UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELIZABETH BOLGER, et al., **Plaintiffs,** **v.** **DISTRICT OF COLUMBIA, et al.,** **Defendants.**	**Civil Action No. 03-0906 (JDB)**

MEMORANDUM OPINION & ORDER

The District of Columbia ("District") has filed a motion for a protective order that would restrict plaintiffs' use and disclosure of materials turned over in discovery that relate to a Metropolitan Police Department ("MPD") disciplinary investigation of defendant Mark Beach, an MPD captain.[1] The District contends that, under Rule 26(c) of the Federal Rules of Civil Procedure, a protective order is warranted because, without it, plaintiffs would be free to publicize or otherwise disseminate the purportedly sensitive information contained in these materials. According to the District, widespread disclosure of such information not only would lead to embarrassment for the persons involved in the incidents underlying the investigation, but also would impose an undue burden on the District by deterring other witnesses from speaking openly with police (and thereby hamper the MPD's ability to conduct internal investigations).

The District's motion seeks a protective order that would cover "all contents of the [MPD] Internal Affairs' 2001 investigation of defendant Mark Beach and the MPD personnel and unit

[1] The District produced the materials to plaintiffs, subject to an interim confidentiality agreement, in response to discovery requests.

file [on Beach]" as well as "any testimony relating to the investigation." The 2001 probe concerned Captain Beach's truthfulness in statements that he made to Internal Affairs agents who were investigating a "domestic incident" involving Beach, another MPD officer, and a private citizen.[2] This proposed protective order is, at bottom, a publicity-preventing order. It would not deny plaintiffs access to any information or render any materials undiscoverable. Rather, the order would restrain plaintiffs from using information relating to the investigation for any purpose other than "preparation and trial of this litigation" and would further limit the scope of disclosure of such information to the parties in this case and their attorneys.

To succeed on a motion for a protective order, the movant must make a showing of "good cause." Equal Employment Opportunity Comm'n v. Nat'l Children's Center, Inc., 98 F.3d 1406, 1411 (D.C. Cir. 1996) (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984)). Rule 26(c) permits the Court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden." Fed. R. Civ. P. 26(c). "Whether a movant has demonstrated good cause is an 'unusually fact-sensitive' inquiry," Condit v. Dunne, 225 F.R.D. 113, 116 (S.D.N.Y. 2004), and the Court possesses broad discretion to determine what degree of protection, if any, is required, United States ex rel. Purcell v. MWI Corp., 209 F.R.D. 21, 27 (D.D.C. 2002) (citing Seattle Times, 467 U.S. at 36).[3] In exercising this discretion, the Court should consider such factors as (1) the relevance of the information to the litigation, (2)

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[2] Notwithstanding the resolution of this motion, the Court will refrain from recounting details of the events underlying the investigation beyond what already is in the public record.

[3] It is well-settled that a court order such as the one the District seeks -- that is, a Rule 26(c) protective order prohibiting a civil litigant from disseminating information obtained solely through pretrial discovery -- is fully reconcilable with the First Amendment's protection against prior restraints on speech. See Seattle Times, 467 U.S. at 37.

the requestor's need for the information from the particular source seeking protection, (3) the burden of producing the sought-after material, and (4) the potential harm that disclosure would cause. Id. at 27-28 (citing Burka v. Dep't of Health and Human Servs., 87 F.3d 508, 517 (D.C. Cir. 1996)). Furthermore, the Court's assessment of potential harm ought to take account of both public and private interests:

> It is appropriate for courts to order confidentiality to prevent the infliction of unnecessary or serious pain on parties who the court reasonably finds are entitled to such protection. In this vein, a factor to consider is whether the information is being sought for a legitimate purpose or for an improper purpose. However, privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny. While preventing embarrassment may be a factor satisfying the "good cause" standard, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. ... Circumstances weighing against confidentiality exist when confidentiality is being sought over information important to public health and safety and when the sharing of information among litigants would promote fairness and efficiency. A[nother] factor [that] a court should consider in conducting the good cause balancing test is whether a party benefitting from the order of confidentiality is a public entity or official. Similarly, the district court should consider whether the case involves issues important to the public.

