

Minneapolis
City of Lakes

Office of the City Attorney

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September 8, 2009
VIA FAX AND U.S. MAIL

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Jill Clark, Esq.
2005 Aquila Avenue North
Golden Valley, MN 55427

Re: *Paul Stepnes vs. Peter Ritschel & City of Minneapolis*
Court File No.: 08-CV-5296 ADM/JJK

Dear Ms. Clark:

Thank you for your emails sent on September 3, 2009 at 9:44 a.m., and on September 4, 2009 at 7:52 a.m. I write to respond to your inquires below. As to any inquiries send after that date and time, I will respond to them in another communication.

Hennepin County:

If I hear what you are saying now, there never was any involvement with the Hennepin County Sheriff's Office. If that is not right, please let me know ASAP. I guess I am not clear how that "rumor" got started, and that is part of what is confusing.

I have done some additional investigation on this issue. Pursuant to Judge Porter's order, the MPD delivered the copied hard drives to Judge Porter on June 6, 2008, and returned the computers to Mr. Stepnes.

On June 19, 2008, the Judge's law clerk, Catherine Ryan, contacted Chris Dixon, indicated that the Judge was unable to view the data, and asked for software to view the data. Mr. Dixon responded suggesting Officer Hanson could bring a computer to Judge Porter's chambers to help him view the



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data. Catherine Ryan responded that to maintain the integrity of the in camera review, Judge Porter was working with the Hennepin County District Court's IT professionals. She asked for the MPD crime lab to provide instructions, rather than hands-on assistance.

Officer Hanson offered to explain to a District Court's IT professionals the software and procedures necessary to view the data. Ms. Ryan instructed the City to contact Saleem Ghani with the District Court IT staff. Officer Hanson talked with Mr. Ghani and gave him the necessary software to view the file structure.

On June 24, 2008, Ms. Ryan contacted Mr. Dixon and asked if the MPD could provide equipment for the District Court IT staff to view the data. On June 25, 2008, Officer Hanson suggested an alternative: He noted that the District Court IT staff told him that they had no experience with this type of forensic images, and that a qualified computer examiner should present the data to Judge Porter. Officer Hanson suggested that Hennepin County Crime Lab computer examiner Tony Pollock assist Judge Porter with the examination of the data. Mr. Pollock had no knowledge of the case and was not associated with the MPD. Officer Hanson contacted Mr. Pollock and asked him whether he was available and willing to help Judge Porter. Mr. Pollock agreed to do so.

On July 9, 2008, Mr. Dixon informed Officer Hanson that Judge Porter agreed to use Mr. Pollock to view the data. Officer Hanson provided Mr. Dixon with Mr. Pollock's contact information. Mr. Dixon forwarded that information to the Court.

On September 12, 2008, Officer Hanson wrote to Mr. Dixon to inquire about the status of the hard drive review. Officer Hanson indicated that he had spoken with Mr. Pollock, and that he had not been contacted by Judge Porter to conduct the independent examination.

On September 15, 2008, Officer Hanson asked Sgt. Ritschel if he still wanted the computers examined. Sgt. Ritschel noted that there was still potential for fraud charges and that any evidence should be retained for review of whether those charges might be filed. Sgt. Ritschel told Officer Hanson he thought the crime lab's review of the computers had already been completed with no results.

On November 11, 2008, Officer Hanson asked Mr. Dixon whether the Court still had the hard drives in its possession. Mr. Dixon replied that to his knowledge, the Court still had the hard drive.

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On December 29, 2008, Officer Hanson reported that he had completed the forensic examination report in this case, filed a copy with Property and Evidence, and sent a copy to Sgt. Ritschel.

Whether MPD had right to make images of hard drives:

*You suggest in your letter that Judge Porter ordered that copies be made of the computer hard-drives. That is true. But you are not being faithful to the text. He ordered that the disks of the imaged hard-drives be delivered to him. He ****never**** gave police the authority to make copies of those disks. That was clear from the transcripts, and it was clear from Judge Porter's order that was recently received.*

I do not read the transcript of the June 2, 2008 hearing the way you do. Judge Porter ordered the MPD to make copies so that the computers could be returned to Mr. Stepnes. Judge Porter ordered the MPD not to review copies until he was able to review the data for privileged information.

Whether the image copies were made as part of this civil case:

Clearly, the MPD thought they could just sneak a little copy, and then come in through the back door to use it to defend in this civil case. That is not allowed.

[The documents] were gathered to try to defend Ritschel in this action and they flowed into this action.

The copying of the hard drive and the review of the hard drive was not performed for the civil case. It was part of the criminal case.

