

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MICHAEL COSTA,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 11-336L
	:	
STEPHEN RASCH, Alias, Individually	:	
and in his Official Capacity as a Police	:	
Officer for the City of Providence,	:	
Rhode Island, et al.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

Plaintiff Michael Costa has sued the City of Providence (“the City”) and the three police officers involved in the incident under 42 U.S.C. § 1983 (“Section 1983”) to recover damages for injuries that he sustained in an encounter with the officers following his protest of their conduct in arresting another individual. Before the Court for determination is his Motion to Strike Objections and Compel Answers to Interrogatories Propounded to Defendant City of Providence.¹ ECF No. 29. The gravamen of the Motion is the relevancy, and if relevant, the burden, of producing information in three categories:

Interrogatory No. 5: a listing of all investigations performed by the City into allegations of excessive force by any Providence police officer from 2000 to the present, including a summary of the investigation, the race of the victim and the resolution of the complaint.

Interrogatory No. 6: a listing of lawsuits based on Section 1983 in which the City was a party alleging either excessive force or racial profiling/discrimination by any Providence police officer from 1996 to the present.

¹ In addition to the issues discussed in this Memorandum and Order, this Motion also asked for leave to renumber the interrogatories to eliminate certain clerical errors; because Defendants had no objection to the proposed correction and because judicial intervention is unnecessary to accomplish such a correction, that aspect of this Motion was denied as moot. In addition, at the same hearing, the Court took up Plaintiff’s Motion to Strike Objections and Compel Answers to His Second Request for Document Production to Defendant City of Providence. ECF No. 30. It was granted by text order on April 16, 2013.

Interrogatory No. 16: a description of all training programs or sessions from 1997 to the present that involved the supervision of patrol officers to assure they do not engage in excessive force.

A hearing on this Motion was held on April 16, 2013.

I. Background and Travel

Plaintiff's Amended Complaint is based on an incident that occurred in the early morning hours of March 22, 2010, when he observed the three Defendant officers using what he believed was excessive force while arresting an African-American female.² He and other unnamed civilians protested to the three officers to no avail. An observer started to record the event with a cell phone camera, but one of the officers took the phone and knocked off the individual's glasses. When Plaintiff attempted to assist that individual by retrieving the glasses, the officer kicked them away. Plaintiff's protests continued, now accompanied by a request for the officers' badge numbers. When he got their badge numbers and started to walk away, the officers rushed him, dragged him to the ground, struck him in the face and pepper-sprayed him. Observers were warned by the officers not to take photographs, as Plaintiff was handcuffed and placed in a police cruiser. As a result of the injuries he received, Plaintiff needed immediate medical and dental treatment; he expects that he will need more dental treatment in the future.

The officers charged him with disorderly conduct, obstruction of police officers and resisting arrest. He was acquitted of all charges by a jury following a Superior Court trial on February 14, 2012.

Most of the claims in Plaintiff's eight count Amended Complaint are against the three Defendant officers, who are not involved in this discovery dispute. This Motion deals only with Count Seven, which lays out the claim of municipal liability against the City, based on an unwritten custom or policy of deliberate indifference to the needs of police officers for training

² These facts are based solely on the allegations in the Amended Complaint.

to avoid the use of excessive force. Count Seven asserts that excessive force has been allowed by the City to become an accepted practice used by some officers in their official dealings with the public, resulting in constitutional deprivations. In seeking to impose municipal liability on the City, the Amended Complaint focuses on the lack of appropriate training and the superficiality of the City's investigations of complaints, demonstrating that retaliatory physical abuse, including excessive force, is considered by the City to be a reasonable way to treat persons with whom its officers come into contact. Plaintiff claims that his injuries were proximately caused by this custom or policy.

The history of an earlier discovery motion in this case is important background. In 2012, Plaintiff moved to compel production of the personnel files, complaints of excessive force, internal affairs investigations, complaints to the Human Rights Commission and race-based investigations regarding the three Defendant police officers. That motion was granted in part and denied in part. Two points about it are significant.

