

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS.

DISTRICT COURT DEPARTMENT
PALMER DIVISION
CIVIL ACTION NO. 1143CV293

Brian Johnson,)	MEMORANDUM OF LAW IN
Plaintiff)	SUPPORT OF DEFENDANT'S
v.)	MOTION TO RECONSIDER
Peter Frei,)	MOTION FOR LEAVE
Defendant)	TO REOPEN DISCOVERY

There is a reason procedural law requires to serve adversaries copies of any documents filed with the courts.

It is inconsistent with procedural law to show up at a motion hearing and hand the judge and your adversary documents on which you base your argument.

This is exactly what Johnson's attorney Tani Sapirstein ("Sapirstein") did the day this Court did hear Frei's motion for leave to reopen discovery.

Sapirstein was sitting in the lobby for at least 25 minutes and choose not to hand Frei said document even so Frei handed her a copy of my motion for a continuance he filed the same day. Sapirstein and Frei were sitting in the court room for another hour to wait their turn. Frei would have had ample time to read Sapirstein's document (copy of **M.G.L. c.268B, s.4, CERTAIN PUBLIC OFFICIALS AND EMPLOYEES, INVESTIGATION BY THE [ETHICS] COMMISSION**).

Sapirstein had good reason not to hand Frei a copy and thereby prevent Frei from reading it; Section 4 is not applicable to the situation at hand.

Section 4 provides, "All commission proceedings ... whether to initiate an inquiry shall be confidential."

The inquiry which is confidential is a preliminary

inquiry or initial staff review by the State Ethics commission ("Commission") which fails to produce "reasonable cause for belief" that a violation occurred.

After conclusion of the preliminary inquiry, the Commission took a vote and decided that the Commission would conduct an inquiry. Not only did the Commission inquire, the Commission even made a finding that a violation of the Conflict Of Interest Law had occurred.

As soon as the Commission made that finding, the inquiry was no longer "preliminary" and became public. Section 4, par (b) provides:

If a preliminary inquiry fails to indicate reasonable cause for belief that this chapter or said chapter two hundred and sixty-eight A has been violated, the commission shall immediately terminate the inquiry and so notify, in writing, the complainant, if any, and the person who had been the subject of the inquiry. All commission records and proceedings from any such preliminary inquiry, or from any initial staff review to determine whether to initiate an inquiry, shall be confidential.

A careful reading of the above par. (b) pegs the confidentiality to a failed inquiry; hence, only the record of a preliminary inquiry that failed to indicate reasonable cause for belief that a violation occurred is confidential, and rightfully so.

After the preliminary inquiry actually shows reasonable cause, the proceedings are no longer confidential; par. (h) of Section 4 provides:

All adjudicatory proceedings of the commission carried out pursuant to the provision of this section shall be public, unless the members vote to go into executive session.

And here is where it gets complicated; while section 4 does not provide for any proceedings between a "preliminary inquiry" which is confidential if no reasonable cause for belief of a violation exists, and "adjudicatory proceedings" which follow and which are public, the commission made a finding after the conclusion of the preliminary inquiry that reasonable cause existed.

Thereafter, Johnson submitted his memorandum with his request to the Commission to reconsider, but the Commission denied Johnson's request, "On March 19, 2015, the Commission voted to find reasonable cause to believe that each of you violated G.L. c.268A. You sought reconsideration and submitted memoranda to the Commission. Thereafter, the Commission affirmed its reasonable cause determination." See PEL, page 1.

Regardless how one interprets preliminary inquiry, Johnson's memoranda followed the conclusion of the preliminary inquiry, a preliminary inquiry with an affirmative reasonable cause determination. Johnson's memoranda under no circumstances deserves the protection of confidentiality, as the preliminary inquiry was concluded and the affirmative decision made.

Frei, the defendant and plaintiff of the counterclaim "abuse of process", finds it inconceivable that he should be denied to do discovery on an issue which only came to light after trial. In the name of justice it is imperative this Court allow Frei discovery so Johnson can be held accountable for his actions.

This Court suggested Frei file a public information request with the State Ethics Commission; Frei did so but the request was denied. A lengthy phone conversation with the General Counsel of the State Ethics Commission, attorney Eve Slattery, brought to light that the issue at hand is not clear-cut due to the special circumstances of the case and she advised Frei to appeal her decision to the Superior Court.

Also, the Appeals Court in its rule 1:28 rescript opined, "We conclude, therefore, there is sufficient evidence in this record to satisfy all three prongs of an abuse of process claim." The three prongs are described by the Appeals Court in its rescript as, "(1) 'process' was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage." Appeals Court rescript, docket 17-P-218, pages 2-4.

It is obvious that Frei could prove prong (2) as described by the Appeals Court with the fact stated in the PEL that Johnson "aimed" to "deter" and "discourage" Frei from filing "future lawsuits against the town." See PEL.

A subpoena by this Court of the Commission's record is needed to prevent prejudice to Frei.

WHEREFORE, Frei respectfully prays your honor, to grant his Motion to reconsider.

Respectfully written and submitted by the Defendant,

Peter Frei
101 Maybrook Road
Holland, MA 01521
phone (413) 245 4660
April 23, 2019,

Peter Frei

CERTIFICATE OF SERVICE: I hereby certify that a true copy of the above document was served upon the following by First Class Mail, postage prepaid:
Tani E. Sapirstein,
Sapirstein & Sapirstein, P.C.
1331 Main Street, 2nd Floor
Springfield, MA 01103

April 23, 2019,

Peter Frei