IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-N-0740 (CBS)

AMERICAN FRIENDS SERVICE COMMITTEE, a Pennsylvania not-for-profit corporation;
ANTONIA ANTHONY;
END THE POLITICS OF CRUELTY, an unincorporated association;
CHIAPAS COALITION, an unincorporated association;
STEPHEN NASH; and
VICKI NASH,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

Plaintiffs, American Friends Service Committee, Sister Antonia Anthony, End the Politics of Cruelty, Chiapas Coalition, Stephen Nash, and Vicki Nash (collectively, "Plaintiffs"), respectfully move for entry of a protective order, pursuant to Fed. R. Civ. P. 26(c), with respect to certain irrelevant, harassing, and otherwise improper interrogatories and document requests (the "Improper Requests") that defendant City and County of Denver (the "City") propounded to Plaintiffs.

CERTIFICATION PURSUANT TO D.C.COLO.LCivR 7.1(A)

Counsel for Plaintiffs has conferred with counsel for the City regarding this motion, and represents to the Court that this motion is contested.

I. INTRODUCTION

Plaintiffs filed this lawsuit to stop the Denver Police Department's practice of collecting information and building files about political opinions, peaceful protest actions, and the expressive activities of law-abiding advocacy organizations. Despite Mayor Webb's public statements that the core concerns animating this lawsuit are valid and legitimate, the City's attorneys have now demanded that Plaintiffs supply – in wholesale quantities of detail – the very information about their First Amendment activities that this lawsuit seeks to safeguard from the grasp of government investigators. Plaintiffs object strenuously to this apparently vindictive attempt to penalize them for daring to challenge the City in federal court. Plaintiffs seek a protective order to stop the City from using the tools of civil discovery in what will be perceived as a brazen effort to supplement the City's dossiers on Plaintiffs' political opinions, activities, and associations.

The Improper Requests include the following:

- That each Plaintiff provide a list of every organization with which they have affiliated since 1999;
- That each Plaintiff organization provide its membership lists for the last four years;
- That Plaintiffs identify each and every expressive activity in which they have participated since 1999, along with the names of all other participants; and
- That Plaintiffs provide details of each time they have discussed or spoken out on the issues that the Denver Police Department's (the "Department") political spying raises, including the names, addresses, and employment of every person who may have heard Plaintiffs' comments.

As Plaintiffs demonstrate below, the City seeks information that is irrelevant to the claim or defense of any party to this action. More importantly, however, the compelled production of such detailed information about Plaintiffs' opinions, their protest activities, and their political

associations threatens to chill the exercise of First Amendment rights and intrudes impermissibly into constitutionally-protected zones of privacy. Thus, even if some of the requested information is marginally relevant under the admittedly broad standard of Rule 26(b)(1), that relevance is clearly outweighed in this case by the importance of the First Amendment interests that compelled production would harm.

II. THE IMPROPER REQUESTS

On October 2, the City served its first set of written discovery on Plaintiffs. In this motion, Plaintiffs seek a protective order striking the City's interrogatory nos. 2, 3, 4, 8, 11, 15, and 17 and requests for production nos. 2, 3, and 9. (A copy of the full set of the City's written discovery requests is attached hereto as Exhibit A.) The text of the Improper Requests and the relevant definitions are set forth below:

Interrogatories

2. For each plaintiff who is a natural person, **IDENTIFY** each and every organization that you have been a member of for the period from January 1, 1999 through the present.

3. For each plaintiff that is an organization, association, or other entity, **IDENTIFY** each and every member of the organization for the period from January 1, 1999 through the present.

4. **IDENTIFY** each and every peaceful political, religious, educational, social, or expressive activity that you have engaged in for the period from January 1, 1999 through the present.

8. **IDENTIFY** each and every arrest, prosecution, civil action, or other legal proceeding against you, including but not limited to any such actions related in any way to expressive conduct or civil disobedience by you.

11. **IDENTIFY** each and every individual or organization with which **YOU OR ANYONE ACTING ON YOUR BEHALF** have communicated concerning any appearance of your name in the intelligence database or the possible joinder as a plaintiff in this action.

