UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-cv-30097-MGM
	)	
AMHERST COLLEGE, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER REGARDING
NON-PARTY ERIC HAMAKO'S MOTION FOR A PROTECTIVE ORDER
(Dkt. No. 63)
June 17, 2016

ROBERTSON, U.S.M.J.

Plaintiff "John Doe" ("Plaintiff"), a former student at Amherst College ("Amherst" or "the College"), brings this action against the College and its president, Carolyn "Biddy" Martin, and former administrators James Larimore, Susie Mitton Shannon, and Laurie Frankl (collectively, "Defendants") in connection with the College's sexual misconduct disciplinary proceedings against him. Before the court is a motion by non-party Eric Hamako ("Mr. Hamako") for a protective order quashing a subpoena that Plaintiff served on him for deposition testimony and documents (Dkt. No. 63). Plaintiff opposes Mr. Hamako's motion (Dkt. No. 80). The court heard Mr. Hamako[1] and Plaintiff at oral argument (Dkt. No. 86), and for the reasons stated, denies the motion.

[1] Mr. Hamako is represented by counsel for Defendants.

I. Background

A brief sketch of the factual allegations and procedural background suffices for purposes of this motion.[2] On October 28, 2013, a female student at Amherst, "Sandra Jones" ("Jones"), filed a complaint accusing Plaintiff of sexually assaulting her in February 2012 (Dkt. No. 102 at ¶27.). The College retained an attorney to investigate Jones's complaint and report on her conclusions and held a disciplinary hearing on December 12, 2013 (*id*. at ¶¶ 30, 47). Mr. Hamako was one of three panelists on Amherst's sexual misconduct disciplinary hearing board (the "Hearing Board") (*id*. at ¶ 48 and Ex. 3, p. 4).

Both Jones and Plaintiff testified at the hearing (*id*. at ¶¶ 53-55 and Ex. 3). Jones testified that in the very early hours of the morning on February 5, 2012, she and Plaintiff had a sexual encounter during which she initially consented to and did perform oral sex on Plaintiff (*id*. at ¶ 53). She became uncomfortable, however, and told Plaintiff that she wanted to stop (*id*.). Plaintiff persisted, holding her head down until he ejaculated (*id*.). In response to a question from Mr. Hamako about what she did in the hours immediately following the incident, Jones testified that she did not want to be alone, so she texted a friend to come over to talk and spend the night (*id*. at ¶ 54 and Ex. 3, p. 45). Jones also testified to having texted with another student about her sexual encounter with Plaintiff "as if it had been consensual," which she explained was because she "didn't want to address what had happened … and … was in no position yet to accept that it had been rape" (*id*. at ¶ 56 and Ex. 3, p. 135-36). For his part, Plaintiff testified that he had blacked-out and had no memory of the encounter with Jones, but he would never force a woman to have sex (*id*. at ¶55).

[2] The facts are drawn from Plaintiff's Amended Complaint (Dkt. No. 102).

After deliberating, the Hearing Board found Plaintiff responsible for sexual assault and assigned the sanction of expulsion (*id*. at ¶ 58 and Ex. 4). Plaintiff was notified of the decision in writing the following day and was immediately removed from the campus (*id*. at ¶¶ 58, 60 and Ex. 4). The decision stated that the Hearing Board had found Jones's account of withdrawing consent to be "credible and supported by a preponderance of the evidence" (*id*. at Ex. 4). While the Hearing Board also found it "credible" that Plaintiff was "blacked out," Plaintiff was advised that being intoxicated or impaired by drugs or alcohol "is never an excuse" (*id*.). Doe appealed the Hearing Board's decision within the seven days allotted for him to do so, but his appeal was denied (*id*. at ¶¶ 59, 61).