Whether any party has an advantage in this lawsuit because of the forensic examination:

I anticipated that some defense attorney would try to say that they would have gotten all of the documents in this litigation, anyway. The attempt is still startling, however. Never, ever, do you get to gain an advantage from violating a court order. That should be a given.

But certainly, Ms. Lathrop, your clients would never have gotten 2 hard-drives in a civil case, with unmitigated perusing authority: i) without some showing; and ii) without some safeguards. Further, by perusing emails that we deem not relevant (or worse, otherwise privileged or confidential), the defendants have gained an advantage

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Benefit to defendants: But you are also not addressing, Ms. Lathrop, the problem that the defendants have now gained an advantage from that forensic report. That has been quite clear in depositions. Names were obtained from the report, and have been used to form questions asked by Defense attorneys in this case.

* * *

Further, the subpoena's sent out by Faegre, for example to Midwest Marketing, we deem to have been sent because information was gleaned from the forensic report. These are just examples, we will provide the Court with additional details.

As to whether the defendants have gained some kind of advantage in this litigation, I do not see how this is the case. The defendants have no advantage from the production of the forensic computer report. All parties have the same report. All parties have access to the same information. All parties have had access to it for months.

Are you arguing that you and your client should have been able to decide for yourself whether or not to produce documents that are material to the subject matter of this lawsuit? Every document on that forensic report relates to the subject matter of this lawsuit. They came from your client's computers. At the time that I disclosed the existence of the forensic report, and further when I provided access to it and ultimately provided copies of it, I did believe that Judge Porter had ruled that the MPD could do its forensic search based on information that I had at that time. We can argue about whether the Court's order was violated by the MPD's forensic review of the hard drive images, but I do not see how you can argue that the documents that appear in that report were not discoverable in this lawsuit. If your client had those documents in his possession or control, he had a duty to produce them in this lawsuit; moreover they are specifically responsive to document requests from WCCO and Esme Murphy.

I also fail to see how any of this has adversely affected your client's position in this lawsuit. If you could spell this out more clearly, that would be helpful.

Whether the forensic report contains documents irrelevant to this lawsuit:

Further, Plaintiffs dispute that all of the documents would have been discoverable in this action. We are quite concerned about some of the documents "gathered" in the forensic report. We will discuss that more later.

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Further, by perusing emails that we deem not relevant (or worse, otherwise privileged or confidential), the defendants have gained an advantage.

As to your allegation that the forensic computer report contains documents that were not discoverable because they are irrelevant, and therefore would not have been produced, please advise specifically the documents to which you refer. If you point to particular documents, the parties could review them and try to resolve whether or not they are relevant and properly in this case.

Whether the forensic report contains privileged communications:

You also need to note, that Judge Porter asked me to provide a list of attorneys, which would assist him in perusing the disks for attorney-client privilege. It is absolutely naïve and quite troubling, that the MPD focused solely on Jill Clark as Stepnes' attorney. I provided Judge Porter with a list of attorney names (in camera by permission) and it included a lot more names than Jill Clark.

Mr. Sullivan asked (not verbatim) whether Pete Girard had been told about an email from Paul Simonson. Do you know who Simonson is? He is an attorney.

Further, by perusing emails that we deem not relevant (or worse, otherwise privileged or confidential), the defendants have gained an advantage.

As to your allegation that the forensic computer report contains documents that were privileged, or were confidential, please advise specifically the documents to which you refer. (Excluding the folders of emails between you and Mr. Stepnes, which I have not seen and will not view.) If you point to particular documents, the parties could review them and try to resolve whether or not they are relevant and properly in this case, and if so, if they revealed some information that gives one party an unfair advantage over another.

From my review, I did not find documents on the forensic computer report disk (except the emails between you and Mr. Stepnes, which I cannot comment upon because I have not viewed them) that were confidential or privileged. If there are other privileged communications with attorneys on that report, please tell me who they are.

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As for Mr. Simonson, according to the Minnesota Office of Lawyers Professional Responsibility, an individual named Paul Simonson was disbarred on March 25, 1988 and his license has not been reinstated. There is no other attorney with that name in the attorney rolls in Minnesota. The attorney-client privilege does not extend to disbarred former attorneys.

I disagree with your assertion that the MPD made no efforts to protect any privileged materials on Mr. Stepnes' hard drives. Sgt. Ritschel's work order to the crime lab instructed, "avoid any files related to any possible attorney/client privileged materials." The crime lab provided software to the Court, and arranged to have an independent third party computer examiner present the data to Judge Porter. Moreover, the work order was put on hold for six months to permit the judge to review the hard drives for privileged material. Officer Hanson believed the MPD had permission to search the hard drives when he did so. And in addition, in this litigation the City Attorney's Office has made sure not to review the emails between you and Mr. Stepnes that appear on the forensic computer report.

