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' REPLY IN SUPPORT OF THEIR 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 submit the following reply in support of their Motion for Protective Order (the "Motion"), pursuant to Fed. R. Civ. P. 26(c), regarding certain irrelevant, harassing, and otherwise improper interrogatories and document requests (the "Improper Requests")[1] that defendant City and County of Denver (the "City") propounded to Plaintiffs.

[1] The Improper Requests include 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 to the Motion as Exhibit A.)

I. INTRODUCTION

Plaintiffs filed this lawsuit to stop the Denver Police Department's (the "Department") practice of collecting information and building files about political opinions, peaceful protest actions, and the expressive activities of law-abiding advocates and advocacy organizations. Mayor Webb has publicly acknowledged that the core concerns giving rise to this action are valid and legitimate, and that the Department's conduct violated the City's policy on intelligence gathering. Notwithstanding this admission of wrongful conduct, the City's attorneys seek to use the discovery process to compel Plaintiffs to supply the very information about their First Amendment activities that this lawsuit seeks to safeguard.

In its response to the Motion, the City fails to negate Plaintiffs' argument that the information and documents at issue are at best only marginally relevant to the claims and defenses in this action. The compelled production of 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. 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. ARGUMENT

A. The City's Argument Fails to Recognize Plaintiffs' First Amendment Privilege.

The City seeks to conduct a near-limitless inquiry into the most sensitive issues touching on Plaintiffs' First Amendment associational rights. According to the City, because of the nature of Plaintiffs' claims, Plaintiffs must lay bare their protected associations to a municipality that

considers peaceful protest as suspicious, if not criminal, conduct and that smears activist organizations with the false derogatory label of "criminal extremist."

The City's arguments cannot be squared with the protections for associational rights ensconced in American jurisprudence. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-63 (1958) (compelled production of the NAACP's membership list would infringe on the right of association of the organization and its members). The City unsuccessfully attempts to distinguish that landmark case on the grounds that the NAACP did not allege a violation of its associational rights. See Response at 11. Neither the Supreme Court nor any other court, however, appears to consider that distinction noteworthy. Courts routinely recognize 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), vacated as moot, 458 U.S. 1118 (1982); Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 205 (N.D. Cal. 1983); Britt v. Superior Court, 574 P.2d 766, 771-73 (Cal. 1978); Snedigar v. Hoddersen, 786 P.2d 781, 785 (Wash. 1990) (all recognizing a litigant's right to invoke First Amendment privilege in discovery context); see generally Joan Steinman, Privacy of Association: A Burgeoning Privilege in Civil Discovery, 17 Harv. C.R.-C.L. L. Rev. 355 (1982).

To protect such First Amendment rights, the Tenth Circuit has adopted a four-part balancing test to analyze a party's claim that the First Amendment protects them from responding to discovery. See Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987) (quoting Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977)). The City not only pays mere lip service to this test; it fails to recognize that the four enumerated factors are

not exhaustive. See id. (four factors are "[a]mong the factors that the trial court must consider"). Under the City's analysis of the test, the First Amendment always loses, and plaintiffs who challenge governmental infringements into Constitutionally protected areas always leave their rights at the courthouse door. A proper application of the balancing test, however, demonstrates that the City has no right to the discovery it seeks from Plaintiffs.

Grandbouche and the cases cited in the Motion teach that the First Amendment privilege can be overcome only where the requested information is central to the requesting party's case, or, as the Silkwood court noted, where the information is of "certain relevance" and also "goes to the heart of the matter." Silkwood, 563 F.2d at 438. In cases of marginal relevance, the First Amendment privilege prevails. See id. In this case, the challenged discovery requests have, at best, only marginal relevance to the City's defenses.

B. Contrary to the City's Assertion, a Comparative Analysis of Plaintiffs' Expressive Activities Since 1999 Is Only Marginally Relevant Because the Focus of the Case Is on the Objective Chilling Effect of the City's Wrongful Conduct.

It is highly unlikely that the City could effectively refute Plaintiffs' argument regarding chill by comparing Plaintiffs' expressive activities in 1999 with those in 2002. Plaintiffs are long-time activists and advocacy organizations, who are less likely than the average individual or group to be deterred from continued expressive activities. Similarly, it is unlikely (although not impossible) that Plaintiffs will be able to produce at trial individuals who would testify that they were deterred from participating in a public protest because of fear of winding up in a police Spy File. Such individuals are unlikely to be willing to come forward to testify in a public court proceeding. Those are among the reasons why this Court must evaluate the potential chilling

effect of the City's practices under an objective standard that focuses primarily on the practices of the police. As Plaintiffs pointed out in their Motion:

> 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."

