UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA HANDSCHU, et al.,	:	
Plaintiffs,	:	
- against -	:	71 Civ. 2203 (CSH)
SPECIAL SERVICES DIVISION, *et al.*,	:	**MEMORANDUM AND ORDER**
Defendants.	:	

HAIGHT, Senior District Judge:

The Court is presently considering what directions to give Class Counsel and Corporation Counsel with respect to discovery procedures in disputes arising out of NYPD surveillance and investigation of Muslim communities in the New York City area. The relevant background is stated in the Court's Memorandum reported at 2013 WL 4767815 (S.D.N.Y. Aug. 29, 2013) ("the August Memorandum"), familiarity with which is assumed. The Court heard detailed arguments of counsel during a hearing on October 1, 2013, which produced an 87-page transcript, now come to hand. That hearing was preceded and followed by additional letter submissions from counsel: Class Counsel's letter dated September 27, 2013; Corporation Counsel's letter dated October 8, 2013; and Class Counsel's letter dated October 11, 2013.[1]

DISCUSSION

While the attorneys for the parties in this important case have exchanged views and

[1] The Court notes that Class Counsel's letter is dated "October 11, 2013" on the first page but "October 10, 2013" on the following pages (2-4). For purposes of clarity, the Court will refer to the letter herein as that dated October 11, 2013, regardless of the particular page the Court examines or discusses.

contentions with characteristic good faith and sensibilities, those exchanges reveal and reflect the differing perceptions of counsel as to the nature and effect of the NYPD's Muslim community-related surveillance and conduct; whether that surveillance and conduct give rise to any problems, with particular reference to the Modified Handschu Guidelines; and to the extent problems may exist, what steps should be taken under Court supervision to identify and deal with them.

Acting *sua sponte*, the Court has deferred consideration of the perceived problems and suggested solutions articulated by Class Counsel and Corporation Counsel throughout October 2013. Since that time, the legal character actors on the litigation stage – trial attorneys and trial judge – have not changed, but the off-stage principals are now quite different. As the result of the November municipal election, New York City has a new Mayor, a new Police Commissioner, and a new Corporation Counsel. It is a dramatic reflection of the transience of this earthly life that, for those multitudes who reside in or visit New York City, there is no longer a Mayor Bloomberg or a Commissioner Kelly, being advised by Corporation Counsel Cardozo. They have given way to Mayor De Blasio, Police Commissioner Bratton, and Corporation Counsel Carter. Even so neutral and apolitical an individual as a federal judge may be permitted to wonder whether these changes on the thrones and in the corridors of municipal power may have an effect upon the resolution of disputes as this class action, now in its forty-fourth year since filing of the complaint before Judge Weinfeld, goes forward. I put the possibility no higher than that. If changes have occurred or will occur in the City's perceptions or intentions, no doubt they will manifest themselves in due course.

In any event, the Court must make an order at this time, on the present state of the record. The August Memorandum identified the NYPD's "Investigative Statement," described in the Corporation Counsel's submissions on the present motion, "as the best evidence, perhaps the only

probative evidence, of whether a particular investigation was commenced in compliance with the Handschu Guidelines." 2013 WL 4767815, at *1. The importance of subjecting the Investigative Statement to discovery was manifest. The parties agreed on that in principle. Disputes arose about how this discovery was to be accomplished in practice.

Class Counsel's letter dated October 11, 2013 set forth "a list of subjects covered in our motion papers and our reply, including the exhibits and affidavits . . ." and continued: ". . . as to which we contend that investigation statements should be produced for review by plaintiffs' class counsel under the attorneys-eyes-only conditions you have proposed." The list consists of five relatively discrete subjects (*e.g.*, "Danish Cartoon document," "Affidavit of Linda Sarsour") and a sixth subject more generally captioned "Strategic Posture." Under the subject "Danish Cartoon document" 13 institutions or entities are listed: mosques, foundations, centers, and societies, each with a name suggesting Muslim or Islamic identity. Under the subject "Strategic Posture" there are listed 31mosques; 7 Muslim student associations; 4 schools; 21 individuals; 10 non-governmental organizations; and 21 "Groups labeled 'Extremist.'" Other listed subjects contain several entities or individuals.

