

REDACTED

DISTRICT COURT, COUNTY OF ARAPAHOE,
STATE OF COLORADO
7325 S Potomac Street
Centennial, Colorado 80112

▲ COURT USE ONLY ▲

Plaintiff: People of the State of Colorado

Case No. **12CR1522**

v.

Division: **22**

Defendant: Holmes, James Eagan

**ORDER RE: RENEWED MOTION TO QUASH PEOPLE'S
SUBPOENA DUCES TECUM (PSDT-2)
FOR DEFENDANT'S EDUCATIONAL RECORDS (D-14a)**

This matter comes before the Court on the People's Subpoena to Produce (PSDT-2), filed September 13, 2012, and Defendant's Renewed Motion to Quash Subpoena Duces Tecum for Defendant's Educational Records (D-14), filed August 8, 2012, and renewed in court September 20, 2012. The Court incorporates its analysis from its Order Re: Motion to Quash Subpoena Duces Tecum for Defendant's Educational Records (D-14), issued August 27, 2012. Having considered and reviewed the Motion, Response, Reply, and Oral Arguments, as well as the applicable authorities, the Court FINDS and ORDERS as follows:

FACTS

At the hearing held August 30, 2012, this Court granted leave to the People to reissue their subpoena duces tecum to the University of Colorado for Defendant's education records. The original subpoena issued August 3, 2012, produced 340 pages of documents from the university, which were submitted to this Court. After an *in camera* review of the documents, the Court released approximately twenty-seven pages from the packet produced by the University of Colorado. A subsequent modified subpoena was issued to the University of Colorado on September 10, 2012, which requested records held by the university regarding Defendant, including: the completed student application, all class schedules and transcripts of grades, any departmental files contained within the Department of Neuroscience, all records relating to building access, all oral-examination documents and testing materials generated and utilized by CU staff, all documents from the University of Colorado Behavioral Evaluation and Threat Assessment team, and all campus police records. The University of Colorado provided this Court with two identical sets of documents on September 20, 2012. Both sets were separated into nine different document categories and Bates-stamped; each set included a table of contents, a redaction log, and a Bates index.

ANALYSIS

Defendant asserts that the People's subpoena duces tecum for Defendant's education records from the University of Colorado is an improper prosecutorial fishing expedition to obtain discovery. Defendant continues to assert that the subpoena is overbroad, lacks specificity, and is unreasonable and oppressive, and, therefore, it should be quashed under Colo. R. Crim. P. 17(c). Additionally, Defendant argues the subpoena is being used by the People to circumvent Defendant's Fourth Amendment right under the United States and Colorado Constitutions because the subpoena compels production of information in which Defendant has a reasonable expectation of privacy. Finally, Defendant asserts that the education records contain privileged and confidential information and are therefore protected by federal and Colorado statutes.

The People state that, while the education records are protected by state and federal statutes, their subpoena duces tecum for Defendant's University of Colorado records falls under an exception to those statutory protections because the subpoena is for a law enforcement purpose. It is the People's position that information about Defendant's admission to, performance in, and withdrawal from the University of Colorado is of great importance because it gives context to what was happening in his life on and before July 20, 2012. The People assert that such information will show Defendant's intent, motive, and plan regarding the charged crimes. The People state that Defendant's career path at the university will illustrate his general dissatisfaction with life and a downward spiral, which resulted in the events of July 20, 2012. The People state that they have not subpoenaed medical or psychiatric records and assert that the documents are, therefore, not protected by any medical-record privilege. The People have requested that the Court review the education records *in camera* to remove any inadvertently included medical information and ask the Court to release to the People any of Defendant's non-privileged education records from the University of Colorado.

The Court incorporates into this section its conclusions of law from its previous Order Re: Motion to Quash Subpoena Duces Tecum for Defendant's Educational Records (D-14), issued August 27, 2012. In its previous Order, this Court found that it was appropriate to conduct an *in camera* review of the materials produced by the University of Colorado. Having incorporated those findings, the Court FINDS that an *in camera* review of the second set of documents produced by the University of Colorado on September 20, 2012, is appropriate to excise the non-discoverable material from the discoverable documents. See *People v. Ullery*, 984 P.2d 586, 590 (Colo. 1999) (finding *in camera* review appropriate where court reviewed materials to determine which documents were protected attorney work product and which should be disclosed).