15. **IDENTIFY** each and every communication that you have had with other potential class members concerning this action.

17. If you have communicated or published information to anyone that you are the subject of an intelligence file or disclosed the contents of those files, list the names of the persons to whom the information was communicated and when the communication took place.

Requests for Production

2. Produce each and every publication (including books, newspapers, newsletters, brochures, flyers, pamphlets, etc.) prepared for, or by, **YOU OR ANYONE ACTING ON YOUR BEHALF** during the period from January 1, 1999 through the present related to any expressive purposes or activities.

3. Produce all photographs, videotapes, audio recordings, or computer-accessible digital versions of the same related to any of the **INCIDENTS** or occurrences described in the Complaint in this action.

9. Produce all photographs, videotapes, audio recordings, or computer-accessible digital versions of any rallies, demonstrations, or expressive activities of any of Plaintiffs during

the time period beginning when Plaintiffs first contend Defendant engaged in any wrongful conduct related to Plaintiffs' complaint through the present.

Definitions

(e) **IDENTIFY** with respect to a person means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment.

(g) **IDENTIFY** with respect to an activity or incident means to provide date, time, location, individuals present, nature, and purpose of the activity or incident.

III. ARGUMENT

A. The Improper Requests Seek Information that Is Not Relevant to the Claim or Defense of any Party.

"[O]nce a relevancy objection has been raised, the party seeking discovery must demonstrate the information sought to be compelled is discoverable." Alexander v. FBI, 194 F.R.D. 316, 325 (D.D.C. 2000). See also Steil v. Humana Kansas City, Inc., 197 F.R.D. 442, 445 (D. Kan. 2000) ("where relevancy is not apparent, it is the burden of the party seeking discovery to show the relevancy of the discovery request").

The 2000 amendments to the Federal Rules of Civil Procedure narrowed the scope of discoverable information. Under the former standard, parties were able to discover information that was "relevant to the subject matter of the litigation." See Beauchem v. Rockford Prods. Corp., No. 01-C-50134, 2002 U.S. Dist. LEXIS 18166, *9-10 (N.D. Ill. Sept. 27, 2002). In contrast, under the current standard, discovery is limited to information that is "relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1).

Even under the more liberal standard of relevance of the pre-2000 rule, courts warned the standard "should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case." Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 635 (D. Minn. 2000) (quoting Hofer v. Mack Trucks, Inc., 981 F.2d 377, 380 (8th Cir. 1992)). "Therefore, despite the liberality of discovery, we will remain reluctant to allow any party to roam in the shadow zones of relevancy to explore matter which does not presently appear germane on the theory that it might conceivably become so." Prokosch, 193 F.R.D. at 635 (citations and internal quotations omitted).

The current relevance standard of Rule 26 must be applied in light of the claims and defenses raised in the pleadings. Because the City has not yet filed an answer, the record contains no assertion of any affirmative defenses to which the requested information could arguably be relevant. Plaintiffs thus focus on the claims alleged in the Complaint.

Plaintiffs' claims focus almost entirely on the actions of the Department in monitoring peaceful protest activity and in keeping files on the expressive activities of law-abiding advocacy organizations. Plaintiffs allege that each of them is the subject of Spy Files that the Department's Intelligence Bureau has maintained inappropriately, in clear violation of the standard articulated in the document that Mayor Webb identified as the City's policy on intelligence gathering. That policy states as follows:

> The Department shall not collect or maintain criminal intelligence information about the political, religious, or social views associations or activities of any individual or any group, association, corporation, business, partnership, or other

> organization, unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal activity.

Complaint, Exhibit C.

The City does not dispute Plaintiffs' allegations that they were included in the Intelligence Unit's Spy Files in violation of the foregoing policy. Indeed, the City has already represented that it would purge from the Intelligence Unit's database the files of each of the named Plaintiffs. It is doubtful that the City seeks discovery regarding allegations that it does not dispute.

