UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFI; SYED AMJAD ALI JAFFRI; YASSER EBRAHIM; HANY IBRAHIM; SHAKIR BALOCH; and AKIL SACHVEDA, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

JOHN ASHCROFT, Attorney General of the United States; ROBERT MUELLER, Director of the Federal Bureau of Investigation; JAMES W. ZIGLAR, Commissioner of the Immigration and Naturalization Service; DENNIS HASTY, former Warden of the Metropolitan Detention Center; MICHAEL ZENK, Warden of the Metropolitan Detention Center; JOHN DOES 1-20, Metropolitan Detention Center, Corrections Officers; and JOHN ROES 1-20, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents,

Defendants.

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O R D E R

02 CV 2307 (JG)

On April 17, 2002, plaintiffs commenced this action against the Attorney General of the United States, the Director of the Federal Bureau of Investigation ("FBI"), the Commissioner of the (former) Immigration and Naturalization Service ("INS"), current and former wardens of the Metropolitan

Detention Center ("MDC"), and two groups of unnamed individuals,[1] pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Alien Tort Claims Act, 28 U.S.C. § 1350, and the Vienna Convention on Consular Relations, April 24, 1963, art. 36, TIAS 6820, 21 U.S.T. 77. Plaintiffs allege that they and other male non-citizens from the Middle East and South Asia were unlawfuly detained in the wake of the September 11, 2001 terrorist attacks. Plaintiffs allege, *inter alia*, that the conditions of their confinement were unreasonably harsh and that they were the victims of excessive force.

On July 2, 2003, defendants filed a motion to dismiss the claims in the second amended complaint, alleging, among other things, that defendants were entitled to qualified immunity. (See Defs.' Letter, dated August 4, 2003 at 2). While that motion to dismiss was pending before the District Judge, plaintiffs sought leave from this Court to conduct "limited" discovery in order to obtain the identities of officers involved in the conduct alleged in the complaint in order to name them as defendants in the case. (Pls.' Letter, dated July 31, 2003 at 1). By Order dated August 26, 2003, this Court allowed to plaintiffs to proceed with discovery for the limited purpose of ascertaining the identities of the unnamed defendants.

During the course of pursuing this limited discovery, plaintiffs sought production of certain documents which the government has withheld on the basis of the deliberative process and law enforcement privileges. By letter dated June 14, 2004, the documents were submitted to the court for

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[1]The "John Doe" defendants are federal employees employed as corrections officers at the MDC (see Second Amended Compl. ¶ 25), and the "John Roe" defendants are federal law enforcement agents "employed by the FBI or the INS." Id. ¶ 26.

in camera review.

The withheld documents include the following: (1) "Appendix A to the OIG's[2] Supplemental Report - Findings Relating to Individual Staff Members" (the "Appendix"), which describes specific offenses allegedly committed by certain officers and the evidence relating to these incidents; (2) eight "Memoranda of Investigation" prepared by the OIG in the course of its investigation, which record interviews of officers as well as of a named plaintiff; (3) OIG investigators' notes regarding certain videotapes of activities recorded at the MDC; (4) OIG investigators' notes regarding interviews with two named plaintiffs; (5) photospreads indicating the identification of guards by two plaintiffs as well as a summary of additional photospreads conducted with named plaintiffs and other detainees who may be potential classmembers; and

(6) a computerized printout from the Bureau of Prisons ("BOP"), listing subjects of the investigation, as well as complainants, including one of the plaintiffs named in this action.

The government asserts that all of the documents in dispute are protected from disclosure by the law enforcement privilege, stating that, if disclosed, the documents would reveal law enforcement techniques and procedures, the identity of sources, witnesses and law enforcement personnel, and would interfere with an ongoing investigation. With respect to the Appendix to the OIG's report, the government additionally claims that this document is protected from disclosure by the deliberative process privilege, because the document pertains to the decision making process of officials within the Department of Justice.

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[2]"OIG" is the acronym for Office of Inspector General of the Department of Justice.