First, this Court took a skeptical look at discovery requests based on race in light of Plaintiff's claims. Because Plaintiff did not plead that racial animus is a basis for his claims, the Court held that documents pertaining to claims of excessive force based on racial profiling or race discrimination are not relevant to this case. Notice of Completion of *In Camera* Review and Order Granting in Part Motion to Compel Production, ECF No. 20, at 4. Rather, Plaintiff's claim is based on an incident during which he alleges that the three Providence police officers retaliated against or threatened various citizens – including Plaintiff – who were exercising their First Amendment right to criticize the police for their conduct in arresting an African-American woman. The race of Ms. Doe has no relationship to the excessive force allegedly used to prevent Plaintiff from criticizing the officers. *Id.* n.3. That holding remains the law of this case and must

be applied to limit the scope of this discovery now. See United States v. Wallace, 573 F.3d 82, 87-88 (1st Cir. 2009); United States v. Kayser-Roth Corp., Inc., 103 F. Supp. 2d 74, 82-83 (D.R.I. 2000).³

Second, as a result of the first discovery motion, Plaintiff has already received significant discovery – all of the relevant personnel files, complaints, investigations and training information pertaining to the three Defendant officers. The instant Motion, focused solely on the City, seeks to mow a wider swath. Plaintiff now asks for investigations, lawsuits and training programs affecting all officers who have served in the Providence Police Department in the past thirteen years for investigations, seventeen years for lawsuits and sixteen years for training. It thus implicates the “more vexing issues raised when records of other officers are sought in an attempt to prove the practice and policy of a municipal government.” King v. Conde, 121 F.R.D. 180, 185 (S.D.N.Y. 1988); see Perry v. City of Gary, Ind., No. 2:08-CV-280-JVB-PRC, 2009 WL 2253157, at *54-5 (N.D. Ind. July 27, 2009) (complaints against all police and not just those involved in incident may be relevant when municipality named in excessive force claim); Scaife v. Boenne, 191 F.R.D. 590, 595 (N.D. Ill. 2000) (same).

The City protests the breadth of the information that it is being asked to locate, reaching back well over a decade. Exacerbating the burden is the reality that the City’s files are not maintained so as to make those Plaintiff seeks readily retrievable. Compliance with the interrogatories would require the City to incur the expense of assigning someone (probably counsel) the task of reading more than a decade’s worth of material to locate the needles in the haystack that Plaintiff claims he needs. To the extent that responsive files are subsequently required to be produced, the painstaking task of redacting the names and identifying information

³ At the hearing, Plaintiff acquiesced to this limitation.

pertaining to individual complainants, whose identities are confidential, would remain. Further, an investigation is not proof that misconduct occurred; every complaint identified creates the risk of a mini-investigation to recreate what really happened.

In examining these burdens, the City asks the Court to consider the threadbare nature of Count Seven of Plaintiff's Amended Complaint; it is based on boilerplate allegations with no specific facts identified, beyond those pertaining to the episode itself. In balancing the burden imposed on the City against Plaintiff's need for the discovery, the City argues that this Court should weigh the allegations of Count Seven as barely sufficient under the standard set out by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009), to "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." The City correctly points out that municipal culpability is at its most tenuous when the claim turns on a failure to train, which is the keystone of Plaintiff's theory of municipal liability. Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011).

II. Standard of Review

Rule 26(b)(1) of the Federal Rules of Civil Procedure limns the scope of what is discoverable – here it is any nonprivileged matter relevant to Plaintiff's claim against the City in Count Seven. Rule 26 further empowers this Court to exercise its discretion to limit the extent of otherwise allowable discovery if it can be obtained from a more convenient source that is less burdensome or if the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the parties' resources, the importance of the issues and the importance of the requested discovery in resolving those issues. Fed. R. Civ. P. 26(b)(2)(C).

