

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FIVE BOROUGH BICYCLE CLUB, et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

**PLAINTIFFS’ REPLY TO
DEFENDANTS’ OPPOSITION
TO PLAINTIFFS’ MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS CONCERNING
DEFENDANTS’ USE OF
UNDERCOVER AND
ELECTRONIC SURVEILLANCE**

07 Civ. 2448 (LAK)

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Defendants’ Opposition (“Opposition”) to Plaintiffs’ Motion to Compel provides no basis for denying the discovery sought by Plaintiffs. For the reasons set forth in their Motion and discussed in further detail below, Plaintiffs respectfully request the Court to order Defendants to comply with the Requests.

Defendants have failed to properly or timely invoke the law enforcement privilege. A party asserting privilege as a basis for withholding production of documents must “identify the nature of the privilege (including work product) which is being claimed,” and provide extensive information including the authors, recipients, dates, and subject matter of the withheld documents. Local Rule 26.2. Defendants admit (Opposition at 2 n.2) they did *none* of these things — they merely included the single word “privilege” in their objections to the Requests. Despite repeated requests, Defendants *still* have not provided a privilege log. Remarkably, Defendants assert for the first time in their Opposition a blanket assertion of privilege with respect to every single document responsive to the Requests, *without providing a single supporting detail*. This is reason enough to reject Defendants’ assertion of law enforcement privilege.

Defendants fail to make the threshold showing required to establish the law enforcement privilege. The two-page, conclusory Declaration of Thomas Graham (“Graham”) in support of the Opposition fails to establish that production of documents responsive to the Requests would interfere with effective law enforcement. Appropriate deference to the needs of law enforcement does not extend to conclusory and plainly dubious statements. Graham contends that effective law enforcement requires uncertainty and secrecy as to the NYPD’s use of undercover personnel. This contention, even if true, is immaterial. The New York Times long ago demonstrated with detailed and convincing video evidence that NYPD undercover personnel participate in group bicycle rides involving as few as 15 participants, eliminating any uncertainty on this point among would-be criminals. Ex. B ¶¶ 9-10. Defendants need not fear that either the identities of particular undercover officers or operational details truly important to law enforcement confidentiality would become public, as Plaintiffs would stipulate to a protective order that limits disclosure of such information, and in fact have been waiting for over a month for Defendants’ comments on Plaintiffs’ draft confidentiality order. Ex. O.

The court in *MacNamara v. City of New York*, 04-Civ. 9216, 2007 U.S. Dist. LEXIS 28956, at * 13 (S.D.N.Y. Apr. 20 2007), Ex. M, reached exactly these conclusions in rejecting the City’s similar claim of law enforcement privilege. There, the City argued that “confirmation of [the presence of undercover and plainclothes officers at demonstrations] will defeat the element of uncertainty, which itself deters criminal activity,” just as Graham argues here. The *MacNamara* court disagreed, primarily because “the fact that the NYPD has used undercover officers at protests is already widely known,” making it “difficult to imagine” how additional disclosure “will do anything further to eliminate ‘the element of uncertainty.’” *See MacNamara*,

at * 22. The *MacNamara* decision, though not final, is well-reasoned, and that reasoning supports the same result here.

Plaintiffs have made a compelling showing of substantial need for this discovery. By their very presence, undercover personnel may push otherwise legal group rides near or over the 50-person threshold, creating liability and deterring participation by onlookers. Videotape evidence showing bike-mounted undercover personnel committing traffic offenses at Critical Mass rides (and being mistakenly “arrested” for such offenses) demonstrates that such personnel are responsible, to some unknown extent, for the alleged lawlessness that Defendants cite as the prime justification for the Parade Rules. *See* Ex. B at ¶ 9; Ex. D.

Defendants acknowledge this role of undercover officers in creating lawlessness at group rides, but try in vain to cast it as insignificant given the “sheer number of instances of lawless behavior at Critical Mass rides.” Opposition at 4 & Ex. D (citing NYPD memoranda regarding Critical Mass rides by Defendant and NYPD Deputy Chief Stephen R. Paragallo). That argument fails on its face, because Defendants have refused to allow discovery of the facts that would establish the extent to which that conduct is attributable to its own agents.

More fundamentally, Defendants’ use of the Paragallo memoranda create a false appearance of lawlessness at Critical Mass rides, underscoring the need for full discovery of the supposed “lawlessness” of Critical Mass. The Paragallo memoranda each purport to list offenses committed “during [a] Critical Mass Demonstration,” but in fact list random violations by bicyclists, motorists and pedestrians, often with no connection whatsoever to Critical Mass:

- One memo lists 50 violations purportedly committed “during [a] Critical Mass Demonstration,” but the summonses reveal that 47 of these violations occurred *before the start* of the Critical Mass ride, with some involving non-bicycling offenses such as “brake light,” “no seatbelt” and “urinat[ing] in public,” and many others given to individual bicyclists a block or more away from Union Square. *See* Opposition Ex. D at 7-8; Ex. P at NYC001937 (NYPD activity log indicates that Critical Mass ride began no earlier than

7:44 p.m.); Ex. Q (NYC002029-46) (copies of summonses listed in Paragallo memo showing time and location of alleged violations).

- Another memo concerns June 29, 2007 — ***a date on which no Critical Mass ride occurred.*** Although 120 bicyclists gathered at 7 p.m. that day at Union Square, “Paragallo advis[ed]” that this group dispersed at 8:38 p.m. when clusters of “1-2 bicyclist[s] le[ft the] park and not in groups.” See Ex. R at NYC001935; see also Ex. S at NYC001339 (ride “failed to materialize”). Paragallo’s memorandum nonetheless states that “[t]hirty-four summonses . . . were ***issued during the Critical Mass Demonstration which occurred on June 29, 2007.***” Opposition Ex. D at 5.

Defendants have put forward this grossly mischaracterized “evidence” of “lawless behavior at Critical Mass rides” to prove that discovery of the role of undercover personnel at group bicycle rides is unnecessary. Opposition at 4. To the contrary, this “evidence” proves the need for such discovery. If the modest amount of discovery allowed by Defendants thus far demonstrates that summonses and uniformed NYPD personnel have been used to create a false impression of lawlessness at Critical Mass rides, then Plaintiffs are entitled to further discovery to determine the extent to which undercover personnel have contributed to that false impression with their own, demonstrated violations of law at Critical Mass rides.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: New York, New York
March 7, 2008

Respectfully submitted,

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/s/ Steve Vaccaro

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