Thereafter, Plaintiff retained counsel, and, four months later, on April 16, 2014, he presented the College with what he describes as exculpatory evidence, consisting of affidavits from two other students attaching text message strings involving Jones contemporaneous to the alleged assault (*id*. at ¶¶ 63-72). The evidence, which was unavailable at the disciplinary hearing, showed that immediately after the sexual encounter between Plaintiff and Jones, Jones invited another student to her room for a sexual encounter via text, and the two engaged in consensual sex (*id*.). The evidence also showed Jones communicating with another student about her encounter with Plaintiff immediately after it happened without any indication that it had been non-consensual, e.g. "Ohmygod I jus did something so fuckig stupid"; "Fucked [Plaintiff]"; "official story is he puked and I took care of him but yes. Yes I did. FUCK"; "it's pretty obvi I wasn't an innocent bystander" (*id*.). Amherst refused Plaintiff's request that he be reinstated or the disciplinary process reopened in light of the newly-presented evidence (*id*. at ¶¶ 72-73).

Shortly thereafter, Plaintiff filed this lawsuit claiming that the College failed to adhere to the provisions in its *Student Handbook* for investigating and fact-finding in cases involving complaints of sexual misconduct and that the College's investigatory and disciplinary processes were deeply flawed, unreliable, unfair, and biased against him because of his gender, race, and national origin.[3] In particular, Plaintiff highlights the failure of the disciplinary process to uncover the text messages and Amherst's refusal to reconsider the results of the process once Plaintiff provided them, all of which Plaintiff alleges occurred in an atmosphere of very intense and very public pressure on Amherst to punish male students for sexual misconduct. Plaintiff asserts claims sounding in contract and tort, as well as claims for violation of his civil rights, and he seeks injunctive relief and compensatory damages.[4] On or about January 20, 2016, Plaintiff served Mr. Hamako with a subpoena seeking to take his deposition and directing him to produce "[a]ll documents, notes, memoranda, and communications concerning the Amherst College disciplinary hearing involving John Doe and Sandra Jones which was held on December 12, 2013" (Dkt. No. 65 at ¶13). Mr. Hamako seeks a protective order quashing the subpoena in its entirety (Dkt. No. 63).

II. Legal Standard

Recently amended Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[u]nless otherwise limited by court order … [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the

[3] Plaintiff is Asian-American (*id*. at ¶1).

[4] Plaintiff's amended complaint states a total of ten counts for: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) tortious interference with contract; (4) gender discrimination in violation of Title IX; (5) racial discrimination in violation of 42 U.S.C. § 1981; (6) gender and race discrimination in violation of the Massachusetts Civil Rights Act, M.G.L. c. 12, §§ 11H, 11I; (7) defamation; (8) negligence; (9) negligent infliction of emotional distress; and (10) injunctive relief.

needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "As a general matter, relevancy must be broadly construed at the discovery stage such that information is discoverable if there is any possibility it might be relevant to the subject matter of the action." *Cherkaoui v. City of Quincy*, No. 14-cv-10571-LTS, 2015 WL 4504937, at *1 (July 23, 2015) (quoting *E.E.O.C. v. Electro-Term, Inc.*, 167 F.R.D. 344, 346 (D. Mass. 1996)). "[B]ecause discovery itself is designed to help define and clarify the issues, the limits set forth in Rule 26 must be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Green v. Cosby*, No. 14-cv-30211-MGM, 2015 WL 9594287, at *2 (D. Mass. Dec. 31, 2015) (quoting *In re New England Compounding Pharmacy, Inc. Products Liab. Litig.*, MDL No. 13-2419-FDS, 2013 WL 6058483, at *4 (D. Mass. Nov. 13, 2013)). "To this end, it is 'very unusual for a court to prohibit the taking of a deposition altogether.'" *Id*. (quoting *E.E.O.C. v. Freudenberg-NOK Gen. P'ship*, No. 07-cv-406-JD, 2009 WL 909571, at * 3 (D.N.H. April 3, 2009)).

There are limits on the scope of discovery, however. A court must limit discovery on motion or on its own "if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C). In addition, pursuant to Rule 26(c)(1), "[t]he court may, for good cause, issue an order to protect a party or [any] person [from

whom discovery is sought] from annoyance, embarrassment, oppression, or undue burden or expense," including an order forbidding the discovery or forbidding inquiry into certain matters. Fed. R. Civ. P. 26(c)(1). The party or person seeking the protective order has the burden of demonstrating the existence of good cause. *Green*, 2015 WL 9594287, at *4-5. "If a motion for a protective order is wholly or partly denied, [however,] the court may, on just terms, order that any party or person provide or permit discovery." Fed. R. Civ. P. 26(c)(2).

