JOHN DOE 10	:	COURT OF COMMON PLEAS
c/o Monahan Law Practice, P.C.	:	
7 Great Valley Parkway, Ste. 290	:	PHILADELPHIA COUNTY
Malvern, PA 19355	:	PENNSYLVANIA
Plaintiff,	:	
v.	:	CIVIL ACTION
ARCHDIOCESE OF PHILADELPHIA	:	**JURY TRIAL DEMANDED**
222 N. 17th Street	:	
Philadelphia, PA 19103	:	FEBRUARY TERM, 2011
and	:	
MSGR. WILLIAM LYNN	:	NO. 001128
222 N. 17th Street	:	
Philadelphia, PA 19103	:	
and	:	
MARTIN SATCHELL	:	
Last Known Address: 501 Wayne Drive	:	
Apartment 212	:	
King of Prussia, PA 19406	:	
Defendants.	:	

ORDER

AND NOW, this day of , 2013, upon consideration of PLAINTIFF'S Motion to Overrule Objections and Compel DEFENDANT's Discovery Responses, and DEFENDANT'S Response thereto, it is hereby

ORDERED and DECREED that DEFENDANT will provide full and complete Answers to PLAINTIFF'S Interrogatories, and produce all requested documents responsive to PLAINTIFF'S Request for Production of Documents within thirty (30) days of the date of this Order or suffer the imposition of further sanctions.

BY THE COURT:

_____
J.

Discovery ends: December 2, 2013

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PLAINTIFF'S MOTION TO OVERRULE OBJECTIONS AND COMPEL DEFENDANT'S ANSWERS TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

John Doe 10 (hereinafter "Plaintiff) hereby requests this Honorable Court to overrule objections and compel Defendant Archdiocese of Philadelphia (hereinafter "Archdiocese") to provide full and complete verified answers to Plaintiff's interrogatories, and produce all documents requested in Plaintiff's Request for Production of Documents and in support thereof avers as follows:

1. On August 16, 2011, counsel for Plaintiff served Defendant with Interrogatories and Request for Production of Documents with respect to the above referenced matter. (A copy of correspondence to Defendant's counsel dated August 16, 2011, is attached hereto and marked as Exhibit "A").

2. Pursuant to the Pennsylvania Rules of Civil Procedure, Defendant's responses to Plaintiff's discovery requests were due within thirty (30) days from the date of receipt.

3. On June 19, 2013, almost two (2) years since discovery was sent, Defendant provided non-responsive answers to Interrogatories and production requests, further objecting to each request and demanding a confidentiality agreement before responding. A copy of Defendant's Answers are attached hereto and marked Exhibit "B".

4. The Court has set a discovery deadline for December 2, 2013, and as a result of Defendant's failure to provide discovery answers for almost two (2) years, Plaintiff has been prejudiced in this case.

5. Plaintiff respectfully requests an Order from this Court compelling Defendant to fully and completely answer said Interrogatories and Request for Production of Documents, or suffer the imposition of sanctions.

WHEREFORE, Plaintiff respectfully requests this Honorable Court to enter the attached Order compelling Defendant to provide full and complete Answers to Plaintiff's Interrogatories

and Request for Production of Documents within thirty (30) days of the date of this Order or suffer sanctions as deemed proper by this Court.

Respectfully submitted,

Dated: July 8, 2013 BY: _____

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JOHN DOE 10 c/o Monahan Law Practice, P.C. 7 Great Valley Parkway, Ste. 290 Malvern, PA 19355 Plaintiff, v. ARCHDIOCESE OF PHILADELPHIA 222 N. 17th Street Philadelphia, PA 19103 and MSGR. WILLIAM LYNN 222 N. 17th Street Philadelphia, PA 19103 and MARTIN SATCHELL Last Known Address: 501 Wayne Drive Apartment 212 King of Prussia, PA 19406	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY, PENNSYLVANIA CIVIL ACTION **JURY TRIAL DEMANDED** FEBRUARY TERM, 2011 NO. 001128

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO OVERRULE OBJECTIONS AND COMPEL ANSWERS TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff, by and through his undersigned counsel, hereby submits this Memorandum of Law in Support of the Motion to Overrule Objections and Compel Defendant's Answers to Interrogatories and Request for Production of Documents as follows:

I. MATTER BEFORE THE COURT

The matter before this Honorable Court is Plaintiff's Motion to Compel Defendant to provide more complete Answers to Interrogatories and Request for Production of Documents, and to strike Defendant's objections to each interrogatory and request for production of documents.

II. STATEMENT OF QUESTIONS INVOLVED

Under Pennsylvania law, should Defendant be compelled to give full and complete answers to interrogatories and requests for production of documents where they have failed to provide adequate answers, where the objections by Defendant are improper, and where objections are not made within the time limits prescribed by the Pennsylvania Rules of Civil Procedure?

Suggested Answer: "YES."

III. FACTS

In the Complaint filed on February 14, 2011, Plaintiff alleges that he was sexually molested in the early 1990's by Defendant Martin Satchell who was, at the time, a Roman Catholic seminarian at St. Charles seminary owned and operated by the Defendant Archdiocese and supervised by Father Joseph Logrip, a Roman Catholic priest in the Archdiocese, who has been removed from ministry since the filing of this Complaint.