In its previous Order, this Court analyzed the first set of documents produced by the University of Colorado first under the *Spykstra* Test, which requires that the proponent of the subpoena show the requested materials: (i) exist, (ii) are evidentiary and relevant, (iii) are not otherwise procurable, (iv) are necessary to trial preparation, and (v) are not requested as a fishing expedition. *People v. Spykstra*, 234 P.3d 662, 669 (Colo. 2010). Additionally, the Court analyzed the People's subpoena under the Fourth Amendment, the Colorado Open Records Act ("CORA"), the Family Educational Rights and Privacy Act of 1974 ("FERPA"), and the Health Insurance Portability and Accountability Act ("HIPAA"). Having incorporated the findings of

the Order Re: Motion to Quash Subpoena Duces Tecum for Defendant's Educational Records (D-14), issued August 27, 2012, this Court will use the same framework and procedure to analyze each of the nine document categories that the University of Colorado has identified and produced in response to PSDT-2. First, this Court will examine the People's subpoena under the *Spykstra* Test, and then it will weigh Defendant's confidentiality interest in the documents against the People's showing of need for the documents. The Court has reviewed documents CU 00001-340. Because the Court relies on the categories created and produced by the university, the Court FINDS a redacted copy of the Table of Contents, the redaction log, and the Bates indices may be released to the People.

1. Registrar File

The People state that it is likely that Defendant's education records contain a statement of purpose of why Defendant applied to the University of Colorado and what he expected to accomplish if he was accepted. Hr'g Tr., Aug. 23, 2012, 25:5-7. The People assert that Defendant's expectations set forth in his application establish where he thought he would be and what he believed he would accomplish at the University of Colorado. *Id.* They state that such facts, combined with evidence that Defendant failed to attain his goals or meet his expectations, would show that Defendant was generally dissatisfied with his life and had motive to commit the crimes charged. Hr'g Tr., Aug. 23, 2012, 25:22-25; 27:11-16. The People state that evidence of motive is relevant to the element of intent, which they are required to prove at trial. Hr'g Tr., Aug. 23, 2012, 25:22-25.

It is likely that Defendant's education records at the University of Colorado contain documents that Defendant sent as part of his application to the university, and it seems likely that such application documents would be possessed and retained only by the university. Therefore, this Court FINDS that the People have sufficiently shown that the documents exist and are not otherwise procurable. The People must show the documents are relevant, necessary, and not requested for a fishing expedition. While Defendant argues that motive is not an element and is therefore not relevant, "motive is a state of mind personal to the party harboring it and is a circumstance tending to establish the requisite mens rea for a criminal act." *People v. Elkhatib*, 632 P.2d 275, 279 (Colo. 1981). Intent will be a key issue at trial, and it is likely that facts relevant to prove motive will tend to make the question of intent more or less probable. Therefore, evidence of motive relevant to the issue of guilt and intent is sufficiently relevant to meet the *Spykstra* requirement. Documents that establish Defendant's expectations when applying to the University of Colorado could possibly make more or less probable the fact that Defendant had a motive to commit the crimes charged. Therefore, the Court FINDS that the People have established that documents concerning Defendant's expectations at the time he applied to the University of Colorado are sufficiently evidentiary and relevant under the *Spykstra* Test.

Because the People must establish the element of intent at trial, any information regarding intent, planning, or motive is necessary to the People's investigation and prosecution of this case. Therefore, the Court FINDS the application documents created by Defendant when applying to the University of Colorado Neuroscience Department are necessary. This request is

sufficiently specific and narrow to meet the *Spykstra* requirement that the subpoena not promote a general fishing expedition.

