UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELIZABETH BOLGER, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 03-906 (JDB)
	)	
DISTRICT OF COLUMBIA*, et al.*	)	
	)	
Defendants.	)	
	)	

OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

The mass arrest of twenty-five political demonstrators on April 20, 2002 at the direction of MPD Commander Mark Beach was anything but a private event. The plaintiffs were lined up against a wall outside for over an hour. The top MPD brass were called in. Chief of Police Charles Ramsey and Assistant Executive Chief of Police Terrence Gainer worked the media, explaining how they had busted a ring of disruptive anarchists who had been squatting in a garage facility. Plaintiffs were processed through the criminal justice system. The fact of their arrests was made available to the public through the Criminal Justice Information System.

Commander Beach allowed plaintiffs to be interrogated about their political beliefs, their political activities and the identities of persons with whom they associated. Law enforcement agents conducted sophisticated and focused video interviews about the plaintiffs' political activities and associations. Surely, this First Amendment protected information has now been catalogued in an information system and is available for use or dissemination.

All of this occurred to plaintiffs based on a fraud perpetrated by Commander Beach and the Metropolitan Police Department, who actually arrested plaintiffs for unlawful entry into a

garage despite their having presented an electronic key card that worked to allow entry.

Beach and the MPD have 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.

Beach even goes so far as to claim that he ordered these mass arrests based on a complaint from building management. He also claims he cannot recall the complainant, whose identity – as important as it might seem to be – was not recorded anywhere by Beach or anyone else. He has never produced a shred of supporting evidence that there was complainant despite plaintiffs exhaustive discovery requests to that end.

Plaintiffs, recognizing this whole situation to be a fraud, have engaged in an effort to locate any such possible complainant. There is no such complainant. In fact, counsel for the building management firm, JBG Companies, has provided an affidavit attesting, "The business records of JBG do not contain any information at all concerning the lodging of a complaint related to any alleged unlawful entry of persons into the garage at 1275 K Street, N.W. on April 20, 2002. The records do not contain any information at all concerning the lodging of any complaint on that day at that location. Indeed, the records do not contain information at all concerning this purported incident." See Exhibit 3, JBG Aff.

Mark Beach fabricated the basis for these mass false arrests which were made solely because plaintiffs were protestors who were perceived to be anarchists or to be associated with anarchism, and not based on any criminal activity. As the Commander who authorized and directed the mass arrests, he is the sole and most critical witness for the defense. His veracity is squarely at issue.

Defendant Beach has an established history at the Metropolitan Police Department, in the MPD's records, that show that Beach is known to provide false statements and engage in deceptive conduct so severe that he has twice been demoted from the position of commander.

Now comes Defendant Beach and the District of Columbia, claiming that were information related to Beach's established lack of veracity be made public that it would subject him and others to embarrassment and loss of privacy.

At trial, witnesses including Terrence Gainer and Chief Ramsey will be appropriately examined regarding Beach's lack of truthfulness. See Fed.R.Evid. 608(b) (allows questioning of witnesses as to specific instances of conduct concerning the truthfulness of the principal witness); Fed.R.Evid. 608(a) (allows opinion evidence of the untruthful character of witness). Plaintiffs may inquire of Gainer, Ramsey and other officers as to whether they know of Beach's reputation for truthfulness and, even if they testify that they have no knowledge of untruthful conduct or reputation, each may be properly asked regarding about awareness of specific acts of misconduct, including that which resulted in disciplinary findings. See Deary v. City of Gloucester, 9 F.3d 191, 196 (1st Cir. 1991).

In addition, plaintiffs will introduce elements of an MPD Internal Affairs file to establish that Beach has the routine practice of falsely stating "I don't recall" to questions about subjects about which he is lying or evading. See Exhibit 1 (report finds that Beach repeatedly makes false denials of knowledge by stating "I don't recall.") In the instant case, Beach's testimony is rife with claims of a lack of recollection as to critical adverse information that would normally be deemed important and/or recorded by an officer in his position, including the identity of the intelligence officers on the scene including those who interrogated plaintiffs about their political

associations. See Fed.R.Evid. 404(b) (evidence of other wrongs or acts is admissible to establish proof of intent, knowledge or absence of mistake or accident); Fed.R.Evid. 406 (evidence of routine practice admissible to show action in conformity).

There shall clearly be litigation including contested motions *in limine* regarding such inquiry. The defendants' instant filing foreshadows additional filings disputing whether inquiry may be allowed. The District contends that Beach was "exonerated" of charges that he lied under oath to law enforcement. First, this is untrue. See Exhibit 1, Final Report with Recommendations, and Exhibit 2, Final Notice of Adverse Action (finding and upholding charges). Second, regardless of the merits of this "exoneration" argument[1] there exists a substantial basis on which to make inquiry into Beach's lack of truthful character and into the substance of the specific instances in which he lied under oath. That Beach has lied under oath to law enforcement in the performance of his law enforcement duties is strongly probative of his character for untruthfulness. See United States v. Whitmore, 359 F.3d 609, 618 - 622 (D.C. Cir.

