UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ADRIAN SCHOOLCRAFT,

Plaintiff,

- against -

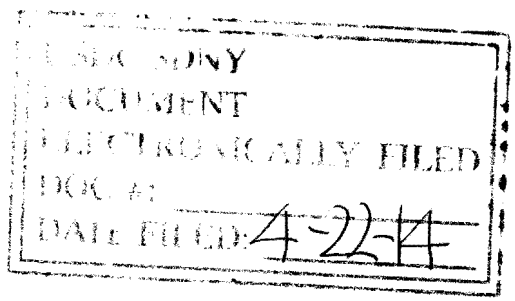
CITY OF NEW YORK, et al.,

Defendants.

----------X

10 Civ. 6005 (RWS)

OPINION



A P P E A R A N C E S:

Attorneys for the Plaintiff

LAW OFFICE OF NATHANIEL B. SMITH
111 Broadway
Suite 1305
New York, NY 10006
By: Nathaniel B. Smith, Esq.

Attorneys for the City Defendants

MICHAEL A. CARDOZO
CORPORATION COUNSEL OF THE CITY OF NEW YORK
100 Church Street
New York, NY 10007
By: Suzanna P. Mettham, Esq.

Attorneys for Non-Party Journalist Graham Rayman

MILLER KORZENIK SOMMERS LLP
488 Madison Avenue
New York, NY 10022
By: David S. Korzenik, Esq.

Sweet, D.J.

Defendant City of New York ("City" or "City Defendants") has moved to compel non-party Graham Rayman ("Rayman") to produce documents related to the matter of *Schoolcraft v. City of New York, et al.*, 10 Civ. 6005. Upon the conclusions set forth below, City Defendants' motion is granted in part and denied in part.

Prior Proceedings

A detailed recitation of the facts of the underlying case is provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part Defendant Jamaica Hospital Medical Center's motion to dismiss. *See Schoolcraft v. City of N.Y.*, 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed. The action involves claims brought by Plaintiff Adrian Schoolcraft ("Plaintiff" or "Schoolcraft") in the Second Amended Complaint, dated September 25, 2012 (the "SAC") against the City, several members of the New York City Police Department ("NYPD"), Jamaica Hospital Medical Center ("JHMC"), two doctors employed by JHMC, and others (collectively the "Defendants").

The instant motion involves a subpoena dated December 3, 2013 served by the City on Rayman (the "Subpoena"). The Subpoena had a return date of December 20, 2013. The Subpoena was made after City Defendants learned of the existence of several of these documents from Rayman's book, *The NYPD Tapes* (the "Book").

The Subpoena makes 23 requests ("Requests" or "Subpoena Requests") and seeks the following information or documents from Rayman:

- Written statements by Plaintiff (Subpoena Requests Nos. 5, 14 and 16);
- E-mails to Rayman (Subpoena Requests Nos. 2, 3 and 18);
- Recordings made by Plaintiff of his co-workers and Defendants (Subpoena Requests Nos. 4, 7, 11, 12, 20 and 21);
- Crime complaint reports (Subpoena Request No. 6);
- Memoranda from Plaintiff regarding NYPD misconduct (Subpoena Requests Nos. 8 and 10);
- Letter firing prior counsel (Subpoena Requests No. 13);
- Documents received from Larry Schoolcraft (Subpoena Requests Nos. 15, 17 and 19);
- Agreements and/or contracts between Rayman and Schoolcraft and Larry Schoolcraft (Subpoena Requests Nos. 22 and 23);
- Other documents (Subpoena Requests Nos. 14-21); and
- Moot requests (Subpoena Requests Nos. 1, 9, 13, 22 and 23).

To date, Rayman has not complied with the Subpoena. He has cited reporter's privilege regarding all of the Subpoena Requests, as well as claimed that several of the requests are unduly burdensome or too vague. Subsequently, City Defendants filed the instant motion to compel on March 5, 2014. Briefing was submitted by the City and Rayman; oral arguments were held and the matter was marked fully submitted on April 8, 2014.

The Applicable Standard

Federal Rules of Civil Procedure 37 permits a party to move for an order compelling disclosure or discovery from a non-party to an action. *See* Fed. R. Civ. P. 37(a)(2). A court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." *See* Fed. R. Civ. P. 45 (d)(3)(iii).