Having found that the People's request for documents created by Defendant and sent to the University of Colorado during his application for admission passes the *Spykstra* Test, the Court must consider whether the People's interest in these documents outweighs Defendant's confidentiality interest in his education records. FERPA grants students a general confidentiality interest in education records. However, the statute specifically creates an exception to the general confidentiality afforded to education records when record production is requested for a law enforcement purpose. Therefore, this Court FINDS that the People's request made in the interest of investigating and prosecuting this case to the full extent of the law falls under the law enforcement exception and overrides Defendant's FERPA confidentiality interest in these documents.

The Court FINDS that certain documents in the Registrar File authored by Defendant and sent to the University of Colorado as part of his application for admission may be released to the People. The Court ORDERS the release of CU 000020-28; CU 000031-36; CU 000040; and CU 000045. The People have not sufficiently illustrated how any other part of the Registrar's File in Defendant's education records would be necessary or relevant and evidentiary to the prosecution of this case. Therefore, the Court FINDS those remaining Registrar's File documents in Defendant's education records may not be released.

2. Class Schedule

The People assert that Defendant's course schedules will illustrate what he was being asked to do in the program and in each of his specific classes. Hr'g Tr., Aug. 23, 2012, 26:15-20. Combined with other information, such as his grades, the course schedules would likely illustrate what Defendant was studying and where his problems and difficulties were occurring. Hr'g Tr., Aug. 23, 2012, 26:15-20. It is the People's position that such information would give context to the events of July 20, 2012, and would show the planning and intent of the events.

Defendant's course schedule is likely to exist in his education records at the University of Colorado. Defendant attended classes at the university during 2011 and 2012, and it is likely that the university kept track of the courses in which he was enrolled and those that he attended. It also seems likely that, aside from the university, no other entity would have detailed information about Defendant's course schedule. Therefore, the Court FINDS that the People have sufficiently shown that documents about Defendant's class schedule exist and are not otherwise procurable. However, the details of Defendant's courses and studies are not facts of consequence regarding the events of July 20, 2012, and the People have not sufficiently illustrated how the course schedules are relevant to facts that would illustrate an element of the crimes charged in this case. Therefore, the Court FINDS that the People have failed to show that the documents about Defendant's class schedule are evidentiary and relevant, necessary to trial preparation, and, thus, not a fishing expedition. Therefore, the Court ORDERS that documents CU 000056-63 shall not be released to the People.

3. Unofficial Transcript

The entirety of this section was previously released to the People under the Order Re: Motion to Quash Subpoena Duces Tecum for Defendant's Educational Records (D-14), issued August 27, 2012. The Court incorporates its findings of fact and conclusions of law under that Order and FINDS the entirety of this section, documents CU 000064-65, may be released to the People.

4. Department File

The People state that information regarding Defendant's relationships and performance within his department at the University of Colorado are important. The People assert that Defendant's communications with faculty, professors, and other students would indicate when and in what areas Defendant started to struggle and what his professors were advising him to do at that time. Hr'g Tr., Aug. 23, 2012, 26:25-27:3. Additionally, the People assert that information regarding Defendant's withdrawal from the University of Colorado is of great importance because his decision and rationale for severing his relationship with the university happened just weeks before the events of July 20, 2012, and, therefore, could shed light on his motive and intent for those events. Hr'g Tr., Aug. 23, 2012, 27:11-16.

The analysis of the subpoenaed documents in the Department File is similar to the analysis of documents in the Registrar File above. Defendant's education records are held by the University of Colorado and are likely to contain documents referring to Defendant's application to, time in, and withdrawal from the university and its Neuroscience Department. Therefore, the Court FINDS these documents likely exist. Again, it seems likely that such application documents would be possessed and retained only by the university, and, thus, the Court FINDS these documents are not otherwise procurable. Having already determined that any documents that establish Defendant's expectations when applying to the University of Colorado are relevant and necessary, the Court FINDS that those documents are relevant, evidentiary, and necessary. Similarly, documents concerning Defendant's withdrawal from the University of Colorado may shed light on Defendant's state of mind around the time of the events leading to the current charges. Because Defendant's state of mind could make the element of intent more or less probable and because the People must establish intent at trial, the Court FINDS documents regarding Defendant's withdrawal from the University of Colorado are relevant and are necessary to the People's investigation and prosecution of this case. Therefore, this Court FINDS the People have shown a need for the documents that goes beyond a mere fishing expedition.

