

## THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
Northern District

JULY TERM, 2002

## SUBPOENA DUCES TECUM

To: Keeper of Records  
Diocese of Manchester  
c/o David Vicinazo  
Nixon Peabody, LLP  
889 Elm Street  
Manchester, NH 03101

You are required to appear before the Hillsborough County Grand Jury, Northern District, sitting at Hillsborough County Superior Courthouse, Manchester, New Hampshire, on August 15, 2002, at 9:00 a.m., and everyday thereafter until your testimony is completed, to testify as to what you know concerning an investigation of sexual assaults and other crimes against minors by certain clergy.

You are further required to produce for the Grand Jury at that time all of the following original records: any and all documentation, in any form, relating to priests against whom allegations of sexual misconduct have been made.

HEREOF FAIL NOT, as you will answer your default under penalties prescribed by law.

Dated at Concord, N.H., the 30<sup>th</sup> day of July A.D. 2002.



Justice of the Peace/Notary Public

N. William Delker

My Commission expires: May 2004

HILLSBOROUGH-NORTH, SS

SUPERIOR COURT

NOTICE OF DECISION

June 19, 2002

N. William Delker, Esq.  
Office of Attorney General  
33 Capitol Street  
Concord NH 03301-6397

**InRe: Grand Jury Subpoena**

Docket #:  
02-S-1154

Please be advised that on 6/17/2002 Judge Barry made the following order relative to:

**Court Order ; Order Made**  
**Re: Motion to Reconsider**

**Copy of Order Attached Hereto**

John M. Safford, Clerk  
300 Chestnut Street, Room 127  
Manchester, NH 03101-2490  
603-669-7410

cc: Bradford E Cook, Esq.

THE STATE OF NEW HAMPSHIRE

11155

HILLSBOROUGH, SS  
NORTHERN DISTRICT

SUPERIOR COURT  
2002

No. 02-S-1154

In Re: Grand Jury Subpoena Duces Tecum Served On April 8, 2002

ORDER, UNDER SEAL

Before the Court is a Motion to Reconsider filed by the Roman Catholic Bishop of Manchester (Diocese of Manchester) (the "Diocese"). The State objects. For the reasons set forth below, the Motion to Reconsider is DENIED.

The State is investigating allegations of sexual assault lodged against members of the clergy in New Hampshire. In furtherance of the State's investigation, a grand jury subpoena *duces tecum* was issued on behalf of the Grand Jury for Hillsborough County, Northern District, requiring the Keeper of Records of the Diocese to produce all records relating to allegations of sexual abuse by its clergy. The State is investigating "whether the Diocese or any of its members engaged in any criminal conduct by failing to protect children from sexual abuse by priests or by covering up such information." See State's Objection to Motion to Reconsider, ¶ 1.

On May 14, 2002, after receiving redacted records from the Diocese, the State filed a Motion to Compel in an effort to obtain the redacted materials. On May 30, 2002, the Court granted the State's Motion to Compel. The Diocese now asks the Court to reconsider its ruling.

In its objection to the State's Motion to Compel the Diocese

asserted that it had redacted the records in question "on the basis (a) that they were protected under the First Amendment; (b) that they were protected under the Fourth Amendment; [and] (c) that they were protected by the priest-penitent and physician-privileges." See Objection to Motion to Compel, p. 1. Both in its Motion to Compel and in its subsequent reply to the Diocese's objection to the Motion to Compel, the State articulated its position in detail. According to the State, none of the grounds invoked by the Diocese are sufficient to avoid compliance with the subpoena.

In its Motion to Reconsider the Diocese states that it expected that the Court would hold a hearing on the Motion to Compel. The Diocese further states that it anticipated, "once a hearing date was set, individual priests whose private information and rights were implicated by the State's subpoena would have the opportunity to intervene in this case through counsel who were informed of this proceeding." See Motion to Reconsider, ¶ 2. On the question of the necessity of a hearing the Diocese asserts that:

A hearing is necessary to allow all parties, most particularly those whose records are sought, to be heard by this court, and will allow a procedure of review of records which will be more refined than that afforded by a blanket grant of the State's motion and therefore more able to address particular legal positions on particular records, which will protect the rights of the parties and make an appeal of the Court's order less likely.

Id., ¶ 3.

The State argues that a hearing is not necessary. The State

avers that "[t]here does not appear to be any factual dispute with respect to the records that would necessitate a hearing on this matter." See State's Objection to Motion to Reconsider, ¶ 3. Moreover, the State objects to the participation of third parties in any possible hearing, particularly in the absence of a motion to intervene or a motion to quash. The State asserts that, because grand jury matters are subject to secrecy, any such third party participation is forbidden. Finally, the State argues that, insofar as the expeditious handling of grand jury proceedings is of major public concern, any further delay in this matter should be avoided.

The Court would also note that it recently received an objection filed by counsel for [REDACTED]. Without further elucidation, the single paragraph pleading states:

Now comes [REDACTED] by his Attorney [REDACTED] and objects to any release of his personal and personnel records in the possession of the Diocese of Manchester to the Attorney General's Office pursuant to his Constitutional rights set out in Part 1, Article 15 of the New Hampshire Constitution and Article [sic] 4, 5 and 6 of the United States Constitution.

See Objection to Release of Any Records Concerning [REDACTED] [REDACTED] (filed June 14, 2002).

