UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JUAN BARRERA, JOSÉ CABRERA, DANIEL CHAVEZ, JOSÉ DUMA, JOSÉ LLIBISUPA, ISAAC MALDONADO, EDGAR REDROVAN, NICHOLAS SEGUNDO SANCHEZ, JUAN CARLOS SIMBAÑA, and DANILO BRITO VARGAS, *Plaintiffs*, v. MARK BOUGHTON, ALAN BAKER, JOSÉ AGOSTO, RICHARD DEJESUS, JAMES A. FISHER, JAMES LALLI, CRAIG MARTIN, JOSEPH NORKUS, JOHN DOES, CITY OF DANBURY, JAMES BROWN, RICHARD MCCAFFREY, RONALD PREBLE, JOHN DOES, and the UNITED STATES, *Defendants.*	CIVIL ACTION NO. 3:07-cv-01436-RNC September 2, 2009

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND TO OBTAIN COSTS FROM CITY OF DANBURY AND INDIVIDUAL DANBURY DEFENDANTS

This is a civil rights lawsuit to remedy the discriminatory and unauthorized enforcement of federal immigration laws against the Plaintiffs[1] in the City of Danbury. Plaintiffs have asserted claims against the Individual Danbury Defendants for, inter alia, violating their rights under the First, Fourth and Fourteenth Amendments, and under the Connecticut constitution, by

[1] Plaintiffs refers to the following eight individuals: Juan Barrera, José Cabrera, Daniel Chavez, José Llibisupa, Isaac Maldonado, Edgar Redrovan, Nicolas Segundo Sanchez and Juan Carlos Simbaña.

targeting them on the basis of their race, ethnicity and perceived national origin; arresting them without valid warrants, without probable cause, and without the authority to make civil immigration arrests; and doing so in retaliation for their exercise of free speech and association. Plaintiffs also assert claims against the City of Danbury for its role in promulgating and executing an unconstitutional municipal policy and/or custom of immigration enforcement and impermissible discriminatory law enforcement, which led to Plaintiffs' arrest.[2]

Plaintiffs file this motion because Danbury Defendants[3] have refused to produce documents requested by Plaintiffs in a Request for Production dated February 13, 2009 ("February 13 RFP") that are relevant to parties' claims and defenses and to the subject matter of this action. See Nurhussein Decl. Ex. A. Moreover, in response to Plaintiffs' good faith efforts to resolve this dispute over the course of five months, Danbury Defendants have dragged their feet, shifted positions, and refused to produce material even after Plaintiffs' narrowed requests have caused the Danbury Defendants to withdraw their objections. Plaintiffs now ask this Court to compel production of the relevant, non-privileged documents that Plaintiffs have requested.[4]

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2 Plaintiffs also have claims against Immigration & Customs Enforcement (ICE) and several of its agents.

3 "Danbury Defendants" refers to both the City of Danbury and the Individual Danbury Defendants (Mark Boughton, Alan Baker, José Agosto, Richard DeJesus, James A. Fisher, James Lalli, Craig Martin, Joseph Norkus, Julio Lopez, Luis Ramos, Mitchell Weston and John Does).

4 Consistent with Plaintiffs' February 13 RFP, "document(s)" should be understood as encompassing both hard copy and electronic documents. See February 13 RFP Definitions ¶ 2. The Danbury Defendants have produced hard copy documents responsive to some of the discovery requests, but have failed to conduct any electronic searches whatsoever.

ARGUMENT

Plaintiffs are entitled to broad discovery of information relevant to the Amended Complaint. Fed. R. Civ. P. 26(b)(1). Courts have construed the term "relevance" broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

I. The City of Danbury and Individual Danbury Defendants have refused to produce documents relating to immigration enforcement activities.

Plaintiffs propounded several Requests relating to immigration enforcement by the Danbury Police Department and collaboration between the City and ICE. The Requests, together with the Danbury Defendants' objections, are set out below:

Request 3: *Produce all documents relating to the investigation, arrest, or detention of any suspected immigration violators or removable aliens in Danbury, Connecticut from December 1, 2001 to the present, including but not limited to any investigative activities, arrests or detentions made on February 14, 2006, June 8, 2006 and October 11, 2006.*

Objection: Vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; seeks disclosure of documents related to matters which occurred after September 19, 2006, the date of the subject incident – such documents, to the extent they exist, are irrelevant to the present matter; seeks the disclosure of sensitive information which, if disclosed, could compromise the safety of the DPD officers who work undercover;[5] unduly burdensome and costly as applied to electronically stored information.

Request 4: *Produce all documents relating to surveillance, investigative or enforcement activities in the City of Danbury by the Department of Homeland Security, Immigration and Customs Enforcement, or employees thereof from December 1, 2001 to the present.*

Objection: Defendants are not the proper parties to respond to this request as it seeks information not within their knowledge or possession – the United States is a party to this lawsuit and this document request is more properly directed to it; unduly burdensome and costly as applied to electronically stored information.

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5 Only the Individual Danbury Defendants invoked the law enforcement privilege for this request.

Request 5: *Produce all documents relating to communication, cooperation, coordination and/or dealings by the City of Danbury, the City of Danbury Police Department, and/or employees, departments, or agencies thereof, including but not limited to the Mayor, the Mayor's office, Corporation Counsel, and the Special Investigations Division (SID) with the Department of Homeland Security, Immigration and Customs Enforcement, or employees thereof with from December 1, 2001 to the present.*

Objection: No objection as to hard copy documents; unduly burdensome and costly as applied to electronically stored information.

Request 13: *Produce all documents relating to the surveillance, investigation, or arrest of immigration absconders or fugitives in Danbury, Connecticut from January 1, 2002 to the present.*

Objection: Vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; seeks the disclosure of sensitive information which, if disclosed, could compromise the safety of DPD officers who work undercover; seeks disclosure of documents which, to the extent they exist, may contain indications of law enforcement methods which should remain confidential to protect their effectiveness; unduly burdensome and costly as applied to electronically stored information.

Request 14: *Produce all documents relating to any other dealings by the Department of Homeland Security, Immigrations and Customs Enforcement, and/or employees thereof with the City of Danbury or its agents, not covered in the foregoing descriptions including but not limited to any other surveillance, investigations, arrests, or detentions of suspected undocumented aliens.*

Objection: Vague, overly broad and unduly burdensome and seeks materials not relevant to the claim or defense of any party; seeks disclosure of sensitive information which, if disclosed, could compromise the safety of DPD officers who work undercover; seeks disclosure of documents which, to the extent they exist, may contain indications of law enforcement methods which should remain confidential to protect their effectiveness; unduly burdensome and costly as applied to electronically stored information.

Request 23: *Produce all documents regarding the Alien Absconder Initiative (AAI), the National Fugitive Operations Program (NFOP), Operation Return to Sender, the Office of Detention and Removal (DRO), Fugitive Operations Team (FOT), Operation Predator, Operation Community Shield, Secure Border Initiative, Operation FLASH, or any other documents related to any Immigration and Customs Enforcement (ICE) operations, including but not limited to communication with the Department of Homeland Security, Bureau of Immigration and Customs Enforcement, relating to the identification, apprehension, or arrest of any alien with an outstanding order to removal, deportation , or exclusion, in Danbury, Connecticut.*

Objection: Defendants are not the proper parties to respond to this request as it seeks information not within their knowledge or possession – the United States is a party to this lawsuit and this document request is more properly directed at it; seeks disclosure of documents which, to the extent they exist, may contain references to law enforcement informants and indications of law enforcement methods which should remain confidential to protect their effectiveness;[6] unduly burdensome and costly as applied to electronically stored information.