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787-88 (3d Cir. 1994) (internal citations and footnotes omitted); see also Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995) (noting that the criteria identified in Pansy are "neither mandatory nor exhaustive").

By imposing the burden of establishing "good cause" on the party seeking protection, Rule 26(c) effectively creates a presumption that civil litigants are free to use the information they obtain through discovery for any otherwise lawful purpose.[4] At the same time, the Rule

[4] It is, however, no longer true that materials produced or created in discovery automatically become matters of public record, as the Federal Rules of Civil Procedure have ceased to require that parties file such materials with the Clerk of the Court. Indeed, since 2000, the Rules have *forbidden* such filing, absent a court order to the contrary, until the materials are used as part of a public proceeding, e.g., submitted in relation to a motion or at trial. See Fed. R. Civ. P. 5(d); see also L. Civ. R. 5.2(a).

recognizes that discovery privileges have the potential to be abused unless there is some mechanism for courts to constrain litigants in the use of materials obtained solely through judicial process. See S.E.C. v. TheStreet.com, 273 F.3d 222, 229 (2d Cir. 2001) ("[P]rotective orders issued under Rule 26(c) serve the vital function ... of secur[ing] the just, speedy, and inexpensive determination of civil disputes ... by encouraging full disclosure of all evidence that might conceivably be relevant. ... Without an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless annoyance, embarrassment, oppression, or undue burden or expense.") (internal quotations and citations omitted). Hence, the "good cause" requirement of Rule 26(c) dictates that courts weigh factors such as those set out above before issuing protective orders. See Hawley v. Hall, 131 F.R.D. 578, 584 (D. Nev. 1990) ("A showing of Rule 26(c) good cause requires a balancing of the interests of the parties competing to open or close the civil discovery process to the public."). As the following discussion reflects, application of the relevant factors to the circumstances of this case leads the Court to conclude that the District has failed to establish good cause for issuance of the proposed protective order.

Where, as here, the materials for which protection is sought already have been produced to the requestor, consideration of either the requestor's need to obtain the information or the burden of producing the requested material would be inapposite. Plaintiffs here already are in possession of the information (albeit subject to an interim confidentiality agreement) and defendants already have produced it. Thus, in determining whether to restrict plaintiffs' use of information that it already has obtained through discovery, the Court focuses on other considerations -- namely, relevance and potential harm.

With regard to relevance, the District contends that the materials in question are of minimal relevance to this case, which challenges the lawfulness of the MPD's conduct toward eleven individuals who had congregated in a D.C. parking garage following a mass demonstration on April 20, 2002. Among the MPD officers named as defendants in this action is Captain Beach, who was an MPD Commander at the time of the events at issue and allegedly directed the actions of the officers who detained and arrested plaintiffs. The materials for which the District seeks protection relate to an entirely different set of events and arose out of a domestic incident that was largely unrelated to Beach's police work -- although they do involve charges that Beach "made false statements during an [Internal Affairs] investigation of another officer." Defs.' Mem. in Supp. of Mot. for Protect. Order at 2. Plaintiffs contend that Beach's character for truthfulness is a core issue in their case because they believe that Beach "engaged in a campaign of lies and false statements to justify what were politically motivated mass false arrests, conducted solely because plaintiffs were perceived to be anarchists or to associate with anarchism." Pls.' Opp'n to Mot. for Protect. Order at 2. Plaintiffs' theory of liability thus involves calling into question Beach's veracity in his professional conduct. That, they say, renders these investigative materials relevant.

Whether or not the materials ultimately would be admissible evidence -- a question on which the Court expresses no opinion -- it is undisputed that they are discoverable, and the Court finds that they do have some bearing on this litigation, inasmuch as they relate to either defendant Beach's reputation for truthfulness or perhaps, as plaintiffs suggest, certain habitual practices of Beach. Even so, however, their relevance to this case is only marginal. Hence, to the extent that diminished relevance undercuts Rule 26(c)'s presumption of unrestricted use of

discoverable materials, see TheStreet.com, 273 F.3d at 229, this factor weighs in favor of entering some form of protective order that would limit the dissemination of this information (even if not necessarily the precise order proposed by the District).