Medocino 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)). Thus, with regard to chilling effect, the primary focus at trial will be whether the challenged police practices pose a credible threat of chilling persons of ordinary firmness – as opposed to the groups and individuals who are courageous enough to take a public stand against political surveillance – from exercising their constitutional rights. The City's proposed fishing expedition into the history of the individual Plaintiffs' expressive conduct and associations is therefore, at best, of only marginal relevance.

Moreover, many of the challenged practice have come to light only recently. The existence of the Spy Files emerged just a few weeks before this lawsuit was filed. In recent weeks, the City has disclosed additional information about its use of information collection practices that have the objective effect of chilling the exercise of First Amendment rights. For example, the City recently released to Plaintiff Chiapas Coalition and Direct Action Network ("DAN") a document revealing that an undercover police officer had covertly attended two DAN meetings held at the office of plaintiff American Friends Service Committee. A copy of one of these documents is attached as Exhibit A. In contrast to the City's labeling of the Plaintiff organizations as "criminal extremist," the City's Spy Files describe DAN as a "protest group." The Spy Files state that DAN is "an amalgam of protest groups banded together to ensure large

numbers of protesters at local demonstrations." See Exhibit A. This description suggests nothing criminal or sinister (except possibly in the eyes of the Denver Intelligence Unit, which considers any protest activity to warrant surveillance). Indeed, the City had no reasonable suspicion that DAN was involved in any criminal activity.

News of this baseless, unjustifiable, and covert infiltration of a peaceful activist group will inevitably travel – not because Plaintiffs brought this action, but through the City's disclosure of the shocking content of the DAN Spy File outside this litigation. It may be too early to determine the chilling effect the disclosure of the Department's covert infiltration will have on the First Amendment activities of Plaintiffs and other individuals who otherwise would join Plaintiffs in expressive activities.

What is clear, however, is that the information sought in the challenged discovery requests will have only marginal relevance to disproving the allegation that the Department's covert infiltration of peaceful advocacy groups poses a credible threat of deterring the exercise of First Amendment activities. The City's refusal to adopt a policy to control or to regulate infiltration of organizations engaged in peaceful criticism of government policies sends the message that peaceful critics of government policies should assume that Denver police officers will covertly infiltrate their meetings: listening, recording, and distorting.

As the Colorado Supreme Court recognized earlier this year, the values underlying the First Amendment are undermined when bookstore browsers believe that police officers are looking over their shoulders or obtaining the records of their purchases. See Tattered Cover, Inc.v. City of Thornton, 44 P.3d 1044, 1053 (Colo. 2002). A similar chill is inevitable when the government covertly infiltrates the meetings of peaceful advocacy groups. That chill cannot be

measured, however, through the marginally-relevant information the City seeks through its intrusive and burdensome discovery requests.

C. The City's Argument on the Specific Improper Requests Fail to Demonstrate that They Do Not Infringe on Protected Expressive Conduct and Associations.

1. Interrogatory Nos. 2 and 3.

The City distorts the allegations of Plaintiffs' Complaint in a strained effort to frame its vindictive and burdensome requests as seeking supposedly relevant information. 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. The City argues that it requires the requested information to determine if Plaintiffs' associational activities have been chilled. Compelling production of membership lists clearly violates the principles of NAACP, 357 U.S. 449, however.

The same discovery dispute presented here also arose in the challenge to the activities of the Chicago "red squad" that eventually resulted in a consent decree banning the kind of political spying at issue in this case. See Alliance to End Repression v. Chicago, 561 F. Supp. 537 (N.D. Ill. 1982) (decision approving consent decree). In a ruling that is discussed more fully in Steinman, supra, the Chicago court ruled that the plaintiffs did not have to respond to discovery requests that are remarkably similar to the ones Plaintiffs challenge in this case. See Alliance to End Repression v. Rochford, No. 74 C 3268 (N.D. Ill. March 30, 1976). A copy of the court's Memorandum Opinion and Order ("Order") is attached hereto as Exhibit B.

