

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FIVE BOROUGH BICYCLE CLUB, SHARON BLYTHE,  
JOSH GOSCIAK, KENNETH T. JACKSON, MADELINE  
NELSON, ELIZABETH SHURA, LUKE SON,

Plaintiffs,

-against-

THE CITY OF NEW YORK, RAYMOND KELLY, Police  
Commissioner of the New York City Police Department,  
JAMES TULLER, Commanding Officer, Patrol Borough  
Manhattan South, Lt. John Doe, and Captain Jane Doe, New  
York City Police Department,

Defendants.

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**PLAINTIFFS' MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS  
CONCERNING  
DEFENDANTS' USE OF  
UNDERCOVER AND  
ELECTRONIC  
SURVEILLANCE**

07 Civ. 2448 (LAK)

This motion to compel, seeking production of documents concerning Defendants' use of undercover personnel at group bicycle rides, follows from the Court's order dated November 27, 2007 (D.I. No. 37) (the "Order"). The Order denied without prejudice Plaintiffs' original motion of November 9, 2007 to compel production of such documents, and directed Defendants to describe their use of such surveillance in response to an interrogatory to be propounded by Plaintiffs. This would enable the Court to determine what documents should be produced "in light of any answer to such an interrogatory." Order, at 2 ¶ 5.

Plaintiffs now renew their motion to compel in light of Defendants' interrogatory response. Surprisingly, that response consists of a refusal to provide any information concerning the use of undercover personnel at group bicycle rides, based on a belated, conclusory and erroneous assertion of the law enforcement privilege.

For the reasons set forth in greater detail below, Plaintiffs respectfully request the Court to order Defendants to comply with Plaintiffs' Document Request Nos. 7(c) and 11 (Ex. A).

True and correct copies of documents supporting the Motion are attached as Exhibits A through O.

***Documents regarding undercover and electronic surveillance are relevant in this action.*** Plaintiffs need documents concerning the use of undercover personnel to determine whether such personnel have by their presence pushed rides near or over the 50-person threshold, creating liability where none would otherwise have arisen, deterring onlookers from joining in the ride, and implicating due process and First Amendment concerns. Plaintiffs have presented video evidence showing that NYPD has fielded bike-mounted undercover agents at group rides, some equipped with cameras to record events. *See* Declaration and Supplemental Declaration of Eileen Clancy (Exs. B, C). It appears that at least once, an undercover officer bicycled through red lights and on the sidewalk in connection with a Critical Mass ride. Ex. D (DVD submitted March 27, 2007). The evidence created by these undercover officers is relevant to Defendants' argument that the alleged lawless tendencies of group bicyclists justify the Parade Rules. That evidence also may establish that NYPD undercover personnel themselves are responsible for the alleged lawlessness of group bicyclists.

***Defendants' belated interrogatory response is insufficient to raise the law enforcement privilege as to Plaintiffs' document requests.*** On November 29, 2008, two days after the Order was issued, Plaintiffs propounded an interrogatory to Defendants requesting them to describe NYPD's use of undercover surveillance in connection with group bicycle rides. *See* Ex. E. Defendants failed to timely respond to this Interrogatory, and instead requested or simply took several extensions of time, finally completing their response on February 7, 2008 (Exs. F, G, H, I, J).

In their interrogatory response (Exs. I, J), Defendants assert for the first time a blanket objection to discovery of any information regarding the use of undercover personnel at group bike rides, based on the law enforcement privilege. This assertion of privilege is limited to

Defendants' interrogatory response. Defendants never have asserted the law enforcement privilege as an objection to Plaintiffs' document requests, and never have served a privilege log with information supporting their claim of privilege. *See* Ex. K, at 1,7, 10 (Defendants' general and specific responses to Plaintiffs' Document Request Nos. 7(c) and 11 dated June 5, 2007 do not refer to law enforcement privilege); Ex. L at 3 (Letter from Mark Muschenheim to Hon. Lewis Kaplan (Nov. 21, 2007), raising only relevance objections to Plaintiffs' motion to compel production of documents concerning use of undercover personnel).

“‘[T]he party asserting the [law enforcement] privilege must make a threshold showing that the privilege attaches’”. *McNamara v. City of New York*, 04-Civ. 9216 (S.D.N.Y. Apr. 20 2007) (attached as Ex. M) (quoting *City of New York v. Beretta U.S.A. Corp.*, 222 F.R.D. 51, 66 (E.D.N.Y. 2004)). Defendants have not even attempted to make this threshold showing, and should not be allowed to do so for the first time at this late date.

***Defendants' assertion of the law enforcement privilege is meritless.*** Even if Defendants are permitted to assert the law enforcement privilege, that assertion should be rejected. Magistrate Judge Francis already has rejected Defendants' claims of law enforcement privilege asserted to prevent discovery of information regarding use of undercover personnel at the 2004 Republican National Convention (“RNC”). *See McNamara* (Ex. M), at 22-2\_. As Judge Francis recognized, “[t]he fact that NYPD has used undercover officers at protests is already widely known”, and therefore the privilege does not apply. *Id.* at 22. Judge Francis ordered the disclosure of the identities of undercover officers and memoranda regarding their use at the RNC, noting that the City had the ability to restrict public disclosures of sensitive law enforcement information through the use of a confidentiality or protective order as necessary. *Id.* at 23-24.

The reasoning of *McNamara* applies with equal force here. This action arises from and directly concerns NYPD arrests and summoning of group bicyclists at the RNC. The press has

documented the use of NYPD undercover personnel at Critical Mass and other group bicycle rides. *See* Ex. N (Dec. 22, 2005 *New York Times* article). Further discovery of this widely known fact will not prejudice law enforcement. *See McNamara*, at 22. On January 25, 2008, Plaintiffs proposed a confidentiality order to protect sensitive law enforcement information from public disclosure, to which Defendants still have responded. *See* Ex. O.

For the reasons above, Plaintiffs request that this Court compel Defendants to produce documents responsive to Plaintiffs' Requests 7(c) and 11. 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  
February 20, 2008

Respectfully submitted,

BY: DEBEVOISE & PLIMPTON LLP

/s/ Steve Vaccaro

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