With respect to the harm that might result from denial of a protective order, the District suggests two possibilities: (1) plaintiffs will disseminate the information in a manner that will cause embarrassment for defendant Beach as well as for the other MPD officer and the private citizen who were involved in the domestic incident that gave rise to the investigation; or (2) plaintiffs will disseminate the information in a manner that will undermine the effectiveness of internal police investigations because witnesses will be more reluctant to speak openly and forthrightly with investigators if they believe their statements may eventually be made public.

As an initial matter, the Court observes that the District has not demonstrated that widespread dissemination of this information is likely or even probable -- an essential premise underlying its request for a protective order. Although it may be fair to assume that counsel for plaintiffs are not averse to publicity for their cases, the Court has no reason to think that plaintiffs plan to disseminate widely any of the information for which the District seeks protection (or even to have the information "posted on a website for the entire world to see," as the District implies may happen, see Defs.' Reply in Supp. of Mot. for Protect. Order at 3).[5] Nor is there any reason to believe that the information would attract substantial public attention even if plaintiffs wanted it to be disseminated to a broad audience, given that the underlying events occurred more than

[5] The Court has reviewed the Web site for the Partnership for Civil Justice, the organization that represents plaintiffs, and notes that the single page that it devotes to this litigation contains only a brief description of the allegations of the complaint and includes no discovery materials whatsoever. See "Arrested for Protesting in Black: Political Profiling by Police Challenged; The 'Stirfry' Case," at http://www.justiceonline.org.

five years ago, that the general subject matter of the Beach investigation previously has been publicized, and that many of the details of the domestic situation that gave rise to the events are included in the public records of the Montgomery County, Md., Police Department, yet apparently have not been widely disclosed. Furthermore, the Court will not presume that plaintiffs' counsel, who are officers of the Court in the context of this and other litigation, have "malicious or improper intentions regarding any of the discovery materials in this case" simply because plaintiffs have resisted the District's proposed protective order. See Condit, 225 F.R.D. at 117.

The Court recognizes that the investigatory materials and the related deposition testimony may contain some information of a private nature and that some of this information might tend to embarrass the individuals involved (two of whom have no connection to this litigation), but the weight accorded these privacy interests is substantially lessened by the fact that, as already noted, the details of the domestic situation that ultimately led to this investigation are publicly available in police accounts of related events. Those police reports -- which relate to a separate incident that occurred on the same date -- describe in detail many of the personal affairs that are recounted in the Beach investigatory materials and identify all of the individuals who were involved. Also a matter of public record is the fact that Captain Beach was the subject of a disciplinary investigation based on allegations that he made false statements during an Internal Affairs probe of another officer. See Petula Dvorak, For D.C. Police, Funding but Too Few Recruits, The Washington Post, Feb. 26, 2002, at B3 (relating a public exchange between MPD Chief Charles Ramsey and a member of the D.C. City Council regarding Beach's "remov[al] from his post as commander of the 3rd Police District after he was accused of making false statements"); Defs.'

Mem. in Supp. of Mot. for Protect. Order, Ex. B (Decl. of Inspector Matthew Klein) ("Th[e] investigation concerned a charge that [then-]Commander Beach made false statements during an [Internal Affairs Division] investigation of another officer. This other IAD investigation of another officer concerned a domestic incident.").

In addition, the Court considers as a counterweight to the privacy interests the fact that the matters addressed in the Beach investigation involved two public employees -- one of whom, Captain Beach, was a senior law enforcement official -- and that the actions of the second officer implicated official duties insofar as the events related to the handling of a police canine. That is not to say that a protective order will never be appropriate where the subject matter is the private life of a public employee, cf. Nixon v. Administrator of General Services, 433 U.S. 425, 457 (1977) (public officials have some "privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."), but on these facts the Court considers the involvement of police officers -- one of a very high rank -- to weigh against entry of the specific protective order sought here.[6]