Having found that the People's requests for documents about Defendant's application to and withdrawal from the University of Colorado pass the *Spykstra* Test, the Court must consider whether the People's interest in these documents outweighs Defendant's confidentiality interest in his education records, as created by FERPA. FERPA specifically creates an exception to the general confidentiality afforded to education records when record production is requested for a law enforcement purpose, and the People's request can be categorized as for a law enforcement purpose. Therefore, this Court FINDS that the People's interest in investigating and prosecuting this case to the full extent of the law, which would be furthered by the production of certain of

these subpoenaed documents, sufficiently overrides Defendant's FERPA confidentiality interest in the records. Therefore, the Court ORDERS that the following documents may be released to the People: CU 000070-80; CU 000093-96; CU 000099-105; CU 000112-119; CU 000125-130; CU 000133-136; CU 000140-142; CU 000148-150; CU 000336.

5. Database Note

The University of Colorado has indicated that the subject of this section of documents might relate to communications that are privileged under C.R.S. § 13-90-107. The matter of privilege has been suspended without a formal resolution, and the People have failed thus far to show that the privilege does not apply to or has been waived with regards to the requested information. If the privilege were to apply to the documents, they would not be released. As to anything not privileged but merely confidential, this Court will apply a balancing test of the People's need for the information against the sensitivity of the confidential information. Having done so, this Court cannot find that the People's interest overrides Defendant's confidentiality interest in those documents because the People have failed to show that the documents are evidentiary and relevant or that they are necessary to trial preparation. This Court FINDS that the People have not made a sufficient showing of need for the documents under this category and disclosure of these documents under the People's subpoena would be improper. Therefore, the Court ORDERS that documents CU 000151-153 not be released.

6. - 7. University of Colorado Police Records & Intelligence File

The People have acknowledged that they "probably have campus police records, but [they] don't know that for sure," as the university has been cautious in releasing records relating to Defendant. Hr'g Tr., Aug. 23, 2012, 27:22-28:2. Records of any campus investigation would be owned and maintained only by the University of Colorado Police Department. The Court FINDS the People have sufficiently shown the records exist and are not otherwise procurable. Generally in a criminal investigation, a prosecutor has access to, and obligations regarding, information collected by staff of the prosecution or any others who have participated in the investigation or evaluation in a case. *See* Colo. R. Crim. P. 16(I)(a)(3) (2012) ("The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office."); *Chambers v. People*, 682 P.2d 1173, 1180 (1984) (stating a "prosecutor is required to maintain conditions adequate to obtain such material from various investigative personnel"). Additionally, prosecutors are obligated to "ensure the flow of information is maintained between the various investigative personnel and her office." Colo. R. Crim. P. 16(I)(b)(4). If the University of Colorado Police Department has a law enforcement investigation file about Defendant, that information is likely relevant. The Court FINDS that the People have shown that the police records and intelligence file are relevant and evidentiary and that they are necessary to the People's continued investigation and prosecution of this case and their obligations under the Rules of Criminal Procedure. Thus, the People's request for campus police records relating to Defendant does not constitute an impermissible fishing expedition.

FERPA specifically excludes from the term “education records” any “records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.” 20 U.S.C. § 1232g(4)(B)(2) (2012). Therefore, Defendant does not have a statutorily-created confidentiality interest in these records under FERPA, and the additional balancing of need against confidentiality or privilege beyond the *Spykstra* Test is not required. See *Spykstra*, 234 P.3d at 670.

