

SEP 04 2002

JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-N-740 (CBS)

AMERICAN FRIENDS SERVICE COMMITTEE, a Pennsylvania not-for-profit corporation;
ANTONIA ANTHONY;
END THE POLITICS OF CRUELTY, an unincorporated association;
CHIAPAS COALITION, an unincorporated association;
STEPHEN NASH; and
VICKI NASH,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

ORDER

Magistrate Judge Craig B. Shaffer

THIS MATTER comes before the court on the parties' stipulation and request that I review *in camera* certain investigative records maintained by the Denver Police Department.

The pending Class Action Complaint for Declaratory and Injunctive Relief, initially filed on March 28, 2002, challenges

a custom and practice of the Denver Police Department (the "Department") of monitoring the peaceful protest activities of Denver-area residents; maintaining files (the "Spy Files") on the expressive activities of law-abiding individuals and advocacy organizations, many of which the Department has falsely branded with the label of "criminal extremist;" and providing copies of certain Spy Files to third parties.

The Complaint further alleges that the Denver Police Department has "singled out and selected

the Plaintiffs and the plaintiff class for surveillance and monitoring based upon their advocacy of controversial or unpopular political positions and opinions.” Plaintiffs express concern that “individuals are less likely to join a rally or to participate in other expressive activities when they reasonably fear that they will be photographed by police or that their names will appear in police ‘criminal intelligence’ files.”

As the parties begin the pre-trial discovery process, the Federal Bureau of Investigation (“FBI”) has expressed concern that 22 files presently maintained by the Denver Police Department also bear upon active criminal investigations by the FBI. Production of documents in this case might well compromise those active investigations. For that reason, the FBI, through its attorneys, has asked the court to review *in camera* these 22 files to determine to what extent, if any, they are relevant to the instant litigation. If the files are relevant, the court would have to fashion some procedure to insure Plaintiffs’ access while simultaneously safeguarding the confidentiality of ongoing criminal investigations. During a hearing on August 28, 2002, counsel for the parties stipulated to the scope of the court’s *in camera* review.

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that “unless otherwise limited by order of the court,” a party may obtain discovery regarding any non-privileged matter “that is relevant to the claim or defense of any party.” The Rule further acknowledges that “relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” While Rule 26 establishes a liberal standard, relevance still defines the bounds of permissible discovery. *Cf. Gomez v. Martin Marietta Corporation*, 50 F.3d 1511, 1520 (10th Cir. 1995) (the desire for broad discovery “is not without limits”). To be discoverable, materials must be non-privileged *and* relevant to a claim or

defense, or must be “reasonably calculated” to lead to admissible, *relevant* evidence. *Cf. Smith v. Pfizer, Inc.*, 2000 WL 1679483 *2 (D. Kan. 2000) (“irrelevant matters are not discoverable”). *See also Williams v. American Cyanamid*, 164 F.R.D. 615, 616 (D.N.J. 1996) (relevance is to be construed liberally, but must be determined and limited by context of facts, circumstances of particular case). The same parameters apply to a request for production of documents under Fed.R.Civ.P. 34. *Lincoln Am. Corp. v. Bryden*, 375 F. Supp. 109, 111 (D. Kan. 1974) (to be producible under Rule 34, document must be relevant within meaning of Rule 26(b)). *See also Bosaw v. National Treasury Employees’ Union*, 887 F. Supp. 1199, 1216 (S.D. Ind. 1995) (decision whether to order production of documents is discretionary with court, guided by standard in Rule 26(b)(1)). This court is also mindful that upon motion and for good cause show, the scope of discovery may be limited as necessary to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *See Fed.R.Civ.P. 26(c)*.

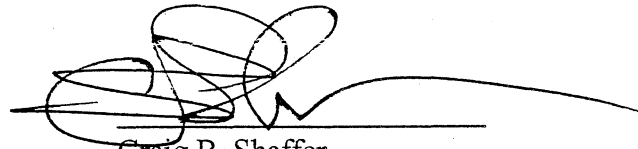
Applying these standards to the materials submitted for my *in camera* review, I conclude that none of the 22 files at issue are relevant to the claims or defenses asserted by the parties in this action. None of the individuals who are the subjects of these files were “monitor[ed] based upon their advocacy of controversial or unpopular political positions and opinions” or identified because of their participation in “expressive activities.” Even under the most expansive definition of relevance, the files in question concern activities wholly unrelated to the subject matter involved in this action. Moreover, the files involve ongoing criminal investigations which warrant confidentiality under Rule 26(c). *Cf. Philadelphia Resistance v. Mitchell*, 58 F.R.D. 139, 143 (E.D. Pa. 1972) (while plaintiffs have no right to “rummage through” government’s investigative files, are entitled to certain information if disclosure is necessary to

presentation of their case and does not jeopardize government's on-going criminal investigation). Non-disclosure of information in the 22 files pertaining to criminal investigations will not prejudice in any way Plaintiffs' ability to conduct meaningful discovery or otherwise prepare this case for trial.

Accordingly, the court orders that the materials submitted for *in camera* review shall remain under seal pending disposition of this case. To the extent material from the 22 files in question may be subsumed by pending or future discovery requests in this action, Defendant may provide redacted responses which omit identifying or other confidential information from these files that might compromise an open or ongoing investigation.

Dated this 29th day of August, 2002.

BY THE COURT:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Craig B. Shaffer
United States Magistrate Judge