UNITED STATES DISTRICT COURT **(ECF)**
SOUTHERN DISTRICT OF NEW YORK

MICHAEL SCHILLER, et al., Plaintiffs, - against - THE CITY OF NEW YORK, et al., Defendants.	04 Civ. 7922 (KMK) (JCF)
HACER DINLER, et al., Plaintiffs, - against - THE CITY OF NEW YORK, et al., Defendants.	04 Civ. 7921 (KMK) (JCF) MEMORANDUM AND ORDER

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

These cases concern the arrests of persons protesting in connection with the Republican National Convention (the "RNC") in 2004. At issue here are 600 pages of documents (the "Intelligence Documents") that relate to intelligence gathered by the New York City Police Department (the "NYPD") and upon which the City of New York and the individual defendants (collectively, the "City") claim that they relied in formulating policies for RNC-related arrests. The City has designated these documents confidential pursuant to a protective order (the "Protective Order") previously entered in these and other related actions. The plaintiffs and the New York Times (the "Times"), which was previously granted permission to

intervene, have moved to lift those confidentiality designations. For the reasons set forth below, their motion is granted.

Background

On October 4, 2005, I approved the parties' stipulation concerning confidentiality, entitled "Protective Order #1." The Protective Order provides that any party may designate discovery materials as "Confidential," triggering specified restrictions on disclosure. (Protective Order #1, attached as Exh. B to Letter of Peter G. Farrell dated March 23, 2007 ("Farrell 3/23/07 Letter"), ¶ 5). Any material deemed "Confidential" may be reviewed only by the parties, their counsel, and their experts. (Protective Order #1, ¶¶ 1, 5). Confidential materials cannot be used "for any purpose other than to prosecute" the RNC cases, and, if docketed with the Court, must be filed under seal. (Protective Order #1, ¶¶ 2-3). In addition, the Protective Order states that "[i]n the event that either party disagrees with the designation of particular material as 'Confidential,' such party shall attempt in good faith to resolve the disagreement with the opposing counsel and, if the parties cannot resolve the matter, they may raise it with the Court." (Protective Order #1, ¶ 6).

On January 19, 2007, the City produced the Intelligence Documents to the plaintiffs. See Schiller v. City of New York, No. 04 Civ. 7922, 2007 WL 735010, at *2 (S.D.N.Y. March 12, 2007). As noted above, these 600 pages of documents reflect intelligence

gathered by the NYPD prior to the RNC. The City designated the Intelligence Documents "confidential" pursuant to the Protective Order and, in addition, sought an order that they be subject to an "attorneys'-eyes-only" designation, to remain in effect unless the Court subsequently ordered otherwise. (Letter of Peter G. Farrell dated Jan. 10, 2007, attached as Exh. B to Farrell 3/23/07 Letter). The plaintiffs consented to that request, and I granted it on January 12, 2007. (Memorandum Endorsement dated January 12, 2007, attached as Exh. B to Farrell 3/23/07 Letter).

The plaintiffs and the Times now challenge the designation of the Intelligence Documents as confidential.

Discussion

In an order dated January 19, 2007 (the "January 19 Order"), I lifted the confidentiality designations assigned by the City to various documents, videotapes, and deposition testimony. Schiller v. City of New York, No. 04 Civ. 7922, 2007 WL 136149 (S.D.N.Y. Jan. 19, 2007). For reasons set forth in detail in that decision, I found that under the Protective Order, the City bears the burden of demonstrating good cause for its confidentiality designations when those designations are challenged by the plaintiffs. Id. at *2-5. I also noted that

> "[o]rdinarily, good cause [for a protective order] exists 'when a party shows that disclosure will result in a clearly defined, specific and serious injury.'" In Re Terrorist Attacks on September 11, 2001, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006) (citing Shingara v. Skiles, 420 F.3d 301, 306 (3d Cir. 2005)). "Broad allegations of

> harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. Moreover, the harm must be significant, not a mere trifle." Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986) (internal citations omitted); see also Allen v. City of New York, 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006) (finding that "generalized and unsupported claims of harm that might result from disclosure" do not constitute good cause).

Id. at *5. The same standard applies here.