Rule 26(b)(2)(C)'s protective provisions are frequently applied in Section 1983 cases, which hold that, even if the discovery sought is generally relevant to a claim of municipal

liability, the plaintiff is not automatically entitled to it. For example in Santiago v. Fenton, 891 F.2d 373, 379-380 (1st Cir. 1989), the First Circuit affirmed a protective order limiting relevant discovery from the City of Springfield, Massachusetts, because the defendants had demonstrated hardship, which the plaintiff had not challenged, and the plaintiff's complaint rested on boilerplate allegations that Springfield and its police chief should have been aware of prior incidents of excessive force, false arrest and false imprisonment, with no facts beyond the immediate incident. Id. at 378, 380 (plaintiff, a 13-year-old, had thrown a snowball at a police car, which resulted in his arrest and a beating by police). In addition to the defendants' un rebutted showing of burden, the opinion notes that the district court "appeared to draw support from the precedent [the First Circuit has] cited regarding dismissal of a municipal liability claim in deciding that discovery should be limited." Id. at 380; see also Moldowan v. City of Warren, Civil Action No. 05 CV 70331 DT, 2006 WL 3106090, at *5 (E.D. Mich. Oct. 31, 2006).

III. Analysis

The filter to perform the litmus test for both relevancy and burden under Rule 26 is Plaintiff's claim against the City in the Amended Complaint. Put differently, the discovery to which Plaintiff is entitled is cabined by the content of Count Seven.

There is no doubt that a Section 1983 complaint based on a single incident faces an uphill climb. Bordanaro v. McLeod, 871 F.2d 1151, 1150-60 (1st Cir. 1989) (extraordinary single incident where entire police night watch converged on motel to break down door and brutally beat persons inside with no warrant or probable cause permits municipal liability based on failure to establish minimally acceptable standards of recruitment, training, supervision or discipline of police officers); McElroy v. City of Lowell, 741 F. Supp. 2d 349, 354-55 (D. Mass. 2010) (single incident of excessive force by police insufficient to trigger municipal liability based on custom or

informal policy unless custom may be inferred from conduct that is both outrageous and pervasive). Nevertheless, while Plaintiff's Amended Complaint has little more than the facts of the specific episode and boilerplate allegations of a failure by the City to investigate complaints and train its officers to avoid repetition of misconduct that has become "an accepted practice," it seems to hit the essential elements⁴ sufficiently to form the basis for discovery. See City of Canton v. Harris, 489 U.S. 378, 388-92 (1989); Haley v. City of Boston, 657 F.3d 39, 52 (1st Cir. 2011).

It is well settled that "local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the government's official decision-making channels." Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690-91 (1978). Liability is attributed to the municipality in custom cases through a policy-maker's knowledge of and acquiescence in the unconstitutional custom. Randall v. Prince George's Cnty., Md., 302 F.3d 188, 210 (4th Cir. 2002); Floren v. Whittington, 217 F.R.D. 389, 391 (S.D. W.Va. 2003). When the complaint raises the failure of the municipality to adequately train, supervise and discipline its police officers for unlawful retaliation against citizens for exercising constitutional rights, the police department's handling of complaints, particularly citizen complaints, internal investigations and their results are all potentially relevant. Floren, 217 F.R.D. at 391-92.

Here, the Amended Complaint recites the facts of an episode that is somewhat more than a single incident – Plaintiff claims that the three officers allegedly engaged in three discrete actions to deter citizens from exercising their First Amendment rights to criticize the officers. First, they took the phone and knocked off the glasses of an individual taking a photograph of the

⁴ It is important to note that this truncated analysis of the Amended Complaint is not the rigorous review that this Court would perform in response to a motion to dismiss, nor does it presage what might follow from a motion for summary judgment.

incident, second, they beat, arrested and charged Plaintiff, and third, they threatened onlookers who attempted to photograph their treatment of Plaintiff. Whether this is enough to permit an inference of a custom need not be resolved now; what matters at this stage is that it is plainly enough to crack the door of discovery regarding complaints, investigations and training of officers other than those sued in this case. Dawson v. Ocean Twp., Civil Action No. 09-6274 (JAP), 2011 WL 890692, at *6-9 (D.N.J. Mar. 14, 2011) (single incident complaint adequate to support discovery with limitations to reduce burden).