For purposes of clarification, the Court will explain its ruling on the State's Motion to Compel. With respect to grand jury proceedings, the government has a strong interest "in maintaining secrecy, preserving investigatory flexibility, and avoiding procedural delays." See U.S. v. R. Enterprises, Inc., 498 U.S. 292, 302 (1991); State v. Canatella, 96 N.H. 202, 205

(1950). The need for secrecy, flexibility, and alacrity springs from "society's profound interest in the thorough investigation of potential criminal wrongdoing." In Re Grand Jury Subpoena, 138 F.3d 442, 445 (1st Cir. 1998). In view of this, "[a] grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." R. Enterprises, 498 U.S. at 298 (quotation omitted). Moreover, "[c]itizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence." Branzburg v. Hayes, 408 U.S. 665, 682 (1972) (emphasis added).

It must be noted, however, that "[t]he investigatory powers of the grand jury are nevertheless not unlimited." R. Enterprises, 498 U.S. at 299; United States v. Calandra, 414 U.S. 338, 346 (1974). For example, pursuant to the Federal Rules of Criminal Procedure, in federal criminal proceedings subpoenas *duces tecum* may be quashed "if compliance would be unreasonable or oppressive." Id. Nevertheless, the burden of showing unreasonableness in the federal system rests on the recipient of the subpoena. Id. at 301. Moreover, federal grand jury subpoenas are presumptively reasonable. Id.

In contrast to the federal courts, however, New Hampshire

does little by way of restricting the common law powers of the grand jury, either by way of statute or by its Constitution. See Powell v. Pappagianis, 108 N.H. 523, 524 (1968). Thus, the limitations imposed on federal grand juries by means of federal rule or statute should not be imported into the state framework unless constitutionally compelled. Id. at 525 (observing that "[i]n the absence of any constitutional or statutory restrictions on the common law powers of a grand jury in this state, it is not a part of the judicial function to import them from other jurisdictions"). In sum, a state grand jury subpoena may not violate a privilege established by either the federal or state Constitutions; nor may it violate a limitation or privilege created by statute or developed through the common law. Id.; Calandra, 414 U.S. at 346.

The Court finds the arguments propounded by the State in favor of compliance with the subpoena persuasive. The arguments articulated by the Diocese in opposition are unavailing. Moreover, the objection filed by [REDACTED] adds nothing of substance to the debate. The documents sought by the Grand Jury are not in [REDACTED]'s possession, but in the possession of the Diocese. Thus, he is not being compelled to produce papers which might incriminate him. Therefore, the issue of his privilege against self-incrimination is not before the Court.

With respect to the Establishment Clause and/or the Free Exercise Clause, the Court finds no violation of the parties' First Amendment rights. The Diocese argues that the subpoena

"has the potential to lead to excessive governmental interference in the affairs of the Diocese" in violation of the test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971). See Objection to Motion to Compel, p. 8. The Court disagrees. Any purported interference with the exercise of religion in this case is "merely the incidental effect" of the subpoena, not the object of the subpoena. See Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 878 (1990). The Diocese cannot evade the reach of the criminal code by attempting to shield its action under the cloak of the Free Exercise Clause. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct. . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." Id. at 885 (quotation omitted). In the instant case, the Grand Jury is investigating allegations of the sexual abuse of children by clergy and the potential culpability of the Diocese in the process. The First Amendment is not a shield against such an investigation.

Regarding the limitation placed on a grand jury by the Fourth Amendment, the United States Supreme Court has held:

The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena *duces tecum* will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment. Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.

Calandra, 414 U.S. at 346 (quotation and citation omitted).

Thus, the salient inquiry is whether the subpoena is "far too



sweeping in its terms to be regarded as reasonable." As a guide to this inquiry:

The following questions are pertinent. . . : (1) Does the subpoena command the production of things relevant to the investigation being pursued by the grand jury?; (2) Does the subpoena specify with sufficient particularity the things being sought?; (3) Is the subpoena sufficiently narrow in scope to be considered reasonable?; (4) Has the subpoena issued for reasons other than to harass the subject?; and (5) Can the subject provide the requested evidence without unnecessary risk of personal harm (e.g., potentially dangerous invasive surgery) and/or personal humiliation (e.g., unnecessary invasion of bodily integrity or dignitary interests)?

In Re Grand Jury Proceedings Involving Vickers, 38 F.Supp.2d 159, 164 (D.N.H. 1998). Because this Court answers each of these questions in the affirmative, the Court finds the subpoena reasonable and therefore permissible under the Fourth Amendment.

Related to this inquiry, the Diocese avers that the subpoena is overbroad insofar as it lacks a time limitation. The Diocese asserts that "[t]he State's subpoena seeks all records of the Diocese with respect to claims of sexual assault dating back to an indefinite period of time." See Objection to Motion to Compel, pp. 9-10. The Diocese argues that the scope of the subpoena should be hedged by the applicable statute of limitations and that its failure in this regard is cause for the Court to disallow the subpoena.

For two reasons the Court does not concur. First, the subpoena is not "indefinite" as to time as the Diocese avers. The timeframe of the subpoena is limited by virtue of the fact that it seeks documents connected with twenty-one specific

individuals named in an attachment to the subpoena. The scope of the Grand Jury inquiry is thus limited by the dates of service of these twenty-one individuals. Second, the Grand Jury is investigating the Diocese itself for possible criminal liability, not merely the individual priests involved. Any statute of limitations analysis with respect to the criminal liability of the Diocese will not necessarily be measured from the dates of the alleged assaults insofar as the Diocese may have made re-assignment decisions with knowledge of the allegations. Consequently, the Court finds it inappropriate to disallow the subpoena based on the statute of limitations.