Class Counsel's October 11 letter may be read as a demand to review all and any investigative statements that have to do with any of the entities or individuals whose names are listed under each of the designated subjects. However, Class Counsel's letter dated September 27, 2013 proposed at page 2 that of the many individuals listed under the Strategic Posture caption, "we pick two organizations or entities from that list and the NYPD will supply the investigation statements for the two organizations that we have chosen." This letter, proposing a form of sampling, was written during negotiations between counsel in the hope that they could proclaim and celebrate agreement

during the previously scheduled October 1 hearing. That did not come to pass. It is not entirely clear precisely what Class Counsel's present position is, but it is sufficiently clear to the Court, having heard the October 1 arguments and read counsels' October 8 and 11 letters, that peace has not yet broken out on this significant front. A Court order seems to be required.

Corporation Counsel's letter dated October 8, 2013 (with which I suspect Class Counsel's October 11 letter crossed) suggests a sampling, rather than a blanket production, of Investigative Statements. Specifically, Corporation Counsel propose that they make available to Class Counsel for review certain Investigative Statements, designated or chosen for review according to the following protocol:

* Corporation Counsel would produce for review all three Investigative Statements related to one of the subjects Class Counsel listed in their subjects: "Declarations of Shamiur Rahman." Corporation Counsel point out, accurately, that in their original motion papers, Class Counsel laid particular emphasis upon the conduct of this individual as evidencing improper surveillance of Muslim entities by the NYPD.

* Class Counsel would pick two individuals or entities from each of four other designated subjects, and Corporation Counsel would make available for review the Investigative Statements relating to those picked: for a total of 8 Investigative Statements. Corporation Counsel would then pick and produce 2 different Investigative Statements from each of these four subjects.

This protocol would result in the production and review of 19 Investigative Statements. It may fairly be characterized as "sampling." Class Counsel's October 11 letter at page 5 rejects that protocol in principle. Class Counsel argue that "[t]he sampling proposal . . . ignores the burden of proof of plaintiff class on this motion, which is to show a policy violative of the Handschu

Guidelines." Counsel profess the concern that: "Even if the sample shows that the sampled investigations were not commenced in compliance with the Handschu Guidelines, defendants are bound to argue that what we have seen is only a sample, and does not prove a policy." "For these reasons," Class Counsel conclude in their October 11 letter, "we request disclosure as outlined above." This would seem to be an abandonment of the sampling procedure Class Counsel themselves suggested in their September 27 letter.

During the October 1 hearing, Corporation Counsel cited and stated the NYPD's reliance upon the Second Circuit's opinion in *In re The City of New York (Dinler v. The City of New York)*, 607 F.3d 923 (2d Cir. 2010) ("*Dinler*"). Judge Cabranes began that opinion by saying that the court of appeals was "called upon to examine the circumstances in which the so-called 'law enforcement privilege' must yield to the needs of a party seeking discovery in a civil action." 607 F.3d at 928. In the case at bar, Corporation Counsel argue that the law enforcement privilege is implicated by Class Counsel's seeking discovery of the NYPD's Investigative Statements; and that the privilege, when combined with the plaintiff class's failures of proof as perceived by Corporation Counsel, require the Court to bar any discovery by Class Counsel into the Investigative Statements.

At the conclusion of the October 1 hearing, Class Counsel stated that "the law enforcement privilege point" is "an entirely new matter. As far as I had known, there was nothing raised about law enforcement privilege." Hearing Tr. 65. Class Counsel appear to suggest that in setting the boundaries of discovery in the case at bar, I should not consider the law enforcement privilege or the Second Circuit's analysis of that privilege in *Dinler*. Corporation Counsel sought to explain any apparent delay in focusing on the privilege by saying that at an earlier stage of this motion practice, Class Counsel "withdrew their motion for discovery. I would never raise a law enforcement

privilege about discovery when it's not at issue in this case." Tr. 79.