On August 16, 2011, counsel for Plaintiff served Defendant with Interrogatories and Requests for Production of Documents with respect to the above referenced matter. (See Exhibit "A").

Pursuant to the Pennsylvania Rules of Civil Procedure, Defendant's responses to Plaintiff's discovery requests were due within thirty (30) days from the date of receipt.

On June 19, 2013 Defendant, almost two (2) years later, provided non-responsive answers to interrogatories and production requests, both objecting to each request and demanding an

unjustifiable confidentiality agreement before responding. A copy of Defendant's non-responsive Answers are attached hereto and marked Exhibit "B".

The discovery deadline set by the Court is now December 2, 2013, and as a result of Defendant's failure to provide proper discovery answers for almost two (2) years, Plaintiff has been severely prejudiced in this case.

Defendant both objects to Plaintiff's interrogatories and requests for documents, and improperly demands a confidentiality agreement in order to obtain answers that are mandated by Pennsylvania discovery rules. In its objections, Defendant asserts a plethora of theories to avoid discovery, including that the requested discovery is either confidential, privileged, barred under Canon law or the United States Constitution, and in particular, the First Amendment, and objects on the basis that the discovery is either not relevant, overly broad, unduly burdensome or vague.

Defendant is time-barred from asserting these objections and requests at this time. At no time during the two years prior to filing the objections to discovery has Defendant requested an extension of time to either object to Plaintiff's discovery or to seek a Protective Order or to request a confidentiality agreement with respect to Answers.

Further, with respect to Defendant's particular objections, the information and documents sought are not protected by law under any of the various privileges and objections the Defendant asserts. Plaintiff's requests are ordinary requests in the context of a child sex abuse case, and not overly broad or unduly burdensome. Defendant is not shielded from disclosing this relevant information by the First Amendment, and this Court is not governed by canon law. Plaintiff specifically asked for information about the offending employees and Defendant's practice of employing and covering up for sex offending employees. Moreover, Defendant has ready access to this information. It has files on these sexually offending agents and has publicly conceded that

it knew the number of abusers that worked for Defendant. Plaintiff simply seeks to apply Pennsylvania's neutral discovery rules to this Defendant employer.

Because the information is relevant and not protected by any privilege or objection, Plaintiff respectfully requests that this Honorable Court order the Defendant to substantively respond to Plaintiff's First Set of Interrogatories and First Request for Production of Documents.

IV. ARGUMENT

A. *Standard of Review*

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." *Pa.R.C.P. 4003.1*. Moreover, all information which appears "reasonably calculated to lead to the discovery of admissible evidence" is discoverable. *Id.* Further, it is not ground for objection that the information sought involves an opinion or contention that relates to a fact in the application of law to fact. *Id.* The objective of the rules of discovery is to encourage the exchange of relevant information by the parties prior to trial and to discourage and prevent unjust surprise and prejudice at trial. *Kaminski v. Employers Mutual Casualty Co.,* 338 Pa. Super 400, 487 A.2d 1340 (1985).

Additionally, discovery is generally allowed with liberality in civil litigation, *Schwab v. Milks*, 8 D.&C.4th 557, 558 (Lacka. Cty. 1990), and any limitations or restrictions upon discovery are narrowly construed. *Horwath v. Brownmiller*, 51 D.&C.4th 33, 39 (Monroe Cty. 2001). All doubts regarding the discoverability of information should be resolved in favor of permitting discovery. *Fitt v. General Motors Corp.*, 13 D.&C.4th 336, 338 (Lacka. Cty. 1992).

The party objecting to the production of discovery generally bears the burden of establishing that the information or document sought is not discoverable and that the objections should be sustained. *Reusswig v. Erie Insurance*, 49 D.&C.4th 338, 341 (Monroe Cty. 2000)

(citing *Schwab, supra*); *Hilgert v. Fish*, 8 D.&C.3d 271, 273 (Monroe Cty. 1978). The Defendant has broadly asserted privilege to Plaintiff's discovery requests refusing to answer all written discovery. However, Defendant has failed to provide any facts that establish its laundry list of privileges. Defendant has not even provided a privilege log for the documents that it alleges are privileged. Because it has not met its burden, Defendant should be required to produce the requested information.

B. *Defendant Is Time Barred From Asserting Objections At This Late Date*

Pa.R.C.P. 4019(a)(2) provides that failure to serve answers, sufficient answers or objections to written interrogatories or to respond to a request for production of documents "may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has filed an appropriate objection or has applied for a protective order."

In *Mountain View Condominium Owners' Association v. Mountain View Associates,* 9 Pa. D. & C.4th 81(1991), in considering a factually similar scenario, the Court held that *Pa.R.C.P. 4011* regarding limitations on the scope of discovery is not self-executing and a party wishing the benefit of the protection of that rule must seek to invoke them in a timely fashion. "Rights, slept on, are lost every day and we see nothing to be gained by encouraging dilatory and discourteous behavior." *Mountainview* at 9 D. & C. 4th at 85. The Defendant Archdiocese was aware of Plaintiff's discovery requests for two years. Given the lengthy time the Defendant had to process these requests, their answers are the epitome of non-responsive, and insult to the judicial process. Moreover, Defendant has long experience responding to discovery requests in this context, as it has been required to cooperate with two in-depth Philadelphia District Attorneys Office Grand Jury Reports on sexual abuse by its employees, as well as the resulting criminal prosecutions of

its employees for the cover up and abuse of children. Defendant slept on its rights and this Court should order responsive answers.

