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

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

It is the rare case where the very arguments presented to the court in order to influence its decision may justifiably be shielded from opposing counsel and from the public. This is not that case.

Background

These are two of the numerous cases arising out of hundreds of arrests that took place in connection with the Republican National Convention (the "RNC") in 2004. Among other things, the plaintiffs challenge policies of the New York City Police Department (the "NYPD") requiring that all arrestees at the RNC be fingerprinted and that they be arraigned prior to release rather than being

issued a summons to appear at a later time. The NYPD contends that these policies were justified by intelligence gathered prior to the RNC that indicated the likelihood of disruptive and illegal activity. At the very close of discovery in January 2007, the defendants produced for the first time 600 pages of intelligence documents in connection with this defense. When it became apparent that the NYPD had in its possession additional relevant information, the plaintiffs served a document request. The defendants responded, objecting to the production of many documents on the ground that they were subject to the law enforcement privilege. The plaintiffs moved to compel production, and in connection with adjudication of that motion, the defendants submitted the documents at issue for in camera review.

In a Memorandum and Order dated August 6, 2007, I granted the motion in part and denied it in part. I ordered some documents produced in their entirety because they were not protected by the law enforcement privilege. With respect to others, I identified portions that were privileged and ordered that the documents be produced in redacted form. Finally, in order to assuage the defendants' concerns even with respect to non-privileged information, I directed that the documents be produced for attorneys' eyes only.

The defendants then filed objections to the August 6, 2007 Memorandum and Order. In support, they submitted a Declaration of

David Cohen, NYPD Deputy Commissioner for Intelligence, dated August 27, 2007 (the "Cohen Declaration"). They also moved for permission to file the Cohen Declaration under seal for ex parte review by the Court and serve a redacted copy on plaintiffs' counsel. By Order dated November 28, 2007, the Honorable Richard J. Sullivan, U.S.D.J., determined that I should have the opportunity in the first instance to consider any new arguments advanced by the defendants in the Cohen Declaration and that I should rule on the application to file the Cohen Declaration under seal. The parties agreed to address the sealing issue first, and when that is resolved, they will proceed to further briefing on the law enforcement privilege questions.

Discussion

Deputy Commissioner Cohen has described the rationale for sealing his declaration as follows:

> I prepared the August 27 Declaration to demonstrate how the specific strands of information ordered disclosed by the Court (i) could reveal the identities of sources of information, including undercovers and confidential informants; (ii) disclose methods of operation and (iii) be used as a means to undermine NYPD law enforcement operations. In order to make that showing, it was necessary to reveal privileged information in the August 27 Declaration including directly quoting documents, grouping documents by certain criteria, providing instruction on how the specific strands of information ordered disclosed can be linked to reveal the identity of undercovers, confidential informants, and other privileged information, including the subjects of active investigations and investigations that may be reopened in the future.

(Declaration of David Cohen dated Dec. 7, 2007, ¶ 5) (footnote

omitted).

While proceeding ex parte is one way to provide the Court with information that the defendants wish to convey, it is not the only way. With the plaintiffs' consent, the defendants have already submitted all of the documents at issue for in camera review. Therefore, there is no need for Deputy Commissioner Cohen to quote from those documents; he can effectively illustrate his arguments by referring to documents by bates number. Furthermore, it is highly unlikely that "grouping documents by certain criteria" or "providing instruction on how specific strands of information ordered disclosed can be linked" would disclose specific law enforcement techniques entitled to protection. To the extent that the defendants believe that the current permutation of the Cohen Declaration risks such disclosure, they are free to submit a revised, less explicit affidavit.

Permitting the submission of secret argument is antithetical to our adversary system of justice. First, it places the opposing party at a distinct disadvantage. In this case, plaintiffs' counsel would have to guess at the rationales advanced by the defendants and would be unable to rebut contentions that they did not correctly anticipate. Second, it alters the role of the court. Recognizing that plaintiffs' counsel lacks the ability to confront the defendants' arguments, the court becomes an advocate, trying to predict and take into consideration the responses that plaintiffs'

counsel would make if they were privy to the defendants' ex parte communications.

"Ex parte, in camera hearings are part of a trial judge's procedural arsenal but, of course, should be used only when necessary." United States v. Southard, 700 F.2d 1, 11 (1st Cir. 1983). The submission of a sealed, ex parte affidavit is not necessary here. This is not a case involving classified information, cf. Tabbaa v. Chertoff, 509 F.3d 89, 93 n.1 (2d Cir. 2007), or state secrets, cf. Kasza v. Browner, 133 F.3d 1159, 1163 (9th Cir. 1998). This is not a case in which ex parte submissions are part of a statutory scheme. Cf. Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (citing Freedom of Information Act as example). But, as discussed above, this is a case where the defendants are fully capable of articulating their arguments without disclosing privileged information given the fact that the underlying documents are available for the Court's in camera review.

Conclusion

The defendants' motion to submit the Cohen Declaration ex parte and under seal is denied. By January 31, 2008, the defendants shall serve and file a revised, unredacted declaration in support of their application for reconsideration of my August 6, 2007 Memorandum and Order. The plaintiffs shall submit any response by February 15, 2008, and the defendants shall reply by

February 22, 2008.

SO ORDERED.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
January 22, 2008

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