

99-2-13911-4 15815210 MMS 01-10-02

FILED  
IN COUNTY CLERK'S OFFICE  
PIERCE COUNTY, WASHINGTON  
A.M. JAN - 9 2002 P.M.  
BOB/SAM SOUCIE  
COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

JOSEPH J. KIRBY and DEBORAH A.  
KIRBY, husband and wife,

Plaintiffs,

v.

THE CITY OF TACOMA, a municipal corporation; RAY CORPUZ and "JANE DOE" CORPUZ, husband and wife; PHILIP ARREOLA and "JANE DOE" ARREOLA, husband and wife; WILLIAM WOODARD and CATHERINE WOODARD, husband and wife; RAYMOND ROBERTS and "JANE DOE" ROBERTS, husband and wife; DAVID BRAME and "JANE DOE" BRAME, husband and wife; and JAMES HAIRSTON and "JANE DOE" HAIRSTON, husband and wife,

Defendants.

No. 99-2-13911-4

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A PROTECTIVE ORDER RE: REQUEST FOR PRE-HIRE FILES

NOTE FOR HEARING:  
January 11, 2002

**Plaintiff has not tied his discovery requests to his claims, and as such is not entitled to the records.**

Plaintiff spends much of his brief arguing that because the City looked at his pre-hire file, he gets to look at everyone else's. This argument is based

REPLY MEMORANDUM IN SUPPORT OF DEFS' MOTION FOR A PROTECTIVE ORDER RE: REQUEST FOR PRE-HIRE FILES - 1

ORIGINAL

Tacoma City Attorney  
Civil Division  
747 Market Street, Room 1120  
Tacoma, Washington 98402-3767  
(253) 591-5885 / FAX 591-5755

1 purely on emotion, and has no basis in law. In order to be within the proper  
2 scope of discovery, plaintiff must show the Request for Production's relevance  
3 to his claims. (CR 26). He glosses over this standard, presumably because he  
4 cannot meet it. He has stated no nexus between his claims and these  
5 requested files, and thus, his argument fails.

6 To begin, the fact that the City may have reviewed plaintiff's pre-hire file  
7 has no bearing on the issue before the court. Plaintiff forgets that these  
8 records belong to the City of Tacoma. The City of Tacoma, when sued, gets to  
9 fish in its own files. Perhaps they will reveal something helpful, perhaps not,  
10 but they are the defendant's files to review. In this particular case, Mr. Kirby is  
11 claiming emotional damage, and his pre-hire file was reviewed to see if there  
12 was any information regarding his mental state at the time of hire, prior to these  
13 alleged events taking place, thus it was reviewed for damage purposes only.<sup>1</sup>  
14 Thus, plaintiff's speculation as to why the City reviewed plaintiff's records is  
15 without merit, and has no bearing on this issue. This was raised by plaintiff as  
16 a smoke screen to avoid having to address the relevance of the pre-hire files to  
17 his claims.  
18  
19

20 Furthermore, plaintiff argues that the pre-hire files are in fact used after  
21 hire by the police department. This argument also is without merit. As outlined  
22 in the defendant's opening material, the Department does not use the pre-hire  
23  
24

25 <sup>1</sup> It is interesting to note that when defense counsel actually received plaintiff's pre-hire file from  
26 the police department, following plaintiff's protestations, the psychological records were  
conspicuously absent. (See Affidavit of Shelley M. Kerslake.)

1 files for advancement, or discipline purposes. They are not used in **any** of  
2 employment decisions, which is what plaintiff's claims are based on. (See  
3 Affidavit of James Hairston and Plaintiff's Complaint.) From time to time, pre-  
4 hire files are used to defend the Department from negligent hiring cases.  
5 Again, this has no relevance to plaintiff's discovery requests, he does not have  
6 negligent hiring claims for **any** of the people he is requesting pre-hire files for.  
7 As Beltran v. DSHS, 98 Wn. App. 245 (1999) points out, there needs to be that  
8 nexus between a pre-hire file and a negligent hiring claim before the records  
9 can be deemed relevant by the court.  
10

11 Plaintiff claims that the City cannot seek a protective order for non-party  
12 files. Plaintiff misunderstands the nature of these files. These files are not the  
13 personal property of the individual employee, they are the City of Tacoma's  
14 records. The City of Tacoma is a party to this action, and is seeking to protect  
15 its own records. Plaintiff cites to a Federal Practice Manual to support his  
16 argument in this regard. However, plaintiff conspicuously omits the relevant  
17 portion of this section. That same section of the practice manual states: "A  
18 protective order may be obtained by motion...it may also be made by the  
19 person from whom the discovery is sought." 8 Fed. Prac. and Proc. Civ.2d §  
20 2035. Thus, plaintiff's argument should be disregarded.  
21

22 Plaintiff spends a good portion of his response attempting to distinguish  
23 the Public Disclosure Act (RCW 42.17). If he had read the defendants'  
24 materials more closely, he would have seen that the discussion of RCW 42.17  
25  
26

REPLY MEMORANDUM IN SUPPORT OF DEFS'  
MOTION FOR A PROTECTIVE ORDER  
RE: REQUEST FOR PRE-HIRE FILES - 3

Tacoma City Attorney  
Civil Division  
747 Market Street, Room 1120  
Tacoma, Washington 98402-3767  
(253) 591-5885 / FAX 591-5755

1 was included by way of analogy. It is an area of the law other court's have  
 2 looked to in deciding the very issue that is before this court. In those instances,  
 3 the court's were persuaded by the legislature's protection of these types of  
 4 records and chose to extend those protections to the discovery process, as  
 5 governed by CR 26.

6 Thus, for the material the plaintiff is seeking to be discoverable, he must  
 7 show its relevance to the claims he has plead. He has utterly failed to do so in  
 8 this case. He has not articulated how a police lieutenant's credit history,  
 9 background check, reference interviews, criminal history, employment  
 10 application and psychological records are in any way related to his claims that  
 11 he was discriminated against based on his age, disability or union activity.  
 12 Therefore, the defendants respectfully request that a protective order be  
 13 entered precluding the discovery of these non-relevant files.  
 14

15 RESPECTFULLY SUBMITTED this 8 day of January, 2002.

16  
 17 ROBIN S. JENKINSON, City Attorney  
 ELIZABETH A. PAULI, Ch. Asst. City Atty.

18  
 19 By: 

20 SHELLEY M. KERSLAKE  
 WSBA# 21820  
 21 Attorney for Defendants  
 22  
 23  
 24  
 25  
 26

REPLY MEMORANDUM IN SUPPORT OF DEFS'  
 MOTION FOR A PROTECTIVE ORDER  
 RE: REQUEST FOR PRE-HIRE FILES - 4

Tacoma City Attorney  
 Civil Division  
 747 Market Street, Room 1120  
 Tacoma, Washington 98402-3767  
 (253) 591-5885 / FAX 591-5755