C. *The First Amendment Does Not Shield Defendant From Their Discovery Obligations Under Neutral Tort Principles Which Apply to Every Other Citizen in Our Society.*

Under Pennsylvania law, the Defendant's objections based on the First Amendment are unavailing. First, it is well-settled that the First Amendment is no barrier to discovery in a clergy sex abuse case. *Hutchison v. Luddy*, 414 Pa. Super. 138, 152, 606 A.2d 905, 912 (Pa. 1992); *Pagano v. Hadley*, 100 F.R.D. 758, 761 (D. Del. 1984). *See also Ambassador College v. Geotzke, 675 F.2d 662, 664-665 (5th Cir.1982); United Methodist Church v. White,* 571 A.2d 790, 792 (D.C. App. 1990); *In re Roman Catholic Archbishop of Portland in Or.*, 335 B.R. 815, 825 (Bankr. D. Or. 2005); *In re Contemporary Mission, Inc.*, 44 B.R. 940, 943 (Bankr. D. Conn. 1984); *Alberts v. Devine*, 395 Mass. 59, 75, 479 N.E.2d 113, 123 (Mass. 1985); *People v. Campobello*, 810 N.E.2d 307, 318-19 (Ill. App. 2004). It is well-settled that there is no free exercise defense to a neutral, generally applicable law, *Employment Div. v. Smith*, 494 U.S. 872 (1990), which the discovery rules related to employee child sex abuse undoubtedly are.

The compelled production of its archival documents does not violate its right to the free exercise of religion as protected by the federal and state constitutions. *Commonwealth v. Stewart,* 547 Pa. 277, 690 A.2d 195 (Pa. 1997). The defendant has the initial burden of establishing that a rule of general applicability constitutes a substantial burden on his or her free exercise of religion. *Muslim v. Frame*, 891 F. Supp. 226, 229 (E.D. Pa. 1995).

Here, Plaintiff simply seeks application of Pennsylvania's neutral, generally applicable discovery rules, essentially what is discoverable and whether any statutory privileges apply. These are neutral principles of law. Accordingly there is no First Amendment violation in their

application.

This same argument was made by the Catholic Cardinal in Los Angeles. *Roman Catholic Archbishop of Los Angeles v. Superior Court.* 32 Cal.Rptr.3d 209 (Cal. Ct. App. 2005). The Cardinal went so far as to petition the United States Supreme Court, which denied review of the case. *Does 1 and 2 v. Superior Court of California, Los Angeles County.* 126 S.Ct. 1786 (Mem) (U.S. 2006), denying cert.

The California Court of Appeals held that neither the Free Exercise Clause nor the Establishment clause protected the Cardinal from disclosing documents from a priest employee's file. *Id.* at 220. The Court concluded that "[w]e are not persuaded by any of petitioners' freedom of religion arguments. We conclude disclosure of the subpoenaed documents is not barred by the First Amendment to the federal Constitution." *Id.* Similarly, the First Amendment in this case does not protect the Defendant from disclosing documents under Pennsylvania's neutral, generally applicable discovery principles.

1. The Free Exercise Clause.

The First Amendment Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. State of Conn.*, 310 U.S. 296, 303-04 (1940). The Supreme Court has stated:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. Laws,' we said, 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices ... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of

the land, and in effect to permit every citizen to become a law unto himself.'

Employment Div. Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 879 (1990).

Free exercise analysis in this case must start with the basic and universal premise that religious organizations are liable for their torts. *Strock v. PressnelL* (1988) 38 Ohio St.3d 207, 527 N.E.2d 1235, 1237-38; *Ravburn v. Gen. Conference of Seventh Day Adventists*. 772 F.2d 1164, 1171 (4th Cir. 1985); *Moses v. Diocese of Colo.*. 863 P.2d 310 (Colo. 1993); *Erickson v. Christensom* 781 P.2d 383 (Or. Ct. App. 1989). The relevant laws here are the Pennsylvania discovery rules. These do not impact the Defendant's beliefs. They are free to believe whatever they want; however, when they commit torts and are sued in a court of law, they are subject to the same discovery rules as any other employer.

Even if the Defendant did assert a burden on some "religious conduct," it is not a burden on religious conduct, and it is well established that the First Amendment "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'." *Smith*, 494 U.S. at 879; see also *Malicki*, 814 So.2d at 354. The Pennsylvania discovery rules apply to every person and employer in Pennsylvania. Plaintiff simply seeks application of these laws to the Defendant in the same manner it is applied to everyone in our society who endangers children.

2. The Establishment Clause.

Any claim by the Defendant that the Establishment Clause grants constitutional immunity over discovery in this case is without merit. Indeed, absolving the Defendant of its obligations under the discovery rules would constitute a violation of the separation of church and state by handing a religious defendant a benefit accorded no other employer. *Texas Monthly v. Bullock*,

489 U.S. 1 (1989).

The parameters of the Establishment Clause of the First Amendment are well established. State action does not violate the Establishment Clause if such action (1) has a secular purpose; (2) has a primary effect which neither advances nor inhibits religion; and (3) does not foster excessive state entanglement with religion. *Lemon v. Kurtzman*. 403 U.S. 602, 612-13 (1971). The first two prongs of this test are not even arguably implicated in this case. At issue here is application of the Pennsylvania discovery rules. These laws have a secular purpose, and its primary affect neither advances nor inhibits religion. Rather, Plaintiff seeks only to apply the civil law to this Defendant employer in conformity with "neutral principles of law" as previously sanctioned by the United States Supreme Court. See *Jones v. Wolf*. 443 U.S. 595, 604 (1979).

