



THE CITY OF NEW YORK
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June 27, 2014

BY ECF

The Honorable Joan M. Azrack
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Raza et al. v. City of New York et al., 13 Civ. 3448 (PKC)(JMA)

Dear Judge Azrack:

I am an Assistant Corporation Counsel in the office of Zachary W. Carter, Corporation Counsel of the City of New York, and an attorney assigned to the above-referenced matter. Pursuant to the Court's order on June 20, 2014, defendants write to respectfully request that the Court deny plaintiffs' request that defendants collect electronically stored information ("ESI") from field personnel, presumably including undercover officers and other officers directly working with undercover officers, for the reasons below.¹

By way of background, defendants provided plaintiffs with defendants' ESI custodian list on April 25, 2014. That list set forth 16 custodians within the Intelligence Bureau from whom ESI would be collected, and who held the following leadership positions during the relevant period: 1) the Deputy Commissioner of Intelligence; 2) the Assistant Commissioner of Intelligence; 3) the Commanding Officer of the Intelligence Bureau; 3) the Commanding Officer of the Intelligence Operations and Analysis Section; 4) the Director of Intelligence Analysis; and 5) an individual who has held several relevant leadership positions during the applicable time period.

These 16 individuals are the only persons within the Intelligence Bureau with the authority to propose and authorize the initiation and continuation of investigations relating to the

¹ The exact language, as set forth in plaintiffs' letter to defendants dated June 10, 2014 is "We also believe that Defendants' custodian list must include at least all field persons directly responsible for the surveillance and investigation of Plaintiffs."

plaintiffs in this case – in other words, these individuals are the policy-makers and/or the key decision-makers with regard to any investigation of plaintiffs. This is significant because plaintiffs’ complaint seeks a judgment against the City solely based on an unlawful policy or practice of unlawful surveillance, *i.e.*, a *Monell* claim against the City of New York.²

It is well-settled law that in order to establish municipal liability, plaintiffs must demonstrate that an individual with final decision-making authority is “responsible for establishing final government policy” for liability to attach. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986). Indeed, a Court’s task is to “identify those officials or government bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.” *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989). In the instant matter, defendants have agreed to provide, and are providing, plaintiffs with the relevant information from the individuals with decision-making authority. Plaintiffs need look no further than these 16 individuals, for whom there are approximately 280,000 documents for the relevant time period, excluding “shared folders,” for information concerning their municipal liability claim, which is the only claim at issue here.

Additionally, courts have found that lower level NYPD employees do not constitute “policy-makers.” *See e.g. Raphael v. County of Nassau*, 387 F. Supp. 2d 127, 132 (E.D.N.Y. 2005) (“Even if Sergeant Mulcahy may have been the ranking officer on the scene and thus may have had some decision-making authority over the conduct of the other officers, the mere exercise of discretion is insufficient to establish municipal liability.”) (citing *Anthony v. City of New York*, 339 F.3d 129, 139 (2d Cir. 2003); *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000)); *Rubio v. County of Suffolk*, No. 01-CV-1806 (TCP), 2007 U.S. Dist. LEXIS 75344, at *21-22 (E.D.N.Y. Oct. 9, 2007) (plaintiffs failed to show how lieutenants and sergeants, as well as the Chief of Police, had the policymaking authority necessary to bind the County). These cases further demonstrate that defendants’ custodian list is appropriate and any additional custodians would be irrelevant.

It is important to point out that authorized Handschu Intelligence Bureau investigations (the kind which plaintiffs may have been subjects of) are different than other types of NYPD investigations. Before an investigation even begins, it must be proposed at the highest levels of the Intelligence Bureau, and authorized by both the Deputy Commissioner of Intelligence and the Commanding Officer of the Intelligence Bureau. Not only are defendants’ 16 proposed custodians those who oversee Intelligence Bureau operations and analysis and set the policy for the Intelligence Bureau, they are also the only individuals who can propose and authorize the initiation and continuation of an Intelligence Bureau Handschu investigation. For these reasons as well, defendants’ custodian list is complete, and the labeling of additional personnel as custodians will be unduly burdensome and unlikely to lead to the discovery of legally relevant information.

² The complaint names as defendants the City of New York and three individuals, all sued in their official capacity. Plaintiffs’ complaint does not seek a judgment against the three individual defendants but rather a judgment against the City based on the alleged unlawful policy.

As Judge Chen noted in her November 22, 2013 order, in determining the limits of discovery, the Court must balance the plaintiffs' need for the information against the burden imposed on the defendants (See Docket Entry 28 at page 7). To collect ESI from all field persons responsible for any surveillance or investigation of plaintiffs would place an undue burden on defendants and would compromise operational security, officer safety, sources, methods and could compromise ongoing and future investigations. Indeed, when defendants asked plaintiffs if by "field persons" they meant undercover officers and confidential informants, plaintiffs stated they did. It would be nearly impossible to collect ESI from confidential informants as the sources of their ESI would not be in the custody or control of the NYPD, among other reasons. Any collection of ESI from undercover officers (or for that matter disclosure of their names as custodians to plaintiffs) would compromise their safety and reveal Intelligence Bureau methodology. Moreover, the extraordinary step of collecting ESI from these sources would have a chilling effect on the Intelligence Bureau's ability to recruit both undercover officers and confidential informants. Separate and apart from the issues of burden and relevance, this material is unlikely to contain the information that plaintiffs have stated they are looking for (i.e., operational tasking of undercover officers and confidential informants). Defendants would be happy to submit a letter to the Court *ex parte in camera* specifically addressing some of these issues.

Finally, it is important to note that defendants have already begun to produce to plaintiffs the thousands of pages of documents which are relevant to any investigation of the plaintiffs in this case. This universe of documents includes, among many other things, the DD5s written by field personnel to document the law enforcement activity taken during authorized Handschu investigations. Importantly, DD5s document any activity by undercover officers or confidential informants in connection with an investigation. Defendants' objection here is simply to the collection of ESI from all field persons who may have been involved in any investigation or surveillance of one or more of the plaintiffs.

Accordingly, for the above mentioned reasons, defendants respectfully request that the Court deny plaintiffs' request to have defendants collect ESI from field personnel responsible for any surveillance or investigation of plaintiffs, including undercover officers. In an effort to compromise, however, defendants would consider adding a group of custodians consisting of the Lieutenants who would have covered any investigation of the plaintiffs that may have existed during the relevant time period. In the alternative, defendants request the opportunity to fully brief this issue for the Court.

Respectfully Submitted,

_____/s_____

Alexis L. Leist
Assistant Corporation Counsel

cc by ECF: Plaintiffs' Counsel