Both the Second Circuit and New York State law recognizes the existence of a qualified reporter's privilege. The Second Circuit has recognized a qualified reporter's privilege, based in the First Amendment and federal common law, which protects journalists from having to produce information obtained during the course of newsgathering. *See, e.g.*,

Gonzales v. National Broadcasting Co., 194 F.3d 29, 35 (2d Cir. 1999); *In re Petroleum Prods. Antitrust Litig. (Petroleum Prods.)*, 680 F.2d 5, 7-8 (2d Cir. 1982); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972). *See also United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011); *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir. 2011); *In re McCray*, 928 F. Supp. 2d 748, 754 (S.D.N.Y. 2013), *adopted*, No. 03 Civ. 9685 (DAB), 2013 WL 6970907, at *4 (S.D.N.Y., Sept. 23, 2013); *Sokolow v. PLO*, No. 04 Civ.397 (GBD) (RLE), 2012 U.S. Dist. LEXIS 127040 (S.D.N.Y. Sept. 6, 2012). The privilege protects both confidential and nonconfidential information. *Gonzales*, 194 F.3d at 35-36.

The privilege seeks to prevent the unnecessary enmeshing of the press in litigation that arises from events they cover. *Id.* at 35. "The privilege, which exists to support the press's important public service function to seek and reveal truthful information, protects newsgathering efforts from the burdensome wholesale production of press files that risk impeding the press in performing its duties." *In re McCray*, 928 F. Supp. 2d at 753 (internal citations omitted).

Gonzales sets out two tests for invocation of the privilege, one applicable to instances where the sought-after evidence pertains to confidential information and the second

applicable to subpoenas where no confidential material is involved. City Defendants seek information from Rayman in which Plaintiff is identified as the source in the Book. Rayman has not contended nor established that the information he received from Schoolcraft was conveyed in confidence. Where, as here, the information comes from a nonconfidential source, the *Gonzales* test for nonconfidential information applies. *Gonzales*, 194 F.3d at 32-33; *see also Schiller v. City of New York*, 245 F.R.D. 112, 119-20 (S.D.N.Y. 2007) (finding information at issue was not conveyed in confidence where conveyers of information understood that it could be made public).

Under the *Gonzales* test for non-confidential information "the nature of the press interest protected by the privilege is narrower. . . . . when protection of confidentiality is not at stake, the privilege should be more easily overcome." *Id.* at 36. Under this test, a subpoena must be quashed unless the issuing party demonstrates (1) "that the materials at issue are of likely relevance to a significant issue in the case," and (2) the materials at issue "are not reasonably obtainable from other available sources." *Id.* The showing needed to overcome the privilege is less than the "clear and specific" showing required under the test for confidential

information. *Id.*

The first prong of *Gonzales* requires the party seeking to compel disclosure to demonstrate that the information sought is of "likely relevance" and goes to a "significant issue" in the case. *Gonzales*, 194 F.3d at 36; *McCray*, 928 F. Supp. 2d at 757-58. The relevancy requirement is not met if the information sought in the subpoena is merely duplicative or serving a "solely cumulative purpose." *United States v. Burke*, 700 F.2d 70, 76 (2d Cir. 1983). While "this standard is less exacting than that which applies to confidential materials, a litigant seeking nonconfidential materials will not be granted unfettered access." *Sikelianos v. City of N.Y.*, No. 05 Civ. 7673, 2008 WL 2465120, at *1 (S.D.N.Y. June 18, 2008).

The second prong of *Gonzales* requires the issuers of subpoenas to make reasonable efforts through discovery to obtain the information from alternative sources to defeat the privilege. Exhaustion of all other available sources of information is sometimes required. *See, e.g., Krase v. Graco Children Prods. (In re National Broadcasting Co.)*, 79 F.3d 346, 353 (2d Cir. 1996) (requiring that party seeking journalist's materials exhaust alternatives); *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993) (stating exhaustion of alternate sources is

nearly implausible early in the discovery process); *Petroleum Prods.*, 680 F.2d at 9 (holding that even though 100 witnesses had been deposed, that was not sufficient to establish exhaustion); *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981) (requiring subpoenaing party to show "he has exhausted every reasonable alternative source of information"); *Carey v. Hume*, 492 F.2d 631, 638 (D.C. Cir. 1974) (60 depositions may be appropriate before compelling reporter to testify); *In re McCray*, 928 F. Supp. 2d 748, 758 (S.D.N.Y. 2013) ("Defendants have failed to establish that the information sought is not obtainable elsewhere"); *Application of Behar*, 779 F. Supp. 273, 276 (S.D.N.Y. 1991) (stating alternate sources, including depositions, must first be exhausted before any deposition seeking privileged information would be warranted); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 120 n.4 (D.D.C. 2002) (failure to exhaust alternative sources weighed "so heavily in favor of quashing the subpoena" that court declined to consider the remaining analysis).