The People requested the Court perform this *in camera* review to remove any privileged medical or psychiatric documents. The University of Colorado has represented that no medical records or documents protected by HIPAA have been produced. This Court previously found that Defendant had a professional relationship with Dr. Lynne Fenton in the summer of 2012 that was privileged under C.R.S. §§ 13-90-107(1)(d), (g). Hr’g Tr., Aug. 30, 2012, 33:10–16. Once a statutory privilege under § 13-90-107 is established, it continues until it is waived by the holder. *Clark v. Dist. Court*, 668 P.2d 3, 8 (Colo. 1983). As of the date of this Order, the People have stipulated to an arrangement regarding other communications between Dr. Fenton and Defendant; this stipulation rendered the issue of the scope and duration of the privileged relationship between Dr. Fenton and Defendant unresolved. Dr. Fenton has indicated that her communications with Officer Whitten at the University of Colorado Police Department might have breached the statutory privilege held by Defendant. Hr’g Tr., Aug. 30, 2012, 65:4–69:13. Therefore, this Court has reviewed the documents produced by the University of Colorado Police Department to prevent disclosure of any documents that could fall within the purview of Defendant’s statutorily-protected privilege.

The Court FINDS that the subpoena by the People for all campus police records relating to Defendant meets the requirements of the *Spykstra* Test, except for any documents that contain information from Dr. Fenton or communications that may be privileged under §§ 13-90-107. Regarding document CU 000277, the Court is still unclear whether the quotations written in the notes of Officer Whitten were from Dr. Fenton and, therefore, the Court will not release that document in an abundance of caution. The Court ORDERS the following documents may be released to the People: CU 000154–233; CU 000235–236; CU 000241–251; CU 000254–266; CU 000270–276; CU 000278; CU 000280; CU 000291–317.

8. University of Colorado Police Report

The entirety of this section was previously released to the People under the Order Re: Motion to Quash Subpoena Duces Tecum for Defendant’s Educational Records (D-14), issued August 27, 2012. The Court incorporates its findings of fact and conclusions of law under that Order and FINDS the entirety of this section, documents CU 000320–334, may be released to the People.

9. Voice Mail

The People have not specifically stated that any voice mails from the University of Colorado are necessary or relevant to their investigation of Defendant and the events of July 20, 2012. Furthermore, the University of Colorado has named both the author and the source of these documents, and both of the parties seemingly had professional relationships with

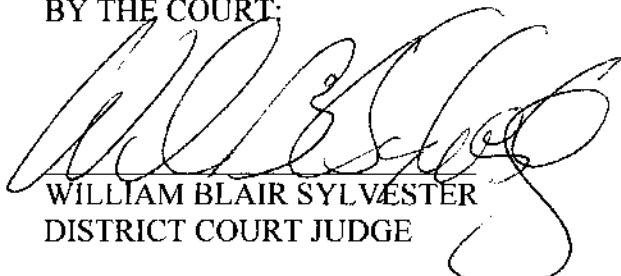
Defendant under C.R.S. § 13-90-107. The communications in these documents may be protected by statutory privilege, and Defendant asserts that the documents should be assumed privileged. This Court agrees. Therefore, the Court ORDERS that document CU 000318 not be released.

CONCLUSION

Having analyzed each of the nine categories of documents identified and produced by the University of Colorado under the *Spykstra* Test and performed the balancing test of the People's need for the materials against Defendant's confidentiality interest in the materials, the Court FINDS and ORDERS that the People may access the documents released above. Copies of the released documents are attached hereto. Any documents that the Court has declined to release shall remain sealed with the Court and kept confidential by the University of Colorado. A clean copy of all the materials produced by the University of Colorado will be retained by the Court for purposes of any appeal.

DATED this 16th day of October, 2012.

BY THE COURT:



WILLIAM BLAIR SYLVESTER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2012, a true and correct copy of **Order Re: Renewed Motion to Quash People's Subpoena Duces Tecum (PSDT-2) for Defendant's Educational Records (D-14a)** was served upon the following parties of record.

Karen Pearson
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Sherilyn Koslosky
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A handwritten signature in black ink, appearing to read "Emma Herub". The signature is written in a cursive style and is positioned to the right of the court seal.