Finally, on the question of the priest-penitent privilege and the physician-patient privilege, the Court finds that neither privilege avails under the circumstances to avoid compliance with the subpoena. As to the former, "the privilege applies only to communications made in the understood pursuance of that church discipline which gives rise to the confessional relation, and, therefore, in particular to confessions of sin only, not to communications of other tenor[.]" 8 Wigmore on Evidence § 2395 (1940). The documents sought are "communications of other tenor" and are not "confessions of sin" in the sense protected by the privilege.

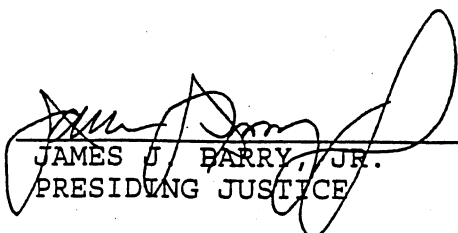
As to the physician-patient privilege, any protection it may have afforded has been waived. Revelation of a privileged communication to a third party "destroys the privilege." See State v. LaRoche, 122 N.H. 231, 233 (1982). Thus, the disclosure

of the medical records in question to the Diocese destroyed the privilege. Therefore, the physician-patient privilege cannot serve as a basis for noncompliance with the subpoena.

Accordingly, for the reasons set forth above, the Diocese's Motion to Reconsider is DENIED.

So ORDERED.

Dated: 12 Jan 2002

  
\_\_\_\_\_  
JAMES J. BARRY, JR.  
PRESIDING JUSTICE

SHEEHAN  
PHINNEY  
BASS +  
GREEN

PROFESSIONAL  
ASSOCIATION



1000 ELM STREET  
MANCHESTER, NH  
03105-3701  
603-668-0300  
FAX 603-627-8121

143 MAIN STREET, SUITE 103  
CONCORD, NH  
03301-5089  
603-223-2020  
FAX 603-224-8899

126 DANIEL STREET  
PORTSMOUTH, NH  
03801-3856  
603-433-2111  
FAX 603-433-3126

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# FACSIMILE TRANSMISSION

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SENIOR ASSISTANT ATTORNEY GENERAL  
CHIEF, CRIMINAL JUSTICE BUREAU  
OFFICE OF THE ATTORNEY GENERAL  
TELEPHONE: 603-271-3671  
FACSIMILE: 603-271-2110

FROM: BRADFORD E. COOK, ESQUIRE  
PHONE # (call this number if there is a problem): 603-627-8110

DATE: 6/10/02 NUMBER OF PAGES (including cover sheet):

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COMMENTS: Diocese of Manchester

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PROFESSIONAL  
ASSOCIATION



ATTORNEYS AT LAW

1000 ELM STREET  
PO BOX 3701  
MANCHESTER  
NEW HAMPSHIRE  
03105-3701  
603-668-0300  
FAX 603-627-8121

143 NORTH MAIN STREET  
SUITE 103  
CONCORD  
NEW HAMPSHIRE  
03301-5089  
603-223-2020  
FAX 603-224-8899

TOLL FREE:  
1-800-625-SPBC

WORLD WIDE WEB SITE:  
<http://www.sheehan.com>

Writer's Direct Dial  
(603) 627-8110  
Fax (603) 641-2343  
[bcook@sheehan.com](mailto:bcook@sheehan.com)

11165

June 10, 2002

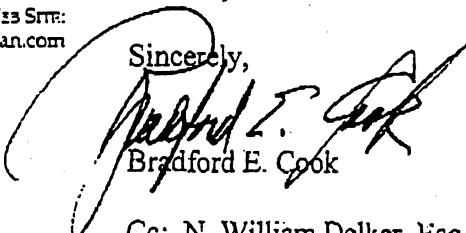
Mr. John Safford  
Clerk  
Hillsborough County Superior Court  
300 Chestnut Street  
Manchester, New Hampshire 03101

Re: In re Grand Jury Subpoena Duces tecum Served on April 8, 2002

Dear Mr. Safford,

Enclosed find a Motion to Reconsider in the above-captioned matter. We hereby request a hearing on this motion and the underlying motion. A copy of this motion and letter is being sent to N. William Delker, Senior Assistant Attorney General.

Sincerely,



Bradford E. Cook

Cc: N. William Delker, Esq.

## THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

UNDER SEALIn re: Grand Jury Subpoena *Duces tecum* Served on April 8, 2002.MOTION TO RECONSIDER

NOW COMES, the Roman Catholic Bishop of Manchester (Diocese of Manchester) (the "Diocese"), by and through its attorneys, Sheehan Phinney Bass + Green, P.A. and respectfully requests that this Honorable Court reconsider its Order granting the Attorney General's Motion to Compel, saying in support thereof:

1. On May 30, 2002, this Court granted Prayers A and B of the Attorney General's Motion to Compel. A Notice of Decision was mailed on May 31, 2002.
2. In coordinating and discussing proceeding under the subpoena by agreement, Assistant Attorney General N. William Delker III and the counsel to the Diocese expected that this Court would hold a hearing on the Motion to Compel filed by the Attorney General and on the Diocese's Objection to Motion to Compel. The parties expected that once a hearing date was set, individual priests whose private information and rights were implicated by the State's subpoena would have the opportunity to intervene in this case through counsel who were informed of this proceeding. This understanding was not communicated to the Court since on information and belief both parties expected that this would be the procedure in the ordinary course and there are

counsel for individuals whose records are sought under the subpoena who intend to participate in the hearing on behalf of their clients.