Request 25: *Produce all documents indicating that HARFOT's assistance was requested by Danbury PD/SID to identify aliens with possible ICE warrants among the day laborers near Kennedy Park.*[7]

Objection: No objection as to hard copy documents (Defendants state that, upon information and belief, they have no responsive documents); unduly burdensome and costly as applied to electronically stored information.

A. Documents relating to immigration enforcement are relevant to material issues in this case.

Documents related to the Danbury Defendants' immigration enforcement activities are highly relevant to Plaintiffs' allegation that they were arrested as part of the City's pattern and practice of unauthorized, unlawful, and discriminatory immigration enforcement, which was carried out at the direction of Defendants Boughton and Baker by Defendant DPD Officers with the help of Defendant ICE Agents. Plaintiffs have alleged, and Danbury Defendants have conceded, that Mayor Boughton has promoted the enforcement of federal immigration laws in Danbury. See Am. Compl. ¶ 32; City of Danbury Ans. ¶¶ 31-32 ("City's Answer"); Individual Danbury Defendants' Answer to Am. Compl., Dkt. No. 147, ¶¶ 31-32 ("Individual Defs. Answer"). However, there remains considerable disagreement between the parties about whether the Danbury Police Department has enforced federal immigration law unlawfully, in a

6 Only the Individual Danbury Defendants invoked the law enforcement privilege for this request.

7 Danbury Defendants stated in their Responses and Objections to Plaintiffs' February 13 RFP that, upon information and belief, they were not in possession of any such documents. However, as with the other Requests, they have not conducted any electronic searches.

discriminatory fashion, with the goal of driving unwanted immigrants and Ecuadorians from Danbury, through pretextual enforcement of local ordinances, in violation of the Federal and State Constitutions, and in coordination with and the full knowledge of the ICE Defendants. See, e.g., Am. Compl., City's Answer, and Individual Defs. Answer ¶¶ 15, 32-33, 37-38, 42-43, 47. These documents would shed light on all these allegations and are thus relevant to Plaintiffs' Second (preemption), Third (equal protection), Fourth (retaliation and suppression for protected speech and assembly), Sixth (Conspiracy), Seventh (Conspiracy), Eighth (supervisory liability), Ninth (Monell liability), and Sixteenth (Conspiracy) claims for relief. These documents are also relevant to the Danbury Defendants' Affirmative Defenses against Plaintiffs' municipal and supervisory liability claims. See City's Answer, Affirmative Defense 4; Individual Defs. Answer, Affirmative Defense 5.

B. Evidence about immigration enforcement events that occurred after September 19, 2006 is relevant to show that the City of Danbury had a pattern and practice of discriminatory and unauthorized enforcement of federal immigration laws.

Defendants have argued that "documents related to matters which occurred after September 19, 2006 . . . . are irrelevant to the present matter."[8] Courts in the District of Connecticut, however, have held that post-event evidence may be highly relevant. See Jones v. Town of East Haven, 493 F. Supp. 2d 302, 331 (D. Conn. 2007) ("Evidence of incidents that occurred subsequent to the incident out of which the plaintiff's claim arises . . . is probative for purposes of showing the existence of a municipal policy or custom."). See also Foley v. City of Lowell, 948 F.2d 10, 14 (1st Cir. 1991) ("[A]ctions taken subsequent to an event are admissible

8 City of Danbury's Responses and Objections to Plaintiffs' Request for Production of Documents – Request 9; Individual Danbury Defendants' Objections to Plaintiffs' Request for Production of Documents – Request 6.

if, and to the extent that, they provide reliable insight into the policy in force at the time of the incident."); Bordanaro v. McLeod, 871 F.2d 1151, 1167 (1st Cir. 1989) ("Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right.").

Evidence about immigration enforcement events that occurred after September 19, 2006 is relevant for showing that the City of Danbury had a pattern and practice of discriminatory and unauthorized enforcement of federal immigration laws. Therefore, the Court should compel Defendants to produce documents related to matters within the full responsive period of the Requests for Production.

C. Plaintiffs have spent months conferring with Defendants' counsel over the immigration enforcement records but still have not received the requested documents.

Plaintiffs' counsel have conferred extensively with counsel for the Individual Danbury Defendants regarding these requests in an effort to address their concerns regarding the cost and burden of conducting the searches. Plaintiffs narrowed the scope of their requests to three search strategies to help guide Defendants' search.

First, Plaintiffs provided a list of 305 dates and/or individuals related to immigration enforcement by the Danbury Police Department, which were found in documents produced by Federal Defendants.[9] See Declaration of Siham Nurhussein, dated Sept. 2, 2009 ("Nurhussein

[9] This list, which was offered by Plaintiffs' counsel on June 4, 2009 to help guide the Individual Danbury Defendants' search, referred to approximately 80 immigration enforcement incidents where there was known Danbury police involvement and approximately 225 additional incidents where there may have been Danbury police involvement. Plaintiffs produced these lists at Plaintiffs' own expense from documents of ICE enforcement activities in the City of Danbury produced by the Federal Defendants to Plaintiffs as well as to the Danbury Defendants. The first list (80 incidents) was provided to

Decl."), ¶¶ 16-19. Second, Plaintiffs asked Danbury Defendants to perform a comprehensive search of the DPD Special Investigation Division ("SID") files for documents related to immigration enforcement, since SID was the small division that has been responsible for many of the city's immigration enforcement activities, including the undercover sting operation at issue in this litigation.[10] Id. at Ex. I. Third, Plaintiffs asked counsel for the Individual Danbury Defendants to consult with their clients and ask them to identify any events that they are aware of related to immigration enforcement or ICE. Id.

Counsel for the Danbury Defendants have not indicated whether they have searched the SID files or consulted with the Individual Danbury Defendants, nor have they indicated whether they have any intention of doing so, despite repeated requests by Plaintiffs' counsel. As for the first strategy (using a specific list of dates and/or individuals, provided by Plaintiffs, to search for documents, counsel for the Individual Danbury Defendants confirmed that he "would be amenable to [Plaintiffs] providing . . . dates and other information [Plaintiffs] have. This would address our overbreadth objections to those items." Id. Ex. I. After reviewing the initial list, counsel for the Individual Danbury Defendants questioned the relevance of any incidents that occurred after September 19, 2006 (all but approximately 10 of the incidents on the list provided). See Nurhussein Decl. ¶ 20. Then, on July 20, 2009, counsel for the Individual Danbury Defendants reversed course, stating that Defendants were unwilling to search for even

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counsel for the Individual Danbury Defendants on July 1 and the second list (225 incidents) was provided on July 8.

[10] By "SID files," Plaintiffs mean any documents in the possession, custody, or control of the Danbury Defendants related to law enforcement activities that SID was involved in or to collaboration between SID and ICE.

the limited number of records referenced on the lists provided by Plaintiffs, unless additional identifying information was provided. See Nurhussein Decl. ¶ 21.

Plaintiffs' counsel has already spent at least 30 hours conferring with Danbury Defendants regarding the immigration enforcement records and compiling a list of specific incidents to facilitate their search. Id. ¶ 17. Despite these months of conferrals and substantial efforts to narrow the dispute by providing dates of specific incidents, Plaintiffs still have yet to receive any of the requested records regarding immigration enforcement activities in Danbury.

D. Danbury Defendants have improperly invoked the law enforcement privilege.

1. Defendants have not met their burden to demonstrate the existence of a law enforcement privilege over the requested documents.