Reporter's privilege is also recognized under the New York Shield Law, N.Y. Civ. Rights Law § 79-h. New York Shield law provides qualified protection for "nonconfidential news." N.Y. Civ. Rights Law § 79-h(c). To obtain any such nonconfidential information, a party must make a "clear and

specific showing" that the information "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim . . . ; and (iii) is not obtainable from any alternative source." *Id.*; *see also Holmes v. Winter*, 3 N.E.3d 694, 699, 22 N.Y.3d 300, 362, 980 N.Y.S.2d 357 (N.Y. 2013).

The SAC alleges federal claims and state law claims under the Court's supplemental jurisdiction. (*See* SAC ¶¶ 255-397). Rayman raises New York State Shield Law as a ground for asserting privilege on the information related to Plaintiff's state law claims. However, "asserted privileges in actions that raise both federal and pendent state law claims are governed by the principles of federal law." *In re McCray*, 928 F. Supp. 2d at 753; *see also von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (stating that court "may consider . . . the applicable state law," but that it "[was] not bound to follow New York law"). Moreover, "the federal and state policies" on nonconfidential reporter's privilege "are 'congruent.'" *In re McCray*, 928 F. Supp. 2d at 753 (citing *von Bulow*, 811 F.2d at 144). "Both reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment." *Id.* (internal

quotation marks and citations omitted). The Plaintiff's federal and state law claims conflate and overlap in issues substantially. The appropriate action in this instance, where both the federal and state policies reflect the fundamentally same principles, is to consider the motion under the federal articulation of the privilege.

City Defendants' Motion Is Granted In Part And Denied In Part

City Defendants have made 23 Subpoena Requests, some of which seek specific documents from Rayman. Others do not seek specific information, but rather whole categories of documents.

Rayman Has Not Waived Any Privilege

As an initial matter, City Defendants contend that Rayman has waived his privilege because he has not provided a privilege log. City Defendants has cited Fed. R. Civ. P. 26(b)(5)(ii), but Rule 26(b)(5)(ii) is specific to a party's assertion of privilege. Rule 45(e)(2)(A) does require nonparties to provide a privilege log, but there is no relevant case law in this Circuit regarding whether the press can waive its *Gonzales* privilege from failing to produce a privilege log

three months after the service of the subpoena.

As the Second Circuit noted in *Gonzales*:

> If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties-particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.

194 F.3d at 35.

The "heavy costs of subpoena compliance" would be a significant issue if reporters have to immediately prepare a privilege log upon being served with a subpoena. Such a requirement would incur a heavy burden on the press that would inhibit its ability to perform its duties. This is especially true where City Defendants seek "any written accounts" or "any

documents, emails, text messages, and/or recordings" of several categories of issues (*See* Mettham Decl. Ex. A); any effort by Rayman to produce a privilege log by the less-than-a-month long period afforded by the Subpoena's return date would have been costly and extremely time consuming. Finding waiver of privilege here would serve against the policy reasons for the privilege delineated in *Gonzales*.

That is not to say that it is impossible for Rayman to waive his privilege in the future if he fails to provide a privilege log. *See, e.g., In re Application of Chevron Corp.*, 736 F. Supp. 2d 773, 782 (S.D.N.Y. 2010) (noting journalist "has advanced no persuasive reason why he should not be compelled to claim privilege . . . in the same manner as any other litigant—providing a privilege log enumerating the documents as to which privilege is claimed and including as to each such information as may be necessary to make out his claim of qualified journalist privilege"). However, given the notable reasons against finding waiver in this instance, the lack of a privilege log does not waive Rayman's privilege at this time.

City Defendants' General Subpoena Requests Are Denied On Privilege Grounds

Subpoena Requests Nos. 14 through 21 are generalized subpoena requests for documents regarding the issues in this case. These requests do not described with any particular detail as to what documents the City seeks. Subpoena Request No. 14, for example, seeks "[a]ny written account of Larry Schoolcraft regarding alleged misconduct by any current or former members of the NYPD not otherwise listed above."

The reporter's privilege protects the press from wholesale discovery of its documents. The privilege protects journalists from a party's "unfettered access to 'sift through [journalists] files in search of information supporting [his] claims.'" *Sikelianos*, 2008 WL 2465120, at *1 (quoting *Gonzales*, 194 F.3d at 35 (alterations in original)). The Subpoena Requests were made without particularity and essentially seek widespread access to all of Rayman's files. Wholesale exposure of press files to litigation scrutiny is an impermissible burden, *Gonzales*, 194 F.3d at 35, and the motion is denied with respect to these requests.