3. A hearing is necessary to allow all parties, most particularly those whose records are sought, to be heard by this court, and will allow a procedure of review of records which will be more refined than that afforded by a blanket grant of the State's motion and therefore more able to address particular legal positions on particular records, which will protect the rights of the parties and make an appeal of the Court's order less likely.

WHEREFORE, the Roman Catholic Bishop of Manchester respectfully requests that this Honorable Court Rule as follows:

- A. Grant this Motion to Reconsider;
- B. Schedule a hearing on this motion and the State's Motion to Compel; and
- C. Grant the Diocese such other and further relief as may be just, equitable and appropriate under the circumstances.

Dated: June 10, 2002

Respectfully Submitted,

THE ROMAN CATHOLIC BISHOP  
OF MANCHESTER

By Its Attorneys:  
SHEEHAN PHINNEY BASS + GREEN,  
PA.

By: 

W. Michael Dunn


By: 

Bradford E. Cook  
603-658-0300

*June 10, 2002*

CERTIFICATION

I hereby certify that a copy of this Motion to Reconsider has been this day forwarded via first class mail to N. William Delker, Senior Assistant Attorney General, 33 Capitol Street, Concord, N.H. 03301-6397.

  
W. Michael Dunn

g:\gfa\cin\manchester diocese\motion to reconsider.doc



HILLSBOROUGH-NORTH, SS

SUPERIOR COURT

NOTICE OF DECISION

N. William Delker, Esq.  
Office of Attorney General  
33 Capitol Street  
Concord NH 03301-6397

InRe: Grand Jury Subpoena

Docket #:  
02-S-1154

Please be advised that on 5/30/2002 Judge Barry, Jr. made the following order relative to:

Motion to Compel ; Granted  
"Granted as to Prayers A and B."

05/31/2002

John M. Safford, Clerk  
300 Chestnut Street, Room 127  
Manchester, NH 03101-2490  
603-669-7410

cc: Bradford E Cook, Esq.

ATTORNEY GENERAL  
STATE OF NEW HAMPSHIRE

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

11170

PHILIP T. MCLAUGHLIN  
ATTORNEY GENERAL



STEPHEN J. JUDGE  
DEPUTY ATTORNEY GENERAL

May 29, 2002

John Safford, Esquire, Clerk  
Hillsborough County Superior Court  
300 Chestnut Street  
Manchester, NH 03101

RE: In Re: Grand Jury Subpoena *Duces Tecum* Served On April 8, 2002

Dear Clerk Safford:

Enclosed please find the State's Response to Diocese's Objection to Motion to Compel regarding the above-referenced matter. Please call if you have any questions or concerns.

Sincerely,

A handwritten signature in cursive script that reads "N. William Delker".

N. William Delker  
Senior Assistant Attorney General  
Chief, Criminal Justice Bureau  
(603) 271-3671

NWD/mmp  
Enclosure

cc: Bradford Cook, Esquire  
Michael Dunn, Esquire

## THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
Northern District

MAY TERM, 2002

UNDER SEAL

In re: Grand Jury Subpoena *Duces Tecum* Served On April 8, 2002

STATE'S RESPONSE TO DIOCESE'S OBJECTION TO MOTION TO COMPEL

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and, in support of its response to the Diocese' objection to the motion to compel, states as follow:

1. On April 8, 2002, a grand jury subpoena duces tecum was issued on behalf of the Grand Jury for Hillsborough County, Northern District, for the Keeper of Records of the Diocese to produce all records relating to criminal sexual abuse by clergy. On May 14, 2002, the State filed a motion to compel production of certain records that the Diocese withheld. On May 24, 2002, the Diocese filed an objection to the motion to compel. In its objection, the Diocese raised several issues that were not addressed by the State in its motion to compel. None of the issues raised by the Diocese provide grounds to avoid compliance with the subpoena.

2. The Diocese first asserts that the documents and information were withheld because the subpoena violated the Fourth Amendment to the United States Constitution. The Diocese asserts that victims of sexual assault have an expectation that their communications with the Diocese will not be disclosed to law enforcement authorities. There are several problems with this position. The Diocese cites no authority for the proposition that privacy

considerations are a proper inquiry for determining whether a witness must comply with a subpoena duces tecum. In fact, contrary to the Diocese's contention, the Fourth Amendment does not apply to grand jury subpoenas in the same way that it does to search warrants. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Some abstract hope that witnesses or victims may have had the Diocese would not disclose information about criminal conduct is not protected by the Fourth Amendment. The United States Supreme Court has specifically recognized that a person "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443 (1976) (citation omitted).

3. The Supreme Court has questioned whether the Fourth Amendment has any bearing on a challenge to a grand jury subpoena duces tecum at all. In Walling, a corporation challenged a subpoena for corporate books and records on the ground that it violated the Fourth Amendment to the United States Constitution. 327 U.S. at 194-95. The Court began by noting that "[t]he short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question of whether order of court for production of specified records have been validly made: and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to

orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made.” Id. at 195. The Court went on to note that “the Fourth [Amendment], if applicable, at most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described,’ if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure shall not be unreasonable.” Id. at 208. More recently, the Court has reaffirmed this position, by noting, the Fourth Amendment’s limit on subpoenas for corporate records is only to prevent “unreasonably burdensome” requests for records. See Donovan v. Lone Steer, Inc., 464 U.S. 408, 415 (1984) (quotation omitted).

