IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN STARTZELL, et al.,	**:**	**CIVIL ACTION**
Plaintiffs,	**:**	
	:	
v.	**:**	**NO. 05-05287**
	:	
CITY OF PHILADELPHIA, et al.,	**:**	
Defendants.	**:**	

M E M O R A N D U M

STENGEL, J. **October 13, 2006**

Plaintiffs' motion to compel seeks certain deposition testimony from Assistant District Attorney Donna Marcus of the Philadelphia District Attorney's Office regarding the basis for the criminal charges brought against Plaintiffs. Plaintiffs also want to ask Ms. Marcus about her religious faith and whether she has any bias or prejudice against Christians. For the reasons discussed below, I will deny the motion.

I. BACKGROUND

Plaintiffs are a group of Christians who protested during Philadelphia's "Outfest" festival held on October 10, 2004.[1] When Plaintiffs arrived at Outfest, organizers of the event and the Philadelphia police confronted them. At one point, Defendant Chief Inspector Tiano of the Philadelphia Police Department asked Plaintiffs to relocate. As Plaintiffs began to leave, the police arrested them, placed them in handcuffs, and

[1]Outfest is an annual festival held in Philadelphia in conjunction with National Coming Out Day. According to Plaintiffs, Outfest is a celebration of one's proclamation of his or her homosexuality.

transported them to a police station for booking.[2] On February 17, 2005, the court[3] dropped the criminal charges against Plaintiffs after holding a preliminary hearing. Plaintiffs initiated this civil rights case on October 6, 2005, alleging: (1) seven violations of 42 U.S.C. § 1983 ("section 1983"), including a count for malicious prosecution; (2) a violation of 42 U.S.C. § 1985(3) ("section 1985(3)"); (3) three violations of the Pennsylvania Constitution; and (4) state law claims for battery and false imprisonment.

The pending motion to compel focuses on Plaintiffs' attempts to discover information about the criminal charges lodged against them and the potential bias of the person who approved those charges. On June 28, 2006, Plaintiffs deposed Raymond Wright, the district attorney representative who approved and signed off on the criminal charges brought against Plaintiffs for their actions at Outfest. See Pls.' Mot. Compel ¶ 1-4. Mr. Wright testified that, because he was not an attorney, he did not make the decision to bring the criminal charges against Plaintiffs and had no personal knowledge of the factual basis underlying the charges. Id. Thereafter, the City of Philadelphia identified Ms. Marcus as the individual who had actual knowledge of the basis for the criminal charges brought against Plaintiffs. The City agreed to allow Plaintiffs to depose Ms. Marcus after the discovery deadline of June 30, 2006.

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[2]Plaintiffs were charged with eight criminal counts. The felony counts were: (1) criminal conspiracy; (2) ethnic intimidation; and (3) riot. The misdemeanor counts were: (1) obstructing a highway; (2) recklessly endangering another person; (3) failure to disperse; (4) disorderly conduct; and (5) possession of an instrument of crime.

[3]Plaintiffs' complaint does not identify the court, although this Court presumes the hearing was held in Philadelphia County's Municipal Court. See Compl. ¶ 87.

Plaintiffs' counsel deposed Ms. Marcus on July 17, 2006. Plaintiffs' counsel asked Ms. Marcus about the factual basis for the criminal charges. Ms. Marcus' counsel objected to these questions by asserting two executive privileges (deliberative process and law enforcement) and instructed Ms. Marcus not to respond.

Ms. Marcus was also asked about her religious background and whether she was biased against Christians.[4] Ms. Marcus' counsel objected to these questions as irrelevant to the case and instructed her not to respond.

II. DISCUSSION

A. Motion to Compel Deposition Testimony Regarding the Basis for the Criminal Charges

As the Plaintiffs are asserting federal claims, the privileges in this case are governed by "principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." United States v. O'Neill, 619 F.2d 222, 230 (3d Cir 1980)(citing Fed.R.Evid. 501). The government bears the burden of demonstrating the applicability of the privilege. Redlands Soccer Club, Inc. v. Dep't of the Army, 55 F.3d 827, 854 (3d Cir. 1995). Respondent asserts that two executive privileges bar the motion to compel.

