number of women treated at the Women's Center is not relevant to the First Amendment claim raised in this lawsuit. The protestors have put nothing at issue in this case that relies on the number of patients using the Women's Center. Moreover, in their defense, the City of Allentown has made no claim that the number of women treated at the Women's Center affects the public safety issue of allowing protests in the middle of a narrow public street. Of relevance is the number of cars using the street (a street that numerous businesses use), but the number of patients of the Women's Center is not related to that number. Item 1 is also overbroad in that it seeks records of patient numbers for the calendar year 2003 *before* the Women's Center moved to its present location.

Item 2 requests all videotapes of the Women's Center. The videotapes of the Women's Center depict, among other things, the layout of the outside of the Women's Center, employees

and patients entering and exiting, and other traffic, pedestrian and automobile, outside the clinic. Occasionally, protest activity, such as that engaged in by the protestors, is caught on the videotapes. To the extent the videotapes show the static layout of the outside of the Women's Center and instances of passing automobile traffic, that content is indeed relevant to this litigation, and the Women's Center is willingly bringing the videotape depicting this information and a transcription of the tape to the hearing on February 10. The remaining content of the videotapes, however, is irrelevant to this litigation. The photographic identity of the Women's Center's patients and employees has nothing to do with Plaintiffs' First Amendment claim and will not lead to the discovery of admissible evidence. Likewise, this information has no relevance to the City of Allentown's defense of public safety.

Item 5 requests records of "complaints/reports" made by the Women's Center to the Allentown Police Department with respect to the activities of anti-abortion protestors. First, to the extent this item requests information about any reports that may exist about protestors other than the Plaintiffs, it is irrelevant to this litigation. Second, and more important, any such reports that may exist are irrelevant to Plaintiffs' First Amendment claims. The Women's Center fails to see the logic of how any reports they may have made have any relevance to Defendants' denial of the requested permit based on general principles of public safety on a public thoroughfare. Similarly, this information is not related to the defenses raised by Defendants.

Furthermore, production of any reports that may exist would compromise the Women's Center's security and thus be unduly burdensome. Fed. R. Civ. P. 45(c)(3)(A)(iv). The Women's Center regularly communicates with law enforcement authorities at the local, state, and federal levels in order to improve its security and prepare to defend itself from the domestic terrorism that regularly plagues women's health care facilities. To compel the Women's Center

to disclose these communications to protestors who oppose their continued operation will impair their security and potentially expose them to greater danger.

Item 6 requests a copy of the Women's Center's lease. The Women's Center's lease contains information such as the identification of the boundaries of the property leased, the amount of the lease, the length of the lease, and other terms and conditions. The boundaries of the property leased are relevant to the issue of where the private property is in this case, and the Women's Center is bringing to Tuesday's hearing a redacted copy of the lease showing the property's boundaries. However, nothing else in the lease is relevant, as the amount and length of the lease (as well as other terms and conditions unrelated to the boundaries of the property) are not at all likely to lead to the discovery of admissible evidence in this case. These portions of the lease are not related to the area for which the permit was sought, the extent of Plaintiffs' constitutional rights, or the defense of public safety.

Finally, item 7 seeks the Women's Center's internal reports concerning Plaintiffs' activities. There is nothing in this information that is remotely relevant to the issues in this litigation. The Women's Center's internal records detailing protest activity has no bearing on Defendants' permit process or Plaintiffs' constitutional rights. Furthermore, the request is unduly burdensome because requiring disclosure of internal reports relating to the security of the Women's Center and its safety strategies could impair their security and potentially expose them to greater danger.

B. Portions of Item 2 Are Privileged Because They Are Protected by Constitutional and Regulatory Guarantees of Privacy.

Portions of the videotapes requested in item 2 reveal images of the Women's Center's patients entering and exiting the medical facility. If the Women's Center were forced to reveal

the identities of these people by turning the videotapes over to the protestors and showing these videotapes in open court, the Women's Center would be compromising the confidentiality of its patients. The U.S. Supreme Court has repeatedly and consistently acknowledged the constitutional privacy rights inherent in the right to obtain an abortion. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). Furthermore, if disclosure is ordered, this Court would be placing a substantial obstacle to obtaining an abortion in the way of future patients at the Women's Center because the specter of their confidentiality being breached in the future would always hang over them when being treated at the Women's Center.

Federal regulations also protect the identifying information contained in the videotapes sought by item 2 of this subpoena. The Women's Center is a "covered entity" under the regulations enacted pursuant to the Health Insurance Portability and Accountability Act of 1996. *See* 45 C.F.R. § 160.103 (defining "covered entity" as, among other things, "a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter"). Images collected by the Women's Center of its patients are "individually identifiable health information" under the same regulations. *See* 45 C.F.R. § 160.103 ("information that is a subset of health information, including demographic information [that] is created or received by a health care provider [and] [r]elates to . . . the provision of health care to an individual [and] identifies the individual").

Covered health entities are permitted to disclose individually identifiable health information pursuant to a subpoena only if the strict guidelines set forth in the regulations allowing disclosure under such circumstances are followed:

(e) *Standard: disclosures for judicial and administrative proceedings.*

(1) *Permitted disclosures.* A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: . . .

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

45 C.F.R. § 164.512. The Women’s Center, the covered entity to which a subpoena for individually identifiable health information was directed, has not received the assurance required by subparagraph (A) or (B) of this section. Therefore, the Women’s Center cannot, through a subpoena not accompanied by court order, disclose the patient-identifying information in its videotapes.

III. THE SUBPOENA SHOULD BE QUASHED BECAUSE ITS APPARENT PURPOSE IS TO OBTAIN INFORMATION TO BE USED TO HARASS THE WOMEN’S CENTER.

A court can also quash a subpoena when it is intended to harass the object of the subpoena. *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003) (upon consideration of motion to quash, court should consider whether “the subpoena was issued primarily for purposes of harassment”). In light of the fact that most of the information requested in the subpoena is irrelevant, *see* Section II, *supra*, it appears that the subpoena was issued solely to harass the Women’s Center. Like most clinics that perform abortions, the Women’s Center has been the subject of harassment and protests since its inception. Allowing

the protestors to obtain the documents and other items requested by this subpoena would give them further information to use to harass the Women's Center, its staff, and its patients.

For instance, if the protestors obtained visual images of the Women's Center's employees, they could distribute the images to those who may wish to stalk and harass the employees. *See, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1346 (3d Cir. 1989). Images of patients and employees at some Pennsylvania clinics have appeared on the Internet, thereby invading their privacy and threatening employee and patient safety. *See generally* Linda P. Campbell, *Anti-Abortionists Use Despicable Tactics*, *Seattle Post-Intelligencer*, June 14, 2002, at B7. Other information sought by the subpoena could likewise serve as the basis of harassment, including items such as the number of patients, amount of rent, the length of the lease, e-mail addresses, and internal reporting procedures and concerns. None of this information is relevant to this lawsuit.

CONCLUSION

For the reasons stated above, the Women's Center respectfully requests that its Motion to Quash Third-Party Subpoena be granted.

Respectfully submitted,

Dated: February 9, 2004

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