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' RESPONSE TO DEFENDANT'S SEALED MOTION FOR PROTECTIVE ORDER (FILED UNDER SEAL)

Plaintiffs, American Friends Service Committee ("AFSC"), Antonia Anthony, End the Politics of Cruelty, Chiapas Coalition, Stephen Nash, and Vicki Nash (collectively, "Plaintiffs"), respectfully submit the following response to the Sealed Motion for Protective Order submitted by defendant, City and County of Denver (the "City").

INTRODUCTION

The City seeks an *in camera* review of certain e-mails and related e-mail policy and disciplinary policy documents. The City contends that production of these documents would be embarrassing to the City and to the police officers who exchanged the e-mails. Thus, the City contends that an *in camera* review of these e-mails is necessary. Although Plaintiffs believe the City's embarrassment over these e-mails is the least of its problems with respect to these

documents, Plaintiffs would welcome this Court's *in camera* review of the e-mails.[1] The City also seeks an Order that would eliminate its obligation to respond to Plaintiffs' outstanding written discovery requests. The City has not met its legal burden with respect to the City's request for an Order eliminating its obligation to respond to Plaintiffs' outstanding discovery requests. Accordingly, the City's motion should be denied in its entirety.

FACTS AND LEGAL ARGUMENT

1. Plaintiffs' Request For E-mail Policies and Specific E-mails are Reasonably Calculated To Lead To The Discovery Of Admissible Evidence, and They Should Be Produced.

In paragraphs 13-18 of its Motion, the City objects to the production of its policies regarding the use of its e-mail system and to the production of certain individual e-mails. The City's reasoning is simple. It claims that the e-mails are irrelevant to this case and that their production would be embarrassing. [redacted]

[1] In order to conduct the *in camera* review, Plaintiffs request that the Court immediately direct the City to provide the Court with electronic copies of the specific e-mails at issue no later than March 3, 2003.

As for the e-mails themselves, the City is correct that several of them contain R and X rated photos of the most despicable and profane nature. But the City has only set forth part of the story, and it has argued the wrong standard in seeking to prevent their disclosure. The X rated e-mails contain photographs [photograph should be plural throughout] that attempt to dehumanize women, while the R rated e-mails contain racial and political messages that demonstrate clear prejudice and bias against certain ethnic and national origin groups. [redacted]

The relevance of these photographs are clear when one considers that Plaintiffs, and

members of the putative class in this case, have been the subject of surveillance and spy files because of public stands against racism; against the former South African apartheid regime; in support of Palestinian self-determination; and because of criticism of U.S. policies regarding Iraq and Afghanistan. For example, documents number DPD.American Friends 13430 and 20381, attached hereto as Exhibit A, are Intelligence Bureau reports and emails detailing the Bureau's surveillance of the Palestine Solidarity Committee and Palestinian issues in general. Documents numbered DPD American Friends 15012 and 16878, attached hereto as Exhibit B, are Intelligence Bureau Summary Reports detailing the Bureau's surveillance of the Progressive Action Coalition (a fundraising group that raised money for, inter alia, the Free South Africa Committee, the Southwest African People's Organization and the African National Congress), and the Free South Africa Committee. Document number DPD.American Friends 14425 attached hereto as Exhibit C, is an Intelligence Bureau Group File Report detaining the Bureau's surveillance of the Colorado Campaign For Middle-East Peace.

These documents demonstrate that the City has been conducting surveillance activities against certain groups because of the civil and human rights causes they support, including causes that have a relationship to the subtitles used to describe the photographs contained in the May 29, 2002 email. The emails betray a vicious contempt for certain political positions that appear to prompt inclusion in the Spy Files, a bias that may play a role in the intelligence officers' views about which groups and which activities merit the surveillance and monitoring

that is challenged in this lawsuit. Plaintiffs are entitled at a minimum to have these email documents produced so that issues of bias and motive can be properly explored.[2]

Fed. R. Civ. P. 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis added. This relevancy standard is construed more broadly during discovery than at trial. See 8 C. Wright & A. Miller, Federal Practice and Procedure § 2008 at 41. As the United States Supreme Court stated, a relevant matter is "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Because discovery is designed to define and to clarify the issues, it is not limited only to those specific issues raised in the pleadings. Id. Rather, the question of relevancy should be construed "liberally and with common sense," and discovery should be allowed unless the information sought has no conceivable bearing on the case. Miller v. Pancucci, 141 F.R.D. 292, 296 (C.D. Cal. 1992).

Here, the e-mails are relevant for several reasons. First, the e-mails support Plaintiffs' argument that the creation and retention of the "Spy Files" on certain individuals and organizations was the result of political and racial biases. Thus, the e-mails are reasonably calculated to lead to the discovery of admissible evidence and should be produced. Second, the

[2] There are also a host of other e-mails the City is refusing to produce. These include other e-mails containing pornographic photographs and e-mails containing recorded phone messages of a racially biased and despicable nature.

e-mails are reasonably calculated to lead to the discovery of admissible evidence because they demonstrate that the Denver Police Department, including the highest ranking police officers in the Department, routinely violate internal policies. The City itself has made this issue relevant in this case because the City has maintained that its new intelligence policy will cure the problems of the past and that Plaintiffs and the public at large should trust the City to enforce the new policy properly. Yet, the question remains, if the City does not police itself with respect to its email policies and the dissemination of prejudicial and pornographic photographs by its Police Officers, why would the Plaintiffs, the public, or this Court believe that it will properly police itself with respect to its newly created intelligence gathering policy?

