

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

Governmental Privileges in the Post-9/11 Era

In the last few years, the city of New York has made aggressive use of various privileges to resist discovery in a series of litigations challenging police handling of political demonstrations taking place in the city since the attacks of Sept. 11, 2001.

Its frequent assertion of privileges uniquely available to the government—the deliberative process and law enforcement privileges—brings into sharp focus the tension between the presumptions favoring open and accessible government and the discoverability of relevant information, on the one hand, and the importance of encouraging candid discussions on important matters within the government and the need to guard against compromising law enforcement measures, on the other.

While judges of the U.S. District Court for the Southern District of New York remain solicitous of the attorney-client privilege to shield communications between government employees and their legal counsel,¹ they have shown far less indulgence toward the city's invocation of the deliberative process and law enforcement privileges, rejecting "formulaic incantations of harm" and requiring the city to back up its privilege claims with detailed and specific support.

Mass Protest Cases

These privilege disputes are playing out in cases arising from police tactics at mass protests and demonstrations held in New York City since 2001, including protests at the World Economic Forum in February 2002,² demonstrations against the Iraq War in 2003,³ and demonstrations held at the time of the Republican National Convention (RNC) in August 2004.⁴ The plaintiffs in these actions all challenge aspects of the crowd control procedures employed by the police, as well as what they view as excessively long and uncomfortable detentions which they maintain were designed to keep them off the streets and discourage the exercise of their First Amendment rights.

Deliberative Process Privilege

The city has asserted the deliberative process privilege as one method of curtailing the plaintiffs' discovery in these cases. The deliberative process privilege is a qualified privilege designed to enhance the quality of agency decisions by protecting from



discovery documents that reflect the advisory opinions, recommendations and deliberations that contribute to the formation of governmental policy decisions.⁵ To qualify for the privilege, the material must be both "predecisional"—which means prepared in order to assist in an identifiable policy decision—and "deliberative"—which means actually related to the process by which policies are formulated.⁶ The privilege does not protect factual information and applies only to communications concerning policy-oriented judgments as opposed to routine operations.

The city's widespread invocation of the privilege marks a departure from the traditional use of the privilege to protect individual or small groups of documents from disclosure.⁷ In *McNamara v. City of New York*,⁸ the city invoked the deliberative process privilege to support its redaction or withholding of numerous documents generated during the planning for and aftermath of the RNC. It also sought to block deposition questions concerning the development of the Mass Arrest Processing Plan (MAPP) for the RNC and the Police Department's handling of earlier mass demonstrations.

Southern District Magistrate Judge James C. Francis IV found the privilege unavailable in all these instances. With respect to the withheld and redacted documents, he held that the city's proffered support for the privilege was inadequate. For example, he found that lists of attendees and agendas for meetings, as well as documents and PowerPoint presentations illustrating the MAPP, were plainly factual information that was descriptive rather than deliberative. He also held the privilege inapplicable to e-mails concerning a planned meeting between the mayor and the police commissioner which included some possible "talking points" for the mayor's use. Rejecting the city's suggestion that "virtually all decisions made by the NYPD [and other agencies] regarding the RNC were matters of important public policy," Judge Francis concluded that consideration of whether or not the mayor should use the talking points was not "the sort of public policy decision that falls within the scope of the privilege."⁹

Critiques Not Privileged

The city's explanation of the privilege for documents containing post-convention critiques of police operations consisted solely of a statement that each redaction was "a pre-decisional communication that makes recommendations or expresses opinions on legal/policy matters." Judge Francis held that the city had made no effort to show that these recommendations or comments related to "the formulation or exercise of policy-oriented judgment...with respect to a specific agency decision."¹⁰ His decision regarding these documents echoes an earlier decision by Southern District Magistrate Judge Michael H. Dolinger in *Haus v. City of New York*, declining to apply the deliberative process privilege to internal critiques of police tactics employed at a February 2003 demonstration protesting the impending United States invasion of Iraq.¹¹

Despite the declaration of a Police Department Commanding Officer that the critiques contained the views, recommendations and ideas of police officials considered in making decisions regarding police personnel and equipment at similar future events, Judge Dolinger concluded that the redacted portions of those documents actually consisted of "segregable factual material" and that the declaration did not identify a specific policy decision as to which the redacted comments were directed. He rejected the city's admonition that disclosure of the documents would inhibit the frank and candid exchange of opinions that best informs department decisions, holding that "[t]his formulaic assertion, taken almost word-for-word from innumerable other such agency submissions, plainly fails to offer a persuasive basis for believing that production under the governing confidentiality order would pose any harm to the public interest."¹²

• Privilege Must Yield to Demands of Civil Rights Laws.