III. Analysis

As grounds for quashing the subpoena served on him by Plaintiff, Mr. Hamako argues that he has no relevant, non-duplicative information. In support of this argument, Mr. Hamako claims that his "sole connection" to the case was his role as one of the three panelists on the Hearing Board. Mr. Hamako's attempt to minimize the significance of this connection is unconvincing. Mr. Hamako indisputably played a critical role at the hearing, which was a key component of the disciplinary process that Plaintiff alleges was unfair and biased against him from start to finish. As a member of the Hearing Board, Mr. Hamako has possibly relevant information on any number of matters, including, by way of example only: the training he received from Amherst about service on this or other Hearing Boards; other communications he had with Amherst about serving as a panelist in general or on Plaintiff's case in particular; whether anyone other than the panelists participated in the deliberations; how he voted as to responsibility and the appropriate sanction; whether his votes were based solely on the evidence presented at the hearing or were influenced by external factors, including gender or other bias; and whether Jones's text messages would have been material to his votes. Because Mr. Hamako's testimony on these and other matters could possibly go toward proving (or disproving) the existence of gender or other bias, as well as toward establishing (or negating) the

College's failure to fulfill its contractual obligations or accord Plaintiff basic fairness, it is relevant. *See Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 380 (Mass. 2000) (quoting *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983)) (noting that breach of contract claims in the college university disciplinary setting, in addition to reviewing allegations of breach of contract, courts "examine the hearing to ensure that it was conducted with basic fairness").

Mr. Hamako argues that any relevant information he has is duplicative of information Plaintiff already has in the form of the recording and transcript of the disciplinary hearing. In making this argument, Mr. Hamako seeks to limit the scope of Plaintiff's claims to allegations of discrete procedural infirmities – i.e., that he was denied legal counsel, that a physical barrier prevented him from observing Jones at the hearing, that the later-obtained text messages were not presented at the hearing, and that the evidence did not establish that he violated Amherst's policy – all of which, Mr. Hamako says, are definitively established by the recording and transcript. But the factual questions raised by Plaintiff's claims have not been limited by this court to what procedures were used or what evidence was presented in the hearing. Plaintiff's amended complaint places these procedural and evidentiary issues in the context of a larger disciplinary process, the entirety of which he claims was unfair and biased against him. Accordingly, they cannot be viewed in isolation. Again, by way of example only, the hearing transcript establishes that Jones's text messages were not presented to the Hearing Board, but it does not resolve the issues of whether the investigator's failure to pursue the texts in the first instance, the Hearing Board's and College's failure to pursue them after Jones testified about them during the hearing, or the College's failure to reconsider the disciplinary sanction imposed on Plaintiff after he presented them to the College, were unfair or tainted by gender or other bias. Testimony from Mr. Hamako may be relevant to this and other issues not contained within the

four corners of the transcript. Accordingly, the information Plaintiff seeks from Mr. Hamako is both relevant and non-duplicative, and, therefore, within the scope of Fed. R. Civ. P. 26(b)(1).

This conclusion is supported by a recent decision in another case arising out of a college's sexual misconduct disciplinary proceedings. In *Yu v. Vassar College*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015), the court granted summary judgment to the defendant college on the plaintiff's claims, including claims brought under Title IX and for breach of contract. In so ruling, the court explicitly relied on deposition testimony and affidavits from the panelists on the sexual misconduct hearing board, thereby demonstrating the relevance of this evidence to the issues. *Id*. at 469-71, 474-81. While neither the defendants nor the hearing panelists in *Yu* moved for a protective order preventing the panelists' depositions – and thus, the court was not called upon to make a relevancy determination in advance – the court did address a dispute between the parties about the plaintiff's ability to depose a support person for the complainant who was present at the disciplinary hearing. The court approved the plaintiff's request to take the deposition, stating that, "[h]er presence at the hearing, as well as her position as a point person for victims makes her a plainly relevant witness, and that conclusion is further fortified by the undisputed representation by plaintiff that the tape of the hearing is in substantial part inaudible."[5] *See* S.D.N.Y. Civil Docket No. 13-cv-4373-RA-MHD (RA), *Yu v. Vassar Coll*., at Dkt. No. 74. In its opinion and order on summary judgment, the court cited to the support person's deposition testimony, confirming the soundness of its earlier relevance determination. *Yu*, 97 F. Supp. 3d at 480.