Danbury Defendants seek to withhold various immigration enforcement records by asserting a law enforcement privilege (Requests 13, 14, 23) .[11] They claim that these documents would contain "indications of law enforcement methods which should remain confidential to protect their effectiveness" or "sensitive information which . . . could compromise the safety of . . . officers who work undercover."

The Second Circuit has recognized a qualified "law enforcement privilege" in civil discovery. See In re Dep't of Investigation of the City of New York, 856 F.2d 481, 483-84 (2d Cir. 1988). As with other common-law discovery privileges, the party seeking to assert the privilege bears the burden of establishing that it applies. See Green v. St. Vincent's Med. Ctr., 252 F.R.D. 125, 127 (D. Conn. 2008). When the government seeks to assert the law enforcement privilege, it "must make a substantial threshold showing that there are specific

11 The Danbury Defendants have also asserted a law enforcement privilege with respect to Requests 1, 2, 6, 7, 24 and 33, which are discussed in Sections III and VI, infra.

harms likely to accrue from disclosure of specific material . . . by presenting those facts that are the essential elements of the privileged relationship and not by mere conclusory or *ipse dixit* assertions." MacNamara v. City of New York, 249 F.R.D. 70, 79 (S.D.N.Y. 2008) (internal citations omitted). In the absence of such a showing, "the question is resolved in favor of direct disclosure." King v. Conde, 121 F.R.D. 180, 190 (E.D.N.Y. 1988).

To properly invoke the law enforcement privilege, an objecting party must submit with its objections a declaration or affidavit by an agency official "based on personal review of the documents by an official in the police agency (not the defendants' attorney)." Id. at 189. The statement must explain—"not merely state conclusorily"—how the documents have been "generated or collected"; how they have been kept confidential; what "specific interests" would be harmed by disclosure; and the "projected severity" of each injury. Id. In determining the existence of the privilege, courts must not "rely simply on generalized reiterations of the policies underlying the privilege" and need not "defer blindly" to the declarations of law enforcement officials. MacNamara, 249 F.R.D. at 79, 86.

The City has not submitted an affidavit or sworn statement indicating that its objections are based on any personal review of the documents, much less by an agent besides its counsel. It has failed to explain how these documents have been kept confidential, identify specifically the interests that would be injured by disclosure, or provide any other information to support its bare statement that the privilege exists. See King, 121 F.R.D. at 189. Furthermore, the City and Individual Danbury Defendants have failed to identify even a single document on their privilege logs as being withheld pursuant to a law enforcement privilege. Second Circuit law makes clear that even where a privilege log is used, the court will reject a privilege claim where the party

invoking privilege fails to provide sufficient detail to demonstrate that it has met the legal requirements for the application of that privilege. See United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 473-74 (2d. Cir. 1996) (rejecting party's privilege claim where privilege log was "deficient" and "cursory," and finding that "general allegations of privilege . . . are not supported by the information provided" because "[t]he descriptions and comments simply do not provide enough information to support the privilege claim, particularly in the glaring absence of any supporting affidavits or other documentation"); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 474 (S.D.N.Y. 1993) ("[I]f the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected.").

As a result, the City's objections based on law enforcement privilege should be denied, and the City should be compelled to comply with Plaintiffs' discovery requests.

2. Even if Defendants had demonstrated the existence of such a privilege, Plaintiffs' need for discovery of the information outweighs Defendants' interest in confidentiality.

Even if the City were to properly invoke the law enforcement privilege, Plaintiffs' clear need for the requested information outweighs the City's interest in confidentiality. The law enforcement privilege is a qualified privilege. See MacNamara, 249 F.R.D. at 79. Once the government meets its burden of showing the privilege applies, the district court has a "duty . . . to balance the need for discovery of information contained in law enforcement files with the need for confidentiality." Hodgson v. Roessler, Civ. No. 14, 200, 1973 WL 1102, at *3 (D. Conn. Jan. 30, 1973). A number of courts in the Second Circuit have set forth factors to be considered in

this balance. See King, 121 F.R.D. at 191 (collecting cases).[12] Furthermore, in determining whether to order disclosure, the court "must also consider the value of appropriate protective orders and redactions," MacNamara, 249 F.R.D. at 79 (quoting King, 121 F.R.D. at 190-91), particularly where "[s]uch an order can mitigate many if not all of the oft-alleged injuries to the police and to law enforcement." Schiller v. City of New York, 252 F.R.D. 204, 207 (S.D.N.Y. 2008).

Plaintiffs have demonstrated that the immigration enforcement records are highly relevant to their claims. Furthermore, as these requests are made in the context of a federal civil rights action, on claims that have already survived a motion to dismiss, there is a presumptively strong public interest in favor of disclosure. See El Badrawi v. Dep't Homeland Security, No. 07 Civ. 1074, --- F.R.D. ---, 2009 WL 2255293, at *6 (D. Conn. July 24, 2009) (finding strong public interest in disclosure outweighed law enforcement privilege where plaintiff's civil rights suit would "expose[] extreme and outrageous conduct on the part of those who are charged with policing us all," especially where claims were "clearly not frivolous" for having survived defendants' motion to dismiss); see also Skibo v. City of New York, 109 F.R.D. 58, 61 (E.D.N.Y. 1985) ("In a federal civil rights action, a claim that the evidence is privileged must be so meritorious as to overcome the fundamental importance of a law meant to insure each citizen from unconstitutional state action.") (internal citations omitted). As a result, the City should be compelled to respond to Plaintiffs' discovery requests.

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12 The factors in favor of confidentiality are: (1) threat to police officers' own safety; (2) invasion of police officers' privacy; (3) weakening of law enforcement programs; (4) chilling of police internal investigative candor; (5) chilling of citizen complainant candor; and (6) state privacy law. The factors in favor of disclosure are: (1) relevance to the plaintiff's case; (2) importance to the plaintiff's case; (3) strength of the plaintiff's case; and (4) importance to the public interest. Id. at 191-95.

E. Individual Danbury Defendants Should Pay for the Costs Plaintiffs Incurred Compiling a List of Dates and Names that Correspond to Immigration Enforcement Actions in Danbury

Plaintiffs respectfully request costs and attorney's fees incurred compiling the list of dates and names that the Danbury Defendants indicated would facilitate their search of immigration enforcement records. Plaintiffs also seek costs and attorney's fees for time spent conferring regarding the immigration enforcement records, as well as drafting the portion of this motion to compel that deals with those documents.

An award of costs and fees is "presumptively mandatory" under Rule 37(a)(5). Green v. St. Vincent's Med. Ctr., 252 F.R.D. 125, 130 (D. Conn. 2008) (Smith, M.J.). While a finding of bad faith is not necessary for the Court to award costs and fees under Rule 37(a), see Messier v. Southbury Training Sch., No. 3:94-CV-1706, 1998 WL 841641, at *5 (D. Conn. Dec. 2, 1998), where, as here, a party has exhibited bad faith during the conferral process an award of costs and fees is especially appropriate. This Court should order Defendants to pay costs and fees for not producing immigration enforcement documents that correspond to the list of dates and names compiled by Plaintiffs.

II. Defendants City of Danbury and Individual Danbury Defendants have refused to produce documents from the employment files of officers involved in the planning or execution of the operation that resulted in the arrest of Plaintiffs.