The City contends that the Intelligence Documents must remain confidential because public disclosure would jeopardize the defendants' right to a fair trial.[1] The City notes that plaintiffs' counsel, the New York Civil Liberties Union (the "NYCLU"), posted on its website a number of the documents from which the confidentiality designations were removed as a result of the January 19 Order. (Farrell 3/23/07 Letter at 2). The City also contends that plaintiffs' counsel have made what it characterizes as "inflammatory" and "prejudicial" public statements regarding those documents. (Farrell 3/23/07 Letter at 2-3). The City complains of a "pattern of negative articles" in publications such as the Village Voice, the New York Times, Newsday, and the New York Sun, all of which allegedly "enjoy wide readership within the communities from which juries in the RNC actions will be drawn." (Farrell 3/23/07 Letter at 3-4). According to the City, if the Intelligence Documents are disclosed to the public, the ensuing

[1] Notably, the City does not contend that these documents must be kept confidential because of security concerns or because public disclosure would jeopardize legitimate law enforcement interests.

negative publicity will make it impossible to impanel an impartial jury should these cases proceed to trial.

As an initial matter, it should be noted that the defendants do not, as the City claims, have "a Sixth Amendment right to trial by a jury unprejudiced by facts not in evidence." (Farrell 3/23/07 Letter at 8 (internal quotation marks and citation omitted)). The Sixth Amendment, by its terms, applies only to criminal proceedings. U.S. CONST. amend. VI. Nevertheless, "fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right." Bailey v. Systems Innovation, Inc., 852 F.2d 93, 98 (3d Cir. 1988); see also Columbia Broadcasting System, Inc. v. Young, 522 F.2d 234, 241 (6th Cir. 1975) ("It is true that the right to a fair trial, both in civil and criminal cases, is one of our most cherished values, and that a trial judge should have the authority to adopt reasonable measures to avoid injuries to the parties by reason of prejudicial or inflammatory publicity."). Accordingly, as I noted in the January 19 Order, a party might well be able to establish good cause for a protective order by demonstrating that such an order was required to ensure a fair trial. Schiller, 2007 WL 136149, at *6; see also Jones v. Clinton, 12 F. Supp. 2d 931, 936 (E.D. Ark. 1998) (noting that court had imposed protective order on consent of all parties "to help ensure that a fair and impartial jury could be selected in the event this matter went to trial by limiting prejudicial pre-trial publicity").

The City has made no such showing, however, with respect to these documents. Citing a number of cases involving criminal defendants' Sixth Amendment right to a fair trial, the City contends that it is entitled to a trial that is not dominated by a "wave of public passion," Irvin v. Dowd, 366 U.S. 717, 728 (1961), and is not conducted in a "carnival atmosphere." Sheppard v. Maxwell, 384 U.S. 333, 358 (1966). (Farrell 3/23/07 Letter at 5). The City's claim that the cases it cites are comparable to the circumstances here strains credulity. In both Irvin and Sheppard, the Supreme Court "overturned a state-court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage." Murphy v. Florida, 421 U.S. 794, 798 (1975). In Irvin, "the rural community in which the trial was held had been subjected to a barrage of inflammatory publicity immediately prior to trial," including information regarding the defendant's prior convictions, his confessions to numerous burglaries and murders, including the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death penalty. Murphy, 421 U.S. at 798. "As a result, eight of the [twelve] jurors had formed an opinion that the defendant was guilty before the trial began." Id. Sheppard, as the Supreme Court later pointed out, "arose from a trial infected not only with a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival," and the proceedings were "entirely

lacking in the solemnity and sobriety to which a defendant is entitled." Murphy, 421 U.S. at 799. The Court has found that "[c]ases such as these are relatively rare, and [has] held in other cases that trials have been fair in spite of widespread publicity." Nebraska Press Association v. Stuart, 427 U.S. 539, 554 (1976).