Whether the documents on the forensic report could be shown to a jury:

Further, if the documents were obtained in this litigation, they would not be playable for the jury with the seal of the MPD, and a big banner on the left-hand margin, which would taint the jury thinking that the documents were gathered in some police investigation.

I would be amenable to some kind of stipulation that we present any documents from the computer forensic report in a format without the MPD report menu running down the left side.

Whether we will produce Sgt. Ritschel's hard drive:

Request for hard-drives: I asked earlier whether CBS was going to provide Esme Murphys' hard-drive to Plaintiffs so we could peruse it and makes arguments as to why we should have certain documents. No response. I also asked you, Ms. Lathrop, whether the City was going to provide Sgt. Ritschel's hard-drive. No response. Unless you are prepared immediately to provide me with these hard-drives, I would suggest that you drop the argument that you would have gotten the documents in this civil case.

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I do not think you have made a showing that you should have access to Sgt. Ritschel's hard drive. We decline your request to provide you with Sgt. Ritschel's hard drive.

Collection of copies of images of hard drives and forensic computer report:

*Collect all copies: Please, Ms. Lathrop, collect all copies of the disks from anyone in the MPD (including the drive in "storage" and including any copy on any computer or system (in other words, **no** copies should remain) to hold in your Offices until after Judge Keyes and/or Judge Porter have ruled. Please confirm that you are going to do this and please confirm when it is done.*

I am working on retrieving all MPD copies and holding them until this issue is resolved.

Emails between Assistant City Attorneys:

Intra-MCAO emails: Ms. Lathrop, please also provide me with all emails between you and Chris Dixon, and between you and Patrick Marzitelli. If you claim some type of privilege, please specific what it is, and legal authority for that proposition. If you do not provide them, we reserve the right to request that the Court order them.

I assume your request is limited to emails about this case. I believe any such emails would be confidential attorney work product. Fed. R. Civ. P. 26(b)(3) protects from disclosure documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney). Any such emails in this matter would have certainly been prepared in anticipation of litigation. They would be communications between attorneys within a law firm regarding the representation of their joint client regarding a particular matter. Patrick Marzitelli is a civil attorney in the City Attorney's Office. Christopher Dixon represented the City, the MPD, and Sgt. Ritschel in the civil state-court action. Any emails between me and those attorneys are protected as work product.

Furthermore, you have not made any kind of showing what you are looking for in these emails or why you should have access to them. I decline your request to provide any such emails and will not produce them absent a court order. If you have some kind of legal argument regarding why they should be produced, please provide it.

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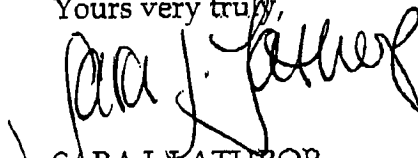
Communications between Sgt. Ritschel and the City Attorneys Office:

Plaintiffs have continued to analyze the issues surrounding Sgt. Ritschel's representation to Dale Hanson that he could go ahead and peruse the 2 disks that contained Stepnies' imaged hard-drives.

I am sure you appreciate that serious issues are involved in this matter. Under the circumstances, Plaintiffs deem it appropriate to request communications between Ritschel and the Minneapolis City Attorney's Office - on this issue. (For example, Ritschel's communication to Ms. Lathrop that Judge Porter had approved the MPD perusal of the disks (in all of its iterations), and communications by counsel to ensure that the court order was being followed.

We do not believe you have made a showing that you have a right to privileged communications between a party and his attorneys. It was my ethical duty to disclose to you the information in my September 1, 2009 letter, pursuant to Rule of Professional Minnesota Rule of Professional Conduct 3.3(a), because information I received was different than information I had previously provided to you. Beyond that, Plaintiff has no right to obtain privileged communications between a party and his attorneys. Absent an order from the Court, we will not disclose privileged communications between Sgt. Ritschel and this office relating to this lawsuit.

Yours very truly,


SARA J. LATHROP
Assistant City Attorney

cc: Michael Sullivan, Esq.
John Borger, Esq.



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FACSIMILE TRANSMITTAL

To: Jill Clark (763-417-9112)

From: Sara J. Lathrop

Michael Sullivan (202-861-9888)

John Borger (612-766-1600)

Date: September 8, 2009

Pages: 9 including cover

Re:

CC:

Fax:

Urgent

For Review

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Notes:

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