4. The Diocese cites In re Grand Jury Proceedings Involving Vicars and Hass, 38 F. Supp. 2d 159 (D.N.H. 1998), in support of its argument that the court should consider a multitude of factors in deciding whether to enforce a grand jury subpoena. Vicars and Hass is not applicable to the case at bar. First of all, this case involved a grand jury subpoena to obtain hair, fingerprints, and saliva – a request that is far more intrusive than the subpoena duces tecum for books and records at issue in this case. Moreover, the federal district court for New Hampshire specifically noted that “while the Constitution undoubtedly protects a citizen from an overly broad grand jury subpoena, the subpoena is not subject to the same type or degree of scrutiny under the Fourth Amendment as are search warrant applications.” Id. at 163. “[T]hose challenging such a subpoena have the burden of showing that irregularity exists.” Id. (quoting United States v. R. Enterprises, Inc., 493 U.S. 292, 301 (1991)).

5. In R. Enterprises, the United States Supreme Court addressed the appropriate test to determining how a court determines whether a witness has met his burden of establishing that the subpoena is unreasonable. The Court began by noting that "Our task is to fashion an appropriate standard of reasonableness, one that gives due weight to the difficult position of subpoena recipients but does not impair the strong governmental interests in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy. We begin by reiterating that the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. . . . Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." 498 U.S. at 300-01.

6. In order to meet this onerous burden in this case, the Diocese must show that "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Id. at 301. In the alternative, the Diocese must show that the subpoena is "too indefinite" or "compliance would be overly burdensome." Id. It does not appear that the Diocese is alleging that the subpoena is too indefinite or that it covers such a vast number of documents that compliance would be overly burdensome. Nor is there any allegation that the subpoena covers material that is irrelevant. In fact, the subpoena is specifically tailored to a finite group of priests and seeks all records relating to sexual misconduct by these priests.

7. The Diocese does allege that the subpoena should be quashed because it seeks records about offenses that may be beyond the statute of limitations. This is not a ground to quash the subpoena. First of all, the Diocese cannot show that "there is no reasonable

possibility" that the subpoenaed records are irrelevant to the grand jury's investigation. The investigation is two-pronged. On the one hand, the investigation covers individual acts of sexual misconduct by individual priests. On the other hand, the investigation is exploring whether the Diocese engaged in any criminal misconduct by its actions. In particular, if there is evidence that the Diocese covered up criminal conduct, that would be a continuing offense for which the statute of limitations has not yet run. Moreover, if the Diocese engaged in acts that amount to endangering the welfare of a child by exposing the child to a know sexual offender, that crime could also be within the statute of limitations, even if the priest committed sexual offenses against children many years ago. See State v. Portigue, 125 N.H. 352, 360-61 (1984) (the State is not required to "allege a specific time frame in which the knowing endangerment took place in order to satisfy the material elements of the offense"; rather the State may allege "a continuous course of conduct involving continuous acts or omissions"). Finally, a grand jury subpoena duce tecum is not defective because it seeks records that may cover conduct outside the statute of limitations. It is well settled that "[a] grand jury may ask questions about events outside the statute of limitations, or about acts which otherwise would not lead to indictments." United States v. Picketts, 655 F.2d 837, 841 (7th Cir. 1981) (citation omitted); see also United States v. Reed, 647 F.2d 849, 853-54 (8th Cir. 1981) (same) (citing numerous cases).

8. To the extent that the Diocese has raised other issues in its objection to the motion to compel, the State feels that those issues were adequately addressed in its initial motion to compel.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Compel the Diocese of Manchester to produce all documents described in the subpoena duces tecum attached hereto as Exhibit A;
- (B) Seal this motion and any accompanying order; and
- (C) Grant such other relief as justice may require.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

Philip T. McLaughlin  
Attorney General




---

N. William Delker  
Senior Assistant Attorney General  
Chief, Criminal Justice Bureau  
33 Capitol Street  
Concord, N.H. 03301-6397  
(603) 271-3671

**CERTIFICATE OF SERVICE**

May 29, 2002

Bradford Cook, Esq. and Michael Dunn, Esq. attorneys for the Diocese of Manchester have been given notice of the State's Motion to Compel and have been provided with copies of the State's Motion on this date.