DISCUSSION

A. Deliberative Process Privilege

Turning first to defendants' reliance on the deliberative process privilege, this privilege is premised on the assumption that "'effective and efficient governmental decision making requires a free flow of ideas among governmental officials and that inhibitions will result if officials know that their communications may be revealed to outsiders.'" New York City Managerial Employee Ass'n v. Dinkins, 807 F. Supp. 955, 957 (S.D.N.Y. 1992) (quoting In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 580-81 (E.D.N.Y. 1979)). It also serves to protect the public from the potential confusion caused by premature exposure to policies before they are adopted.

The deliberative process privilege was conceived as a way "to help preserve the vigor and creativity of the process by which government agencies formulate important public *policies*." Kelly v. City of San Jose, 114 F.R.D. 653, 658 (N.D. Ca. 1987) (emphasis in original) (citing Branch v. Phillips Petroleum Co., 638 F.2d 873, 881-82 (5th Cir. 1981)); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). Thus, the deliberative process privilege "protects 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency,'" Nat'l Cong. for Puerto Rican Rights ex rel. Perez v. City of New York, 194 F.R.D. 88, 92 (S.D.N.Y. 2000) (quoting Grand Central P'ship, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999)), and the privilege should be invoked only in the context of "communications designed to contribute, directly, to the formulation of important public policy." Kelly v. City of San Jose, 114 F.R.D. at 659 (citing Burka v. New York City Transit Auth., 110 F.R.D. 660, 667 (S.D.N.Y. 1986)). See also Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742

F.2d 1484, 1496-98 (D.C. Cir. 1984) (finding that privilege applies to agency's budget recommendation); King v. Internal Revenue Serv., 684 F.2d 517, 519-20 (7th Cir. 1982) (applying privilege to memorandum regarding adoption of agency regulation); New York City Managerial Employee Ass'n v. Dinkins, 807 F. Supp. at 957 (holding documents "memorializing communications among and within City agencies concerning policy issues and alternatives" to be within the privilege).

It is also well-established that the privilege does not "as a general matter, extend to purely factual material." Nat'l Cong. for Puerto Rican Rights ex rel. Perez v. City of New York, 194 F.R.D. at 93 (quoting Hopkins v. United States Dep't of Hous. & Urban Dev., 929 F.2d 81, 84 (2d Cir. 1991)); see also Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980) (stating that the privilege does not shield "purely factual material which is severable from the policy advice contained in a document"). As the court in Cruz v. Kennedy, No. 97 CV 4001, 1998 WL 689946, *8 (S.D.N.Y. Sept. 30, 1998), noted: "Generally, documents that are factual in nature do not qualify as privilged. Whenever possible, facts that are separable from the privileged portion of a document should be disclosed."

The agency claiming the privilege must demonstrate both that the document is predecisional and that the document is a part of the deliberative process. Hopkins v. United States Dep't of Hous. & Urban Dev., 929 F.2d at 84. In order to establish that the communication is predecisional, it must be shown that the communication was "generated before a final decision had been reached with respect to the subject matter of the communication," New York City Managerial Ass'n v.

Dinkins, 807 F. Supp. at 957, and that it was prepared in order to assist the decisionmaker in arriving at his or her decision. Resolution Trust Corp. v. Diamond, 137 F.R.D. 634, 640 (S.D.N.Y. 1991). Documents which are predecisional in nature retain their protection even after the decision is made. See Dipace v. Goord, 218 F.R.D. 399, 406 (S.D.N.Y. 2003). By contrast, any materials related to post-decisional communications, including the explanation, interpretation, or application of an existing policy, are not privileged since the decision has already been made and disclosure would not tend to stifle or inhibit deliberations. Resolution Trust Corp. v. Diamond, 137 F.R.D. at 641.