The Written Statements of Plaintiff Regarding Confinement At JHMC Are Not Protected By Privilege

Subpoena Request No. 5 seeks the written statements of

Plaintiff regarding Plaintiff's confinement at JHMC, specifically a "ten-page single-spaced account Schoolcraft himself wrote." (Reply at 4). City Defendants initially inquired about any written statements by Plaintiff regarding his confinement at JHMC in Plaintiff's deposition, to which Plaintiff denied having done so. (Mettham Decl. Ex. D at 266:25-267:8). The Book was subsequently published, and it stated that Plaintiff provided Rayman with this ten-page account in which Schoolcraft discusses his confinement in JMC. On September 17, 2013, City Defendants requested Plaintiff produce the document. Plaintiff responded by letter dated October 23, 2013 that Plaintiff "has looked for [the ten-page account] in his files and has not been able to locate it." (Mettham Decl. Ex. G).

Plaintiff's ten-page account of his time at JHMC concerns one of the central issues in Plaintiff's claims; the document is thus clearly relevant to the litigation. However, Rayman contends that the information contained in Schoolcraft's written account is available to the City, given that Plaintiff, several other police officers and the supervisors, nursing staff and psychiatric staff at JHMC have provided testimony regarding the incident. Rayman's interpretation of the information the City is seeking is too limited. If the City sought the document

only to impeach Plaintiff's testimony of his time at JHMC then relevancy of the document is doubtful given the number of other witnesses that can provide an account of the issue. *See, e.g., Burke*, 700 F.2d at 78 (where witness was impeached by other evidence, reporter's privilege was not defeated as the information would serve solely cumulative purposes). But the factual accounts in the ten-page paper also provide Plaintiff's impression at the time of writing of his confinement at JHMC. This information is relevant to issues beyond impeachment and speaks directly to the events at the hospital.

With regards to the availability of the document from other available sources, City Defendants seek the ten-page statement only after deposition of the Plaintiff and Plaintiff's statement that he is not in possession of the document. The information sought is thus not available through other sources. City Defendants have shown that the material is not reasonably obtainable from other available sources. As such, City Defendant's motion with regards to Subpoena Request No. 5 is granted.

Several E-mails To Rayman Sought By The City Are Not Protected By Privilege

Subpoena Request Nos. 2 and 3 seek emails from Schoolcraft or his father, Larry Schoolcraft ("Larry Schoolcraft") to Rayman. The emails include the Plaintiff stating, "Nothing has changed regarding my [suspension] status . . . Pay me or fire me . . . I'm never quitting . . . Never!" and an excerpt from a tape of an NYPD sergeant. (Mettham Decl. Ex. A).

The emails are relevant to the claims and defenses of the instant action, as they relate to the events surrounding Plaintiff's dismissal from the NYPD and Plaintiff's motivations for his actions, central issues to Plaintiff's and City Defendants' claims.

City Defendants have previously requested from Plaintiff any emails sent to and from Schoolcraft to journalists. (Mettham Decl. Ex. H). In response, Plaintiff has represented to City Defendants and the Court that, other than some previously disclosed contact with journalists, he did not have any of these statements. (*Id.* Ex. J). Plaintiff later admitted that he had been in email contact with Rayman, but indicated that he "does not have access to his old email communications with the press that he was examined about at his deposition." (*Id.* Ex. G).

With respect to the email regarding Schoolcraft's suspension status, only Plaintiff, the recipient and any individuals with whom Plaintiff or the recipient shared this email would have access to the information on the document. The only other individuals who would have access other than Plaintiff or Rayman are other journalists. (*Id.* Ex. E at 155, 169). Plaintiff's inability to produce this document and City Defendants' exploration of other possible avenues of obtaining the document demonstrates that the information cannot be reasonably obtained from other available sources. The motion is granted with regards to Subpoena Request No. 3.

With respect to the email containing an excerpt from a tape of an NYPD sergeant, City Defendants have not provided a particularized explanation as to why they are seeking the email; City Defendants presumably want the email for its information on the tape excerpt. The Defendants have numerous recordings from Plaintiff, and the City has not indicated whether they have the recording the email transcribes. City Defendants have not shown that they are unable to reasonably obtain the information contained in the email from alternative sources, and the motion is denied with respect to Subpoena Request No. 2.