Even if the City sought discovery relevant to the question whether Plaintiffs were legitimately made the subjects of the Spy Files, the only relevant information is the information already within the City's possession. The standard of reasonable suspicion in the City's policy is a Fourth Amendment standard. Accordingly, the City can justify its decision to include Plaintiffs in the Spy Files only by relying on the information it had in its possession at the time it created the files. See, e.g., Beck v. Ohio, 379 U.S. 89, 91 (1964) (relevant facts are the facts known "at the moment the arrest was made"). Thus, even if the City intended to argue that reasonable suspicion justified its decision to include Plaintiffs in the Spy Files, it would need to rely on the information already in its possession, not on any information it hopes to learn from the intrusive and irrelevant Requests.

Plaintiffs also allege that the practices of the Intelligence Unit, including the monitoring of peaceful protest activity, the building of dossiers on the expressive activities of individuals and groups, and the dissemination of that information to third parties, have, and threaten to continue having, a chilling effect on the exercise of First Amendment rights. The City may

claim that the Improper Requests are relevant to the allegations regarding the chilling effect of the Department's practices. The information the City seeks, however, is not relevant to those allegations.

Plaintiffs are long-time activists and advocacy organizations who are less likely to be deterred from continued expressive activities. In evaluating their claim for prospective relief, the potential chilling effect of the Department's practices is not measured by their effect on the specific Plaintiffs. On the contrary, the chill is evaluated under an objective standard that focuses, not on Plaintiffs, but on the practices of the police:

> Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities."

Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999) (quoting Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996)).

B. The Improper Requests Threaten to Subject the Plaintiffs to Annoyance, Embarrassment, Oppression, or Undue Burden, and Compelling the Requested Information Will Not Advance the Resolution of this Case

Under Rule 26(c), on a showing of good cause, a Court may issue a protective order to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Even if in some cases the information requested is arguably relevant, this Court should issue a protective order under Rule 26(c).

In addition, Rule 26(b)(2)(iii) authorizes a Court to limit discovery when:

> [T]he burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues

> at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(iii). The Court may act under Rule 26(b)(2) on its own or "pursuant to a motion under Rule 26(c)." Id.

In considering the burden of the proposed discovery, the Court has the power to consider not only the time and expense of responding, but also the adverse consequences caused by compelled disclosure of sensitive information, including the harm to desirable social policies. See Johnson v. Nyack Hosp., 169 F.R.D. 550, 561-62 (S.D.N.Y. 1996).

> Where a party establishes that disclosure of requested information could cause injury to it or otherwise thwart desirable social policies, the discovering party will be required to demonstrate that its need for the information, and the harm that it would suffer from the denial of such information, outweigh the injury that disclosure would cause either to the other party or to the interests cited by it.

Id. at 562 (quoting Apex Oil Co. v. DiMauro, 110 F.R.D. 490, 496 (S.D.N.Y. 1985)). In this case, as the following section explains, compelled disclosure will adversely affect important public policies that underlie the First Amendment, especially the right of expressive association and the right of privacy that attaches to the right of association.

C. The Improper Requests Impermissibly Intrude into Plaintiffs' Views, Expressive Activities, and Expressive Associations that Are Protected by the First Amendment.

Almost half a century ago, the Supreme Court recognized that courts must exercise special care to ensure that government demands for information do not impermissibly burden or threaten to chill the exercise of rights protected by the First Amendment. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-63 (1958). The lower court in NAACP had ordered the NAACP to produce its membership list. Id. at 451. The Supreme Court reversed, holding that

the compelled production of the NAACP's membership list would infringe on the right of association of the organization and its members:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particular where a group espouses dissident beliefs.

Id. at 462. The Court subjected Alabama's discovery request to strict judicial scrutiny and concluded that the state had not shown a sufficiently compelling interest in obtaining the membership records to justify the potentially chilling effect on the right of association. Id. at 462-64. See also Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("Since NAACP v. Alabama [the Court has] required that the subordinating interests of the State must survive exacting scrutiny when compelled disclosure imposes encroachments on First Amendment rights").