In addition, the communication must be deliberative in nature. Hopkins v. United States Dep't of Hous. & Urban Dev., 929 F.2d at 84. The statement itself must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made." Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

Moreover, since the deliberative process privilege is a "qualified privilege," United States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 165 (E.D.N.Y. 1994), the court must "balance competing factors to determine whether the privilege prohibits discovery." Skibo v. City of New York, 109 F.R.D. 58, 63 (E.D.N.Y. 1985). The court in United States Postal Serv. v. Phelps Dodge Refining Corp., set forth a non-exhaustive checklist of some of the factors that should be considered as part of this balancing process:

> (1) the relevance of the evidence to be protected; (2) the availability of other evidence; (3) the 'seriousness' of the litigation and the issues

> involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

852 F. Supp. at 165 (citing In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979)).

In order to assert the privilege, the agency must first submit an index, which specifically describes each of the documents asserted to be privileged. Vaughn v. Rosen, 523 F.2d at 1144-45; Mobil Oil Corp. v. Department of Energy, 102 F.R.D. 1, 5-7 (N.D.N.Y. 1983). It should also explain why each document is privileged, including a statement that agency deliberations are involved, and a description of the "role played by the documents" in the deliberative process. Arthur Andersen & Co. v. IRS, 679 F.2d 254, 258 (D.C. Cir. 1982) (internal citations omitted); see also Vaughn v. Rosen, 523 F.2d at 1144-45; Mobil Oil Corp. v. Department of Energy, 102 F.R.D. at 5-7. In addition, many courts require the head of the department or agency asserting the privilege to submit an affidavit to the court, stating that he/she has personally considered the assertion of privilege and reviewed the documents in preparation of the index. Mobil Oil Corp. v. Department of Energy, 102 F.R.D. at 5-7; see also Resolution Trust Corp. v. Diamond, 137 F.R.D. at 641.

Here, the defendants have submitted the Declaration of Harley G. Lappin, Director of the BOP, along with a description of each of the documents sought to be withheld and an explanation justifying their need for protection. Defendants claim that because the Appendix is inter-agency, predecisional, and deliberative, it clearly falls within the deliberative process privilege.

Based on this Court's in camera review of the Appendix, it appears that the Appendix

generally contains a description of the evidence concerning specific conduct of particular MDC staff members, including interviews of staff members, allegations of detainees, an analysis of the writer's observations of activity on certain videotapes, and finally, a conclusion and recommendation for action by the BOP. Indeed, a significant portion of the Appendix not only identifies MDC officers who may have been involved in the alleged misconduct, but includes their statements, the statements of other staff members who witnessed the events, and in some instances, statements of inmates who may be potential class members in this litigation.

Courts have recognized the difficulty of applying the deliberative process privilege to most information generated by law enforcement agencies. Kelly v. City of San Jose, 114 F.R.D. at 658 (noting that it could be applied "only if [courts] are willing to stretch, in some instances beyond recognition, the policy rationale that supports the privilege"); see also Nat'l Cong. for Puerto Rican Rights ex rel. Perez v. City of New York, 194 F.R.D. at 95 (noting that the privilege, properly limited to policy communications, would "offer no protection at all to most of the information police departments would routinely generate") (internal citations omitted). Furthermore, courts have held that the deliberative process privilege should not be applied to preclude disclosure of documents concerning internal affairs investigations in civil rights suits against law enforcement agencies. See Nat'l Cong. for Puerto Rican Rights ex rel. Perez v. City of New York, 194 F.R.D. at 95 (stating that the "deliberative process privilege is inapplicable [to internal police disciplinary records containing accounts of the officers in question and other officer witnesses] because it does not protect personnel decisions by law enforcement agencies"); Soto v. City of Concord, 162 F.R.D. 603, 612-13 (N.D. Ca. 1995) (finding that documents concerning internal investigation of police officers' conduct "would be routinely

generated by" the police department, and therefore were not protected by the deliberative process privilege); Mercy v. County of Suffolk, 93 F.R.D. 520, 521-22 (E.D.N.Y. 1982) (rejecting claim of privilege as to internal affairs report regarding police officers' involvement in alleged assault of plaintiffs). See also Morissey v. City of New York, 171 F.R.D. 85, 89 (S.D.N.Y. 1997) (noting that decisions by law enforcement agencies regarding internal disciplinary matters "are simply not the type of important public policies whose creation the privilege was designed to protect") (citing Kelly v. City of San Jose, 114 F.R.D. at 657).