Most significantly, Judge Francis held in *McNamara* that the deliberative process privilege could not be used to block inquiry at depositions into the Police Department's internal discussions regarding the MAPP for the RNC and other protests, notwithstanding the fact that this questioning did relate directly to deliberations leading to the formulation of policy. He noted that in civil rights lawsuits, where the deliberative process of public officials is itself genuinely in dispute, "privileges designed to shield that process from public scrutiny must yield to the overriding public policies expressed in the civil rights laws."¹³ Judge Francis observed that the plaintiffs' claims depend on their ability to show that the defendants implemented an unnecessarily convoluted arrest processing plan either with intent to discourage political protest or with deliberate indifference to the plaintiffs' constitutional

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rights. Because the intent and knowledge of the NYPD officials were thus central to plaintiff's claims, the plaintiffs were entitled to inquire about the internal deliberations leading to the development of the MAPP.

Law Enforcement Privilege

The city has also sought to limit available discovery in these mass protest cases under the law enforcement privilege, which is designed to prevent disclosure of law enforcement techniques, to preserve confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and to prevent interference with investigations.¹⁴ Among the types of information it has tried to withhold under this privilege are agreements among the city, the Host Committee for the RNC (a nonprofit corporation) and the Republican National Committee;¹⁵ the existence and identity of undercover officers present at anti-Iraq war demonstrations;¹⁶ portions of the Police Department's "Disorder Control Guidelines";¹⁷ and hypothetical incident scenarios and action proposals.¹⁸

Courts considering application of the law enforcement privilege in these cases have consistently found that the city failed to make the required "clear and specific evidentiary showing of the nature and extent of the harm that is likely to be encountered if disclosure is permitted."¹⁹ In *Concepcion v. City of New York*, the city resisted providing documents concerning security arrangements during the RNC based on an assertion by counsel that "[t]he Convention took place in a setting occupied with great concerns for terrorist acts" and that disclosure could compromise security at similar national events. Judge Francis found the privilege inapplicable, noting that "[s]imply raising the spectre of terrorism is not enough."²⁰

Similarly, in the context of the Iraq War demonstrations, Judge Dolinger, in *Kunstler v. City of New York*, rejected as insufficient the city's conclusory assertions that "evil-doers will be able 'to anticipate a response' by the police" if the department's Disorder Control Guidelines were produced. Based on his own review of the guidelines, Judge Dolinger concluded that they are "pitched at such a high level of generality" and the information they contain is so "predictable and lacking in specific detail," that even if this information fell into the wrong hands it would not offer meaningful assistance in evading police tactics.²¹

The city's unsuccessful attempts to invoke the law enforcement privilege in the mass demonstration cases stand in contrast to its successful effort to invoke the privilege with respect to information concerning the frequency and location of subway rider bag searches in *MacWade v. Kelly*.²² In that case, the city submitted detailed and specific support for its assertion that the disclosures would seriously undermine the effectiveness of the program. In reversing a portion of Southern District Magistrate Judge Frank Maas's order directing disclosure of information concerning the number of days on which no searches were conducted and the number of stations and entrances at which no searches were conducted, Southern District Judge Richard M. Berman observed first that Judge Maas had erred in ordering disclosure of "sensitive" documents reflecting "detail[ed] law enforcement techniques and procedures" without first conducting an in camera review of those materials. He further noted that the challenged discovery order did not adequately assess the un rebutted affidavit of the deputy police commissioner explaining that the secrecy of the bag search program injected unpredictability that was

important for deterring terrorist activity and that would be undermined by the disclosures sought by the plaintiffs.²³