Nor does this case involve "excessive entanglement" with religion. The *Lemon* Court was concerned that state action may result in administrative and political entanglement. Administrative entanglement typically involves comprehensive, discriminating and continuing state surveillance of religion. *Id.* at 619-22. Of particular concern is the danger that government action may have "self-perpetuating and self-expanding propensities." *Id* at 624. This generally occurs when the state grants regulated aid to groups affiliated with religious institutions, thus requiring ongoing monitoring. See, e.g., *Vernon v. City of Los Angeles*, 27 F.3d 1385, 14001401 (9th Cir. 1994). The only state action in this case is the ordinary judicial involvement in a tort case involving an employer who has put children at risk. There is no threat or necessity of the state's on-going monitoring of the Defendant's decisions. Thus, no excessive entanglement is at issue. *Id.;* see also *NLRB v. Hanna Boys Center*. 940 F.2d 1295, 1304 (9th Cir. 1991) (finding no entanglement where the national labor relations board's jurisdiction over a church-owned school required government involvement only with respect to specific claims filed on behalf of specific

employees); *U.S. v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979).

The second potential entanglement issue noted by *Lemon* involves the potential for political divisiveness resulting from government action which divides citizens along political lines. The threat of political divisiveness has never alone been grounds for the court to find a violation of the Establishment Clause. *Vernon*, 27 F.3d at 1401. Moreover, there is simply no evidence that political divisiveness would occur in this case, since the court is simply asked to treat the Defendant like anyone else in our society and apply a neutral civil law. Application of the three-pronged test established in *Lemon* reveals that this case does not involve a violation of the Establishment Clause of the First Amendment. *Lemon*, 403 U.S. at 612-13.

Furthermore, granting immunity from the Pennsylvania discovery rules to church employers but not to secular employers would itself raise grave establishment clause issues. Such a law would have no secular purpose and would certainly have the primary effect of advancing religion by immunizing church defendants from tort liability for the public harm that they have caused through shielding their discovery obligations, in violation of the first two prongs of the *Lemon* test. See *Malicki v. Doe*. 814 So.2d 347 (Fla. 2002) (holding that religious institutions are subject to common law civil liability and stating that "to hold otherwise and immunize the church defendants from suit could risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment.")

D. *Canon Law Does Not Offer Defendant Protection for Discovery Requests*

Canon law is no defense in a civil/secular court. This court exists to apply secular law and may not apply canon law; nor is it governed by canon law. *Employment Div. v. Smith, 494 U.S. 872, 879-80 (1990); Jones v. Wolf*, 443 U.S. 595, 603 (1979); *General Council on Fin. & Admin.*

v. Cal. Superior Court, 439 U.S. 1369, 1373 (1978); *Braunfeld v. Brown*, 366 U.S. 599, 603-05 (1961); *Cleveland v. United States*, 329 U.S. 14 (1946); *Prince v. Massachusetts*, 321 U.S. 158, 168-69 (1944); *Minersville School District v. Gobitis*, 310 U.S. 586, 594-95 (1940); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878); *Watson v. Jones*, 80 U.S. 679, 728-29 (1871); *United States v. Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983); *In re Roman Catholic Archbishop of Portland in Oregon*, 335 B.R. 842, 845 (Bankr. D. Or. 2005); *In re The Catholic Bishop of Spokane*, 329 B.R. 304, 321-22 (Bankr. E.D. Wash. 2005); *Antioch Temple, Inc. v. Parekh*, 422 N.E.2d 1337, 1342 n.10 (Mass. 1981); *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 985 P.2d 262, 277 (Wash. 1999); *People v. Campobello*, 810 N.E.2d 307, 317 (Ill. App. 2004). In fact, applying canon law would violate the Establishment Clause. The Defendant has a secure First Amendment right to believe whatever it chooses and to record its beliefs, and even to call them the "law" of the religion, but such a label does not make the religious doctrine a law that can govern a civil court. Defendant's assertion of a canon law privilege is specious.

E. *Most of the Documents that the Defendant Has Refused to Produce Are Unlikely to Be Protected by the Work Product Privilege, the Attorney Client Privilege, or the Priest-Penitent Privilege*

Without having access to any of the documents that the Defendant refused to produce and without even having a basic knowledge of the documents through a privilege log, it is difficult to determine whether and to what extent any documents might be protected by one of the legitimate alleged privileges. Accordingly, Plaintiff provides this Court with some relevant law in these areas and suggests possible documents which the Defendant may claim are covered by these privileges.

1. Work Product Privilege.

The attorney work product privilege is codified in *Pa.R.C.P. 4003.3* which states in

pertinent part: "Subject to the provisions of *Rules 4003.4 and 4003.5*... discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." It is not nearly as capacious as Defendant's Responses seem to assume.