Plaintiffs seek employment records pertaining to all officers or government employees present during the investigation, questioning, arrest and/or detention of Plaintiffs, as well as any civilian complaints naming any of those officers. The Danbury Defendants have refused to produce any responsive documents. The relevant Requests, and the Danbury Defendants' objections, are as follows:

Request 15: *Produce all documents relating to the employment of all officers and/or employees of the City of Danbury that were present during the planning, investigation, questioning, arrest, and/or detention of the Danbury 11 including but not limited to each person's personnel file and documents relating to overtime, disciplinary actions, performance reviews, hiring, promotions, demotions, transfers, and terminations.*

Request 16: *Produce all documents relating to formal or informal citizen complaints made to the Danbury Police Department or to any other agency or department of the City of Danbury or to any employee of the City of Danbury that name any of the officers and/or employees of the City of Danbury that were present during the planning, investigation, questioning, arrest, and/or detention of the Danbury 11 including but not limited to written forms, written complaints, written letters, e-mails, faxes, phone messages, and memos, letters, faxes phone messages, or e-mails referring to such a complaint.*

Objection (both requests): Requested documents are prohibited from disclosure by C.G.S. § 31-128 (f); vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; unduly burdensome and costly as applied to electronically stored information.

A. The personnel files are relevant to material issues in this case.

The Danbury defendants' employment files are relevant, reasonably calculated to lead to the discovery of admissible evidence, and clearly bear on issues involved in this case. The production of these documents is relevant to proving the various claims that Plaintiffs have made, in particular Defendants' willful violation of Plaintiffs' constitutional and common law rights and the liability of their superiors for failure to properly supervise and train them.

The employment records requested by Plaintiffs are reasonably expected to contain, for example, information regarding any prior misconduct of and complaints against the Danbury officers who participated in the arrest, detention, or investigation of Plaintiffs. Any records of prior misconduct by the defendant Danbury officers and other Danbury employees responsible for Plaintiffs' arrest and detention, including acts that occurred after the incident leading to the arrest of Plaintiffs, should be produced because they might lead to evidence relating to intent, knowledge, absence of mistake or pattern. See Moore v. City of New York, No. CV-05-6127,

2006 WL 1134146 (E.D.N.Y. Apr. 27, 2006) (ordering production of employment records concerning acts of police misconduct, including acts that occurred after the incident, because they might be relevant to issues of intent, absence of mistake or pattern). See also Session v. Rodriguez, No. 3:03CV0943, 2008 WL 2338123, at *2 (D. Conn. June 4, 2008) (Martinez, M.J.) (holding that prior complaints in a defendant's disciplinary history were relevant if conduct was similar). These employment records are also relevant to the extent they establish a history of discriminatory law enforcement activities or disregard for constitutional protections. See Unger v. Cohen, 125 F.R.D. 67, 70 (S.D.N.Y. 1989). Additionally, allegations of any misconduct involving false statements would be relevant to the credibility of the individual officers. See, e.g., Giles v. Coughlin, 1998 U.S. Dist. LEXIS 236 at *9 (S.D.N.Y. 1998); Hynes v. Coughlin, 79 F.3d 285, 293-94 (2d Cir. 1996). Both personnel records and records pertaining to civilian complaints should be produced. See Unger v. Cohen, 125 F.R.D. 67, 69-70 (S.D.N.Y. 1989) (in § 1983 action alleging excessive force, court concluded that personnel records and records pertaining to civilian complaints were relevant and should be produced in their entirety because they might contain names of other individuals whose rights had been violated by the defendant police officer, which in turn might lead to admissible evidence).

Indications of prior misconduct are also relevant to establish that the supervisors of the Danbury Defendants and other Danbury employees responsible for Plaintiffs' arrest and detention are liable for failing to properly train and supervise them. Information in the personnel files about employee evaluations, prior misconduct, and other evidence of disregard for proper procedure is relevant to the claims that Defendants Mayor Mark Boughton, Alan Baker, and James Fisher created a policy or custom allowing such misconduct, were negligent in supervising

their subordinates, and failed to act on information that constitutional rights were being violated. See Hayut v. State Univ. of N.Y., 352 F.3d 733, 753 (2d Cir. 2003) (holding relevant issues as to supervisor liability include, inter alia, whether supervisor: (1) created policy or custom under which violation occurred, (2) was grossly negligent in supervising subordinates who committed violation, or (3) was deliberately indifferent to rights of others by failing to act on information that constitutional rights were being violated).

B. Plaintiffs are entitled to broad discovery of information relevant to the complaint.

The general policy allowing broad discovery extends to employment files including personnel records and complaints of misconduct. See McKenna v. Incorporated Vill. of Northport, No. CV 06-2895, 2007 WL 2071603, at *7 (E.D.N.Y. July 13, 2007). If defendants "mak[e] a 'substantial threshold showing' that there are specific harms likely to accrue from disclosure of the specific materials," a court must then balance the interests favoring and opposing confidentiality." Id; see also MacNamara v. City of New York, 249 F.R.D. 70, 79-80 (S.D.N.Y. 2008). In this showing, the police must specify which documents are privileged and the reasons for nondisclosure. MacNamara, 249 F.R.D. at 78-79.

Once the police have met the threshold burden, the court must balance their interest in confidentiality against factors favoring disclosure, such as the relevance to the plaintiff's case, the importance to and strength of the plaintiff's case, and the importance to the public interest. MacNamara, 249 F.R.D. at 78-80. "In light of the great weight of the policy in favor of discovery in civil rights actions and the normal presumption in favor of broad discovery, defendants' case for non-disclosure or restricted disclosure must be extremely persuasive." Id. at 80 (citing King, 121 F.R.D. at 195). The Danbury Defendants have not claimed that the

employment files are protected by any privilege, nor have they articulated any particular harm that would result from their disclosure. As a result, these documents are discoverable if they contain information that is relevant to Plaintiffs' claims or defenses or is reasonably calculated to lead to the discovery of admissible evidence.[13] See McKenna, 2007 WL 2071603, at *9 (where police failed to establish any particular harm from disclosure and made only a "generalized objection" that records were confidential, plaintiffs were entitled to discover records of defendant police officers' personnel records and complaints of professional misconduct against them).

C. The Court is not inhibited by the Connecticut General Statutes from ordering production of the employment files.

The Connecticut statute governing production of personally identifiable information contained in an employee's personnel file does not present any obstacle to this Court ordering production of the files. See Conn. Gen. Stat § 31-128(f). As a preliminary matter, it is far from clear that § 31-128(f) applies in this federal civil rights action. Moreover, even if § 31-128(f) did apply, an order to compel issued by this Court would clearly fall under the second statutory exception (personally identifiable information contained in personnel records may be produced "pursuant to a lawfully issued administrative summons or judicial order"). Ruran v. Beth El Temple of W. Hartford, Inc., 226 F.R.D. 165, 169 (D. Conn. 2005) (court order to produce documents "satisf[ies] the second exception to section 31-218[f] of the Connecticut General Statutes"). Because the personnel files and other employment records are relevant to Plaintiffs'

13 The Plaintiffs stipulate that information of a personal nature included in the personnel files that is not relevant may be redacted, such as social security numbers, home addresses, telephone numbers, and medical information, prior to disclosure.

claims, their production should be ordered by this Court, thereby satisfying the second exception to Conn. Gen. Stat § 31-128(f).

Moreover, Conn. Gen. Stat. § 31-128(f) applies only to employers, not to employees and thus in no way prevents the Individual Danbury Defendants from producing their own personnel files and employment records even without a court order.[14] The Individual Danbury Defendants have control over the requested documents since they may obtain their own records upon request. Because the Individual Danbury Defendants are not bound by Conn. Gen. Stat. § 31-128(f) and have control over the requested documents, the Individual Danbury Defendants should already have produced them in response to Plaintiffs' February 13 RFP.

III. Defendants have failed to conduct a good-faith search for documents relating to the operations of SID and should be compelled to produce additional records.