The City contends that the NYCLU and other plaintiffs' counsel have subjected the City to a "relentless barrage of . . . adverse publicity." (Farrell 3/23/07 Letter at 5). However, the City has given me no reason to believe that extensive media coverage of these cases will be prejudicial to the City's right to a fair trial. The City complains bitterly that it has been treated unfairly by the New York Times, the Village Voice, and other publications, but fails to mention that it has received significant favorable coverage in newspapers such as the Daily News and the New York Post.[2] The press, by encouraging public discussion of the issues raised by these cases, serves an important role in

[2] See, e.g., Editorial, Why the NYPD Must Spy, Daily News, April 2, 2007, at 26 ("Civil liberties zealots who seem to have forgotten that 9/11 ever occurred have been trying to whip New Yorkers into a frenzy by portraying the NYPD as spies and snoops who willy-nilly trample rights here, there and in foreign lands."); David Seifman, Bloomberg Defends NYPD 'Spies,' New York Post, March 28, 2007, at 8 (quoting at length Mayor Michael Bloomberg's defense of NYPD's pre-RNC intelligence program); Editorial, Smearing the NYPD, New York Post, March 27, 2007, at 30 (arguing that NYPD acted within the confines of the law when gathering intelligence prior to the RNC); Steve Dunleavy, It's Times Once Again for Cop-Bashing, New York Post, March 27, 2007, at 25 (referring to New York Times article on NYPD's pre-RNC intelligence program as a "hit job" and quoting Congressman Peter King thanking NYPD "for their extraordinary efforts").

maintaining the robust "'marketplace of ideas so essential to our system of democracy.'" Edwards v. National Audobon Society, Inc., 556 F.2d 113, 115 (2d Cir. 1977) (quoting James v. Board of Education, 461 F.2d 566, 572 (2d Cir. 1972) (internal quotation marks omitted). Moreover, the City's allegations that plaintiffs' counsel have made "misleading" statements to the press about the documents that were the subject of my January 19 Order are entirely conclusory. The City has made no attempt to demonstrate that plaintiffs' counsel have misled the public regarding the contents of those documents, and the complained-of statements are, for the most part, simply reiterations of the allegations made in the complaints in these actions.

It is true that if I remove the confidentiality designations from these documents, their contents will almost certainly be revealed to the public. However, as I have said before, "[w]ithout a concrete showing of harm that would result from public disclosure, the mere fact that the defendants wish to shield from public view the NYPD's preparations for the RNC does not justify a protective order." Schiller, 2007 WL 136149, at *8. The Supreme Court has made it clear that even in the Sixth Amendment context, "pretrial publicity -- even pervasive, adverse publicity -- does not inevitably lead to an unfair trial." Nebraska Press Accociation, 427 U.S. at 554; see also Dobbert v. Florida, 432 U.S. 282, 303 (1977) (finding that "extensive knowledge in the community

of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair"). Accordingly, the City's oft-repeated allegation that the NYCLU is "determined to try this case in the press" (Farrell 3/23/07 Letter at 7), without more, cannot justify its designation of these documents as "confidential."

The City contends that I should not remove the confidentiality designations from the Intelligence Documents because if the documents are released, "the media, in cooperation with the NYCLU, will 'fixate upon and sensationalize them, making it difficult to find jurors who have not seen or heard of [the Documents] before trial.'" (Farrell 3/23/07 Letter at 8 (quoting In re NBC Universal, Inc., 426 F. Supp. 2d 49, 57 (E.D.N.Y. 2006)). The cases cited by the City in support of this claim are inapposite because they address the release of documents containing plainly prejudicial information. For example, the City relies on NBC Universal, a case involving the criminal trial of a defendant who was accused of participating in a racketeering conspiracy involving the Gambino crime family. 426 F. Supp. at 50. At a hearing on the government's motion to disqualify defense counsel, the government played several video recordings of defense counsel visiting with John Gotti, Sr. Id. The court released transcripts of the proceedings, including the recordings, and permitted members of the press to review the recordings at the courthouse, but refused to

permit the media to broadcast them on television. Id. at 58-59. The Court noted that the recordings were inadmissible at trial because "they [were] irrelevant to defendant's guilt and unduly prejudicial." Id. at 55. The Court found that permitting television broadcast of the recordings would "substantially hinder [the] defendant's right to a fair trial" because of the risk of connecting Gotti, "the convicted head of the Gambino crime family, with defendant, through his counsel, in the minds of potential jurors." Id. at 57-58. Similarly, in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), also relied upon by the City, the Supreme Court held that members of the press and the public had no right to be present at pretrial suppression hearings, "the whole purpose of [which] is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury." Id. at 378 (citation omitted). Finally, the City cites United States v. Leonardo, 129 F. Supp. 2d 240 (W.D.N.Y. 2001), in which the court determined that closure of the courtroom for portions of a pretrial detention hearing was appropriate because the government planned to present "prejudicial evidence which may be inadmissible on the issue of guilt but admissible on the issue of bail." Id. at 245.