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[1] There was no "exoneration," see Exhibits 1, Final Report with Recommendations, and Exhibit 2, Final Notice of Adverse Action, although there was another round of false statements that were supported by Beach.

The evidence shows that after Ramsey and Gainer delivered to Beach the news of his demotion from Commander to Captain, with Beach's encouragement an Officer Patricia Cox began to publicly accuse Chief Gainer of sexual misconduct. As Beach recounts the allegations, the advance of which he admittedly encouraged, Cox claimed that Gainer told her that she had to maintain a sexual relationship with Gainer, or else he was going to demote Mark Beach. See Exhibit 7, Beach Dep. at 259. Gainer testified that these were absolutely false allegations. See Exhibit 8, Gainer Dep. at 64. These allegations by Cox were also not maintained in confidence. In fact, Gainer heard of the allegations because they were circulating "on the street." Id. at 65.

The evidence further shows that the so-called "exoneration" was a deal with Chief Ramsey to reinstate Beach to a command position if Cox would drop her allegations of sexual misconduct against Gainer. After this arrangement was struck, and Beach was given the position of Commander of the Major Narcotics Division, he was then again demoted by Ramsey to Captain for reasons publicly reported as"serious misappropriations" of property within the Major Narcotics Division.

2004) (reversible error for trial court to prohibit cross examination into arresting officer's prior untruthful sworn testimony).

As the Seventh Circuit has stated, Rule 26(c)'s good cause requirement means that, "[a]s a general proposition, *pretrial discovery must take place in the public* unless compelling reasons exist for denying the public access to the proceedings." American Telephone and Telegraph Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978) (emphasis added), cert. denied, 440 U.S. 971 (1979); see also, Public Citizen v. Ligget Group, 858 F.2d 775, 790 (1st Cir. 1988), cert. denied, 488 U.S. 130 (1989); Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980); Note, Nonparty Access to Discovery Materials in the Federal Courts, 94 Harv. L. Rev. 1085, 1085-86 (1981).

Where information is germane to judicial decision making, such as that which is submitted in contested filings, it is even more necessary for the bases of the court's decisions to remain public. There is a strong presumption in favor of public access to judicial proceedings. See Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991).

The evidence of the untruthful character of this key witness who ordered the arrest of plaintiffs, and whom the MPD has repeatedly given significant authority to, should not be maintained in secret. This public interest constitutional rights litigation pertains to the abuse of public authority. The integrity of public functions is enhanced by transparent and open proceedings.

Rule 26 places the burden on the movant to establish good cause for the issuance of a protective order. Fed.R.Civ.P. 26(c). That burden has not been met by defendants. See Anderson

v. Cryovac, 805 F.2d 1, 7 (1st Cir. 1986), citing, 8 C. Wright & A Miller, Federal Practice and Procedure § 2035, at 264-65 (1970); Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3rd Cir. 1995) ("[b]road allegations of harm, unsupported by specific examples," do not satisfy the good cause standard).

Defendants contend, through the affidavit of Matthew Klein, that because Beach made false statements in the context of a "domestic incident," there exists a privacy interest that is "paramount."

If such was the case, then the involved persons would have themselves maintained their privacy. However, there was nothing private regarding Mr. Beach's "domestic" situation. He was openly and overtly residing with MPD Officer Patricia Cox while he was married to Mrs. Denise Beach. Public police reports document and recount all of the details related to the "domestic dispute" which arose when Officer Cox was, in her marked police cruiser with her canine, pulled over by Montgomery County Police while following Mrs. Beach. These details are not private, they have been disclosed publicly and widely, including by the involved persons themselves. The details are in publicly available records.[2] They merit no special protection in this forum, particularly as the only reason they are even referenced is because it is within this context that Beach chose to make false sworn statements in the course of a law enforcement investigation.

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[2] The public police report identifies that Officer Cox explained that, "Mark Beach left his wife (Denise Beach) a year ago for her. On Friday, Mark Beach had a 'near death' experience and was going back to his wife." The report describes how Cox was flagged down by MC Police, and thereupon was "very rude and belligerent" to police and using specified vulgar profanity to reference Mrs. Beach. See Exhibit 4, Police Report. This information is neither private nor maintained in confidence.

There exists an appropriate need for disclosure regarding Beach's lack of truthfulness.[3] That Beach has been once demoted and otherwise sanctioned for making false sworn statements to law enforcement is a matter of public record. It has been reported in *the Washington Post* and disclosed in the public and televised hearings of the Council of the District of Columbia that these charges had been sustained against Beach. See Exhibit 5, Petula Dvorak, *the Washington Post*, "For D.C. Police, Funding but Too Few Recruits," February 26, 2002 (recounting discussion between Council and Chief Ramsey related to Mark Beach's "removal from his post as commander of the 3rd Police District after he was accused of making false statements" and the decision by the disciplinary board in support of those findings).