Indeed, some courts have held that where there are allegations of misconduct by the government or by its officials, the privilege should not apply at all. See Alexander v. Federal Bureau of Investigation, 186 F.R.D. 154, 163 (D.D.C. l999) (noting that "the deliberate process privilege disappears altogether when there is any reason to believe government misconduct occurred") (internal citations omitted); Skibo v. City of New York, 109 F.R.D. 58, 61 (S.D.N.Y. 1985) (ordering disclosure of internal affairs manual and evaluations in a civil rights action, finding that "[m]isconduct by individual officers, incompetent internal investigations, or questionable supervisory practices must be exposed if they exist"). As the court in Alexander v. Federal Bureau of Investigation explained, "[t]hese pronouncements of the law make perfect sense because, in terms of a balancing test, the public value of protecting identifiable government misconduct is negligible . . . . Thus, if there is 'any reason' to believe the information sought may shed light on government misconduct, public policy . . . demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative." 186 F.R.D. at 164 (citing In re Sealed Case, 121 F.3d 729, 738 (D.C. Cir. 1997)).

These same concerns apply to the investigation by the OIG into the potential misconduct of the

BOP employees in this case. Like the internal affairs division of a police department, the OIG is charged with investigating allegations of wrongdoing committed by federal officers and employees. There is no relevant distinction between the OIG's investigation here and internal investigations by local law enforcement agencies. Apart from generally asserting that these documents "were prepared in order to assist the agency decision-maker . . . in reaching a decision," and stating that the documents "reflect advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated" (Declaration of Harley G. Lappin, dated June 2, 2004 ("Lappin Dec."), ¶ 4), defendants have not identified any important public policies addressed in these documents that would justify the application of the privilege in this case. See Morrissey v. City of New York, 171 F.R.D. at 89. See also Grand Cent. P'ship Inc. v. Cuomo, 166 F.3d at 482 (stating that "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment") (internal citations omitted). Although in this case, the document contains recommendations as to disciplinary action to be taken against certain employees, agencies' personnel decisions are not the type of important governmental policy to which the privilege applies. Nat'l Cong. for Puerto Rican Rights ex. rel. Perez v. City of New York, 194 F.R.D. at 95.

Even if the Court were to find that the information contained in the Appendix was subject to the privilege, application of the balancing test would dictate disclosure. Here, the information contained in the Appendix includes not only the identity of potential defendants in this case, but witness statements and other evidence which is highly relevant to the plaintiffs' civil rights claims. The litigation, which alleges widespread abuse by prison officials at the MDC directed at a specific class of individuals

based on their national origin, is clearly not a "frivolous" litigation, but instead is of a highly "serious" nature, asserting misconduct by government officials and directly challenging the policies and practices of the government itself.

As to the availability of this information from other sources, defendants have not identified any other specific source of evidence that would provide the information contained in the Appendix. While defendants have produced other documents containing names and images of correctional officers, it does not appear that these other documents contain allegations of relevant conduct against specific officers. In addition, many potential members of the plaintiff class, because they have already been deported by the government, are not readily available for consultation. While videotapes of certain conduct have been provided, it may not be possible for plaintiffs' counsel to identify from these tapes the names of the BOP officials involved or the identities of others who may have been present and witnessed certain incidents.

Finally, the impact on government employees who may fear disclosure of their statements has been found by courts to be of limited concern in cases involving law enforcement officers. King v. Conde, 121 F.R.D. 180, 192-93 (E.D.N.Y. 1988). In fact, the possibility of future disclosure to civil rights plaintiffs and the knowledge that their statements will encounter public scrutiny may in fact encourage government employees to be more forthcoming during internal investigations. Id. Moreover, the importance of this information to the plaintiffs' case and the public's interest in full disclosure regarding potential misconduct by government officials far outweighs any concerns that these employees may have for secrecy.