However, the Superior Court has noted that "*Pa.R.C.P. 4003.3* provides that work product is discoverable, with the exception of the mental impressions and opinions of the party's attorney and other representatives." *Dominick v. Hanson,* 753 A.2d 824, 826 (Pa. Super. 2000). Defendant has been involved in childhood sexual abuse claims in the past. There may be documentation that relates to their attorneys' mental impressions, trial strategy and legal theories in preparing for trials. "The work product privilege, however, protects from discovery only an attorney's mental impressions, conclusions and opinions respecting legal theories and strategies." [citing *Hickman v. Taylor,* 329 U.S. 495]. However, the burden to show this is on the Defendant. *Mesko v. Community Medical Center*, 12 D.&C.3d 741, 745 (Lacka. Cty. 1979) ("It is nearly universally held that the burden of showing that the information sought to be discovered is prohibited by [the work product rule] rests upon the party objecting to such discovery."; *Holowis v. Philadelphia Elec. Co.*, 38 D.&C.2d 260, 267 (Chester Cty. 1966)("the burden is upon the party claiming immunity of information . . . to convince the court that the information sought was gathered in anticipation of litigation).

To this point, the Defendant has not met this burden. Additionally there are most likely numerous documents which have nothing to do with and did not include litigation or their attorneys' mental impressions, which are clearly not protected by this limited privilege.

2. Attorney-Client Privilege.

Pennsylvania also has codified the attorney-client privilege. "In a civil matter counsel shall

not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa.C.S. 5928. The attorney-client privilege applies only to "confidential communications made in connection with providing legal services." *Prison Health Services,* 782 A.2d at 31. The attorney-client privilege applies to those confidential communications that relate to "a fact of which the attorney was informed for the purpose of securing either a legal opinion, legal services or assistance in some legal proceeding." *Brennan,* 422 A.2d at 515. The party seeking the protection of the attorney-client privilege has the burden of proving "that it is properly invoked and the party seeking to overcome the privilege has the burden to prove an applicable exception to the privilege." *Prison Health Services,* 782 A.2d at 31.

Only when certain threshold requirements are met is the communication protected. See *Commonwealth v. Mrozek,* 441 Pa. Super. 425, 428, 657 A.2d 997, 998 (1995); *Hopewell v. Adebimpe,* 18 D.&C.3d 659, 660-61, 129 P.L.J. 146, 147 (1981). "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."

3. Priest-Penitent Privilege

The Pennsylvania statute protecting confidential information acquired by members of the clergy (commonly referred to as the "priest-penitent privilege") also is not as capacious as

Defendant's assertions imply and provides: "No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization, except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, *who while in the course of his duties has acquired information from any person secretly and in confidence* shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any government unit." *42 Pa.C.S. § 5943.*

In analyzing the scope of the clergy-communicant privilege, it has been held that evidentiary privileges are not favored. "Exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Hutchison v. Luddy*, 414 Pa. Super. 138, 146, 606 A.2d 905, 908 (1992)(quoting *Herbert v. Lando*, 441 U.S. 153, 175, 60 L. Ed. 2d 115, 99 S. Ct. 1635 (1979)). Thus, courts should accept testimonial privileges "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *In re: Grand Jury Investigation*, 918 F.2d 374, 383 (3d Cir. 1990)(quoting *Trammel v. United States*, 445 U.S. 40, 46, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980)).

Considering these principles, Pennsylvania courts have interpreted in this state's clergy-communicant privilege as applying only to confidential communications between a communicant and a member of the clergy in his or her role as *confessor* or *spiritual counselor*. *See e.g., Hutchison v. Luddy*, 414 Pa. Super. 138, 146, 606 A.2d 905, 908 (1992); *Commonwealth v. Patterson*, 392 Pa. Super. 331, 572 A.2d 1258 (1990); *Fahlfeder v. Commonwealth, Pennsylvania Board of Probation and Parole*, 80 Pa. Commw. 86, 470 A.2d 1130 (1984).

By seeking to eliminate the requirement of a confessional or spiritual relationship between the communicant and the clergy person, the Defendant would so broadly construe the meaning of information acquired "in the course of [a clergyman's] duties" as to effectively extend the privilege to communications involving secular concerns. Limiting the privilege to communications penitential or spiritual in nature is the most reasonable reading of the statutory language and is a well-established interpretation of the limits of the privilege for confidential information acquired in the course of a clergyman's duties.

In *Hutchinson*, the plaintiff filed a civil action against a priest for alleged pedophilic acts and against the priest's diocese for the alleged negligent hiring and retention of the priest. During pre-trial discovery, the plaintiff sought, *inter alia*, the production of church documents concerning alleged sexual misconduct with minor male children by priests assigned to the diocese; the complete personnel files of specified priests; and documents kept by the diocese in its secret archives. The diocese refused to produce any documents contained in its secret archives.

The trial court ordered discovery of documents relating to incidents of actual or alleged sexual misconduct by priests with minor, male children and information concerning the assignment and transfer of priests.

In reaching its decision, the Superior Court explained that the clergy-communicant privilege is limited to statements made in confidence to a member of the clergy for spiritual considerations or penitential purposes. *Id.* at 15. The court stated that the mere fact that a communication is made to a clergyman or communication was communicated to a clergyman is insufficient in itself to invoke the privilege.