The cases have consistently held that civilian complaints are highly relevant to proving that a municipality had a custom of permitting its police officers to use excessive force in the performance of their duties. Beck v. City of Pittsburgh, 89 F.3d 966, 975 (3d Cir. 1996) (court considers as evidence a number of complaints over more than two years and involving officers other than the officer who allegedly violated plaintiff's constitutional rights). Because documentation of civilian complaints and the resulting investigations are relevant and necessary to establishing the requisite policy or custom and causation required for municipal liability under § 1983, the cases permitting discovery have also held that they should be produced for a period going back more than two years. See, e.g., Marcum v. Scioto Cnty., Ohio, No. 1:10-cv-790, 2012 WL 2018523, at *6-7 (S.D. Ohio June 5, 2012) (eighteen months of files relevant and sufficiently tailored to avoid under burden); Dawson, 2011 WL 890692, at *23 (five years of investigative files relevant, but burden such that they may be listed on privilege log); Lindquist v. Arapahoe Cnty., Civil Action No. 10-cv-022640-REB-MEH, 2011 WL 3163095, at *2 (D. Colo. July 26, 2011) (nine months of files relevant and court noted relevancy diminishes at time passes); Hoyt v. Connare, 202 F.R.D. 71, 78 (D.N.H. 1996) (where police files are not organized

as to be easily retrievable by topic and search of ten years of files is unduly burdensome, discovery limited to five years and search to be based on memory of responsible officers).

Here, Plaintiff's discovery would require the City to go back well over ten years (from thirteen for Interrogatory No. 5 to seventeen for Interrogatory No. 6). That is plainly excessive – files so remote in time are barely relevant and the burden to find them (and explain them after they are found) is unacceptable in light of the strength of the Amended Complaint and Plaintiff's showing in support of this Motion. Rather, this Court finds three years to be more than adequate as a limitation for the City's search. To the extent the discovery received suggests that a longer period may be relevant, the Court will permit an iterative process – Plaintiff may renew its Motion with additional support demonstrating the relevancy of the more remote period.

In fashioning a remedy here that strikes the right balance between Plaintiff's need for the requested information and the City's burden, the Court observes that the pattern described by the Amended Complaint is not one of willy-nilly excessive force, but rather suggests a custom of police use of threats, retaliatory actions up to and including excessive use of force, to prevent and deter citizens from exercising their First Amendment rights to criticize police conduct. This is the crux of relevancy: whether the City was on notice of such a custom or pattern and, if it was, whether it adequately trained and disciplined to prevent it. The City's obligation to respond to these interrogatories must be limited to information pertinent to this claim. As with the time period, if the discovery regarding the individual officers or the discovery that flows as a result of this Order provides Plaintiff with a basis to contend that more is squarely relevant such that the City's burden is offset, Plaintiff may return to this Court for further relief.

The remaining challenge is how to impose the obligation on the City to locate responsive files where they are not arranged so as to permit retrieval of what is relevant without reading

every page. A solution suggested by Hoyt, 202 F.R.D. at 77-78, seems apt: the City may appoint one or more individuals currently or formerly with the police department (or within some other department within the City) who are knowledgeable regarding complaints about police conduct and police training. Those individuals shall gather information responsive to Interrogatory Nos. 5 and 16, as modified by this Order, based on his/her own recollection, reasonable inquiry of other senior officers and available records in the last three years regarding (i) investigations of the use of excessive force to deter onlookers from criticizing police conduct; and (ii) the implementation of training regarding how to deal with the public especially when persons are criticizing police conduct, including the avoidance of use of excessive force. Using that information, the City can formulate a response to these interrogatories.