---

N. William Delker



SHEEHAN  
PHINNEY  
BASS +  
GREEN

PROFESSIONAL  
ASSOCIATION



ATTORNEYS AT LAW

1000 ELM STREET  
PO Box 3701  
MANCHESTER  
NEW HAMPSHIRE  
03105-3701  
603-668-0300  
FAX 603-627-8121

143 NORTH MAIN STREET  
SUITE 103  
CONCORD  
NEW HAMPSHIRE  
03301-5089  
603-223-2020  
FAX 603-224-8899

OLD CITY HALL  
126 DANIEL STREET  
PORTSMOUTH  
NEW HAMPSHIRE  
03801-3856  
603-433-2111  
FAX 603-433-3126

TOLL FREE:  
1-800-625-SPBG

WORLD WIDE WEB SITE:  
<http://www.sheehan.com>

Writer's Direct Dial  
(603) 627-8110  
bcook@sheehan.com

May 24, 2002

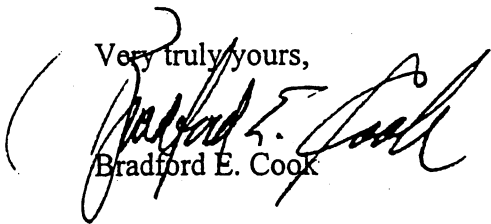
John Safford, Esq., Clerk  
Hillsborough County Superior Court  
300 Chestnut Street  
Manchester, NH 03101

Re: **In re Grand Jury Subpoena *Duces Tecum* Served on April 8, 2002**

Dear Mr. Safford:

Enclosed please find the Roman Catholic Bishop of Manchester's  
Objection to the State's Motion to Compel in the above referenced matter. Please  
do not hesitate to call if you have any questions.

Very truly yours,

  
Bradford E. Cook

BEC/ggf

Enclosure

cc: N. William Delker

## THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

UNDER SEALIn re: Grand Jury Subpoena *Duces tecum* Served on April 8, 2002.OBJECTION TO MOTION TO COMPEL

NOW COMES, the Roman Catholic Bishop of Manchester (Diocese of Manchester), by and through its attorneys, Sheehan Phinney Bass + Green, P.A. and objects to the Attorney General's Motion to Compel the Keeper of the Records of the Diocese of Manchester (the "Diocese"), to produce all documents covered by the State's subpoena *duces tecum*, saying in support thereof:

I. FACTUAL BACKGROUND

On April 8, 2002, Assistant Attorney General N. William Delker, III issued a subpoena *duces tecum* seeking a wide range of materials relating to potential allegations of child sexual abuse by New Hampshire priests. On April 12, 2002, the Diocese produced a package of materials relating to the subpoena *duces tecum*. The Diocese redacted certain materials on the basis (a) that they were protected under the First Amendment; (b) that they were protected under the Fourth Amendment; (c) that they were protected by the priest-penitent and physician-privileges. The redacted materials included the following:

1. The names of victims of alleged child sexual abuse, along with other names that, if disclosed, would clearly identify the alleged victims;
2. Medical records relating to certain priests identified in the subpoena;

3. Intra-church communications and recommendations;
4. Documents relating to civil settlements that (a) are subject to confidentiality agreements; or (b) which the parties had an expectation would be kept private.
5. Attorney-client privileged materials.

The State filed the instant Motion to Compel to compel the Diocese to produce all of the documents described in its subpoena *duces tecum* including the materials redacted by the Diocese.

## II. ARGUMENT

### A. Constitutional Requirements of Valid Subpoena *Duces Tecum*.

There is a presumption of regularity that attaches to grand jury subpoenas, and the burden is upon the party challenging the subpoena. See In re Grand Jury Proceedings Involving Vicars and Hass, 38 F.Supp.2d 159, 163 (D.N.H. 1998). However, the grand jury's subpoena power is not unlimited. U.S. v. Calandra, 414 U.S. 338, 346 (1974). For example, a grand jury may not "violate a valid privilege, whether established by the Constitution, statutes or the common law." Id. Also, a grand jury is without power to invade a legitimate privacy interest protected by the Fourth Amendment and [a] grand jury's subpoena *duces tecum* will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment. Id.

The Federal District Court for the District of New Hampshire has held that there are five questions that are pertinent to assess the reasonableness of a subpoena. They are as follows:

"(1) Does the subpoena command the production of things relevant to the investigation being pursued by the grand jury"; (2) Does the subpoena specify with sufficient particularity the things being sought; (3) Is the subpoena

sufficiently narrow in scope to be considered reasonable; (4) Has the subpoena been issued for reasons other than to harass the subject?; (5) Can the subject provide the evidence without unnecessary risk of personal harm . . . and/or personal humiliation . . . . In short the court must determine whether protected constitutional values or rights are likely to be unduly burdened or violated if the subpoena is not quashed.”

In re Grand Jury Proceedings Involving Vicars and Hass, 38 F.Supp.2d 159, 164 (D.N.H. 1998) (citing In re Grand Jury Subpoenas *Duces tecum*, 391 F.Supp. 991 (D.R.I.1975); Winston v. Lee, 470 U.S. 753 (1985); Cupp v. Murphy, 412 U.S. 291 (1973); Schmerber v. California, 384 U.S. 757 (1966)).

**B. Names of Victims or Witnesses and Settlement Documents.**

On April 12<sup>th</sup>, the Diocese provided the State with copies of the complaint files. In order to maintain the confidentiality of the persons involved, the Diocese redacted the names of the victims of alleged abuse as well as the name of other individuals who, if the names were disclosed, would readily identify the victims. The Diocese also withheld confidential settlement documents that contained express confidentiality provisions. The Diocese withheld these documents on the basis that the persons to which these documents relate had a reasonable expectation that the Church would keep these documents private under the Fourth Amendment and that there was a contractual promise to do so. These legal documents were the result of settlements with claimants represented by legal counsel or, who, having been advised to have counsel knowingly waived that right.

