EXHIBIT L

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September 9, 2013

Honorable Robert W. Sweet
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 1007

Schoolcraft v. The City of New York, et al.,
10-cv-6005 (RWS)

Dear Judge Sweet:

I am writing to Your Honor to request that the Court enter an order permitting the plaintiff, Officer Adrian Schoolcraft, to review materials that have been designated by the City Defendants as subject to the attorney's-eyes-only limitation, including numerous statements by witnesses and by individual defendants taken by the NYPD during the course of its internal investigation of the claims asserted by Officer Schoolcraft. In addition, I write to request that the Court order the City Defendants to return to Officer Schoolcraft all of his personal property that was taken from him on and after October 31, 2009, when he was unlawfully arrested and imprisoned at Jamaica Hospital by the NYPD. Finally, I write to respond to the August 21, 2013 letter from the City Defendants' counsel regarding the discovery that the plaintiff has recently provided to the City Defendants.

The Attorney's-Eyes-Only Limitation

On October 4, 2012, the Court executed a Protective Order that permitted the designation of certain document discovery on an attorney's-eyes-only basis (hereinafter "AEO"). A copy of the Protective Order is attached as Exhibit A.

The AEO Protective Order states that the City Defendants deemed certain documents as highly sensitive and confidential, including, as examples, arrest records protected under N.Y.C.P.L 160.50, documents implicating privacy interests and safety concerns of non-parties, and documents subject to the investigative, law enforcement, and deliberative process privileges. (*Id.* at p.1; second whereas clause.) Where the City Defendants believe that there is good cause under FRCP 26(c) for a AEO designation, the Protective Order permits the City Defendants to designate as AEO certain personnel and disciplinary records of NYPD members and certain documents pertaining to investigations of NYPD members, subject to a challenge to that designation. (*Id.* ¶ 2 at pp. 2-3.) To resolve any disputes over that designation, the Protective Order provides that the plaintiff must object to the AEO designation in writing within 60 days and then the parties must seek to resolve the objection in good faith. If the objection cannot be resolved, the Protective Order provides that the City Defendant must move for an order approving of its AEO designations. (*Id.* ¶ 5 at p.4.)[1]

Five days after the Protective Order was entered, on October 9, 2012, the City Defendants produced an extensive amount of material subject to the AEO designation. Attached as Exhibit B is the City Defendants' transmittal letter, identifying Internal Affairs Bureau ("IAB") interviews of 44 witnesses and parties in this action as subject to the AEO limitation. (Exhibit B at pp. 1-2.) As a result of these designations, Officer Schoolcraft has been prohibited from reviewing the transcripts and memoranda pertaining to these witness and party statements as well as the actual tape recordings of the IAB interviews of these witnesses and parties. (*Id.*)

When the City Defendants refused to consent to lift the AEO designation, Officer Schoolcraft's prior counsel, Jon L. Norinsberg, wrote to the Court on

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[1] The operative language of the Protective Order contains a typographical error stating that it is the plaintiff's obligation to seek an order approving the AEO designation, but the context makes clear that it is the City Defendant's obligation to seek the order approving the designation. The last two sentences of paragraph 5 state: "If plaintiff objects to the designation of particular documents as "Confidential Materials-Attorneys' Eyes Only" plaintiff shall state such objection in writing to the defendants within 60 days of receipt, and the parties shall endeavor in good faith to resolve such objection. If such objection cannot be resolved, the plaintiff [sic, the defendant] shall move for an order approving such designation." *Id.* ¶ 5 at p. 4.

October 18, 2012, seeking an order permitting Officer Schoolcraft access to the AEO materials. A copy of Mr. Norinsberg's October 18, 2012 letter to the Court together with its exhibits is attached as Exhibit C. The City Defendants' October 26, 2012 response is attached as Exhibit D.

On November 7, 2012, the Court conducted a conference on the AEO application and other matters in this action. Based on subsequent correspondence, I understand that the Court told the parties that Officer Schoolcraft should, at the very least, be permitted to review the witness and party statements and directed the parties to work in good faith to reach agreement on the matter. Later that month, however, Mr. Norisberg was relieved as counsel for Officer Schoolcraft, and the matter was not raised for several months while Officer Schoolcraft was in the process of obtaining the undersigned as new counsel.[2]

On July 25, 2013 and on August 22, 2103, while the attorneys for all parties were discussing the new discovery plan for this action, I raised again the issue about the AEO limitation with counsel for the City Defendants and was told that I should designate the specific documents that I believed Officer Schoolcraft had a right to review. On August 30, 2013, I sent the City Defendants a letter requesting that the documents and the tape recording limitation be lifted. That letter is attached as Exhibit E.

Although this AEO request has been outstanding for a substantial period of time and notwithstanding the Court's prior statements about lifting the AEO limitation, the City Defendants have not provided any kind of response to my requests in July and August to permit Officer Schoolcraft to review the AEO materials. Indeed, pursuant to the Discovery Plan executed by the Court on August 30, 2013 (Docket # 162; entered September 5, 2013), depositions in this action will be going forward at the end of his month and the beginning of next month. As such, further delay by the City Defendants compounds the unfairness to Officer Schoolcraft by precluding him from reviewing witness and party statements.