Plaintiff's request for a list of lawsuits tips the balance against the discovery further than Plaintiff's request for investigations and training information. Interrogatory No. 6 seeks to require the City to provide information regarding every lawsuit based on Section 1983 in which the City was a defendant and there was an allegation of either excessive force of any sort or racial profiling in the last seventeen years. This interrogatory ignores the reality that since the introduction of electronic case filing, such information is readily available to Plaintiff at the click of a mouse, using search parameters that permit him to isolate Section 1983 cases against the City. The job of going through the filings in every suit to determine what is relevant is more appropriately done by Plaintiff than by the City. St. Germain v. United States, C.A. No. 12-113S, ECF No. 16 at 5 (D.R.I. 2013) (court declines to order production of all lawsuits involving medical malpractice against a federal health facility since 2000 when PACER system permits plaintiff to search for potentially relevant case in the public record). The City is not obliged to provide a list of lawsuits unless Plaintiff can demonstrate a need which he cannot satisfy by a

review of the public record. Fed. R. Civ. P. 26(b)(2)(C) (court may limit otherwise allowable discovery if it can be obtained from more convenient source that is less burdensome).⁵

IV. Conclusion

Based on the foregoing and for the reasons stated at the hearing, the Court orders as follows:

To the extent that Plaintiff's Motion seeks to compel interrogatory answers regarding race, including racial discrimination, racial profiling or to identify the race of the victim of every incident, it is denied. Plaintiff's claim is not based on allegations of racial animus.

To the extent that Plaintiff's Motion seeks to compel interrogatory answers regarding matters occurring more than three years prior to the episode on which the Amended Complaint is based, it is denied without prejudice to Plaintiff's renewal of the Motion for more remote periods based on specific evidence establishing that the relevancy of the older information trumps the burden that its production would impose on the City.

Plaintiff's Motion to compel information regarding investigations of allegations of excessive force (Interrogatory No. 5) is granted with respect to incidents involving officers other than the three Defendant officers alleging excessive force used for the purpose of preventing or deterring criticism of police conduct in the performance of their duties. To the extent that Plaintiff's interrogatories more broadly seek information regarding all investigations of allegations of excessive force, the Motion is denied without prejudice to Plaintiff's renewal of the Motion for incidents involving the use of excessive force in other circumstances based on specific evidence establishing that the relevancy of the information trumps the burden that its production would impose on the City.

⁵ At the hearing, Plaintiff informed the Court that he does not object to this limitation and withdraws Interrogatory No. 6 for the present.

Plaintiff's Motion to compel information regarding training (Interrogatory No. 16) is granted with respect to training of officers regarding dealing with the public and responding to criticism of police conduct in the performance of their duties, including without limitation, the avoidance of excessive force in those circumstances. To the extent that Plaintiff's interrogatories more broadly seek information regarding unrelated training, the Motion is denied without prejudice to Plaintiff's renewal of the Motion to obtain information about other training based on specific evidence establishing that the relevancy of the information trumps the burden that its production would impose on the City.

In preparing its response to Interrogatories Nos. 5 and 16, the City need not review every file to perform a compliant search for responsive information, but rather may respond by appointing the individual(s) currently or formerly within the police department (or within some other department within the City) who are most knowledgeable regarding complaints about police conduct and training. Such individual(s) shall respond to the modified interrogatory based on his/her own recollection, reasonable inquiry of other senior officers and reasonable review of records.

Plaintiff's Motion to compel an answer to Interrogatory No. 6 is denied without prejudice to a renewal of the Motion based on evidence demonstrating a need for information about Section 1983 lawsuits relevant to this litigation in the past three years, which he cannot satisfy by a review of the public record.

So ordered.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
April 25, 2013