That Beach on a subsequent occasion was demoted "after audit findings revealed serious misappropriations" in the management of property in the Major Narcotics Division, which had

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[3] In or about July, 2001, an Internal Affairs Investigation was initiated into whether Mark Beach had made false statements under oath to law enforcement officials in the course of an investigation into conduct by Officer Cox. Commander Beach was present when on March 6, 2001 Montgomery County police had been called to his and Officer Cox's shared residence by Commander Beach's wife.

All four responding Montgomery County Police officers reported "serious concerns" regarding Officer Cox's failure to control her police issued canine. The Montgomery County Police officers had requested and directed that Officer Cox take steps to control the dog, which she failed to do. Also, according to Montgomery County police, Officer Cox was engaged in inappropriate conduct and vulgar language.

Commander Beach was questioned as a witness to these events. He provided "demonstrably false exculpatory statements regarding Officer Cox's obvious, regrettable conduct and language." In essence, Beach gave sworn statements under penalty of perjury to law enforcement in which he testified that he saw nothing, knew nothing, and had observed no inappropriate conduct by Officer Cox and also swore that she had brought the dog under control "immediately." This contradicted the observations of all four responding police officers.

In all, the Office of Internal Affairs found that additional events, which were "obvious and well remembered by eight people", were denied under oath by Beach in an effort to protect Officer Cox. As a consequence, an investigation was initiated into whether Commander Beach had made false sworn statements to law enforcement. Ultimately, the investigation found that Beach had done so, and this finding was upheld on appeal by the disciplinary review board.

been under his command, is also a matter of public report. See Exhibit 6, Nancy G. Rosen, *The Capital Hill Rag*, “MPD Reassignments,” September, 2005 at 26. The MPD has to date refused to produce any documentation about this demotion, which apparently was based on violations including deception and misappropriation.

Defendants argue that openness in these proceedings will create an “undue burden” on the District and a disincentive for sworn law enforcement officers to provide honest statements in Internal Affairs investigations. Based on this, the MPD contends that the documents related to the false statements of its command staff should be held in secret. In other words, the MPD argues that it must hide evidence of police officers’ lying because if it does not keep their lies secret from the public they are to serve, then officers will lie or at least not be forthcoming. The decisions of this Court should not be based on the premise, advanced by the police department itself, that MPD officers will fail to be honest or forthcoming in the performance of their duties. On the contrary, the public interest and the integrity of the system rests in the open, law-abiding and truthful conduct of the police and it is furtherance of these goals that there be openness and accountability.

In King v. Conde, 121 F.R.D. 180 (E.D.N.Y. 1988) the United States District Court engaged in a thorough review, and rejection, of the argument that disclosure would chill police internal investigation candor. King v. Conde, 121 F.R.D. at 192 - 193. The Court concluded that the stronger argument is that officers will be more candid if they believe their statements may be subject to review and scrutiny. The Court, applying the rule that good cause for a protective order must be established by the movant, ruled that “Ultimately, this debate requires empirical evidence. The burden rests on the party seeking to limit disclosure to show such empirical

support." King v. Conde, 121 F.R.D. at 193. No such evidence has been produced by the movant.

Defendants wish to maintain in secret the information that reflects Beach's character for untruthfulness, which has manifest itself in many ways including in his fabrication of the bases for the mass false arrest of plaintiffs, perhaps also to avoid disclosure related to the Chief's involvement in matters that reflect adversely on the top leadership of the MPD.

Additional Areas of Overbreadth in the Proposed Order

For the reasons stated above, the motion should be denied in particular with respect to the documents constituting or reflecting the Internal Affairs investigation into Beach's false sworn statements, and his practice of falsely claiming a failed recollection when, in fact, he is simply being untruthful or evading the truth.

Defendant's proposed order also encompasses "the personnel and unit file of defendant Mark Beach." It is unclear what the "unit file" refers to. The personnel file has never been produced to plaintiffs, and consequently plaintiffs are not in any position to identify what elements within the file are relevant. Categorically, anything related to the making of false statements may be relevant, as well as any information relating to income and bonuses for Beach may be relevant to claims for punitive damages. Defendants have failed and refused to date to provide any privilege log despite their withholding of documents in response to plaintiffs' discovery propounded a year ago, and despite their identification of materials in their instant motion which they were obligated to have identified to plaintiffs with appropriate descriptive information in such log or index.

Defendants' proposed order also encompasses "any testimony relating to the investigation" that Beach made false statements under oath. This is clearly excessive. Testimony

that relates to the investigation can obviously relate to the issue of Beach's lack of truthfulness and willingness to lie under oath, which is fundamentally at issue.

Conclusion

Defendants have failed to meet their burden of establishing that requested documents and information be maintained in secrecy. The information therein has not been kept confidential and information, as it relates to police corruption, should not be kept secret from the public and community that the police are sworn to serve. When a police officer, even or especially a high command official, uses his authority to order that 25 people be publicly detained, interrogated and jailed on his false representations, it is squarely in the interest of the public that there be open disclosure regarding his established lack of veracity in subsequent public interest constitutional rights litigation.

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Respectfully submitted,

___/s/____________________________

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