Plaintiffs seek documents relating to the establishment or operation of the Danbury Police Department Special Investigations Division (SID)" ("SID Documents"):

Request 33: *Produce all documents relating to the establishment or operation of the Danbury Police Department Special Investigations Division (SID), including but not limited to, documents relating to participation of SID officers or staff in the arrest of the Danbury 11; identification, apprehension, and arrest of alien absconders or fugitives; and other cooperation or assistance with U.S. Department of Homeland Security in any immigration enforcement operation in Danbury.*

Objection: Vague, overly broad, unduly burdensome, not relevant to the claim or defense of any party and not reasonably calculated to lead to the discovery of admissible evidence; seeks the disclosure of sensitive information which , if disclosed, could compromise the safety of the SID officers who work undercover; seeks disclosure of documents which , to the extent they exist, may contain references to law enforcement informants and indications of law enforcement methods which should remain confidential to protect their effectiveness; unduly burdensome and costly as applied to electronically stored information.

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14 The statute states that "[n]o individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer . . . without the written authorization of such employee." Id. (emphasis added).

A. Documents pertaining to SID's operations are relevant to material issues in this case.

Plaintiffs were arrested as part of an undercover sting operation planned by Defendant Detective Lieutenant James Fisher, the head of the Danbury Police Department SID, a small unit within the Danbury Police Department, and executed by Detective Fisher in cooperation with other members of SID. Defendants have asserted that the arrests of Plaintiffs occurred as part of a Danbury Police operation aimed at addressing traffic congestion and safety issues related to the gathering of day laborers at Kennedy Park. See Am. Compl. ¶132; City's Answer ¶78.

Any evidence that SID operates as a unit targeting immigrants under the pretext of enforcing traffic or other minor infractions is directly relevant to Plaintiffs' claims. Moreover, if SID engaged in traffic safety operations only on September 19, 2006, this would tend to indicate that traffic safety was not the focus of SID's undercover operation on that day.

B. Defendants have failed to properly respond to Plaintiffs' request for SID documents despite Plaintiffs' efforts to address their concerns.

In a June 4, 2009 e-mail to counsel for the Individual Danbury Defendants, Plaintiffs responded to Defendants' Objections by proposing a more narrow request for SID Documents.[15] In spite of Plaintiffs' good-faith attempts to reach an agreement with Defendants over the scope of the request for SID Documents, Defendants have failed to respond to Plaintiffs' proposals and have failed to properly invoke the law enforcement privilege they asserted in response to

[15] Plaintiffs requested any documents pertaining a) to the establishment and purpose of SID; b) any documents relating to SID's investigation and enforcement of traffic violations; c) any documents relating to SID's investigation and enforcement of municipal code violations; d) any documents relating to SID's investigation and enforcement of housing code violations; e) any documents relating to SID's investigation or enforcement activity related to backyard volleyball games in the City of Danbury; f) any documents relating to SID's investigation and enforcement of crowd control and parade policing; g) any documents relating to SID's investigation and enforcement of other offenses that carry penalties that do not include incarceration.

Plaintiffs' initial request. See Section I.D, supra. While the Individual Danbury Defendants have provided Plaintiffs with General Order #84-02, which identifies the purpose of and procedures to be followed by the Special Investigations Section, this production falls far short of even Plaintiffs' narrower request. *See* note 14. Moreover, in the June 4, 2009 e-mail to the Individual Danbury Defendants' counsel, Plaintiffs indicated their willingness to negotiate a protective order to address Defendants' concerns with disclosure of law enforcement information. Defendants have not responded.

IV. Defendants have failed to conduct a good faith search for documents relating to the regulation of volleyball games in Danbury and should be compelled to produce additional records.

Plaintiffs propounded the following requests for documents relating to the regulation of volleyball games in Danbury:

Request 26: *Produce all documents relating to the regulation of volleyball games in Danbury, Connecticut, including but not limited to studies and proposals of new ordinances, and studies and proposals and the enforcement of already-existing ordinances.*

Request 28: *Produce all documents relating to the issuance of cease-and-desist orders on or about July 23, 2005, to properties hosting volleyball games.*

Request 29*: Produce all documents relating to the study of proposal of an ordinance regarding control or regulation of "repetitive outdoor activities."*

Objection (all requests): Seeks disclosure of information not relevant to the claim or defense of any party and not reasonably calculated to lead to the discovery of admissible evidence; unduly burdensome and costly as applied to electronically stored information.

The Danbury Defendants have raised only a relevance objection to these Requests.[16] However, documents related to actions taken by the Danbury Defendants against backyard volleyball games in the City of Danbury are highly relevant to Plaintiffs' allegation that they were arrested as part of a campaign of harassment and intimidation, developed by Mayor Boughton, Police Chief Baker, and Lieutenant Fisher, and carried out, in part, by the Defendant DPD Officers, that targeted Danbury's Latino, Ecuadorian, and immigrant communities through discriminatory policies.[17] These policies included, inter alia, discriminatory enforcement of city ordinances aimed at shutting down neighborhood volleyball games, which are a primary venue for Ecuadorian community gatherings. See Am. Compl. ¶¶ 33-35. The Danbury Defendants have admitted that "the Danbury Common Council, with Mayor Boughton's support, considered an ordinance banning certain 'repetitive outdoor group activities'" but have otherwise denied Plaintiffs' allegations that the City discriminatorily enforced city ordinances in order to target Ecuadorian volleyball games. See City's Answer, ¶¶ 33-35; Individual Defs. Answer, ¶¶ 33-35.

16 The Danbury Defendants have thus waived any other potential objections. See Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co., 238 F.R.D. 536, 538 (D. Conn. 2006); Senat v. City of New York, 255 F.R.D. 338, 339 (E.D.N.Y. 2009).

17 The Danbury Defendants can hardly argue that such discovery is not relevant, as the Individual Danbury Defendants issued subpoenas to four non-party organizations seeking depositions and documents related to the discriminatory targeting of volleyball games by the City of Danbury and Mayor Boughton. The City of Danbury argued in favor of those subpoenas at a hearing on May 20, 2009 held before Magistrate Judge Martinez. See Dkt. No. 200. In defending these requests, Individual Danbury Defendants called them "highly relevant." Individual Danbury Defendants' Objection to Nonparties' Motion to Quash, Dkt. No. 165, at 5 (filed Apr. 28, 2009). Having sought and received from organizations who are not even parties to this litigation documents that are related to their discriminatory targeting of backyard volleyball games, the Danbury Defendants can hardly resist Plaintiffs' request for similar materials now.

Discovery into the City's enforcement actions against backyard volleyball games is directly relevant to establish whether that enforcement targeted certain communities. Accordingly, these Requests are relevant to Plaintiffs' Monell claim against the City of Danbury (Am. Compl., Claim for Relief 9); supervisory liability claims against Defendants Boughton, Baker, and Fisher (id., Claim for Relief 8); federal and state equal protection claims against the Defendant DPD Officers[18] (id., Claim for Relief 3); federal and state speech and assembly claims against the Defendant DPD Officers (id., Claim for Relief 4); and the Danbury Defendants' Affirmative Defenses that Plaintiffs' damages and injuries were not proximately caused by a policy or custom (see City's Answer, Affirmative Defense 4; Individual Defs. Answer, Affirmative Defense 5).

The Danbury Defendants' production in response to these requests is incomplete since it does not include documents related to enforcement actions taken by the City of Danbury and, in particular, by the Danbury Police Department and by the Unified Neighborhood Inspection Team ("UNIT"), against backyard volleyball games.[19] The Danbury Defendants should be ordered to produce such documents. See Fed. R. Civ. Proc. 37(a)(4) ("[A]n evasive or incomplete . . . response must be treated as a failure to . . . respond.").