1. Deliberative Process Privilege

[4]Specifically, Defendant asserts that Plaintiffs' counsel asked Ms. Marcus the following questions: (1) "You're not Christian, Jewish, Muslim?"; (2) "Do you actively or passively support the gay and lesbian community in any way, shape, or form?"; (3) How does it [a gay/lesbian event in San Francisco] make you feel?"; and (5) "Do you know whether or not the Bible takes a position on homosexuality . . . as to whether or not [homosexuality is] sinful behavior or non-sinful behavior?" Resp. ¶ 18.

The deliberative process privilege is an executive privilege that applies to "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." In re Grand Jury, 821 F.2d 946, 959 (3d Cir. 1987) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-54 (1975). The privilege seeks to protect the quality of agency decisions by shielding pre-decisional deliberations from public scrutiny. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

The Plaintiffs assert that the deliberative process privilege only prevents the discovery of documents and is inapplicable to this motion to compel deposition testimony. Mot. Compel ¶ 14. On the contrary, courts have applied the deliberative process privilege in analyzing requests to compel deposition testimony. See NLRB v. Building & Constr. Trade Council, No. 88-3495, 1989 U.S. App. LEXIS 9411, at *2 (3d Cir. Apr. 6, 1989)(applying the deliberative process privilege in the deposition context); Cipolla v. County of Rensselaer, No. 99-CV-1813, 2001 U.S. Dist. LEXIS 16150 (N.D.N.Y. Oct. 10, 2001)(applying the deliberative process to protect deposition transcripts that detailed the thought process behind the district attorney's decision to prosecute).

Plaintiffs also argue that Respondent is required to assert the privilege in writing. It is sufficient for the attorney for the city to assert the privilege at Ms. Marcus' deposition and in the Respondent's responsive motion.[5] The manner of asserting the

[5] When documents are at issue, there is a clearly established procedural protocol for invoking executive privileges. See United States v. O'Neill, 619 F.2d at 226 (holding that in order for the government to assert executive privilege, "[t]he head of the agency claiming the privilege must personally review the material, there must be a specific designation and description of the documents claimed to be privileged, and there must be precise and

privilege is not an issue here.

To determine if the privilege applies, courts in the Third Circuit apply a two-part test: (1) determine whether the communications are privileged and (2) balance the parties' interests. Redland Soccer Club, 55 F.3d at 854. The privilege does not apply to factual information, so long as the factual information is severable from opinions, recommendations, or advice underlying the confidential deliberations of law or policymaking. See In re Grand Jury, 821 F.2d at 959.

To satisfy step one in the analysis, a party asserting the privilege must show the information sought is predicisional and deliberative. Cipolla v. County of Rensselaer, No. 99-CV-1813, 2001 U.S. Dist. LEXIS 16150, at *7 (N.D.N.Y. Oct. 10, 2001). The information is predecisional if it reflects the steps that lead to the agency's final decision. Id. It is deliberative if it reflects the process the agency used to reach the decision. Id.

The Plaintiffs seek to discover information that is clearly predicisional. Plaintiffs sought to question Ms. Marcus about "the basis for criminal charges brought against Plaintiffs." Mot. Compel ¶ 6. This information is "predecisional" because it reveals the steps that Ms. Marcus took before drafting the criminal complaint against Plaintiffs.

Compelling Ms. Marcus to testify is also "deliberative" because it reflects the District Attorney's Office's decision-making process. Testimony from Ms. Marcus will

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certain reasons for preserving the confidentiality of the communication. Usually such claims must be raised by affidavit"). Here, Respondent seek to protect deposition testimony and not privileged documents.

reveal how the D.A.'s Office works with the Department of Police to bring criminal charges.[6] The thought process used by attorneys at the D.A.'s Office in forming the decision to prosecute should be protected from public inquiry and shielded from the discovery process by the deliberative process privilege. See Cipolla v. County of Rensselaer, No. 99-CV-1813, 2001 U.S. Dist. LEXIS 16150, at *4 (N.D.N.Y. Oct. 10, 2001); Thompson v. Lynnbrook, 172 F.R.D. 23, 26-27 (E.D.N.Y. 1997); Gomez v. City of Nashua, 126 F.R.D. 432, 435 (D.N.H. 1989).