Nearly every jurisdiction in the United States has recognized a clergy-communicant privilege and, like Pennsylvania, has required the communication to have been motivated by

penitential or spiritual considerations. Although the statutes establishing the privilege vary in language from state to state, the most prevalent feature prescribed by the typical statute is that the communication be made to a member of the clergy in the course of "discipline enjoined" by his or her denomination. Annotation, *Matters to Which the Privilege Covering Communications to Clergymen or Spiritual Advisor Extends*, 71 A.L.R. 3d 794 (1995). Judicial interpretation of the meaning of "discipline enjoined" by the denomination has ranged from a narrow construction limiting the privilege to doctrinally required confessions, *see, e.g., Sherman v. State,* 170 Ark. 148, 279 S.W. 353 (Ark. 1926), to a broader application to the practice of providing religious guidance, admonishment or advice, *see, e.g., Scott v. Hammock,* 870 P.2d 947 (Utah 1994). In either case, the privilege applies only to confidential communications to a member of the clergy acting in a spiritual capacity.

Likewise, the federal courts have held that such a privilege must have similar limits. Whether a particular communication lies within the protection of the privilege, the courts have recognized and applied certain criteria to determine whether the communication was intended by the parties to be truly "confidential" --that is, "to be kept secret from the world at large . . . and whether, granted that the communication was to a clergy person within the scope of the privilege, it was made in that person's spiritual capacity, since otherwise, they would not be deemed to be confidential." *Russell Donaldson, J.D., Annotation, Communications to Clergyman as Privileged in Federal Proceedings*, 118 A.L.R. Fed. 449, 457 (1996).

Confidential communications to a member of the clergy, even for counseling or solace, do not fall within the protections of the privilege unless motivated by spiritual or penitential considerations. Likewise, the privilege does not protect information regarding this employer's policies and conduct regarding the placement of pedophile employees and the endangerment of children. Nor does the privilege protect information acquired by a religious institution through

investigations not involving communications with a member of the clergy for penitential or spiritual purposes. 42 Pa.C.S. § 5943.

F. *HIPAA Does Not Preclude the Disclosure of Medical Records In This Case*

HIPAA and its accompanying regulations govern the disclosure of medical records/information by "covered entities." "Covered Entities" are health care providers, plans, etc. HIPAA has little to no application against employer entities in possession of such records. Moreover, HIPAA is a privacy regulation not a privilege; Courts may order the release of such records and not run afoul of federal law.

Congress enacted the Health Insurance Portability and Accountability Act, commonly known as HIPAA, in 1996. In part and as commonly understood, HIPAA was designed to ensure the privacy of patients' health information. Congress entrusted the Secretary of the Department of Health and Human Services with the task of creating national standards to "ensure the integrity and confidentiality of the information" to be collected and disseminated. 42 U.S.C.A. § 1320d-2(d)(2)(A). Following the enactment of HIPAA in 1996, the Department of Health and Human Services implemented regulations (45 CFR §§ 160-164), to implement its reforms.

1. HIPAA generally applies to "Covered Entities," not Employers

There are three categories of "covered entities": (1) health plans; (2) health care clearinghouses; and (3) health care providers. 45 C.F.R. § 160.103. "Health care provider" means a "provider of services" (as defined in 42 U.S.C.A. § 1395x(u)), a provider of "medical and other health services" (as defined in 42 U.S.C.A. § 1395x(s)), and any other person or organization who furnishes bills, or is paid for health care in the normal course of business. 45 C.F.R. § 160.103.

Employers, including the Defendant religious organization here, have little involvement with HIPAA regulations, including the Privacy Rule. Employers may be implicated under HIPAA with respect to their position as a plan sponsor of a group health plan. *See* 45 C.F.R. § 164.504. There may be the limited exchange of summary health information (defined in 45 C.F.R. § 164.504(a)), between health care plans and providers and the plan sponsor. However, under the privacy rule, employers are not entitled to PHI. Consequently, from 2003 forward, without a valid authorization, 45 C.F.R. § 164.508, an institutional defendant's receipt of their employees PHI from a covered entity would violate the Privacy Rule; but, their subsequent disclosure in discovery would not, as HIPAA is not applicable to employers.

2. The Privacy Rule Provides that PHI May be Released in Judicial Proceedings.

The primary regulation known as the Privacy Rule, governs the disclosure of "protected health information" (PHI). 45 C.F.R. § 164.502. PHI, as defined in the regulations, "(1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse;" and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to the individual; or the past, present, or future payment for the provision of health care to an individual." 45 C.F.R. § 160.103. Under the Privacy Rule, PHI includes "any information whether oral or recorded in any form or medium." 45 C.F.R. § 160.103. The Privacy Rule prohibits the disclosure of PHI by "covered entities" except as required or permitted by the regulations. 45 C.F.R. §§ 160.103; 164.501; 164:502(a).

Even if HIPAA's privacy rule were applicable to medical records already in possession of an institutional defendant (employer of the patient), HIPAA does not create a separate privilege.

Under 45 C.F.R. § 154.512 (Uses and Disclosures for which an authorization or opportunity to agree or object is not required), these records may be released in judicial proceedings.