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18 The Defendant DPD Officers include Defendants Fisher, Agosto, DeJesus, Lalli, Martin, and Norkus.

19 The City of Danbury produced cease-and-desist orders from various dates in July 2005; documents related to deliberations about whether to pass a City ordinance which could be used to shut-down backyard volleyball games; newspaper articles covering the controversy over that ordinance; and residents' complaints about backyard volleyball games.

V. Defendants have failed to conduct a good faith search for documents relating to the Unified Neighborhood Assistance Team (UNIT) and should be compelled to produce additional records.

Plaintiffs propounded the following Request seeking documents relating to the Unified Neighborhood Enforcement Team (UNIT):

Request 30: *Produce all documents relating to the Unified Neighborhood Enforcement Teams's (UNIT) formation, coordination, planning, and activities.*

Objection: Seeks disclosure of information not relevant to the claim or defense of any party and not reasonably calculated to lead to the discovery of admissible evidence; unduly burdensome and costly as applied to electronically stored information.

The Danbury Defendants have raised only a relevance objection to the substance of this request.[20] However, these documents are relevant to Plaintiffs' claims that they were arrested as part of an effort by Mayor Boughton, Police Chief Baker, the City of Danbury, and the Defendant DPD Officers to harass, intimidate, and target Latinos in the City of Danbury through the discriminatory enforcement of local ordinances. That effort included discriminatory enforcement of building code regulations through a specially constituted office called the Unified Neighborhood Assistance Team ("UNIT"). See Am. Compl. ¶ 33. The Danbury Defendants have denied this allegation. See City's Answer ¶¶ 33; Individual Defs. Answer ¶¶ 33. Discovery into "the formation, coordination, planning, and activities" of the UNIT would help confirm or deny Plaintiffs' allegations and the claims and defenses that rest, in part, on those allegations, including Plaintiffs' Third (equal protection), Eighth (Monell liability), and Ninth (supervisory liability) claims and the Danbury Defendants' Affirmative Defenses regarding Monell and

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20 Accordingly, the Danbury Defendants have waived any other potential objections not already raised. See sources cited supra, note 15.

supervisory liability.[21] City's Answer, Affirmative Defense 4; Individual Defs. Answer, Affirmative Defense 5.

The Danbury Defendants' production in response to this request is incomplete since it does not include documents related to the formation of the UNIT and the Office of Neighborhood Assistance; documents related to internal reviews of the activities of the UNIT; and documents related to the Danbury Police Department's role in the activities and operation of the UNIT.[22] Accordingly, the Danbury Defendants should be ordered to produce the requested documents. See Fed. R. Civ. Proc. 37(a)(4).

VI. Danbury Defendants have improperly invoked the law enforcement privilege.

Plaintiffs seek the following documents, for which the Danbury Defendants have improperly invoked the law enforcement privilege:

Request 1: *Produce all documents relating to the planning, investigation, questioning, arrest, detention, and/or removal of the Danbury 11, including but not limited to all pre-operation plans, post-operation reports, press releases, arrest records, booking reports, and incident reports.*

Objection: Seeks disclosure of documents which, to the extent they exist, would contain indications of law enforcement methods which should remain confidential to protect their effectiveness; unduly burdensome and costly as applied to electronically stored information.

Request 2*: Produce all documents relating to equipment or vehicles used in connection with the investigation, arrest and/or detention of the Danbury 11.*

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21 Moreover, as discussed in note 16, supra, the Danbury Defendants can only argue that these documents are not relevant by contradicting a position taken earlier in this litigation. With the City of Danbury's support, the Individual Danbury Defendants have sought and received documents from four non-party organizations related to the City's and Mayor Boughton's discriminatory housing code enforcement. The Individual Danbury Defendants defended these requests as "highly relevant." Individual Danbury Defendants' Objection to Nonparties' Motion to Quash, Dkt. No. 165, at 5 (filed Apr. 28, 2009).

22 The City of Danbury produced printouts from the UNIT's website, a UNIT brochure, and what appears to be a partial list of UNIT inspections.

Objection: Vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; seeks disclosure of sensitive information which, if disclosed, could compromise the safety of the DPD officers who work undercover; unduly burdensome and costly as applied to electronically stored information.

Request 6: *Produce all documents relating to how the City of Danbury and/or the City of Danbury Police Department should work with, has worked with, or will work with the Department of Homeland Security, Immigrations and Customs Enforcement, and/or employees thereof, including but not limited to any agreement, memoranda of understanding, guidelines, and/or any documents that review past operations.*

Objection: Vague, overly broad, and unduly burdensome and seeks materials not relevant to the claim or defense of any party; seeks documents relating to future conduct; which by its nature is speculative and irrelevant to the present action; seeks disclosure of documents which, to the extent they exist, may contain indications of law enforcement methods which should remain confidential to protect their effectiveness.; unduly burdensome and costly as applied to electronically stored information.

Request 7*: Produce all documents relating to how officers or employees of the DPD should conduct surveillance, investigations, undercover operations, investigative detentions, arrests and interagency or intergovernmental operations including but not limited to any laws, regulations, policies, guidelines, directives, memos, handbooks, manuals, checklists, training materials, and any formal or informal documents reviewing past DPD activities.*

Objection*:* Vague, overly broad, unduly burdensome and seeks materials not relevant to the claim or defense of any party; seeks disclosure of sensitive information which, if disclosed, could compromise the safety of DPD officers who work undercover; seeks disclosure of documents which, to the extent they exist, would contain indications of law enforcement methods which should remain confidential to protect their effectiveness; unduly burdensome and costly as applied to electronically stored information.

Request 24*: Produce all documents indicating that SID had information that aliens with Warrants of Removal would be encountered in the group of day laborers near Kennedy Park.*

Objection: Seeks disclosure of documents which, to the extent they exist, may contain references to law enforcement informants and indications of law enforcement methods which should remain confidential to protect their effectiveness; unduly burdensome and costly as applied to electronically stored information.

It is clear that the information requested by Plaintiffs in the discovery requests is vital to Plaintiffs' case. Requests 1, 2 and 24 seek documents relating to the planning and execution of

the Danbury 11 operation. These requests are directly relevant to, or are likely to lead to the discovery of relevant information regarding, Plaintiffs' claims that Defendants acted unlawfully when they stopped, detained, investigated and arrested the Plaintiffs without probable cause on September 19, 2006.

Furthermore, the Danbury Defendants have improperly invoked the law enforcement privilege. As discussed in detail in Section I.D, supra, the Danbury Defendants have failed to meet their burden of showing that the law enforcement privilege applies and, even if they had done so, the need for discovery outweighs Defendants' interest in confidentiality in this case.

VII. Danbury Defendants have improperly failed to conduct any searches for electronic documents responsive to Plaintiffs' requests.

The Danbury Defendants have failed to conduct any electronic search for documents responsive to Plaintiffs' February 13 RFP, claiming that the searches would be unduly burdensome and costly. Plaintiffs have made every effort to work with Defendants to reach an agreement regarding electronic discovery,[23] but the City has failed to negotiate in good faith.[24]

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23 On April 9, 2009, the City requested an extension of time to respond and/or object to Plaintiffs' Request for Production of Documents on the ground that it needed additional time to gather responsive information, particularly with respect to the electronic documents. In its May 14, 2009 Responses and Objections to Plaintiffs' Request for Production of Documents, and in letters dated May 6 and May 18, 2009, the City provided ever-increasing estimates of the time and cost associated with conducting the searches. See Nurhussein Decl. ¶¶ 7-9.