As I find that the deliberative process privilege is applicable because the information sought is predecisional and deliberative, the second part of the analysis requires a balancing of the interests. A party seeking discovery of privileged material may overcome the privilege only by demonstrating a "sufficient need for the material in the context of the facts or the nature of the case." In re Grand Jury, 821 F.2d at 959. To determine whether a "sufficient need" exists, courts in the Third Circuit "balance the competing interests of the parties" by considering the following factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; [and] (v) the possibility of future timidity by government employees who

[6]Further, Ms. Marcus' personal involvement in the decision to prosecute Plaintiffs was extremely limited. Ms. Marcus happened to be the ADA on call when the incident occurred. Dep. pg. 22. Her only action in the case was to prepare the criminal complaint using a three-page police report. Dep. pgs. 27-31. Ms. Marcus did not speak to anyone about the case to gather information in drafting the charges. Dep. pg. 26. Due to her limited involvement and lack of first-hand knowledge about the case, Ms. Marcus undoubtedly employed standard District Attorney's Office procedures in preparing the complaint.

will be forced to recognize that their secrets are violable." Redland Soccer Club, 55 F.3d at 854 (quoting First E. Corp. v. Mainwaring, 21 F.3d 465, 468 n.5 (D.C. Cir. 1994).

The interests balance in Respondent's favor. First, any information that the D.A.'s Office could provide is not directly relevant to Plaintiffs' claims. The D.A.'s Office is not a defendant and was only a minor participant in the events underlying this suit. Ms. Marcus, a representative of the D.A.'s Office, prepared the criminal complaint against Plaintiffs solely based on information provided by the Philadelphia Department of Police. See Dep. pgs. 22-31. She did not conduct additional investigation and employed standard D.A. Office procedures in deciding what charges to bring based on the information provided by the police. Moreover, compelling Ms. Marcus to testify about the D.A. Office's standard practice will implicate the "future timidity"concern. District attorneys frequently make discretionary decisions in determining how to draft criminal complaints. Compelling testimony on this thought process could impede future decision-making of the D.A.'s Office.

Plaintiffs argue that the overriding public interest of enforcing civil rights laws weighs in their favor: "in a civil rights action where the deliberative process of State or local 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." Scott v. Bd. of Educ. of City of East Orange, 219 F.R.D. 333, 337 (D.N.J. 2004). This is just one factor in the balancing of interests and courts continue to apply the

deliberative process privilege even when civil rights are at issue. Cipolla v. County of Rensselaer, No. 99-CV-1813, 2001 U.S. Dist. LEXIS 16150 (N.D.N.Y. Oct. 10, 2001)(applying the deliberative process privilege to deny a motion to compel deposition testimony regarding a district attorney's decision to prosecute in a civil rights lawsuit). I find that due to the concerns noted above, compelling testimony from Ms. Marcus, who based the criminal complaint at issue on information provided by the police, is not essential to the Plaintiffs' civil rights claims.

I find compelling Ms. Marcus to testify regarding the basis for the criminal charges brought against the Plaintiffs would violate the deliberative process privilege.

2. Law Enforcement Privilege

Respondent also asserts that the law enforcement privilege applies. Federal courts have recognized a law enforcement privilege barring the disclosure of investigatory files. See, e.g., Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991); In re Dept. of Investigation of City of New York, 856 F.2d 481, 483 (2d Cir. 1988); Black v. Sheraton Corp. of Am., 564 F.2d 531, 545-46 (D.C. Cir. 1977); Borchers v. Commercial Union Assur. Co., 874 F. Supp. 78, 80 (S.D.N.Y. 1995); U.S. v. Lang, 766 F. Supp. 389, 404 (D. Md. 1991). The law enforcement privilege's purpose is threefold: (1) to prevent the disclosure of law enforcement techniques, procedures and sources; (2) to protect witnesses and others involved in a law enforcement investigation; and (3) to prevent interference with an investigation. In re Dept. of Investigation, 856 F.2d at 484. The

government's interest in protecting investigatory files from disclosure is particularly strong when the files relate to an ongoing investigation. Fin. Mgmt. Prof'l Corp. v. U.S., No. 88-2272, 1989 WL 35425, at *5 (E.D. Pa. Apr. 11, 1989) (citation omitted). When the government invokes the law enforcement privilege, courts must balance the public interest in maintaining the confidentiality of law enforcement investigatory information against any showing by the party seeking discovery of the necessity for such information. Black, 564 F.2d at 545; Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (overruled on other grounds) (identifying factors appropriate for consideration in addressing claim of privilege).