As for the District's assertion of an undue burden based on the chilling effect that disclosure would have on the candor of witnesses in police internal investigations, that contention is, for the most part, a reiteration of the District's argument regarding the potential for embarrassment to third parties. See Defs.' Mem. in Supp. of Mot. for Protect. Order at 7 ("The investigation should remain confidential because, once again, its underlying subject matter

[6] In support of its motion, the District cites to several D.C. statutes that direct the District government to treat certain of its personnel records as confidential. Although the Court does not discount the policies reflected in these statutory provisions, non-federal law does not control discoverability or confidentiality in federal civil-rights actions. See King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988); cf. In re Sealed Case, 381 F.3d 1205, 1212 (D.C. Cir. 2004) ("[W]hen a plaintiff asserts federal claims, federal privilege law governs ....").

involved a domestic incident. ... Witnesses who provided information through investigative interviews should ... be protected in order to avoid embarrassment and public humiliation.").[7] In its reply brief, the District indicates that its principal concern in this regard is the privacy of the private citizen who was involved in the domestic incident that spawned the Beach investigation. Although the District avers that "[i]t cannot logically or empirically be disputed that a party to a domestic dispute would be hesitant to provide the police information if she knows that her statement could later be publicly disseminated," the District (whose burden it is to show good cause for the protective order) offers no evidence, empirical or otherwise, to support a conclusion that disclosure in this circumstance will create any meaningful chilling effect on future investigations of a similar nature.[8] Witnesses to events under police investigation often may prefer to avoid involvement in the matter, but their statements to investigators rarely will be entitled to inviolable confidentiality, and any general expectation to the contrary is unrealistic. Moreover, the Court agrees with the observation made in the King case that "this factor should

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[7] The District's attempted invocation of the qualified common-law "law enforcement investigatory privilege" is, at this point, unavailing, because the District already has produced the purportedly privileged materials to plaintiffs. See Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1427 (3d Cir. 1991) ("[U]nder traditional waiver doctrine[,] a voluntary[, unprivileged] disclosure to a third party waives the ... privilege even if the third party agrees not to disclose the communications to anyone else."); accord Bowne of N.Y. City, Inc. v. AmBase Corp., 150 F.R.D. 465, 480 (S.D.N.Y. 1993) ("[E]ven if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, this agreement does not prevent the disclosure from constituting a waiver of the privilege ...."). The fact that the material *might* have been privileged had the District preserved the privilege claim is of no moment in the context of a motion that seeks a protective order covering the material. In any event, it is far from certain that the privilege would even have applied to these materials. See In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988) (noting that the purpose of the privilege is "safeguarding the integrity of *on-going* civil and criminal investigations") (emphasis supplied).

[8] Even if the Court were to accept the District's argument as fact, mere hesitation on the part of a witness is not necessarily an impediment to effective police investigation.

be accorded little weight," because of the uncertainty surrounding the hypothesis that candor will be diminished if witness statements about police conduct are subject to disclosure to civil-rights plaintiffs or the public at large. See King, 121 F.R.D. at 193-94. Indeed, it is likely that a witness's chief concern in this type of situation would be retaliation by an interested party who might become privy to the witness's statements (e.g., the officer who is under investigation or the officer's allies), rather than a concern about the more remote possibility that a third party will have access to the statements in the context of civil litigation.

Finally, the Court attaches little significance to the fact that some District government employees -- such as the MPD officers who participated in interviews as part of the Beach investigation -- are independently bound to maintain in confidence the information that they learned through their participation in the investigation. See Defs.' Mem. in Supp. of Mot. for Protect. Order at 2 ("[MPD] members signed documents acknowledging that the investigation was confidential and directing members not to discuss the interviews with others."). That obligation appears to be principally concerned with workplace decorum and preserving the integrity of an ongoing investigation. Indeed, there has been no representation that civilian witnesses to internal police investigations are in any way restrained from disseminating the information that they obtain based on participation in such a probe.

For the foregoing reasons, and upon consideration of the public record and the materials submitted by the parties under seal, it is this 3rd day of August, 2006, hereby

ORDERED that [59] defendants' motion for entry of a protective order is **DENIED**; and it is further

ORDERED that all filings relating to this motion heretofore made under seal shall be,

and hereby are, **UNSEALED**.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

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