24 For example, four months into the process, the City for the first time argued that it did not need to conduct a search because, in the City's opinion, its liability is wholly contingent on Plaintiffs' first establishing the liability of individual defendants. See Nurhussein Decl. ¶ 11, Ex. H. There is no merit to the City's position, and it has provided no authority for it. In another example, the Defendants have entirely ignored the proposal of Plaintiffs' counsel that the parties' respective IT personnel confer to gain a better understanding of the City's revised estimates and determine if there was a more efficient way to conduct the searches.

Accordingly, Plaintiffs have no choice but to seek the aid of this Court in securing relevant, non-privileged electronic records responsive to their February 13 RFP.

Plaintiffs move to compel production of electronic documents responsive to all requests in the February 13 RFP. This includes all requests discussed above, as well as the following requests:

Request 8: *Produce all documents relating to how and when officers of the DPD should book individuals including but not limited to any laws, regulations, policies, guidelines, directives, memos, handbooks, manuals, checklists, training manuals, and any documents describing any of the fields contained on any booking documents including but not limited to booking reports and uniform arrest reports.*

Objection: Vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; unduly burdensome and costly as applied to electronically stored information.

Request 9: *Produce all documents relating to how and when officers or employees of the DPD should complete incident reports including but not limited to any laws, regulations, policies, guidelines, directives, memos, handbooks, manuals, checklists, training materials, and any documents describing any of the fields contained on incident reports.*

Objection: Vague, overly broad, unduly burdensome and seeks materials not relevant to the claim or defense of any party; unduly burdensome and costly as applied to electronically stored information.

Request 10: *Produce all documents relating to any application for, inquiry about, or negotiation, consummation, or potential consummation of, any Memorandum of Agreement pursuant to 8 U.S.C. § 1357(g) ("287g agreement") between DHS or ICE and the City of Danbury and/or the Danbury Police Department.*

Objection: No objection as to hard copy documents; unduly burdensome and costly as to electronically stored information.

Request 11: *Produce all documents relating to the training of employees or officers of the City of Danbury by the Department of Homeland Security (DHS), Immigrations and Customs Enforcement (ICE), or employees thereof including but not limited to communications within the City of Danbury, the Danbury Police Department, and/or the Danbury Mayor's Office relating to such trainings, communications between DHS or ICE and the City of Danbury or employees thereof relating to such trainings, schedules, or calendars indicating when such trainings have occurred or were scheduled to occur, agenda and draft agenda for such trainings, training*

materials and draft training materials prepared for or used during such trainings, notes taken by City of Danbury employees prior to, during, or after such training that relate to such trainings, written evaluations of such trainings, and any documents relating to the need for such trainings.

Objection: No objection as to hard copy documents (upon information and belief, no responsive documents); unduly burdensome and costly as applied to electronically stored information.

Request 12: *Produce all documents relating to communication by any agent or employee of the City of Danbury with any state or federal agency, including but not limited to any communication with the Office of the Attorney General of the State of Connecticut, pertaining to any request to deputize state or local police to enforce federal immigration law, pursuant to 8 U.S.C. § 1357(g) or otherwise.*

Objection: No objection as to hard copy documents; unduly burdensome and costly as applied to electronically stored information.

Request 17: *Produce all documents relating to any communication by any agent or employee of the Danbury Police Department, Corporation Counsel, Mayor's Office, or any other municipal agency, pertaining to the Danbury 11, immigrants, immigration, immigration reform, or Hispanics, living or working in the City of Danbury.*

Objection: Vague, overly broad, unduly burdensome and seeks materials not relevant to the claim or defense of any party[25]; seeks disclosure of documents protected by the attorney-client privilege and work product doctrine[26]; some hard copy documents produced by City, but unduly burdensome and costly as applied to electronically stored information.

Request 18: *Produce all documents relating to any communication by any agent or employee of the City of Danbury with any member of the press pertaining to the Danbury 11.*

Objection: To the extent this request seeks newspaper articles, or other public statements in print or electronic media, responsive documents are available to plaintiffs as they are to defendant; some hard copy documents produced, but unduly burdensome and costly as applied to electronically stored information.

Request 19: *Produce all documents relating to City of Danbury policies, practices, or attempts to enforce municipal ordinances, including traffic ordinances.*

Objection: Vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; unduly burdensome and costly as applied to electronically stored information.

[25]Individual Danbury Defendants' objection

[26]City of Danbury's objection.

Request 20: *Produce all documents relating to complaints received about the activities of alleged immigrants, or Hispanics in general, either in or around Kennedy Park, or elsewhere in Danbury, Connecticut, and all documents relating to any follow-up action taken in response to such complaints.*

Objection: Vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; unduly burdensome and costly as applied to electronically stored information.

Request 21: *Produce all documents relating to complaints received about the activities of any individuals or groups of people, in and around Kennedy Park, and all documents relating to any follow-up action taken in response to such complaints*.

Objection: Vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; some hard copy documents produced, but unduly burdensome and costly as applied to electronically stored information.

Request 22: *Produce all documents relating to City of Danbury policies or practices dealing with suspected undocumented immigrants in Danbury, Connecticut.*

Objection: No objection as to hard copy documents (upon information and belief, no responsive documents); unduly burdensome and costly as applied to electronically stored information.

Request 27: *Produce all documents relating to any communication by the Danbury Police Department, Corporation Counsel, or any other employee, agent, or agency of the City of Danbury relating to the policing and crowd control of marches, rallies, and other public protests about the topic of immigrants, immigration, or immigration reform, including a march and rally on or about June 21, 2005, and a march and rally on or about September 30, 2006.*

Objection: Vague, overly broad, unduly burdensome, and seeks materials not relevant to the claim or defense of any party; seeks disclosure of documents related to matters which occurred after September 19, 2006, the date of the subject incident – such documents, to the extent they exist, are irrelevant to the present matter; unduly burdensome and costly as applied to electronically stored information.

Request 31*: Produce all documents relating to any trip taken by Mayor Boughton to Brazil, either to attend a conference on immigration and fraud, or for any other reason.*

Objection: Not relevant to the claim or defense of any party and not reasonably calculated to lead to the discovery of admissible evidence; some responsive documents produced, but unduly burdensome and costly as applied to electronically stored information.

Request 32: *Produce all documents relating to Mayor Boughton's participation in the coalition, Mayors and County Executives for Immigration Reform, and the website* http://www.supportreform.org.

Objection: Not relevant to the claim or defense of any party and not reasonably calculated to lead to the discovery of admissible evidence; some responsive documents produced, but unduly burdensome and costly as applied to electronically stored information.

Request 34: *Produce all documents that contain the name of any of the Danbury 11, or that refer to the Danbury 11 explicitly or implicitly.*

Objection: Vague, overly broad and unduly burdensome; unduly burdensome and costly as applied to electronically stored information.

A. The e-mail and other electronic files are clearly relevant to material issues in this case.

Plaintiffs' requests for the Danbury Defendants' e-mail and other electronic files responsive to the February 13 RFP are relevant, reasonably calculated to lead to the discovery of admissible evidence, and clearly bear on issues involved in this case. In particular, Defendants' e-mail is likely to bear directly on claims that Defendants willfully violated Plaintiffs' federal and state constitutional rights and Connecticut common law. The e-mail and other electronic files requested by Plaintiffs are reasonably expected to contain, for example, communications among the Defendants regarding their hostility toward the immigrant population of Danbury and their efforts to reduce the number of immigrants in the community through various unlawful means. Such e-mails bear directly on whether Danbury Defendants intentionally engaged in discriminatory conduct and are therefore critical to Plaintiffs' claims.