The State’s subpoena is unconstitutionally broad because it seeks documents that are protected under the Fourth Amendment and Part 1, Article 19 of the New Hampshire Constitution. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects. against unreasonable searches and seizures....” Similarly, Part 1, Article 19 of the New Hampshire Constitution, provides that “[e]very

subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.” The burden is on the defendant to show that it has a legitimate expectation of privacy. State v. Alosa, 137 N.H. 33, 37 (1993). To meet this burden, the defendant must satisfy two criteria. Id. First, the defendant must show that it had a subjective expectation that the evidence would remain private. Id. Second, the defendant must show that the expectation is one that society would deem reasonable or legitimate. State v. Valenzuela, 130 N.H. 175, 181, 536 A.2d 1252, 1257 (1987) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), cert. denied, 485 U.S. 1008 (1988)). Certain factors that have been considered pertinent to this analysis include ownership, possession, control, and ability to regulate access to the evidence, historical use of the item seized, and the totality of the surrounding circumstances. United States v. Sanchez, 943 F.2d 110, 113 (1st Cir.1991).

In Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Supreme Court recognized that President Nixon had a legitimate expectation of privacy that entitled him to Fourth Amendment protection for certain personal materials. The Nixon case involved a constitutional challenge of a federal statute that directed that archivists screen materials generated during Nixon’s presidency. Included within the vast number of records that were being screened were certain personal “communications between him and, among others, his wife, his daughters, his physician, lawyer and clergyman.” Id. at 459 (emphasis added). The Court recognized that Nixon had a legitimate expectation of privacy in these personal materials.

The victims of abuse and parties to civil settlements have an expectation that their communications with the Diocese would remain private, which under the circumstances

is a reasonable expectation. First, they were told that the information would be kept confidential and that the documents and communications would be kept in central files. Second, the materials sought by the State contain highly personal information relating to priests, employees and parishioners that no reasonable person would expect the Church to divulge without their prior consent. The Church's parishioners understand that their communications to the church are privileged under state law and Canon Law. They have an expectation that the Church will not unilaterally force them into a situation where they must discuss these allegations in public by disclosing information they communicated to the Church with an expectation of privacy. Clearly, given the tremendous publicity of the recent allegations against the Church, victims understand that they may come forward if they choose to do so. Third, many of the settlement agreements that the State seeks are subject to nondisclosure agreements to which the Church is contractually bound. All of these factors would tend to show that the parties to whom the files refer had a reasonable expectation that information contained within the Diocese's files would be kept confidential.

The compelled disclosure of confidential information relating to the victims also infringes upon the rights of the victims to associate with the Church. In Buckley v. Valeo, 424 U.S. 1, 66 (1976), the Supreme Court held that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment Rights." The rights of the Church's members to associate and practice their religion could become impaired if the names and records of those who participate in the Church can become subject to mandatory disclosure.

Here, the victims of alleged abuse relied upon the Church to keep their confidential documents private. The compelled disclosure of this information could expose a large number of parishioners who have otherwise decided not to come forward, to the review of the grand jury. This compelled disclosure could cause disincentives for people to associate with the Church because they no longer believe that their confidences could be kept.

**C. Medical Records Relating to Priests.**

The Diocese also withheld certain medical records relating to the Diocese's priests suspected of abuse. These documents are covered by RSA 329:26, which sets forth the physician-patient privilege<sup>1</sup>, and/or RSA 330-A:32 which applies to communications to psychologists, clinical social workers and pastoral psychologists.<sup>2</sup> Both of these statutes provide that communications between a licensed professional and patient are placed on the same basis as communications between attorney and client, any may not be disclosed except pursuant to a court order.

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<sup>1</sup> RSA 329:26 provides in pertinent part that: "[t]he confidential relations and communications between a physician or surgeon licensed under provisions of this chapter and the patient of such physician or surgeon are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications. Confidential relations and communications between a patient and any person working under the supervision of a physician or surgeon that are customary and necessary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising physician or surgeon."

<sup>2</sup> RSA 330-A:32 which provides in pertinent part that: "[t]he confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order. Confidential relations and communications between a client and any person working under the supervision of a person licensed under this chapter which are necessary and customary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with the supervising person licensed under this chapter, unless such disclosure is required by a court order."

The State argues that the priests have waived whatever expectation of privacy that they enjoyed by disclosing the contents of their files to the Diocese. "Ordinarily, the presence of an extraneous third party to a privileged conversation destroys the privilege." State v. LaRoche, 122 N.H. 231, 233 (1982). The purpose behind the physician-patient privilege is not to exclude relevant evidence, but to facilitate activities that require confidence. See In re Katherine M. et al., 126 N.H. 472, 475 (1985) (discussing psychiatrist-patient privilege). The disclosure of confidential medical information to the Diocese should not constitute a waiver of that physician-patient privilege, because the Diocese, unlike an extraneous third party, is subject to several obligations of confidentiality that are discussed throughout this Objection. First, the Diocese is required by the priest-penitent privilege and Canon Law to keep information received from its members private. These privileges apply to priests as well as parishioners for the purposes of seeking religious counseling. See Under New Hampshire Rule of Evidence 505. Second, the Church enjoys First Amendment protections under the Establishment clause particularly where issues relating to the assignment of priests are implicated. Third, the Church is contractually bound to keep certain documents confidential.

**D. Intra-Church Recommendations Regarding the Assignment of Priests and Internal Church Governance**

In response to the State's subpoena, the Diocese withheld certain communications and recommendations by the Diocese relating to the assignment of particular priests or considerations of Church policy or organization. The Diocese, like all other religious organizations, has a First Amendment right to make certain decisions regarding matters of faith.