The Recordings Made By Plaintiff Of His Co-Workers And Defendants Are Privileged

Subpoena Request Nos. 4, 7, 11, 12, 20 and 21 seek recordings made by Schoolcraft and provided to Rayman. City Defendants state that they have received recordings from Plaintiff, but are concerned that Plaintiff may not have produced the entirety or all of his recordings. The City contends that several recordings mentioned in the Book were not produced by Plaintiff: Subpoena Request Nos. 7, 11 and 12 refer to recordings that the Defendants did not receive from Plaintiff. City Defendants have not made any particularized statement regarding Subpoena Request Nos. 4, 20 and 21, which seek the CD containing all recordings made by Schoolcraft and provided to Rayman, any recordings regarding alleged misconduct by the NYPD and any recordings regarding Schoolcraft's confinement at JHMC. (Mettham Decl. Ex. A).

City Defendants have not shown that any of the recordings are relevant to the litigation. City Defendants central contention regarding the relevancy of these tapes is that they were not produced by Plaintiff but mentioned in the Book. The City has not provided any specific arguments as to why the actual content of the recordings goes to a "significant

issue" in the case. *Gonzales*, 194 F.3d at 36. Moreover, the City has information as to Plaintiff's failure to produce recordings, including a recording obtained by the Internal Affairs Bureau of the NYPD ("IAB"). (Reply at 6). City Defendants seek these recordings for a "solely cumulative purpose," to show that Plaintiff altered potential evidence, which cannot defeat the reporter's privilege. *Burke*, 700 F.2d at 78. The Motion is denied with regards to Subpoena Request Nos. 4, 7, 11, 12, 20 and 21.

The Crime Complaint Reports Are Protected Documents

Subpoena Request No. 6 seeks a copy of "questionable crime reports [Schoolcraft] gave [the NYPD's Quality Assurance Division ('QAD')] which Schoolcraft provided to Rocco Parascandola." (Mettham Decl. Ex. A). Plaintiff has claimed that the NYPD "stole" these crime complaint reports from Plaintiff's apartment on October 31, 2009. The Book suggests that Plaintiff provided the crime complaint reports to Rayman following the October 31, 2009 incident.

City Defendants seek information as to the veracity of Plaintiff's allegations and whether or not Plaintiff was still in possession of the reports after the October 31, 2009

incident. However, Subpoena Request No. 6 would not provide this information for the former, only the latter. The City contends that possession of the reports by Rayman would exonerate the City with respect to Plaintiff's claims that the NYPD stole his evidence of NYPD misconduct. But City Defendants have not sufficiently shown how Rayman's possession of the crime complaint reports or a copy thereof would be relevant to Plaintiff's allegations of theft, and the City has not claimed that Plaintiff has denied having copies of the crime complaint reports. The relevant issue is the NYPD's conduct and motivation for such in the October 31, 2009 incident. Obtaining copies of the reports in Rayman's possession would not provide any insight as to the truth of Plaintiff's version of the October 31, 2009 incident. The City's motion with regards to the crime complaint reports is denied.

The Memoranda From Plaintiff Regarding NYPD Misconduct *Is Not Privileged*

Subpoena Requests Nos. 8 and 10 seek two written memoranda Plaintiff alleges to have written to former 91st Precinct Commanding Officer Deputy Inspector Robert Brower in 2006 and 2007 regarding NYPD misconduct. The Book indicates that Plaintiff provided copies of these memoranda to Rayman.

(Mettham Decl. Ex. E at 41, 44). City Defendants have searched for and are unable to locate any record of these memoranda being provided to any employees of the NYPD. The Court has previously ordered Plaintiff to produce the memoranda, but Plaintiff insists that the memoranda are no longer in Plaintiff's possession.

The existence of the memoranda and the information contained therein are relevant to Plaintiff's claims of retaliation from his whistle-blowing of illegal practices at the 81st Precinct. It is a disputed material issue of fact regarding what alleged misconduct Plaintiff was aware of at the 81st Precinct, whether he was retaliated against as a result of such whistle-blowing and whether the memoranda actually exists. Obtaining the memoranda would provide information on all of these issues.

While the Plaintiff has testified regarding these alleged memoranda, the memoranda have not been produced through discovery and the NYPD and City Defendants have been unable to locate them. As far as City Defendants are aware, Rayman is the only individual who has a copy of these documents. City Defendants have shown that the memoranda are of likely relevance to a significant issue that is not reasonably obtained from

other available sources. The motion with regards to Subpoena Requests Nos. 8 and 10 is granted.