Here, given the need of the plaintiffs to obtain this information so that they can amend their

complaint in a timely fashion and name all of the potential defendants in the case prior to the expiration of the statute of limitations, the Court concludes that the deliberative process privilege does not protect the Appendix from disclosure. The vast majority of the information in the Appendix is purely factual, and is therefore not protected by the privilege. However, the Appendix also contains some brief recommendations concerning disciplinary action to be taken against certain officers. While the applicability of the deliberative process privilege to these discrete portions of the Appendix is a closer question, this information is not relevant to the identification of individual defendants. Therefore, defendants may redact these portions of the Appendix. Plaintiffs, however, may renew their application for this information, if they so choose, during the course of merits discovery.

Accordingly, based on an in camera review of the Appendix to the OIG investigative report, this Court finds that the information contained in the Appendix is not covered by the deliberative process privilege.

B. Law Enforcement Privilege

Defendants also claim that the law enforcement privilege should apply to all of the documents in question. The stated purpose of the law enforcement privilege is "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." In re Department of Investigation of the City of New York v. Myerson, 856 F.2d 481, 484 (2d Cir. 1988). However, "[w]hen the government invokes the law enforcement . . . privilege, the court must balance the public interest in nondisclosure

against the need of the particular litigant for access to the privileged information." Raphael v. Aetna Cas. & Sur. Co., 744 F. Supp. 71, 74-75 (S.D.N.Y. 1990). The court in Morrissey v. City of New York stated that:

> The factors disfavoring disclosure are the threat to the safety of police officers, the invasion of the privacy of the police officers, the weakening of law enforcement programs or procedures, the chilling of police investigative candor, the chilling of citizen complainant candor and state privacy law. The factors favoring disclosure are the relevance of the material to the plaintiff's case, the importance of the material to the plaintiff's case, the strength of the plaintiff's case, and the importance to the public interest in releasing the information.

171 F.R.D. at 92 (citing King v. Conde, 121 F.R.D. at 190-96).[3] Thus, the law enforcement privilege, like the deliberative process privilege, is a qualified, rather than absolute, privilege. See Raphael v. Aetna Cas. & Sur. Co., 744 F. Supp. at 74.

The documents at issue fall into several categories: Documents 2-8 are summaries of interviews

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[3] In Morrissey, the court discussed these factors in connection with the court's analysis of the "official information privilege." Morrissey v. City of New York, 171 F.R.D. at 91. The official information privilege, closely related to the law enforcement privilege, has been developed by courts to govern disputes over the production of law enforcement records in civil rights actions. Id. at 92 (citing King v. Conde, 121 F.R.D. at 190). While the official information privilege is broader than the law enforcement privilege, id. at 91-92, these factors are useful in weighing the application of the law enforcement privilege since both privileges are designed to protect the integrity of law enforcement investigations.

of various BOP staff members, describing their own actions, their observations of the actions of other staff members, and their observations regarding various inmates. Document 9 is a summary of a telephonic interview with plaintiff Hany Ibrahim. Document 10 appears to be a transcript of at least some of the videotapes, which includes not only a description of what was said by the individuals viewed on the tapes, but also comments regarding the observations of the individual who prepared the transcript as to what he or she observed occurring on the tapes. Documents 11-13 appear to be interviews with two inmates who are among the named plaintiffs in this action. Document 14 is a summary of the results of photographic lineups conducted with certain named plaintiffs as well as with other detainees, and documents 15-20 are copies of the

actual photospreads reviewed by two of the named plaintiffs. Document 21 consists of several pages from a computer database containing information regarding complaints against several corrections officers lodged by various detainees, including one of the named plaintiffs.

In arguing against disclosure of these items, the government cites concern for witness confidentiality, the need to protect law enforcement techniques, and the concern that disclosure might alert the subjects of the investigation to the fact that they are under investigation. In addition, as the court in King v. Conde noted, a "pointed menace to police effectiveness may arise if the civil rights plaintiff seeking internal police files is simultaneously (or reasonably likely to be in the future) the defendant in a criminal proceeding following from the incident in question." 121 F.R.D. at 192. In this case, plaintiffs are not actual or potential defendants in an ongoing criminal matter,[4] and thus, disclosure

[4] While it is possible that some of the detainees ultimately faced prosecution for immigration violations or other conduct, there has been no representation made by the government that any of the

will not "weak[en] law enforcement programs or procedures," Morrissey v. City of New York, 171 F.R.D. at 90-91, such as a future criminal trial. Thus, this consideration weighs in favor of disclosure.