The plaintiffs in Alliance to End Repression alleged that the Chicago Police Department monitored their activities, compiled extensive files on them, and disseminated derogatory information about them, resulting in chilling their exercise of constitutional rights. Id. at 541; Order at 1. The defendants in Alliance sought to compel the organizational plaintiffs' responses to Interrogatory 1, which required the plaintiff organizations to do the following: "List the members of each plaintiff organization for the period beginning in November 1972, and continuing to the present." A copy of the Interrogatories To Plaintiffs, propounded by the City of Chicago and served on the plaintiff organizations, is attached as Exhibit C. The defendants likewise sought to compel the individual plaintiffs' response to Interrogatory 5, which required individual plaintiffs to do the following: "For each individual plaintiff, identify every club, association, committee, coalition, organization, civil, religious, political or community group of which that plaintiff is now or has since January, 1970, been a member." A copy of the Interrogatories To Plaintiffs Set No. 2, propounded by the City of Chicago and served on the individual plaintiffs, is attached as Exhibit D.

The Alliance court rejected the defendants' argument that the information it sought would constitute "an objective indicator of any 'chill' accruing to plaintiffs as alleged in the complaint." Order at 1. The court reasoned as follows:

> [T]he Court is not convinced that disclosure of identity of these persons . . . would be in any way indicative of "chill." It does not follow that a decline in membership is proof of "chill" emanating from defendants, or conversely, that a rise in membership indicates lack of "chill." Further, assuming arguendo, some validity in defendants' argument, there is no need for names of individuals but rather a need for statistical data.

Order at 2. The same reasoning applies to this case.

The City also claims it is entitled to know the identity of each member of the Plaintiff organizations in order to test the truth of the Plaintiffs' allegation that individuals are less likely to join a rally or to participate in other expressive activities when they reasonably fear that they will be photographed by police or that their names will appear in police "criminal intelligence" files. Response at 3. The City cannot seriously intend to contest this allegation. Indeed, in the press statement attached to the Complaint as Exhibit D, the City, through Mayor Webb, admitted that Denver residents had called him to express their concern that they might wind up in a police file if they joined a peaceful demonstration.

Moreover, the Spy Files demonstrate that the City's agents are well aware that police surveillance has a chilling effect. For example, in Exhibit E herewith, submitted under seal, an intelligence officer noted that members of the organization under surveillance were avoiding meetings because of the fear that they will be identified and included in police files. See also deposition of Sgt. Al Miller, 105:13 to 106:4, Exhibit F herewith, also submitted under seal. Courts recognize that the potential for chill is obvious in situations such as those alleged here. See, e.g., Nagel v. HEW, 725 F.2d 1438, 1441 (D.C. Cir. 1984) ("the mere compilation by the government of records describing the exercise of First Amendment freedoms creates the possibility that those records will be used to the speaker's detriment, and hence has a chilling effect on such exercise").

2. Interrogatory No. 4; Requests for Production No. 3 and 9.

Interrogatory no. 4 propounded by the City asks for a list of every "political, religious, educational, social or expressive activity" in which Plaintiffs have engaged in since 1999. The City claims this astonishingly overbroad inquiry must be answered in order for the City to test

the truth of Plaintiffs' allegations that their expressive activities have been chilled as a result of the City's conduct. See Response at 3-4.

Again, the information the City seeks is at best marginally relevant to that inquiry. See Section II.B. supra. In response to far less invasive inquiries, the Alliance court reasoned:

> This Court is very reluctant, absent a clear showing of need, in a suit alleging invasion of privacy, to allow defendants to discover the very information they allegedly have been seeking by overt and covert means. Plaintiffs brought this lawsuit to enjoin defendants' alleged spying. Defendants may not employ discovery in this suit to further their alleged intelligence gathering activities.

Order at 2. The infringement on First Amendment values outweighs any marginal relevance of the requested information.

In addition to seeking irrelevant information, interrogatory no. 4 propounded by the City intrudes impermissibly into freedoms protected by the First Amendment. The same is true of requests for production nos. 3 and 9, which 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. The City has not demonstrated a compelling need for the requested information, thus, Plaintiffs should be protected from compelled production.

3. Interrogatory No. 8.

The City asserts, with respect to interrogatory no. 8, that it needs to know Plaintiffs' entire history of legal proceedings in order to test the allegation that they have been falsely labeled as "criminal." Response at 4.[2] The City's argument is meritless.

First, the City's inquiry has no relevance to any of the individual Plaintiffs, because the Spy Files label only groups as "criminal extremist." The City does not classify individuals using that term. Rather, the City identifies those individuals who are members of the groups that it classifies as "criminal extremist." Therefore, an individual's criminal record – or lack thereof – has no bearing on whether he or she affiliates with a group that the Denver Police Department has classified as "criminal extremist."