[5] The court notes that the transcript attached to Plaintiff's complaint in this case indicates that some parts of the recording of Plaintiff's disciplinary hearing are inaudible as well (*id*. at Ex. 3).

Mr. Hamako argues that, even if the subpoena seeks relevant, non-duplicative information falling within the proper scope of discovery, the court should nevertheless quash it pursuant to Rule 26(c). "Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise …. [T]he 'good cause' standard in the Rule is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case." *Gill v. Gulfstream Park Racing Ass'n, Inc*., 399 F.3d 391, 402 (1st Cir. 2005) (quoting *United States v. Microsoft Corp*., 165 F.3d 952, 959-60 (D.C. Cir. 1999)). "In particular, considerations of the public interest, the need for confidentiality, and privacy interests are relevant factors to be balanced [against the litigant's interest in the discovery]." *Id*. (string cite omitted). Mr. Hamako argues that good cause exists here because the subpoena is unduly burdensome and because strong public policy concerns weigh in favor of keeping deliberations by sexual misconduct hearing boards confidential and private. The court finds that Mr. Hamako has not established good cause for the issuance of a protective order on either ground.

Mr. Hamako merely recites the "undue burden" language from Rule 26(c) and asserts that the "unwanted burden thrust upon [him] is … entitled to special weight," because of his status as a non-party. *Cusamano v. Microsoft Corp*., 162 F.3d 708, 717 (1st Cir. 1998) (citing cases). This is insufficient. "The party [or person] resisting discovery … 'cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance.'" *Compounding Pharmacy*, 2013 WL 6058483, at *6 (quoting *Biological Processors of Alabama, Inc. v. N. Georgia Envtl. Servs., Inc*., No. 09-cv-3637, 2009 WL 1663102, at * 1 (E.D. La. June 11, 2009)). It may be some burden for Mr. Hamako to have to make himself available for a deposition, but that burden in and of itself is not undue. If it were, every non-party subpoenaed

for a deposition could avoid appearing. Because Mr. Hamako has failed to demonstrate how complying with Plaintiff's subpoena would impose an undue burden on him, he has not established good cause for the issuance of a protective order on this ground.

Turning to Mr. Hamako's public policy argument, while not stated as such, he is asking the court to recognize a privilege excusing members of sexual misconduct hearing boards of private colleges and universities from having to testify in lawsuits such as this one. Mr. Hamako does not provide any authority for the creation of such a sweeping testimonial privilege, and federal and state courts routinely allow discovery to be taken from key decision makers in a broad array of civil rights cases, including cases alleging employment discrimination or violations of federal and state constitutional and statutory rights, including discovery into the deliberative or consultative process through which the challenged decisions that injured the plaintiffs were made. Defendants have not explained why Hearing Board members, who are selected by the College with no input from the target of the disciplinary hearing, should be treated differently than those who make decisions in other disputes between private parties.

Instead, Mr. Hamako analogizes the role of disciplinary hearing board members to "judicial and quasi-judicial decision-makers, including jurors, judges, and arbitrators" (Dkt. No. 64 at p. 14). Even these privileges, which are long-standing and well-established, however, are not absolute. *See, e.g.*, Fed. R. Evid. 606(b) (identifying exceptions to a general prohibition on juror's testifying about deliberations); *Bliss v. Fisher*, 714 F. Supp. 2d 223, 224 (D. Mass. 2010) (noting that there are "circumstances [albeit limited] under which a party may compel a judge to testify concerning official matters"); *Bliznik v. Int'l Harvester Co.*, 87 F.R.D. 490, 491-92 (N.D. Ill. 1980) (denying a motion to quash a subpoena served on an arbitrator where he was in possession of relevant evidence that could be crucial to the plaintiff's case). Indeed, jurors,