Relying on NAACP v. Alabama and its progeny, courts have recognized that litigants may invoke the First Amendment to shield themselves from discovery requests that threaten to intrude into the protected realm of thoughts, opinions, expressive activities, and expressive associations. See, e.g., Black Panther Party v. Smith, 661 F.2d 1243, 1266 (D.C. Cir. 1981) ("the plaintiff's First Amendment claim should be measured against the defendant's need for the information sought"), vacated as moot, 458 U.S. 1118 (1982); Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 205 (N.D. Cal. 1983) ("[a] good-faith interjection of First Amendment privilege to a discovery request . . . mandates a comprehensive balancing of the [requester's] need for the information sought against the [objector's] constitutional interests in claiming the privilege"); Britt v. Superior Court, 574 P.2d 766, 771-73 (Cal. 1978) (order compelling disclosure of

plaintiffs' associational affiliations and memberships violated First Amendment); Snedigar v. Hoddersen, 786 P.2d 781, 785 (Wash. 1990) (court must weigh potential chilling effect of compelled disclosure against opposing party's need for the information); see generally Privacy of Association: A Burgeoning Privilege in Civil Discovery, 17 Harv. C.R.-C.L. L. Rev. 355 (1982).

For example, in Britt, 574 P.2d 766, the California Supreme Court reasoned that "compelled disclosure of an individual's private associational affiliations and activities . . . frequently poses one of the most serious threats to the free exercise of this constitutionally endowed right [of association]." Britt, 574 P.2d at 771. The court explained that, when a discovery request infringes on the right of associational privacy, the government bears a "particularly heavy" burden of demonstrating "a compelling state interest which justifies the substantial infringement of First Amendment rights." Id. at 773. Even when an order compelling disclosure is justified, "the compelled disclosure [must] be narrowly drawn to assure maximum protection of the constitutional interests at stake." Id. at 775.

In Grandbouche v. Clancy, 825 F.2d 1463, 1465-67 (10th Cir. 1987), the Tenth Circuit recognized that the First Amendment privilege can protect litigants from the obligation to disclose information in discovery proceedings. In that case, the government defendants demanded that the plaintiff National Commodity and Barter Association produce a membership list and a mailing list. The trial court rejected the Association's claim of a First Amendment privilege, and dismissed the lawsuit as a sanction for the Association's failure to comply with its discovery order. In reversing, the Tenth Circuit held that the trial court had erred by failing to consider the claim of First Amendment privilege:

> [W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must

> conduct a balancing test before ordering disclosure. Among the factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information. The trial court must also determine the validity of the claimed First Amendment privilege. Only after examining all of these factors should the court decide whether the privilege must be overborne by the need for the requested information.

Id. at 1466-67 (citations omitted). This Court must consider the balancing test required under Grandbouche.

D. This Court Should Issue a Protective Order pursuant to Rules 26(b)(2) and 26(c).

Analysis of the Improper Requests demonstrates that Plaintiffs are entitled to a protective order. The City seeks information that is not relevant to any claim or defense of any party. Even if some portions of the Improper Requests arguably may seek relevant information, a protective order should issue to protect Plaintiffs from unnecessary annoyance, embarrassment, oppression, or undue burden. Moreover, all but one of the Improper Requests (interrogatory no. 8) poses a serious threat to First Amendment rights.

Interrogatory no. 2 asks each individual Plaintiff to list every organization in which he or she has been involved since 1999. Similarly, interrogatory no. 3 asks each organization to list the names, addresses, and last known employment of all of its members. Such associational information is not relevant to the allegations of Plaintiffs' complaint. This is particularly true with regard to plaintiff American Friends Service Committee, an organization whose members are spread across the entire country.

Interrogatory no. 4 asks for a list of every "political, religious, educational, social or expressive activity" in which Plaintiffs have engaged in since 1999. This astonishingly

overbroad inquiry apparently requires Plaintiffs to furnish a list of every time they have attended worship services, voted, or even made a casual conversational comment about public affairs. The only relevant information regarding the Plaintiffs' expressive activities is the information that already appears in the files of the Denver Police Department. If Plaintiffs have attended or sponsored some rallies that are not reflected in the Spy Files, then that information is not relevant to the City's decision to have included Plaintiffs in the Spy Files. For the same reasons, the information requested in requests for production nos. 3 and 9 is also irrelevant.