Second, the City's contention that it needs to test the truth of the organizational Plaintiffs' denial that they are "criminal extremists" is baffling. The City has repeatedly failed to produce any definition of its term "criminal extremist" or any criteria for labeling groups as "criminal extremist." In addition, and no matter how the City chooses to define the term, the only criminal activity that is even arguably relevant to proving or disproving the accuracy of the label is criminal activity that is carried out on behalf of, or in the name of, the organization, or criminal activity that the organization itself advocates, authorizes, or ratifies. Crimes carried out by individuals on their own, acting independently of the organization, are not relevant to whether

[2] Interrogatory no. 8 is actually somewhat less absurd. It provides: "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."

the organization itself is labeled accurately as "criminal extremist." Finally, the information the City seeks is not relevant because the City did not limit its request for information about past legal proceedings to criminal matters. The City offers no explanation of how a Plaintiff's involvement in a civil proceeding could be relevant to the City's labeling the Plaintiff as a "criminal extremist." Whether a Plaintiff was a party to a small claims court case decades ago is of no consequence to the City. Even if, hypothetically, the City were 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.

To again quote the court in Alliance:

> The Court is unable to ascertain any relevance of the information sought to the instant litigation. Disclosure of background information would invade the privacy of the individual plaintiffs without sufficient reason. The only end ascertainable by the Court that defendants might achieve from this information, is the completion of files defendants allegedly maintain on these individuals as set forth in the complaint.

Order at 4.

4. Interrogatory Nos. 11, 15, and 17.

The City claims it needs the information sought by interrogatories no. 11, 15, and 17 to show that the associational rights of third parties were chilled by the Plaintiffs, not the Defendants. In addition, the City claims it needs the information to show that any harm the Plaintiffs may have suffered also was caused by the Plaintiffs', rather than the Defendant's conduct. Evidence of Plaintiffs' communications regarding the case would not help to prove or to disprove the impact of the City's activities on Plaintiffs or other individuals or groups.

According to the City's theory, Plaintiffs would lose their standing to challenge government spying as soon as they filed a complaint in a public court file, to which the media has access. The City's theory is not the law, nor can it support the City's bid for sweeping discovery into all of Plaintiffs' communications about the intelligence files.

The City overlooks the significant difference between an official government pronouncement that says "X is a criminal extremist" and a statement by an ordinary person or by the media asserting that the government has unfairly and unjustifiably accused X of being a criminal extremist. The former, especially when communicated without opportunity for rebuttal or critique, carries the considerable weight of the government's imprimatur. The latter statement communicates a challenge to the authority, the accuracy, or the legitimacy of the government's label. The former injures reputation; the latter attempts to rehabilitate it.

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

5. Request for Production No. 2.

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 City claims it needs such information to test the truth of the allegation that the City distorted, misstated, or mischaracterized the Plaintiff organizations' goals or purposes. Response at 5. Again, the only publications relevant to the City's decision to engage in surveillance and to create Spy Files on Plaintiffs are the ones about which the 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.

D. The City Ignores Plaintiffs' Assertion that the Only Relevant Information for Determining the Appropriateness of the City's Surveillance and File Creation Is What the City Possessed At the Time It Created the Spy Files

The City ignores Plaintiffs' key argument that the Improper Requests are irrelevant, at least with respect to the issues relating to the City's determination of which individuals and groups would be the subject of surveillance and Spy Files, because the only relevant information is that already within the City's possession. Such policy does not allow the Department to "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 (emphasis added).

The appropriate standard with respect to relevance with respect to these issues is whether the City can justify its decision to include Plaintiffs in the Spy Files, 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 in its possession at the time it created the Spy File. Any information the City hopes to learn in the future from the Improper Requests cannot possibly be relevant to justify decisions the Department made in the past.[3]

III. 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.

[3] The City argues that, as an alternative to the "drastic" relief Plaintiffs seek, the Court should enter a protective order that merely limits the access to the information and documents responsive to the Improper Requests. A protective order that merely limits the disclosure of privileged responses, however, does not cure the irrelevant, overbroad, and burdensome nature of the City's requests. More importantly, the compelled disclosure itself would infringe on protected activities, regardless of limits on subsequent dissemination. The City fails to cite to any authority for its novel proposition that, where the First Amendment privilege applies, it can be overcome by a protective order limiting further disclosure. See Planned Parenthood Golden Gate v. Superior Court, 99 Cal. Rptr. 2d 627, 645 (Ct. App. 2000) (holding that even with protective order limiting dissemination of information to party's attorneys, right of privacy prevented compelled production of names and addresses of witnesses with knowledge).

Dated: November 27, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2002, a true and correct copy of

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER

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