This peripheral issue is highly technical. I decline to resolve it on technicalities. The law enforcement privilege is of obvious potential importance to the case at bar. The Second Circuit's opinion in *Dinler* is a recent compendium of authority on the subject which district judges would disregard at their peril. Judge Cabranes's articulation of holdings is lucid and straightforward. I may comprehend and profit by them. I do not discern a present need for briefs of counsel discussing *Dinsler* and its effect, if any, upon the case at bar. Such a need may develop over time.

In fairness, I should note that the sampling protocol suggested by Corporation Counsel, discussed *supra*, represents the City's fall-back position, to be reached only if the Court concludes, contrary to the City's threshold contention, that the Plaintiff Class's present motion on behalf of the Muslim community presents issues worthy of further litigation which entitle Class Counsel to further discovery in aid of their claims.

In point of fact, I resolve that question in favor of the Plaintiff Class, and reject the contention of the City and NYPD that the Plaintiff's motion to hold the NYPD in contempt for violating the Handschu Guidelines should be denied on the present record. My reasons follow.

The Muslim community is concerned about the attentions being paid to it by the NYPD. That concern is natural and reasonable. It is prompted by personal observations of Muslim community leaders and non-Muslim educators. Recent published accounts by investigative journalists have increased awareness of the NYPD's Muslim-related activities and heightened the call for scrutiny.

The NYPD has not denied taking steps of an intelligence nature with respect to the Muslim community. On the contrary: former Commissioner Kelly, in his public or telecast statements, repeatedly professed that activity and proclaimed its propriety. He stated, in words or in substance,

that everything the NYPD was doing with respect to Muslims "was approved by a federal judge." I interpret that, perhaps immodestly, to be a reference to this Court. What the Defendants are really saying is *not* that (contrary to fact) this Court gave specific preliminary or post-activity approval to the NYPD's conduct; rather, the defensive position is that whatever the NYPD is doing with respect to the Muslim community fully complies with the Handschu Guidelines. The keystone of that compliance, the NYPD's argument continues, is the internal preparation and approval of an Investigative Statement, without which no investigative or comparable police activity is allowed to take place. The August Memorandum gives full particulars with respect to the centrality of the Investigative Statement's role in the case.

To comply, or not to comply, with the Handschu Guidelines: that is the question, fairly posed by Class Counsel's present motion. In Corporation Counsel's view, the world knows the NYPD's activities in question comply with the Guidelines because David Cohen, the Deputy Commissioner of Intelligence, says so. Defendants' Brief [Doc. 414] asserts at 10: "The NYPD's Intelligence Division has in place a robust legal and operative review process to insure that investigations are authorized consistent with the Modified Handschu Guidelines." The brief's recital of facts said to support that assertion is based solely upon Deputy Commissioner Cohen's declaration.[2] Cohen is a veteran and experienced officer. There is no reason to doubt the accuracy of his description of the multi-stage procedures the NYPD constructed in order "to insure that investigations are authorized consistent with" the Guidelines. However, Cohen's conclusions, implicit in his declaration and explicit in Corporation Counsel's brief, are that: (1) this "robust legal

[2] The sentence from Defendants' Brief quoted in text is followed by a footnote, which says: "The following facts are found in Cohen ¶ 13-22, 54."

and operative review process" was in fact followed by the rank-and-file police officers and staff attorneys involved; and (2) the process in fact achieved its intended purpose, namely, to insure that each Muslim-related investigation complied with the Handschu Guidelines. The case really turns on these latter two propositions. In respect of them (and meaning no disrespect), the evidentiary value of Deputy Commissioner Cohen's declaration does not rise above that unpersuasive advocate's tool known as the *ipse dixit*. His inherently self-serving conclusion of NYPD compliance *in fact* with the Guidelines is entitled to the respectful attention of Class Counsel and this Court, but it cannot be (and is not) binding in either quarter.