2. Plaintiffs have propounded six legitimate sets of written discovery requests

To date, Plaintiffs have issued six separate sets of written discovery requests. Those discovery requests have included forty separately numbered interrogatories, twenty-four separately numbered requests for production, and thirty-seven separately numbered requests for admission.[3] Pursuant to the Scheduling Order issued by this Court, Plaintiffs are entitled to

[3] On June 28, 2002, Plaintiffs propounded their first set of written discovery, consisting of seventeen interrogatories and five requests for production of documents. On August 5, 2002, Plaintiffs propounded their second set of written discovery consisting of four interrogatories and five requests for production of documents. Plaintiffs propounded a third set of written discovery that was subsequently withdrawn. On November 7, 2002, Plaintiffs propounded their fourth set of written discovery, consisting of ten interrogatories and four requests for production of documents. On December 2, 2002, Plaintiffs propounded their fifth set of written discovery consisting of one interrogatory and eight requests for admission. Finally, on February 5, 2003, Plaintiffs propounded their sixth set of written discovery, consisting of eight interrogatories, ten requests for production of documents, and twenty-nine requests for admission. In total, Plaintiffs

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propound forty interrogatories, forty requests for production and forty requests for admission. Yet, in response to Plaintiffs' Sixth Set of Written Discovery, the City has objected, claiming that Plaintiffs have exceeded their allowable discovery limits. The City's argument is disingenuous. Plaintiffs have not propounded multiple sets of discovery as an intellectual exercise. Rather, they have done so because the City has failed to provide information in a timely manner and provided discoverable information in piecemeal fashion, requiring follow-up discovery requests. The City's own Motion proves this point.

In paragraph 12 of its Motion, the City indicates that it has produced "over 23,000 pages of documents from Intelligence Bureau files," it has "made available six file cabinets of files containing additional tens of thousands of pages of documents," it has "made available for review an additional five boxes of documents containing approximately 4,800 pages," it has "made available for review two CD-ROMS," and "during the past month [it] has made available the e-mail folders (including archive, draft and sent item mail folders) for Intelligence Bureau detectives." See the City's Motion at 12.

Interestingly, the City identified the 23,000 pages of information in its Rule 26 disclosures in only the most generic fashion but virtually none of the remaining information was identified in its mandatory Rule 26 disclosures. More problematic, however, the City has provided Plaintiffs with untimely and piecemeal discovery responses. For example, at the

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have propounded forty separately numbered interrogatories, twenty-four requests for production of documents and thirty-seven requests for admission.

February 18 status conference, the Court ordered the City to provide discovery responses to requests that had been pending since last August. If the City had properly identified and disclosed discoverable information in a timely manner, Plaintiffs would not have been forced to issue six sets of written discovery requests.

As for its specific argument that Plaintiffs have exceeded their allowable discovery limits, the City is in error. The City complains that certain interrogatories and requests for production of documents "contain multiple subparts" and should, therefore, be counted as separate discovery requests. See, e.g., Defendant's Motion at ¶ 4, p. 2. However, when subsections of interrogatories and requests for production are logically or factually subsumed within and necessarily related to the primary question, they may be deemed to comprise a single interrogatory. See Kendall v. GES Exposition Serv., Inc., 174 F.R.D. 684, 685 (D. Nev. 1997); Ginn v. Gemini Inc., 137 F.R.D. 320, 321-22 (D. Nev. 1991); Clark v. Burlington N. R.R., 112 F.R.D. 117, 118-21 (N.D. Miss. 1986). Moreover, "an interrogatory containing subparts directed at eliciting details concerning a common theme should be considered a single question, although the breadth of the area inquired about may be disputable." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2168.1 (2d ed. 1994). See also, 7 Moore's Federal Practice, § 33.30[2] (Matthew Bender 3d ed.) ("The better view is that subparts may be counted as part of one interrogatory if they are logically and necessarily related to the primary question. This approach is most consistent with the intent of the discovery rules to provide information, not hide information, with reasonable limits.")

Here, Plaintiffs have propounded 40 separately numbered interrogatories and 24 separately numbered requests for production of documents. Though, admittedly, some of these

discovery requests contain subparts and illustrative examples, they are all logically and/or factually related to the primary question raised in the particular discovery request. Thus, as noted in both Moore's and Wright & Miller, supra, the subparts and illustrative examples do not themselves count as separate discovery requests.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny the City's motions in its entirety, enter an Order requiring the City to provide Plaintiffs with copies of the subject e-mails and e-mail policies, and enter an Order requiring the City to respond in full to Plaintiffs' outstanding discovery requests.

Dated: February 27, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2003, a true and correct copy of **PLAINTIFFS' RESPONSE TO DEFENDANTS SEALED MOTION FOR PROTECTIVE ORDER (FILED UNDER SEAL)** was delivered via First Class Mail, postage prepaid, to the following:

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