Defendants further assert that disclosure may reveal witness identities and the identities of preliminary targets of an ongoing investigation at the BOP. However, the argument is weakened by the statement of Director Lappin, that the "OIG has completed its investigation of allegations made by plaintiffs in this case and has referred the matter to the BOP for administrative action." (Lappin Dec. ¶ 6). Although Director Lappin subsequently states that "this matter is currently under investigation by BOP's Office of Internal Affairs," id., Lappin admits that the "subjects may be aware that an investigation is pending." (Id. ¶ 10).[5] Furthermore, several of the BOP officers interviewed are no longer employed by the BOP and are not likely to be still subject to disciplinary action. Thus, defendants' claim of privilege on this basis is not persuasive.[6]

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detainees face prosecution for conduct occurring while they were detained, and it is this conduct that is the subject of the documents under review.

[5] In addition, there is a confidentiality order in place in this litigation which would prohibit further disclosure of this information by plaintiffs except in limited circumstances.

[6]Defendants have not asserted that any of the subjects of the investigation have been referred for possible criminal prosecution. While the Declaration from Director Lappin indicates that the OIG's investigation has been completed and the matter has been referred to the BOP for administrative action, unfortunately, nothing in the government's submission indicates when the OIG completed its investigation, when the Appendix was prepared, or for how long the matter has been pending before the BOP. Moreover, it is clear that the actions of which plaintiffs complain occurred almost three years ago, shortly after September 11, 2001, and many of the Memoranda of Investigation, documents 2 - 9, reference interviews of MDC staff members conducted during the period from May 2003 to August 2003. Other documentation indicates that interviews of inmates were conducted as early as May 2002. At this point, with the expiration of the statute of limitations looming to cut off any action by plaintiffs against these officers, the Court finds that any concern that disclosure will impede the disciplinary decisions of the BOP is outweighed by the "strong policy in favor of full development of the facts in

Furthermore, although defendants claim that the disclosure of documents would reveal the identities of witnesses to incidents at the MDC, it should first be noted that it is "presumably the obligation" of government employees to "cooperate in incident investigations." Burka v. New York City Transit Auth., 110 F.R.D. at 664. Thus, to the extent that the documents contain interviews of staff personnel, the question of privacy is far outweighed by the need for the information. Moreover, to the extent that defendants raise a concern about the willingness of staff members to come forward and be truthful in this and in future investigations, the court in Mercy v. County of Suffolk rejected that argument, noting: "If defendants are saying that police officers are more likely to be untruthful if they know potential plaintiffs might receive their reports than they ordinarily are when they are faced with possible departmental disciplinary action, the court does accept their argument." 93 F.R.D. at 522. The court further noted that disclosure of the records of an internal disciplinary investigation can only further the policy of encouraging self-evaluation and remedial action.

> These investigations are conducted, at taxpayer expense, to determine whether the procedures of the department or individual police officers were responsible for the complained-of incident, and whether disciplinary or other remedial action is necessary to prevent the recurrence of similar incidents. No legitimate purpose is served by conducting the investigations under a veil of near-total secrecy. Rather, knowledge that a limited number of persons, as well as a state or federal court, may examine the file in the event of civil litigation may serve to insure that these investigations are carried out in an even-handed fashion, that the statements are carefully and accurately taken,

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federal litigations to the end that justice be served." Lora v. Board of Education, 74 F.R.D. 565, 579 (E.D.N.Y. 1977); see also Burka v. N.Y.C. Transit Auth., 110 F.R.D. at 666. Indeed, at least one court has found that the policy reasons for staying discovery in a civil action in deference to a criminal proceeding do not apply in the context of a pending disciplinary hearing. See Maher v. Monahan, No. 98 CV 2319, 2000 WL 648166, at *3-4 (S.D.N.Y. May 18, 2000).