In these circumstances, the need for additional discovery is manifest, and must be accomplished unless precluded by governing appellate authority. For the reasons previously stated, discovery should begin with the Investigative Statements.

That brings us to the Second Circuit's opinion in *Dinler,* which Corporation Counsel reads as precluding discovery by Class Counsel of the Investigative Statements. The case reached the Court of Appeals on the defendant City's motion for a writ of mandamus seeking relief from the District Court's order compelling the City to produce for discovery in a civil rights action "roughly 1800 pages of confidential reports created by undercover NYPD officers who were investigating potential security threats in the months before the [Republic National Convention]" in New York City. 607 F.3d at 928. Those 1800 pages were referred to, in the NYPD's parlance of the day, as "Field Reports." The Second Circuit held that the law enforcement privilege applied to the Field Reports, and the plaintiffs had failed to show a compelling need for undercover police reports that outweighed the public's substantial interest in nondisclosure. The Court of Appeals vacated the District Court's order and remanded the case to that court, with an instruction to deny plaintiffs'

motion to compel production of the reports in question. *Id.* at 929.

The NYPD activity at issue in *Dinler* began when in February 2003, Mayor Bloomberg announced that the 2004 Republican National Convention ("RNC") would be held in New York City. The NYPD, mindful of the City's status as a prime target of international terrorism, and aware that a large political event could attract anarchist violence and unlawful civil disobedience, embarked upon a strategy to avoid disorder and violence during the RNC. That strategy began with NYPD officers, under the direction of Intelligence Division Deputy Commissioner Cohen, gathering publicly available Internet information concerning "potential extremist groups and their plans for disrupting the RNC." 607 F.3d at 930. The Second Circuit's opinion continues:

> The Intelligence Division compiled the results of that research into 600 pages of so-called "End User Reports." Additionally, some members of the Intelligence division went undercover and infiltrated various organizations to determine whether these organizations had devised plans to disrupt the RNC. The undercover officers prepared the Field Reports to memorialize what they had learned in various meetings and discussions with members of the infiltrated organizations.

Id. (footnote omitted).

While the Second Circuit in *Dinler* vacated the District Court's order compelling production in discovery of the NYPD Field Reports to the civil rights plaintiffs, its opinion does not mandate the same result in respect of Class Counsel's demand for production of the NYPD Investigative Statements. Judge Cabranes's opinion for the Court of Appeals in *Dinler* is careful to note: "We have concluded that the law enforcement privilege applies to the Field Notes. But the law enforcement privilege is qualified, not absolute, so determining the applicability of the privilege does not complete our inquiry. Instead, . . . the public interest in nondisclosure must be balanced against

the need of a particular litigant for access to the privileged information." 607 F.3d at 945 (citation, internal quotation marks, and brackets omitted). That balancing, the *Dinler* opinion goes on to instruct, is best accomplished by resort to the familiar litigation device of an *in camera* review by the trial judge. Circuit Judge Cabranes, himself a distinguished former district judge, composed in *Dinler* what is close to an ode in praise of *in camera* review:

> [F]iling documents under seal may inadequately protect particularly sensitive documents. Thus, rather than require that the parties file the potentially privileged documents with the court, the district court may, in the exercise of its informed discretion and on the basis of the circumstances presented, require that the party possessing the documents appear *ex parte* in chambers to submit the documents for *in camera* review by the judge, after which the materials can be returned to the custody of that party. . . .
>
> If the district court determines that the law enforcement privilege does not protect the documents at issue, the documents must be disclosed. . . . Although the court is free to tailor the protective order to the circumstances presented, the court may wish to consider making the documents available only on an "attorneys' eyes only" basis or requiring that the documents – and other submissions that reference them – be filed under seal.

607 F.3d at 948-49 (citations omitted).

Practicing what they preached, the Second Circuit judges in *Dinler* noted in a footnote the District Court's implicit factual findings "as to the contents of the Field Reports and how the Field Reports could prove useful in litigation," and recited in 607 F.3d 946 n. 24:

> To determine whether the District Court indisputably abused its discretion, we review those factual findings for clear error. To accomplish this, we have carefully reviewed the Field Reports and End User Reports *in camera*.