First, PHI in possession of a covered entity may be released by a Court order expressly authorizing that release. 45 C.F.R. § 164.512(e)(1)(i).

Second, PHI in possession of a covered entity may be released "in response to a subpoena, discovery request, or other lawful process," without a court order in two scenarios. 45 C.F.R. § 164.512(e)(1)(ii). The entity could receive adequate assurances from the party seeking the information that the individual subject to the PHI request has been given notice of the request, or the entity receives assurance that the party seeking information has made reasonable efforts to secure a "qualified protective order." *Id.*

Third, a covered entity may release PHI if it provides reasonable notice to the individual subject of the request *or* it seeks a qualified protective order. 45 C.F.R. § 164.512(e)(1)(vi).

Accordingly, HIPAA and its Privacy Rule do not provide a bar to the release of any PHI in possession of our institutional defendants.

3. Employee Medical Records Are Not Privileged in These Circumstances

Public records reveal that the Defendant had numerous employees evaluated at various medical facilities, many established solely for the evaluation of priest employees with sexual abuse issues. The medical records requested were not obtained for the diagnosis and treatment of various clergy. Rather, they were intended to provide the Defendant with a professional assessment of an employee's suitability to properly perform the duties assigned by the employer Defendant. The medical assessments are for the benefit of the Defendant employer, and if there was any benefit to its priest-employees, it was purely incidental.

Where, as here, an employee undergoes a psychiatric evaluation at the request of his employer, at the expense of his employer and for the use of his employer, that employee cannot claim any expectation of privacy in the communications made.

G. *Defendant Should be Required to Substantively Respond to Plaintiff's Discovery Because they are Relevant.*

Plaintiff's discovery requests are directly related to Plaintiff's neutral, generally applicable legal theories. Furthermore, the Philadelphia Grand Jury Reports and succeeding criminal trials already have established that the Defendant had a pattern and practice of covering up and concealing sex offenders, placing sex offenders back in positions of authority without warning any of the children or families, and failing to report the criminals to law enforcement. This is directly related to the Plaintiff's claims of negligence, vicarious liability, and a claim for punitive damages. Plaintiff and the public know that Defendant had a number of sex offender employees. The Defendant itself has publicly stated numerous times that many of its employees from 1950 until the present have been credibly accused of sexual abuse involving minors.

Overall Plaintiff's discovery requests go directly to the incidents of sexual abuse, to when the Defendants received reports (when they had knowledge of the abuse), to how long the problem was kept secret (duration and concealment of the abuse) and what they did when they found out (what their conduct was when they found out about the abuse). These requests are relevant and tailored specifically to adduce information necessary for Plaintiff's claims.

In addition, Plaintiff needs the requested information and documents in this case in order to show that sexual abuse of minors by priests was well known to Defendant. Pennsylvania law on vicarious liability requires a plaintiff to show that the harm was a well- known hazard to the employer. The issue of foreseeability, as it relates to sexual abuse for a vicarious liability claim,

has been examined numerous times by the Pennsylvania Supreme Court.

An employer may be negligent if he knew or should have known that his employee had a propensity for violence and such employment might create a situation where the violence would harm a third person. *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968), indicates that an employer may be negligent for the failure to exercise reasonable care in determining an employee's propensity for violence. In *Coath*, 277 Pa. Super. at 482, 419 A.2d at 1250. the Superior Court held that, "the defendant could be found negligent if [the perpetrator] was known to have the inclination to assault women or if the defendant should have known that." *Id.*, at 483, 419 A.2d at 1250. The court further held that, "if it were foreseeable by the defendant that [the perpetrator] . . . could attack a customer because he had, on a previous occasion, been admitted to her home on the employer's business, then there would exist a special relationship between defendant and the customer and a duty on the employer to give a reasonable warning to the customer." *Id.*, at 485, 419 A.2d at 1252. The Superior Court concluded that, "the [trial] court improperly sustained the defendant's preliminary objection. Under the status of the pleadings the plaintiff has alleged facts which could support defendant's liability." *Id.* at 486, 419 A.2d at 1252. This is a different standard than for a negligence claim where the focus can be on the individual perpetrator and whether it was foreseeable that the specific individual would offend. For vicarious liability, the inquiry is on how well known the hazard (priests abusing kids) was in the industry. Accordingly, a necessary element of Plaintiff's vicarious liability claim is showing that sex abuse by priests is a well- known hazard.

Plaintiff also needs the requested information and documents in order to prove that Defendant followed routine practices and policies with its sex offender employees. Plaintiff believes that discovery will show that Defendant and its officials had a routine practice of concealing sexual abuse of minors by its employees, transferring those

offending employees to new parishes without informing the parishioners, and not informing police of the crimes. The failure to report the crimes to the police, coupled with the decision not to warn parents and parishioners of abusing employees, sealed the information away, and provided the cloak of secrecy needed by sex offenders to access children.

Pennsylvania Rule of Evidence, Rule 406 (2013), provides:

> Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or there was an eyewitness.

This rule relates to the evidentiary rules for admitting evidence at trial, a much higher standard than mere discovery, which is the current procedural posture of this case, but even it weighs against Defendant's refusal to cooperate with discovery. Plaintiff's requested discovery relevant to: what information Defendant received about the sexual abusing priests, what action Defendant took in response, whether that information was ever given to law enforcement, and whether the offender was put back into ministry without telling the parishioners and children about the previous offenses. Plaintiff also sought any documents which contained this information. These directly relate to the routine practice of the Defendant with regard to its sexually offending employees. This information is relevant under the Pennsylvania Rules of Evidence, and Defendant should be compelled to produce it, and to do so in a timely manner.