> and that the true facts come to light, whether they reflect favorably or unfavorably on the individual police officers involved or on the department as a whole.

Id. In this case, where there are allegations of widespread, systemic abuse of federal prisoners based upon their race and national origin, the need to ensure that these allegations are properly investigated is paramount. Indeed, if such abuse has occurred, the public interest in ensuring that corrective action is taken to prevent such abuse in the future and to discipline those responsible for such abuse far outweighs any concern that the government may have that disclosure will chill potential witnesses and thwart the interdepartmental investigation.

Finally, there has been no showing that the BOP officers who were witness to the events documented in the investigation made their statements "with the clear understanding that their identity not be disclosed," Cullen v. Margiotta, 811 F.2d 698, 714 (2d Cir. 1987), overruled on other grounds, Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 1021 (1987), a factor often found to be dispositive in deciding whether to disclose documents that identify witnesses or sources. See id.; Cruz v. Kennedy, 1998 WL 689946, at *5 (citing cases); Burke v. New York City Police Dept., 115 F.R.D. 220, 227 (S.D.N.Y. 1987). Thus, defendants' conclusory claims that disclosure of the identities of BOP officers who witnessed the events will thwart these types of investigations should be entitled to little weight in the balancing test.

However, to the extent that the documents identify inmate witnesses other than the named plaintiffs, those individuals do have an interest in keeping their identities confidential. Since the request for information is currently limited to that necessary to identify potential defendants, the non-government

witnesses' statements should be provided but with the witnesses' names redacted.

Defendants also claim that the documents should be withheld because they disclose law enforcement techniques and investigators' thought processes and tactics in questioning witnesses. However, "across the board claims of law enforcement privilege supported only by conclusory statements will not suffice." Alexander v. Federal Bureau of Investigation, 186 F.R.D. at 167. Defendants' claims are similar to those made by the police department in Maher v. Monahan, where the defendants claimed that investigative files would "reveal both investigative techniques and confidential sources of information." 2000 WL 648166, at *5. The court found this assertion to be "both entirely speculative and conclusory," stating that it is "thus entitled to little, if any, weight in the balancing process." Id.[7] Defendants in this case make no showing as to how disclosure of the documents at issue would reveal special law enforcement techniques. Here, defendants have failed to identify any specific "strategy" or "tactics" or law enforcement intiatives that would be revealed by disclosing these documents. Other than interviewing staff members and inmates, conducting photo lineups, and reviewing videotapes, which are standard law enforcement techniques, there is nothing in these documents that would merit protection based on the interest in protecting law enforcement strategies.

Defendants also claim that disclosure may not be fair to "officers whose reputations may be

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[7] But cf. Nat'l Cong. for Puerto Rican Rights ex rel. Perez v. City of New York, 194 F.R.D. at 94 (upholding law enforcement privilege with regard to memoranda involving "strategy and tactics, opinions, analysis and deliberations" relating to "special enforcement programs and initiatives" such as deployment tactics to reduce subway crime and plans for future law enforcement endeavors to combat organized crime).

injured." (Lappin Dec. ¶ 10 at 5). However, "neither state nor federal law contemplates denial to a litigant of information from personnel files or other documents if that information is necessary to the party's preparation of his case, even if the material may reveal matters that could cause embarrassment or . . . harm to another party, or even to a non-party." Burke v. New York City Police Department, 115 F.R.D. at 225. Furthermore, a protective order is already in place in this action. Thus, defendants' claim of privilege on this basis should be denied.

In weighing the factors favoring disclosure, such as the importance of the material to plaintiffs' case, plaintiffs make a strong argument that the documents should be released. The importance of certain information to the plaintiff's case "has at times been viewed as the most important of all factors." King v. Conde, 121 F.R.D. at 194 (citing cases). The plaintiffs' need to identify the officers[8] who have allegedly violated their constitutional rights is great considering that their claims against the officers are subject to a three-year statute of limitations. Here, the documents directly address the incidents complained of, and provide witness statements as well as interviews of the officers and victims themselves. These factors tip the balance in favor of disclosure of the documents.