Role of Protective Orders

A number of decisions rejecting the city's privilege claims stress that risk of harm from public disclosure is mitigated by confidentiality orders governing the productions at issue.²⁴ But the courts have also been open to requests seeking to lift confidentiality designations regarding specific documents. Recently, in *Schiller v. City of New York*,²⁵ Judge Francis declined to maintain confidentiality for certain materials produced by the city in the RNC litigation, when the plaintiffs and *The New York Times* (as intervenor) objected to the city's designation of those materials as confidential pursuant to a protective order authorizing initial, unilateral confidentiality designations.

Judge Francis held that the city had waived any claim of privilege for those documents because it had already produced them. He went on to observe that the city's conclusory assertions of harm from the release of the materials did not support a finding of good cause for the issuance of a protective order. For example, he found that videotapes showing arrests of demonstrators did not implicate the privacy interests of the demonstrators because these tapes were made in public and the arrests could have been witnessed or filmed by any passerby. He also rejected the notion that the tapes would reveal police tactics for monitoring large crowds, observing that it would not come as a surprise to anyone that the NYPD videotapes crowds of protestors in light of the substantial publicity already generated by that practice.

Judge Francis was not persuaded by the city's invocation of the threat of terrorism as a justification for keeping the materials confidential. The city argued against dissemination of schematic diagrams, photos and structural information about Pier 57 (where arrestees were processed during the RNC), asserting that this information "could be of considerable interest to those seeking to threaten the security of the building itself or its future occupants." Judge Francis concluded that the fact that other properties owned by the same entity have been designated as potential terrorist targets, coupled with a "vague assertion that terrorists might be interested in schematic diagrams and other information related to Pier 57," was plainly insufficient to meet the burden of showing a particular and specific demonstration of harm.²⁶ He similarly rejected the city's contention that disclosure of deposition testimony regarding intelligence gathered in advance of the RNC and how the NYPD responds to certain scenarios would provide a "road map to those, who would, in the future, seek to engage in [public] disorder."²⁷

Conclusion

Perhaps in recognition of the fact that the discovery disputes in these cases may well be outcome determinative, the courts have consistently required the city to back up its claims that the requested discovery would aid terrorists or otherwise compromise security or governmental functions with specific, detailed support. Courts considering these privilege claims have painstakingly reviewed the disputed materials, permitting substantial discovery with only limited redactions, and authorizing public release of much of the disputed information so that these disputes might ultimately be decided on the merits and in public view.

1. See, e.g., *McNamara v. City of New York*, 2007 WL 755401 (SDNY March 14, 2007) (Francis, M.J.) (upholding claims of attorney-client privilege while rejecting claims of deliberative process and self-critical analysis privileges), objections filed March 28, 2007. See generally *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007) (communications between government lawyer and public official assessing legality of policy and proposing alternatives covered by attorney-client privilege).

2. *Allen v. City of New York*, No. 03 Civ. 2829 (KMW)(GWG).

3. *Haus v. City of New York*, No. 03 Civ. 4915 (RWS)(MHD); *Kunstler v. City of New York*, No. 04 Civ. 1145 (RWS)(MHD).

4. *McNamara v. City of New York*, No. 04 Civ. 9216 (KMK)(JCF); *Schiller v. City of New York*, No. 04 Civ. 7922 (KMK)(JCF).

5. *Dept. of the Interior v. Klamath Water Users Protective Ass'n*, 532 US 1, 8-9 (2001); *Tigue v. U.S. Dept. of Justice*, 313 F.3d 70, 76 (2d Cir. 2002), cert. denied, 538 U.S. 1056 (2003).

6. *Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350, 356 (2d Cir. 2005).

7. See, e.g., *Nat'l Council of La Raza*, 411 F.3d 350 (privilege asserted over memorandum prepared by Office of Legal Counsel regarding role of state and local law enforcement in enforcing federal immigration policy); *Tigue*, 313 F.3d 70 (privilege asserted over memorandum from federal prosecutor containing recommendations on conduct of criminal tax investigations); *Ingles v. City of New York*, 2004 WL 2274653 (S.D.N.Y. Oct. 8, 2004) (Chin, J.) (privilege asserted over drafts and discussions reflecting recommendations and comments regarding revision of Department of Correction's "use of force" policy).