In addition, compelling production of membership lists clearly violates the principles of NAACP, 357 U.S. 449. The NAACP decision also controls the analysis with regard to interrogatory no. 2, which seeks additional organizations with which Plaintiffs are affiliated. Interrogatory no. 4 intrudes impermissibly into freedoms protected by the First Amendment. In addition, requests to produce nos. 3 and 9 also implicate the right of association, as they require Plaintiffs to produce any documentation, not only of their own First Amendment activities, but also the First Amendment activities of others who may appear in the requested photographs and documents. Unless the City can demonstrate a compelling need for the requested information, which it surely cannot, Plaintiffs should be protected from compelled production.

Interrogatory no. 8 asks for a complete listing of every legal proceeding in which any of Plaintiffs have ever been a defendant. The City apparently wants to know even about minor arrests that may have occurred 50 years ago, small claims court actions, or juvenile cases that are sealed. The requested information has no relevance to the claims in this case. Even if, hypothetically speaking, the City was able to discover that one of the Plaintiffs had once been convicted of a crime, that information could not retroactively justify the City's decision, made on

the basis of information about peaceful expressive activities, to label one of the Plaintiff organizations, falsely, as a "criminal extremist" group. Even if the City could somehow demonstrate some marginal relevance, a protective order should nevertheless issue to protect the Plaintiffs from annoyance, embarrassment, or oppression.

Interrogatory nos. 11, 15, and 17 require Plaintiffs to provide the City with an inventory of virtually all their political activity in connection with the issues that the Department's political spying raises. Interrogatory no. 11 requires an accounting of almost every time that Plaintiffs have discussed the Spy Files issue with anyone, whether individually or in a group, whether privately or publicly. Because the City broadly defines the term "identify," the interrogatories also require that Plaintiffs list every individual to whom they have addressed their communications.[1] Interrogatory no. 15 is almost as broad in scope as no. 11, because "potential" class members include virtually anyone who, now or in the future, engages in peaceful religious, social, political, or educational activities.

Thus, these questions not only impermissibly intrude on Plaintiffs' First Amendment activities, but also implicate the right of political association and the privacy of those with whom Plaintiffs communicate. This Court must not permit the City to use this lawsuit to force Plaintiffs into a situation where they can discuss or criticize the City's political spying only upon

[1] Nor would the interrogatories be saved if they were narrowed, as interrogatory no. 15 appears to be, to communications with potential class members about this litigation. The First Amendment squarely protects such communications. See In re Primus, 436 U.S. 412, 431 (1978) (litigation may be "a vehicle for effective political expression and association, as well as a means of communicating useful information to the public").

pain of turning over to the government the names, addresses, and employment information of each person in their audience.

Request for production no. 2 is an overbroad and impermissible attempt to intimidate Plaintiffs by forcing them to turn over to the government all of their writings "related to any expressive purposes or activities" for the past four years. The only publications relevant to Plaintiffs' claims are the ones about which the Denver Police Department knew when it decided to include Plaintiffs in the Spy Files. Even if the City could establish some arguable relevance to a complete library of Plaintiffs' writings, compelled disclosure would impermissibly undermine First Amendment values. This Court should not permit the City to intimidate future plaintiffs from vindicating their First Amendment rights by sending the message that they may do so only if they are willing to subject all of their thoughts, opinions, and writings to the scrutiny of government lawyers.

The Improper Requests are a frontal assault on Plaintiffs' First Amendment rights. This Court therefore must conduct a balancing test to determine whether the City's need for the information outweighs Plaintiffs' First Amendment interests. The answer to that inquiry is negative. Even if the City could somehow demonstrate the doubtful proposition that it has some legitimate interest in obtaining the requested information, that interest does not and cannot outweigh the significant intrusion on Plaintiffs' First Amendment rights.

IV. CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court enter a protective order, pursuant to Rules 26(b)(2) and 26(c)(1), striking interrogatory nos. 2, 3, 4, 8, 11, 15, and 17 and requests for production nos. 2, 3, and 9 of the Improper Requests.

Dated: October 16, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2002, a true and correct copy of **PLAINTIFF'S MOTION FOR PROTECTIVE ORDER** was deposited in the United States mail, postage prepaid, addressed to the following:

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