The City does not contend that the Intelligence Documents will be inadmissible at trial. On the contrary, the City claims that they are "central to [the] defendants' case" because they "detail

what information the NYPD relied upon in formulating its policies" for RNC-related arrests. (Letter of Gerald S. Smith dated Feb. 21, 2007, attached as Exh. 1 to Letter of Christopher Dunn dated April 9, 2007, at 8-9). The fact that some members of the jury pool may become aware of the contents of a document that is likely to be introduced at trial does not provide good cause to keep that document confidential. In each of the cases cited by the City, the court based its decision on the fact that the information at issue was prejudicial and inadmissible at trial. In this case, by contrast, the City has not demonstrated that public awareness of the information contained in the Intelligence Documents will result in any prejudice whatsoever.

The City's reliance upon United States v. Gangi, No. 97 Cr. 1215, 1998 WL 226196 (S.D.N.Y. May 4, 1998), is similarly misplaced. In that case, the court denied the Times permission to publish an internal prosecution memorandum that had been inadvertently publicly filed. The court found that the memorandum was attorney work product, and that although the government had waived work product immunity with regard to its adversary by mishandling the document, it did not follow that the public was entitled to view it. Id. at *3. Moreover, the court found that the memorandum contained "hearsay information involving various individuals' alleged criminal involvement," creating a risk that "'[r]eputations [may] be impaired, personal relationships ruined,

and businesses destroyed on the basis of misleading or downright false information.'" Id. (quoting United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995)). Here, there is no indication that public disclosure of the Intelligence Documents would have any such harmful effects. Although the City contends that the documents are misleading because they "were not written for consumption by the general public" and "contain information filtered and distilled for analysis by intelligence officers accustomed to reading intelligence information" (Farrell 3/23/07 Letter at 6), such concerns do not support a finding of good cause for a protective order. See Schiller, 2007 WL 136149, at *6.

In NBC Universal, the court found that voir dire would be "an insufficient cure if a large segment of the citizens in this district [were] exposed to" the video recordings. 426 F. Supp. 2d at 58. As explained above, the City does not contend that the Intelligence Documents contain inadmissible or prejudicial information of the kind at issue in NBC Universal, Gannett, and Gangi. Even if I assume that public disclosure of the documents might have some prejudicial effect, however, the City has not demonstrated that voir dire would be an insufficient cure. In the so-called "Abscam cases," several courts confronted the issue of whether to permit television networks to broadcast video and audiotapes admitted into evidence and played in open court during trial. The defendants objected, contending that such broadcasts

would jeopardize their Sixth Amendment right to a fair trial in the event that they were retried or tried separately on related indictments. The courts found, however, that "the appropriate course to follow when the spectre of prejudicial publicity is raised is not automatically to deny access but to rely primarily on the curative device of voir dire examination . . . ." United States v. Criden, 648 F.2d 814, 827 (3d Cir. 1981); accord In re Application of National Broadcasting Co., 635 F.2d 945, 953-54 (2d Cir. 1980) ("The opportunity for voir dire examination still remains a sufficient device to eliminate from jury service those so affected by exposure to pre-trial publicity that they cannot fairly decide issues of guilt or innocence."). "'It is the rare case in which adverse pretrial publicity will create a presumption of prejudice that overrides the jurors' assurances that they can be impartial.'" United States v. International Boxing Federation, No. Civ. A 99-5442, 2000 WL 1575576, at *2 (D.N.J. Jan. 28, 2000) (quoting United States v. De Peri, 778 F.2d 963, 972 (3d Cir. 1985)). The City has failed to demonstrate that this is one of those rare cases.

In summary, the City has not shown that public disclosure of the Intelligence Documents will have any prejudicial effect upon its right to a fair trial and therefore has not met its burden of demonstrating that public disclosure of these documents will result in a "clearly defined, specific and serious injury." In re

Terrorist Attacks, 454 F. Supp. 2d at 222. Accordingly, the Intelligence Documents are not properly within the scope of the Protective Order and need not be kept confidential. Obviously, the "attorneys'-eyes-only" designation is also lifted.

Conclusion

For the reasons set forth above, the motion to remove the confidentiality designations from the Intelligence Documents is granted.

SO ORDERED.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
May 4, 2007

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