The law enforcement privilege does not bar discovery once investigation and prosecution are complete. Rizzo, 59 F.R.D. at 343-44. Since the city is no longer pursuing the criminal case against Plaintiffs, the three-fold purpose of the privilege is not implicated. Asserting that discovery of information in one case will hamper future investigations is an insufficient basis for preventing discovery under this privilege. Revelle v. Trigg, No. 95-5885, 1999 U.S. Dist. LEXIS 890, at *8 (E.D. Pa. Feb. 2, 1999). Since the criminal prosecution of the Plaintiffs is complete, I find that Respondent cannot rely on the law enforcement privilege to bar discovery.

B. Motion to Compel Deposition Testimony Regarding Ms. Marcus' Bias

Under Federal Rule 26(b)(1), "[p]arties may obtain discovery regarding any

matter, not privileged, that is relevant to the claim or defense of any party....Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. FED. R. CIV. P. 26(b)(1). The Third Circuit "employs a liberal discovery standard." Westchester Fire Ins. Co. v. Household Int'l, Inc., No. 05-1989, 2006 U.S. App. LEXIS 2375, at *11 (3d Cir. Jan. 17, 2006)(citing Pacitti v. Macy's, 193 F.3d 766, 777 (3d Cir. 1999). While Rule 26 still defines the scope of discovery broadly, "courts should not grant discovery requests based on pure speculation that amount to nothing more than a 'fishing expedition' into actions...not related to the alleged claims or defenses." Collens v. City of New York, 222 F.R.D. 249, 253 (S.D.N.Y. 2004)(collecting cases).

The party resisting discovery has the initial burden to show how each interrogatory or question is overly broad, burdensome, or oppressive. Josephs v. Harris Corp., 677 F.2d 985, 992 (3d Cir. 1982). Respondent has satisfied this burden. Respondent objected at the deposition to questions seeking Ms. Marcus' religious affiliation and her views and past support of the gay and lesbian community as irrelevant to the Plaintiffs' case. See Dep. pgs. 9-10, 69-78. In responding to Plaintiffs' motion to compel, Respondent further asserts that Plaintiff's questions were "outrageous, shocking, and shameful...[and] of an extremely private nature." Resp. ¶ 18.[7]

[7]Respondents assert that Plaintiffs' counsel asked Ms. Marcus the following questions: (1) "You're not Christian, Jewish, Muslim?"; (2) "Do you actively or passively support the gay and lesbian community in any way, shape, or form?"; (3) How does it [a gay/lesbian event in San Francisco] make you feel?"; and (5) "Do you know whether or not the Bible takes a position on homosexuality . . . as to whether or not [homosexuality is] sinful behavior or non-sinful behavior?"

Once the party states the objection, the party seeking discovery has the burden of showing that the discovery request lies within the boundary of Rule 26. Engers v. AT&T, No. 98-3660, 2004 U.S. Dist. LEXIS 29538, at *22 (D.N.J. March 3, 2004). Plaintiffs argue that questioning Ms. Marcus about her potential bias or prejudice toward Christians is relevant to prove their Section 1983 claim that the City has engaged in a pattern and practice of interfering with the first amendment rights of Christian evangelists. Pls.' Mot. Compel ¶ 21-22.

I find that Plaintiffs fail to meet their burden of showing that the evidence sought is relevant to their claims or reasonably calculated to lead to relevant evidence. Even if Plaintiffs show that Ms. Marcus is biased, this is not relevant to Plaintiffs' case because *respondeat superior* is not a viable theory of recovery in § 1983 civil rights actions. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)("... a municipality cannot be held liable solely because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory."). Instead, Plaintiffs are required to show the execution of a government policy to recover against a local government under §1983. Id. at 694. Ms. Marcus' personal bias, if any, does not establish a "government policy" within the meaning of Monell.[8] Because Ms. Marcus' own motivations cannot be imputed to the City, they are irrelevant.

[8]See nt. 6 supra for a description of Ms. Marcus' limited involvement in the case.

IV. CONCLUSION

For the reasons described above, Plaintiffs' motion is denied. An appropriate Order follows.

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	:	
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Defendants.	**:**	

O R D E R

AND NOW, this day of 13th October, 2006, upon consideration of Plaintiffs' Motion to Compel Testimony of Donna Marcus, Esquire and for Sanctions (Document No. 43) and the Response of Ms. Marcus (Document No. 44), it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.