The fruits of that appellate-level *in camera* review are described in text:

> We have reviewed the Field Reports and the End User Reports, and

> we conclude that the information in the Field Reports in no way undermines, contradicts, or casts doubt upon the information in the End User Reports. . . . Because the Field Reports do not undermine the information previously disclosed to plaintiffs, we have no difficulty in concluding that plaintiffs do not have a need, much less a compelling need, for the Field Reports.

607 F.3d at 946.

With respect to the applicability *vel non* of the law enforcement privilege, there is no discernible basis for differentiating between the Field Reports in *Dinler* and the Investigative Statements in the case at bar. Both sorts of documents are generated by the same sort of police activity, and are subject to the privilege. *Dinler* expressly holds that documents of this sensitivity may not be adequately protected by an "attorneys' eyes only" protective order or by placing the documents under court seal. The Second Circuit's reasoning instructs district judges that judicial *in camera* review is the preferred way to strike the necessary balance between competing legitimate interests. Thus, in order to move the case at bar forward, it may become necessary for this Court to review the Investigative Statements *in camera*. Their number seems to approach Legion. One hopes that, in order to conserve judicial resources, some sort of sampling would suffice: a sampling protocol of the Court's devising, after consultation with counsel, who could suggest but not command.

I defer making an order for such a process at this time, because if the protocol Corporation Counsel suggested in their letter of October 8, 2013 is still available, I think the sensible course is to implement and follow its procedures and find out whether, and to what extent, those procedures satisfy Class Counsel's legitimate discovery needs. Further steps, including an *in camera* review by this Court, can be taken in case of need.

The Second Circuit's opinion in *Dinler*, when properly applied to the case at bar, evokes the deathless prose of Lincoln's Second Inaugural Address: "The prayers of both could not be answered; that of neither have been answered fully." Class Counsel's prayer that the discovery rules entitle them to production for their inspection of all the NYPD's Investigative Statements cannot be granted. Corporation Counsel's prayer that the law enforcement privilege entitles them to make Class Counsel go away empty-handed cannot be granted. If counsel for the parties, working together in good faith with their characteristic good will and common sense, cannot agree upon an accommodation (as they have failed to do up to now), the talents of this Court (such as they are) will be deployed in an *in camera* review of as many Investigative Statements as may be necessary to strike a fair and just balance between (1) Class Counsel's legitimate interest in discovery into the NYPD's conduct relating to the City's Muslim community (with a view toward possible Handschu Guidelines violations); and (2) Corporation Counsel's equally legitimate interest in protecting from public knowledge and display undercover and confidential police activity undertaken to enforce the law or preserve the public safety.

Counsel will be given some time to reflect upon this Memorandum, derive from it such guidance as it may afford, and (particularly in the case of Corporation Counsel) give advice to their clients and take instructions from them. As noted *supra*, that cast of characters has changed. In recent years, Corporation Counsel Cardozo advised Mayor Bloomberg and Police Commissioner Kelly and received instructions from them. Now, Corporation Counsel Carter will advise Mayor De Blasio and Commissioner Bratton and receive instructions from them.[3]

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[3] I may be permitted to express the hope that these hierarchical changes will not deprive the Court of the able advocacy of Senior Counsel Peter G. Farrell.

CONCLUSION

In this totality of circumstances, the Court directs that counsel for the parties continue their dialogue with each other. Counsel are further directed to write letters simultaneously to the Court, not later than March 14, 2014. Those letters should describe the then existing status of the case, identify any pending disputes, set forth their contentions with respect to any disputes, and offer suggestions for the further governance of the case. If counsel wish to obtain the Court's intervention prior to that date, they know how to ask for it.

The foregoing is SO ORDERED.

Dated: New York, New York
January 30, 2014

CHARLES S. HAIGHT, JR.
Senior United States District Judge