Defendants have argued that the victims' recollection of events and their review of guard photos and videotapes are an adequate substitute for the OIG report and other investigation records. This claim is without merit. As the court in Kelly v. City of San Jose noted, "since information in police files

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[8]This is not an uncommon situation. Very often, "defendants refuse to give plaintiffs the names of officers who were involved in the alleged incident, thus requiring plaintiffs to engage in costly discovery merely to reach the point where they know the names of the parties they are suing." Mercy v. County of Suffolk, 93 F.R.D. at 523. Furthermore, the Court notes that "the internal affairs file is prepared at public expense, for a public purpose," id., which militates in favor of disclosure of the files.

will have been developed closer in time to the subject events, when witnesses were around and their memories were fresher . . . it will not be likely that information of comparable quality will be available from any source." 114 F.R.D. at 667. Here, as noted above, many of the witnesses and potential class members may have been deported or released from custody and are no longer available for consultation, and, even if they were, may not be able to identify by name those guards who either engaged in or witnessed the alleged abuse. Thus, since "'the government cannot show that the information of comparable quality is as efficiently available from other alternative sources, this factor should weigh in favor of disclosure.'" King v. Conde, 121 F.R.D. at 195 (quoting Kelly v. City of San Jose, 114 F.R.D. at 667).

In weighing the factors set out by the court in King v. Conde, the scales tip substantially in favor of disclosure of the documents to plaintiffs. This is especially so given that "[d]oubts must be resolved, at the discovery stage, in favor of the [civil rights] claimant," King v. Conde, 121 F.R.D. at 195 (quoting Kelly v. City of San Jose, 114 F.R.D. at 666, and more so in light of the "elusiveness of proof on some kinds of civil rights claims." Kelly v. City of San Jose, 114 F.R.D. at 666.[9]

Accordingly, based on an in camera review of the documents at issue, the Court orders defendants to produce all of the documents to plaintiffs.[10] Defendants may, however, redact the names

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[9] In addition, with regard to certain of the documents withheld by defendants, particularly the summaries of interviews with named plaintiffs and the photospreads completed by named plaintiffs, no colorable claim can be made that these documents are protected by the law enforcement privilege. Thus, this Court must conclude that defendants withheld these documents simply to delay production to the plaintiffs.

[10] While the relevance of document 10, the transcripts and notes regarding the contents of various videotapes, is not immediately obvious, this document does contain the names of various BOP

of inmate witnesses, other than the named plaintiffs, appearing in the documents. Defendants may also redact the disciplinary recommendations contained in document 1, the Appendix. Furthermore, to the extent that document 21 contains addresses and social security numbers for either inmate witnesses or governmental employees, this information may be redacted as well.[11]

Finally, this Court notes that it appears that defendants may have withheld certain documents containing information relevant to the identification of officers involved in the alleged abuse of detainees where those documents do not relate specifically to interactions between officers and the named plaintiffs.[12] While this Court is aware that its earlier August 26, 2003 Order only required the production of documents relating to interactions between officers and the named plaintiffs, the statute of limitations will soon expire as to all individuals potentially culpable for the alleged abuses at the MDC. Therefore, to the extent that the documents in defendants' posession identify any government employees potentially responsible for misconduct involving putative classmembers other than the named plaintiffs, those documents must be produced to plaintiffs as well.

Defendants are hereby Ordered to produce the documents by August 4, 2004, subject to the protective order that is already in place.

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employees whose identities may not be clear from the tapes themselves.

[11] Plaintiffs may, during merits discovery, may make an application for these addresses and social security numbers upon a showing that such information is relevant. Cf. Goodman v. City of New York, No. 03 CV 2497, 2004 WL 1661105, at *1-2 (S.D.N.Y. July 23, 2004).

[12]Specifically, the Court notes that document 14 summarizes the results of photolineups conducted with detainees other than the named plaintiffs, and yet the Court was not provided with the copies of the actual photospreads shown to these other detainees.

SO ORDERED.

Dated: Brooklyn, New York
July 29, 2004

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Cheryl L. Pollak
United States Magistrate Judge