8. 2007 WL 755401; 2007 WL 1169204 (S.D.N.Y. April 20, 2007), objections filed May 11, 2007.

9. 2007 WL 1169204, at *4-5 (quoting his prior decision in *Schiller v. City of New York*, 2007 WL 136149, at *10 (SDNY Jan. 19, 2007)).

10. 2007 WL 755401, at *9 (internal quotation and citation omitted). In *McNamara*, 2007 WL 755401, at *3-6, Judge Francis also rejected the city's assertion of the self-critical analysis privilege, noting that its availability remains an open question in the U.S. Court of Appeals for the Second Circuit, but that, in any event, it was inapplicable to the facts presented.

11. 2004 WL 3019762 (S.D.N.Y. Dec. 29, 2004), aff'd, 2005 WL 1021173 (S.D.N.Y. April 28, 2005) (Sweet, J.). See also *Haus v. City of New York*, 2005 WL 1705291 (S.D.N.Y. July 21, 2005) (Dolinger, M.J.) (finding that, under Fed. R. Civ. P. 37(a)(4), the city's re-assertion of deliberative process privilege for additional critiques located after initial production was not "substantially justified").

12. 2004 WL 3019762, at *4.

13. 2007 WL 755401, at *10 (quoting *Grossman v. Schwarz*, 125 F.R.D. 376, 381 (S.D.N.Y. 1989)).

14. *Concepcion v. City of New York*, 2006 WL 2254987, at *3 (S.D.N.Y. Aug. 4, 2006) (Francis, M.J.) (quoting *In re Dep't of Investigation of the City of New York*, 856 F.2d 481, 484 (2d Cir. 1988)).

15. *Concepcion*, 2006 WL 2254987.

16. *Kunstler v. City of New York*, 2006 WL 1676430 (S.D.N.Y. June 15, 2006) (Dolinger, M.J.).

17. *Kunstler v. City of New York*, 2005 WL 2656117 (S.D.N.Y. Oct. 18, 2005) (Dolinger, M.J.).

18. *McNamara*, 2007 WL 1169204.

19. *Concepcion*, 2006 WL 2254987, at *3 (quoting *Kunstler*, 2005 WL 2656117, at *1).

20. 2007 WL 2254987, at *4 (citing *Kunstler*, 2005 WL 2656117, at *2; *Haus*, 2004 WL 3019762, at *4-5).

21. 2005 WL 2656117, at *3.

22. 230 F.R.D. 379 (S.D.N.Y. 2005) (Berman, J.).

23. Judge Berman also recognized that the law enforcement privilege is a qualified one, requiring the balancing of a litigant's "substantial need" for the information against harm to law enforcement interests from the information's disclosure. He directed the parties to address at an evidentiary hearing whether the requested discovery was relevant and "substantially needed." For the subsequent history of this litigation, see *MacWade*, 460 F.3d 260 (2d Cir. 2006).

24. See, e.g., *McNamara*, 2007 WL 1169204, at *7; *Haus*, 2004 WL 3019762, at *4.

25. 2007 WL 136149 (S.D.N.Y. Jan. 19, 2007).

26. *Id.*, at *11.

27. *Id.*, at *19. See also *Schiller*, 2007 WL 1299260 (S.D.N.Y. May 4, 2007) (granting subsequent motion by the plaintiffs and *The New York Times*, as intervenor, to lift the confidentiality designations covering documents, and stressing the important role of the press in maintaining the "robust marketplace of ideas so essential to our system of democracy" by "encouraging public discussion of the issues raised by these cases"); *Allen v. City of New York*, 420 F. Supp. 2d 295 (S.D.N.Y. 2006) (Gorenstein, M.J.) (lifting confidentiality order for documents used in summary judgment motion on claims arising from arrests at 2002 World Economic Forum demonstrations because city could not show reliance on protective order and in light of the presumption favoring access to judicial documents).