The Letter Firing Prior Counsel Are Protected By Privilege

Subpoena Request No. 13 seeks a letter from Plaintiff firing his prior counsel. City Defendants contend that the letter indicates that Plaintiff had fired his prior counsel because he wanted "a more media-driven, public airing than is now occurring" in the litigation. (Def. Br. at 15). This statement was referred to in an article by Leonard Levitt. City Defendants note that at oral arguments on November 13, 2013, Plaintiff made representations to this Court that the Levitt statement was false. The Court permitted the City to depose Plaintiff to determine whether he provided a copy of this document to any third parties; City Defendants noticed Plaintiff's deposition but also offered Plaintiff the ability to avoid the deposition if he agreed to sign an affidavit indicating that he did not provide the document to any third parties. Plaintiff has refused to sit for the deposition or sign the proposed affidavit. The Book suggests that Rayman may have a copy of the letter. (Mettham Decl. Ex. E at 240).

City Defendants have not shown that the letter or that

Rayman's possession of the letter is a "significant issue in the case." The City has the Levitt article and the Book, both of which refer to the letter. City Defendants seek the letter presumably to show Plaintiff as a source of media "leaks," which the City contends have plagued this lawsuit. Notwithstanding this concern, media leaks are peripheral issues in this litigation and not a significant issue in the parties' cases. The City has not shown the relevancy of the letter, or how it is important to any of the issues raised by Plaintiff's or Defendants' cases. Given such, the motion with respect to Subpoena Request No. 13 is denied.

The Documents Received From Larry Schoolcraft Are Protected By Privilege

Subpoena Requests Nos. 15, 17 and 19 seek documents in the possession of Rayman that he received from Larry Schoolcraft. Larry Schoolcraft was ordered by the Honorable Judge Peebles in the Northern District of New York to appear for a deposition and to produce the requested documents on December 11, 2013. (Mettham Decl. Ex. N). However, no documents were brought by Larry Schoolcraft to his deposition.

As an initial matter, City Defendants seek these

documents based on their belief that Larry Schoolcraft provided the documents to Rayman. The City does not know what specific documents, if any, were actually provided. They have not provided any information as to whether Rayman even has the documents. As previously noted, a party "will not be granted unfettered access to 'sift through [journalists] files in search of information supporting [his] claims.'" *Sikelianos*, 2008 WL 2465120, at *1 (quoting *Gonzales*, 194 F.3d at 35 (alterations in original)). City Defendants, with these unspecified Requests in the Subpoena, has failed to make the necessary showing to overcome the asserted privilege.

The Agreements And Contracts Between Rayman And Schoolcraft And Larry Schoolcraft Are Protected

Subpoena Requests Nos. 22 and 23 seek any agreements, contracts or proof of payment to Schoolcraft or Larry Schoolcraft from Rayman. City Defendants seek this information on the grounds that whether Plaintiff made any money from his story regarding NYPD misconduct bares on Plaintiff's bias and motivations in bringing this lawsuit. The City has not provided any information as to whether the information at issue is not reasonably obtainable from other available sources. It is possible that whether Plaintiff or Larry Schoolcraft received

payment from Rayman can be determined from other documentary evidence or from the deposition of Plaintiff or Larry Schoolcraft. Thus, these requests cannot be compelled. *See, e.g., Sikelianos*, 2008 WL 2465120, at *1 (where information sought was available from other sources, privilege could not be overcome).

The Motion Is Denied With Respect To Moot Requests

Due to intervening circumstances, Subpoena Requests Nos. 1, 9, 13, 22 and 23 are now moot. The motion with respect to these Subpoena Requests is denied.

There Is No Undue Harm Or Burden On Rayman

Rayman has objected to the production of the documents in Subpoena Requests Nos. 1 through 13, 22 and 23 on the basis that these requests are unduly burdensome. With regards to the Requests that are not protected by privilege, the Subpoena provides substantial detail as to the exact document it seeks. Finding such documents will likely not cause Rayman a significant amount of time or cost, and the Subpoena with respect to these documents will not cause undue harm or burden on Rayman.

Conclusion

Upon the conclusions set forth above, City Defendants' motion to compel is granted with respect to Subpoena Requests Nos. 3, 5, 8 and 10. The City's motion is denied with respect to all other Subpoena Requests.

It is so ordered.

New York, NY
April 18, 2014

Sweet

ROBERT W. SWEET
U.S.D.J.