

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BENNY T. WARR and NINA M. WARR

Plaintiffs

v.

**AFFIDAVIT OF SPENCER L.
ASH, IN RESPONSE TO
PLAINTIFF'S MOTION TO
COMPEL AND MOTION FOR
A PROTECTIVE ORDER**

ANTHONY R. LIBERATORE
JOSEPH M. FERRIGNO
MITCHELL STEWART, II,
JAMES SHEPARD,
CITY OF ROCHESTER.

13-CV-6508-DGL-MWP

Defendants.

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

Spencer L. Ash, Esq., being duly sworn, deposes and says:

1. I am an attorney with the City of Rochester Law Department, attorneys for the Defendants. I am admitted to practice law before the courts of the State of New York.
2. I respectfully submit this Affidavit on behalf of City Defendants in response to Plaintiff's Motion to Compel dated July 14, 2014. The information set forth in this Affidavit is based upon my personal knowledge and a review of the proceedings in this action.
3. Additionally, Defendants move herein, *inter alia*, for a protective order against any disclosure of personal information contained in Defendants' personnel records. Defendants also seek a protective order against disclosure of any internal communication(s) related to specific procedures or tactics of the Rochester Police Department as such disclosures may compromise operations and public safety. I have conferred with Mr. Burkwit in good faith on

multiple occasions to resolve any and all disputes without judicial interference, including email, telephone and in person conversations.

4. This matter was assigned to me following the departure of previously assigned counsel in late July of 2014. I immediately began corresponding with Plaintiff's counsel via telephone and email informing him that I was assiduously collecting discovery that had not been previously collected due to transitional staffing shortages and case volume. *See Exhibit A.*

5. Thereafter, I tendered over 200 pages of discovery to Mr. Burkwit during the date and time agreed upon during our several discussions. On Monday September 22, 2014, I informed Mr. Burkwit by email that discovery responses were being delivered to his office. *See Exhibit A.* However, it was clear that Mr. Burkwit had already "promised his client" he would file a motion to compel—despite knowing that my office was working diligently to answer Plaintiff's onerous, invasive and in large part, irrelevant, demands. *See Exhibit A.* In an effort to avoid unnecessary judicial intervention, I also told Mr. Burkwit during several face to face conversations that if he had any issues with Defendants' tender, to call my office to discuss. Counsel agreed to this courtesy, but filed his motion without contacting me.

Responses to Plaintiff's First Request For Production of Documents

6. With respect to Demands numbers 6, 7, 8, and 21 of Plaintiff's First Request For Production of Documents, each of these demands are excessive, overly burdensome, not material to specific claims asserted by Plaintiff and constitute an obvious attempt to generally mine sensitive data from confidential Rochester Police Department records.

7. With respect to Demands 9 and 10, both requests are lack specificity and clarity. Moreover, with respect to #9 the request is overly broad, has no relationship to the specific allegations in the Complaint, and is not likely to lead to relevant and discoverable material.

8. Concerning 16, 17, 18, 19, and 20 Defendant has provided all material in its possession. Over 100 pages of documentation responsive to Plaintiff's Request were provided in Defendant's Responses to Plaintiff's Interrogatories to the City of Rochester.

Responses to Plaintiff's First Set of Interrogatories to City of Rochester

9. Regarding Interrogatories 1, 2, and 3, same are facially excessive and overly broad with respect to subject matter and temporal scope and are not likely to lead to relevant and discoverable material. These requests are a clear fishing expedition and bear no relation to the specific facts of this case, which involves the arrest of a belligerent, albeit disabled, individual who created a mob scene in a high crime area.

10. As to Interrogatory #5, there was no Civilian Review Board review of this matter.

11. With respect to Interrogatory #8, Defendant is not in possession of any evidence of criminal prosecution of a Rochester police officer for excessive force over the last 10 years. Notwithstanding this response, Defendants reassert their objection as to scope and relevancy of this request.

12.

a. Defendant Ferrigno has been employed with the Rochester Police Department as a Police Officer since 2007.

b. Defendant Liberatore has been employed with the Rochester Police Department as a Police officer since 2006.

c. Personnel records of former employees are not housed on site. Notwithstanding this response, the employment history of Former Chief Sheppard is wholly irrelevant to plaintiff's claims.

None of the named Defendants have been subject to demotions or disciplinary action over the course of their employment. All other information requested is irrelevant and subject to confidentiality as part of their personnel records. Defendants request that this material be precluded from disclosure.

13. Defendants provided *Exhibit E* in their responses. Operation "Cool Down" is a call for overall heightened presence and vigilance by officer during what is traditionally a period of elevated criminal activity. Defendants have no further evidence or documentation in this regard.

Responses to Plaintiff's First Set of Interrogatories to Defendants Joseph M. Ferrigno, II and Anthony R. Liberatore

14. Regarding Interrogatory #1, Defendants object to a request for private information from active police officers that violate privacy, undermine personal safety, and are wholly irrelevant to the underlying claims. Defendants request that a protective order be applied to this request.

15. Notwithstanding the current objection to Interrogatory # 9, Defendants Liberatore and Ferrigno have not been subject to any discipline, actions or inquiries with exception of the present matter. All materials regarding inquiries made or actions taken in the present matter have

already been disclosed to the Plaintiffs. See Exhibit A of Defendants' Responses to Plaintiffs' Interrogatories to the City of Rochester.

16. All material responsive to Interrogatory #19 have been provided to Plaintiffs in Exhibits A and B of the City's Responses to Plaintiffs' Interrogatories.

17. The response to Interrogatory #20 is **NO** with respect to all Defendants. Notwithstanding this response, this Interrogatory is confusing and wholly irrelevant. An Ordinance violation could relate to the condition of rental property or the height of Defendants' grass.

18. The response to Interrogatory #23 is that there has been no involvement or review by any Civilian Review Board or third party agency.

Responses to Plaintiff's First Set of Interrogatories for James M. Sheppard and Mitchell R. Stewart, II.

19. Defendants have no record of Interrogatories for Mitchell Stewart being served by Plaintiffs since I have been corresponding with Mr. Burkwit regarding this matter.

20. Former Chief Sheppard has been retired from the City of Rochester since November of 2013 and is not currently under the City's control. Accordingly, Defendant offered a less onerous means to take his testimony through depositions. Had Mr. Burkwit simply called my office to state his objection, I would have endeavored to secure Mr. Sheppard's responses.

Wherefore, Defendants seek denial of Plaintiffs' motion in its entirety. Alternatively, Defendants seek a Protective Order pursuant to Rule 26 (c) against disclosure of any and all personnel information and internal communications/materials concerning ongoing police security measures. Should the Court deny Defendants' request for a protective order, Defendants request

in camera review of material(s) demanded by Plaintiff, together with such other and further relief as the Court deems appropriate and just.

DATED: November 7, 2014

T. Andrew Brown, Corporation Counsel

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