The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This proscription has been extended to the States by virtue of the Fourteenth Amendment. The Establishment Clause under the First Amendment generally provides that "religious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). Thus "religious organizations may establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes of church matters" which may not be questioned by civil courts. Id. at 724.

Under the Establishment Clause, governmental interference in religious organizations is evaluated on the three part test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971), and will be upheld so long as the governmental interference (i) has a secular purpose; (ii) has a primary effect that neither advances nor inhibits religion; and (iii) does not produce excessive governmental entanglement with religion. The State seeks private communications between members of the Diocese regarding the assignment of priests. The State's subpoena has the potential to lead to excessive governmental interference in the affairs of the Diocese, in violation of the third prong of the Lemon test. Questions regarding who should, and who should not serve as a priest goes to the core of church decision-making. See Minker v. Baltimore Annual Conf. of the United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990). In Minker, the D.C. Circuit held that "any inquiry into the church's reasons for asserting that [a priest] was not suited for a particular pastorate, would constitute excessive entanglement in its affairs." Id. at 1359.

Similarly, it was held in United Methodist Church v. White, 571 A.2d 790 (D.D.C. 1990) that “[t]he First Amendment Establishment Clause and Free Exercise Clause grant churches immunity from civil discovery under certain circumstances in order to avoid subjecting religious institutions for defending their religious beliefs and practices in a court of law.” See also McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir.1972) (“[a]n investigation and review of such matters of church administration and government as a minister's salary, his place of assignment, and his duty, ... could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the Constitution.”). There is a serious potential that the State’s subpoena could result in an after-the fact review of the Church’s evaluations and treatment policies regarding its own priests.

E. **The State’s Subpoena Is Overbroad and Seeks Irrelevant Documents Since It Does Not Contain A Time Limitation**

New Hampshire’s statute of limitations for the prosecution of sexual assaults is generally six years. RSA 625:8, I. In 1990, RSA 625:8 was amended to provide that the statute of limitation for child sex abuse runs until 22 years after the victim’s eighteenth birthday. RSA 625:8, III(d). “[U]ntil a criminal statute of limitations has run, it is a mere regulation of the remedy and [the court] will presume that an extension of the limitations period applies retrospectively.” State v. Hamel, 138 N.H. 392, 395 (1994)(citations omitted). “After the limitations period has run, however, it is a vested defense of right that cannot be taken away by legislative enactment.” Id. (citations omitted).

Clearly, there are many matters barred by the statute and that information can be determined from the information already provided. The State’s subpoena seeks all records of the Diocese with respect to claims of sexual assault dating back to an

indefinite period of time. The State's subpoena should be tailored to the search for evidence of prosecutable offenses. Any materials that relate to a time period earlier than the applicable statute of limitation are irrelevant and any subpoena that seeks documents which does not reasonably relate to the statute of limitations period is overbroad. Other courts have evaluated the proper scope of a grand jury subpoena based upon the statute of limitations for the crimes being investigated. See In re Grand Jury Investigation, 459 F.Supp. at 1343 (holding that grand jury subpoena seeking documents for past five or six years was not unreasonable when it approximated five year statute of limitations); In re Grand Jury Proceedings (John Doe), 801 F.2d 1164 (9<sup>th</sup> Cir. 1986)(holding that subpoena seeking materials for prior two or three years was reasonable where statute of limitations was five years). Therefore the State's subpoena is overbroad to the extent that it seeks any documents in cases already barred.

### III. CONCLUSION

For the reasons discussed above, the State's Motion to Compel should be denied. If, however, the Court does decide that any of the constitutional or evidentiary privileges discussed above should yield, the court should in order to prevent abuse "examine with counsel the records and other materials in question and determine" what parts, if any must be disclosed. See State v. Farrow, 117 NH 731, 733 (1976).

WHEREFORE, the Diocese of Manchester respectfully requests that this Honorable Court Rule as follows:

- A. Deny the State's Motion to Compel in its entirety;

B. In the event that the Court decides not to deny the State's Motion, order that the records sought should be reviewed by the Court in camera for privilege on a document by document and case by case basis; and

C. Grant the Diocese such other and further relief as may be just, equitable and appropriate under the circumstances.

Dated: May 24, 2002

Respectfully Submitted,

THE ROMAN CATHOLIC BISHOP  
OF MANCHESTER

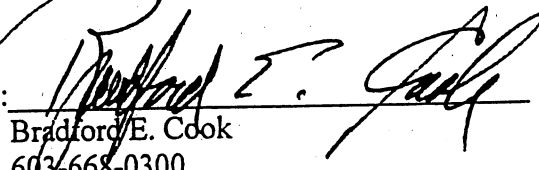
By Its Attorneys:

SHEEHAN PHINNEY BASS + GREEN,  
PA.

By:

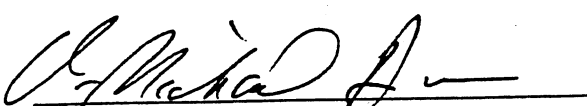
  
W. Michael Dunn

By:

  
Bradford E. Cook  
603-668-0300

**CERTIFICATION**

I hereby certify that a copy of this Objection to Motion to Compel has been this day forwarded via first class mail to N. William Delker, Senior Assistant Attorney General, 33 Capitol Street, Concord, N.H. 03301-6397.

  
W. Michael Dunn