judges, and arbitrators all can be deposed regarding issues of bias or prejudice, issues which are present in this case. *See, e.g.*, Fed. R. Evid. 606(b)(2) ("A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; [or] (B) an outside influence was improperly brought to bear on any juror"); *Hoeft v. MVL Group, Inc*., 343 F.3d 57, 66-67 (2d Cir. 2003), *overruled on other grounds, Hall Street Assocs. v. Mattel, Inc*., 552 U.S. 576 (2008) ("[A]rbitrators may be deposed regarding claims of bias or prejudice …."); *Jones v. Tozzi*, No. CV-F-05-148 OWW/DLB, 2007 WL 1299795, at *5-6 (E.D. Ca. April 30, 2007) (denying a judge and an executive court officer's motion to quash deposition subpoenas as to testimony regarding whether they bore any racial animus or were part of an alleged race-based conspiracy). Thus, Mr. Hamako cannot establish the existence of good cause to prohibit the taking of his deposition altogether simply by casting his role as a quasi-judicial one.

Nor has Mr. Hamako established an entitlement to a narrower protective order preventing Plaintiff from inquiring of him about the Hearing Board's deliberations or his mental processes, issues which lie at the heart of his asserted confidentiality concerns.

> Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public … has a right to every man's evidence." As such, they must be strictly construed and accepted '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 truth.

Jackson v. Harvard Univ., 721 F. Supp. 1397, 1406-1407 (D. Mass. 1989) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Mr. Hamako's speculation that subjecting panelists on sexual misconduct hearing panels to depositions "*may* well deter faculty and staff from serving on those panels, and those who choose to participate on a panel *may* feel constrained in their deliberations and less free to exchange ideas," (Dkt. No. 64 at p. 15) (emphasis added), does not establish the existence of a transcendent public good. It is equally likely that "the prospect of

scrutiny can be expected to impress upon [panelists] their duty to be prepared to offer defensible reasons for their [findings]." *Jackson*, 721 F. Supp. at 1407. *C.f. Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 200-01 (1990) ("[W]e are not so ready as petitioner seems to be to assume the worst about those in the academic community. Although it is possible that some evaluators [in the peer tenure review process] may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness."). Indeed, Defendants have not shown that depositions of disciplinary hearing board members in other cases have resulted in the negative consequences he envisions. *See, e.g.*, *Yu*, 97 F. Supp. 3d at 469-71, 474-81; *Furey v. Temple University*, 730 F. Supp. 2d 380, 387 (E.D. Pa. 2010) (referencing depositions of members of a disciplinary hearing board panel); D. Mass. Civil Docket No. 1:15-cv-10790, *Doe v. Trs. of Boston Coll.*, at Dkt. No. 71 (referencing depositions of disciplinary hearing board members filed under seal as support for defendants' statement of material facts in support of summary judgment). Moreover, courts have been unpersuaded by similar contentions with respect to the decision-making processes of other college boards in the face of claims of unlawful discrimination. *See Theidon v. Harvard Univ.*, No. 15-cv-10809-LTS, 2016 WL 447447, at *2 (D. Mass. Feb. 2, 2016) (allowing the plaintiff to discover the names of the individuals involved or discussed in the course of her tenure review where she alleged that she was denied tenure on the basis of her gender); *Krolikowski v. Univ. of Mass.*, 150 F. Supp. 2d 246, 248-49 (D. Mass. 2001) (allowing discovery of medical peer review materials in a case involving allegations of unlawful gender discrimination).

It is important for colleges to take steps to protect sexual assault victims on college campuses. It is also important to prevent unlawful gender discrimination by academic institutions. Amherst's desire to protect the confidentiality of the Hearing Board's deliberations

does not transcend Plaintiff's need for core information relevant to his claims of gender discrimination. *See Jackson*, 721 F. Supp. at 1407 ("[W]hen discrimination by an academic institution is alleged, the public good is best served by a thorough examination of the factors that influenced the disputed decision.").

IV. Conclusion

For the reasons stated above, Mr. Hamako's motion for a protective order is DENIED. Mr. Hamako will make himself available for a deposition to be scheduled by the parties at a mutually convenient time and will produce the documents requested by Plaintiff's subpoena.

It is so ordered.

/s/ Katherine A. Robertson
KATHERINE A. ROBERTSON
United States Magistrate Judge