H. ***Defendant's Objections That Plaintiff's Requests are Unduly Burdensome and Overly Broad Is Misplaced.***

Defendant's own documents, testimony and press statements that have been produced in the past show that the requests are not burdensome, and Defendant could easily respond to the requests. Defendant has publicly stated repeatedly that there have been a number of sex offending

employees. From their own public statements and their involvement in the 2005 and 2011 Grand Jury Reports, and the criminal trials that followed, this is information that they have, and it would not be burdensome for them to produce it.

Similarly, Plaintiff requested that Defendant provide the names and information about each sex offender that worked for Defendant. Defendant objected that the request was unduly burdensome. This objection is not well-founded and actually nonsensical. Defendant had to have the names of the offenders when they publicly stated that the existence of a number of offenders. They did not just guess at the number. In fact, in the testimony of Monsignor William Lynn, a former official of the Archdiocese, at his criminal trial, he admitted that the Archdiocese had a list of clergy sex offenders. Even if the Defendant did not have the names and information readily available, they must comply with their discovery obligations. Accordingly, the requests were not burdensome and Defendant should be required to provide the information sought.

With regard to documents on each offender, Defendant admits in its public statements and testimony that it has files and documents on these clergy offenders, which are also reflected in the 2005 and 2011 Grand Jury Reports. Defendant could simply start by providing the documents and files on the sex offenders known to it. Those files are already segregated. This would be far from burdensome to do.

In addition to not being unduly burdensome, Plaintiff's requests are not overly broad. Plaintiff specifically requested information about the sex offending employees within the Defendant organization. Plaintiff limited all of his interrogatories and request for documents to the years during which the sexual abuse of Plaintiff occurred. None of these requests were overly broad.

V. CONCLUSION

For all of the above reasons, Defendant's Objections should be stricken, its request for confidentiality denied, and that the information and documents requested be provided to Plaintiff.

WHEREFORE, Plaintiff respectfully requests this Honorable Court to enter the attached Order compelling Defendant to (1) substantively respond to Plaintiff's First Set of Interrogatories to Defendant; and (2) substantively respond to Plaintiff's First Request for Production of Documents within thirty (30) days of the date of this Order or suffer further sanctions as deemed proper by this Court.

Dated: July 9 BY: Daniel F. Monahan

DANIEL F. MONAHAN, ESQUIRE
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Malvern, PA 19355
610-363-3888
dmonahan@jdllm.com

VERIFICATION

DANIEL F. MONAHAN, ESQUIRE, hereby states that he is the attorney for the Plaintiff in this action and verifies that the statements made in the foregoing Motion are true and correct to the best of his knowledge, information and belief.

The undersigned understands that the statements made herein are subject to the penalties of 18 Pa.C.S.A. Section 4904 relating to unsworn falsification to authorities.

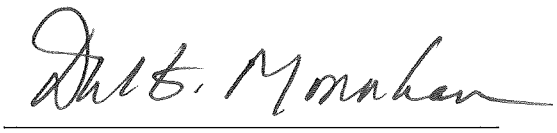
Date: July 9, 2013

DANIEL F. MONAHAN, ESQUIRE

CERTIFICATION OF SERVICE

I, Daniel F. Monahan, hereby certify that a true and correct copy of the foregoing Motion to Compel Discovery was served upon all counsel of record via E-file Service pursuant to the Rules of Civil Procedure on the date dated below.

Date: July 9, 2013

By: 

Daniel F. Monahan, Esquire

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Re: John Doe 10 v. Archdiocese of Philadelphia, et al.
Philadelphia C.C.P., February Term 2011; No.: 01128

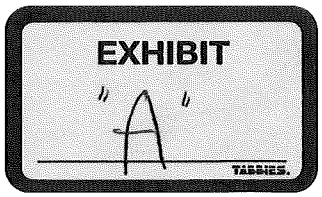
Philip Gaughan v. Archdiocese of Philadelphia, et al.
Philadelphia C.C.P., March Term 2011; No.: 00052

Francis Finnegan v. Archdiocese of Philadelphia, et al.
Philadelphia C.C.P., March Term 2011; No.: 01377

John Doe 168 v. Archdioceses of Philadelphia, et al.
Philadelphia C.C.P., March Term 2011; No.: 01919

Michelle Forsyth, et al. v. Archdiocese of Philadelphia, et al.
Philadelphia C.C.P., April Term 2011; No.: 00468

John Doe 172, et al. v. Archdiocese of Philadelphia, et al.
Philadelphia C.C.P., May Term 2011; No.: 00870



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Dear Counsel:

Enclosed please find the above mentioned Plaintiffs 1st Set of Interrogatories and Request for Production of Documents.

Please answer the enclosed discovery requests within the time limits pursuant to the applicable Pennsylvania Rules of Civil Procedure.

Thank you for your attention to this matter.

Very truly yours,

Danielle N. McLaughlin, Paralegal to
Daniel F. Monahan, Esquire

/dnm
Enclosure