Danbury Defendants' e-mails and other electronic files capture communications that are not likely preserved in any other form, including internal discussions between the Mayor and his staff, members of the police department, and other City employees. For this reason, Plaintiffs seek discovery of responsive e-mails or other electronic records Danbury Defendants have in any

e-mail accounts they maintain, including any personal e-mail accounts or other communication tools such as social networking sites or blogs.

While failing to produce any e-mail or other electronic records responsive to Plaintiffs' discovery requests, the Individual Danbury Defendants have particularly objected to producing documents from their personal e-mail or other social networking accounts. See Nurhussein Decl. ¶ 14. There is no merit to this position. Defendants' personal e-mail and other social networking accounts likely contain material that may be highly relevant and probative of Plaintiffs' claims.[27] See Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 287 (S.D.N.Y. 2003) ("An e-mail contains the precise words used by the author. Because of that, it is a particularly powerful form of proof at trial when offered as an admission of a party opponent."). Defendants should therefore be required to search for documents responsive to Plaintiffs' discovery requests in any e-mail account they maintain, including any personal e-mail or other social networking accounts. Furthermore, Plaintiffs' requests for electronic materials dated subsequent to Sept. 19, 2006 are relevant to Plaintiffs' pattern-and-practice claims. See Section I.B, supra.

B. Defendants have failed to establish that their email and other electronic files are not reasonably accessible, and good cause justifies discovery of the materials in any event.

"[I]t is black letter law that computerized data is discoverable if relevant." Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ. 2120 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3,

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27 These sources are expected to include communications related to Defendants' hostility toward the immigrant population of Danbury and desire to drive immigrants out of the community, as well as knowledge of the legal restrictions on the authority of DPD officers to enforce civil immigration laws. Evidence that Defendants harbored such sentiments would clearly support Plaintiffs' contention that Defendants targeted them based on their ethnicity and as part of a deliberate campaign of conduct defendants knew to be illegal and discriminatory.

1995). The 2006 amendments to the Federal Rules of Civil Procedure "confirm[ed] that discovery of electronically stored information stands on equal footing with discovery of paper documents." Adv. Committee note to 2006 amendment to Rule 34(a). Search and review of a party's e-mail is "a routine aspect of modern discovery." SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 417 (S.D.N.Y. 2009). While a party need not provide discovery of electronically stored information from sources that are not reasonably accessible because of undue burden or cost without good cause shown, active user e-mail files that reside in an on-line server are assumed to be readily accessible. Zubulake v. Warburg, 217 F.R.D. 309, 320 (S.D.N.Y. 2003). The burden is on the responding party to show that particular sources of electronically stored information are not reasonably accessible. Fed. R. Civ. P. 26(b)(2)(B) ("[T]he party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.") There is no automatic assumption that an undue burden or expense may arise simply because electronic evidence is involved. Zubulake, 217 F.R.D. at 318.

To date, Defendants have refused to search any source for e-mails or other electronic files responsive to Plaintiffs' requests, and they have failed to make any showing that the electronic files are not "reasonably accessible." See Nurhussein Decl. ¶ 3. Defendants' flat-out refusal to engage in electronic discovery is patently unreasonable in light of the "routine aspect" of electronic searches in modern discovery. Collins & Aikman Corp., 256 F.R.D. 417. As an initial matter, Defendants cannot be considered to have responded in good faith to any Plaintiffs' discovery requests as long as they refuse to conduct any electronic searches, to negotiate in good faith for a set of targeted search terms, or to use a sampling method to estimate the cost of a search and the likelihood that it would produce relevant, non-privileged material. The court in

Collins & Aikman recently held that a party's similar "blanket refusal" to engage in electronic discovery was "unacceptable":

> Without even an attempt to negotiate search terms that would weed out privileged, protected, or irrelevant e-mails, the SEC cannot reasonably assert that a routine aspect of modern discovery-search and review of a party's e-mail-is beyond its capability. Essentially, the SEC's position is that the cost of such a search is simply too high, but it has made no effort to document the cost or the likelihood that it would produce relevant, nonprivileged material. The concept of sampling to test both the cost and the yield is now part of the mainstream approach to electronic discovery.

256 F.R.D. at 417-18.

Plaintiffs have reached out to Defendants to resolve this issue, including by offering to schedule a telephone conference between Plaintiffs' and Defendants' respective IT professionals, but Defendants have refused to respond. See Nurhussein Decl. ¶¶ 10-11. Defendants have failed to specify the data sources in their possession that contain e-mails and other electronic files responsive to Plaintiffs' requests but which they decline to search or produce due to alleged burdensomeness or cost.[28] They have given Plaintiffs no information about the likelihood that the searches requested will produce the documents sought. Without any of this information, Plaintiffs have no ability to weigh the burden and cost of production against the anticipated benefit. As such, Defendants have not met their burden of showing that the documents at issue are not reasonably accessible. See Collins & Aikman Corp., 256 F.R.D. at 417.

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[28] A responding party must "identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burden and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." Fed R. Civ. P. 26(b)(2), advisory comm. notes to 2006 Amend.

Even if Defendants were to make a showing that their e-mails and electronic files were not reasonably accessible, Plaintiffs clearly demonstrate good cause for this Court to order their production. A responding party must produce even those materials that are not reasonably accessible upon a showing of good cause. Fed R. Civ. P. 26(b)(2). In determining good cause to order the production of electronic materials that are not reasonably accessible, courts have considered the following factors: the specificity of the discovery request, the quantity of information available from more easily accessed sources, the likelihood of finding relevant, responsive information that cannot be obtained elsewhere, the usefulness of the further information, the importance of the issues at stake in the litigation, and the parties' relative resources. See Fed R. Civ. P. 26(b)(2), advisory comm. notes to 2006 Amend.; W.E. Aubuchon Co., Inc. v. BeneFirst, LLC, 245 F.R.D. 38, 43 (D. Mass. 2007); Peskoff v. Faber, 251 F.R.D. 59, 60 (D.D.C. 2008). Here, Plaintiffs have made every effort to narrow their requests so as to specifically tailor them to discover relevant information. Had Defendants been willing to negotiate in good faith, the parties may have been able to reach agreement on a narrowly tailored production of electronic materials.[29]

Few other records exist that are likely to capture Defendants' internal communications about their hostility toward immigrants or knowledge that their enforcement of civil immigration laws is unlawful. Defendants' email is likely to yield critical information that is highly probative of Plaintiffs' claims. The issues at stake in this case are of significant public interest. Finally, Plaintiffs are indigent and represented by pro bono counsel; their resources are no match for

[29] Defendants cut off conferral on this issue months after Plaintiffs propounded their discovery requests with the novel assertion that the City of Danbury is not obligated to comply with discovery requests since the City's liability depends on first establishing individual defendants' liability. See Nurhussein Decl. ¶ 11, Ex. H.

those of the Defendants. As a result, the Defendants must be compelled to conduct the full search and bear the resulting costs.

CONCLUSION

The documents requested are highly relevant to the claims presented in this case. The Plaintiffs, through counsel, have attempted in good faith to resolve this dispute with Defendants. This Court has broad discretion to compel discovery under Fed. R. Civ. P. 37 and should order the City of Danbury and the Individual Danbury Defendants to fully comply with Plaintiffs' Request for Production of Documents.

Respectfully submitted,

_____/s/_____
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September 2, 2009

[30] *Pro hac vice* motion forthcoming.