There is no basis in the law for sustaining the AEO designations by the City Defendants. Under Rule 26(c) of the Federal Rules of Civil Procedure, the party seeking to depart from the general rule of openness and transparency in the judicial

[2] It should be noted that one of the reasons that Mr. Norisberg was relieved by Officer Schoolcraft was because Mr. Norisberg agreed to enter into the AEO limitation without Officer Schoolcraft's knowledge or consent.

process has the burden of showing that good cause exists for the issuance of a protective order. *Gamble v. Deutsche Bank*, 377 F. 3d 133, 142 (2d Cir. 2004); *see also Schiller v. City of New York*, 2007 U. S. Dist. Lexis 4285 at *16-17 (S.D.N.Y. Jan. 17, 2007) (party seeking to sustain confidentiality designation has the burden of proving good cause where the parties entered into a stipulated protective order that provides a mechanism for challenging a designation; rules for "modification" of an existing protective order do not apply). And the good cause required to shield the disclosure of evidence cannot be satisfied based on generalized or conclusory assertions of need or harm. Instead, good cause must be based on particular and specific demonstrations of facts showing that "disclosure will result in a clearly defined, specific and serious injury." *Schiller, at supra,* p.*17 (quoting *In re Terrorist Attacks*, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006)); *see also Haven v. Metropolitan Life Ins. Co.*, 1995 U. S. Dist. Lexis 5183 at * 29 (S.D.N.Y. April 20, 1995) (specific facts required); *Allen v. City of New York*, 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006) (disclosure must threaten a clearly defined and serious injury).

In this case, the City Defendants failed to seek an order approving of their AEO designations, as required by the terms of the Protective Order; they have repeatedly failed to address requests to lift the limitation; and they have failed to identify any specific harm that could arise from disclosure. As such, the Court should find that all of the AEO designations should be lifted. In addition, as noted by Officer Schoolcraft's prior counsel, the AEO designations should be lifted because they were created for the purpose of permitting discovery to proceed while the City Defendants undertook discovery on the issue of whether Officer Schoolcraft was the individual who provided Graham Raymond of the *Village Voice* with a report by the Quality Assurance Division of the NYPD. Since the City Defendants have failed to present or obtain any such evidence, the extraordinary AEO limitation ought to be removed. (*See* Exhibit C at pp. 1-2.)

In the City Defendants' October 26, 2012 response to Officer Schoolcraft's first application on the AEO issue (Exhibit D), the City Defendants claimed that Officer Schoolcraft failed to satisfy the standard for the "modification" of an existing protective order. (*Id.* at pp. 2-3.) That is a meritless argument because the Protective Order provides for a mechanism for resolving objections to AEO designations, and therefore, as a matter of law the Protective Order does not vitiate the City Defendants' burden of proving that its AEO designations satisfy the good cause requirement of FRCP 26(c). *Schiller, supra,* is directly on point.

The other sundry justifications offered by the City Defendants in their October 26th letter also fail. Employment records of NYPD employees that are generally protected by the New York Freedom of Information Act do not contain the kind of truly sensitive information that could justify an AEO designation and there is an existing confidentiality order that should apply to that information. The City Defendants certainly failed to come forward with any specific harm that would result from any specific disclosure, as the law requires. In addition, "ongoing" investigations by the NYPD also do not merit AEO protection because those investigations have now been completed. Background checks on non-parties ought to be disclosed because that type of information is particularly relevant to a party's or a witness's credibility and motivations for testifying. Finally, concerns about the privacy of citizens who were the victims of criminal conduct or about personal medical information are bogus concerns because the City Defendants redacted that information even in the AEO documents that they produced to Officer Schoolcraft's attorneys.

Since the City Defendants utterly fail to provide any concrete facts showing any specific harm that could result from disclosure, the AEO designations should be lifted. Fundamental notions of due process require that Officer Schoolcraft be permitted to review *all* the evidence in this case, including the witness and party statements, the IAB and QAD investigation files, the relevant employment records, and the witness and party background checks. There is no basis for claiming that Officer Schoolcraft leaked confidential information to the media in this case. Indeed, a recent book entitled *The NYPD Tapes* by Graham Raymond, the *Village Voice* reporter who obtained the QAD report that became the genesis for the AEO Protective Order, contains information that suggests that Mr. Raymond, like other New York City reporters covering the NYPD, has confidential sources inside the NYPD.

Officer Schoolcraft's Personal Property

I am also requesting that the Court order the City Defendants to return to Officer Schoolcraft all of his personal property that the NYPD took from him on or after October 31, 2009. Despite several requests, the City Defendants have simply refused to give him back his property, which includes the tape recorder that he used to record various of the key events in this action, various papers that were in his apartment the night he was unlawfully arrested, and his father's rifle. When I specifically raised this request on July 25, 2013 with counsel for the City Defendants no justification for keeping Officer Schoolcraft's property was

provided and, as noted above, the City Defendants have ignored my August 30th letter, which reiterated this request.

The City Defendants' Discovery Letter

The City Defendants claim in their August 21, 2013 letter to the Court that Officer Schoolcraft has failed to comply with his discovery obligations. The City Defendants claims are meritless.

We have already stated in writing that, other than the information already provided, Officer Schoolcraft has no additional information pertaining to retaliation against Officers Pallestro and Polanco. That ought to be the end of the matter, yet the City Defendants persist with this meritless application that can only be designed to make work for opposing counsel and impose needless (and endless) discovery burdens on the plaintiff.

In addition, on July 25th I informed counsel for the City Defendants that the address for Officer Schoolcraft's father was the same address as the one contained in the discovery records in this case. Thus, the City Defendants complain about not being provided with information that they already have.

Finally, the City Defendants complain that our amplification of Officer Schoolcraft's deposition testimony about the contents of the numerous tape recordings is not sufficient. The City Defendants' complaints, which are of their own making, are as endless as they are meritless. During the course of a poorly organized examination of Officer Schoolcraft, he testified that many of the specific areas that the City Defendants were asking about were contained in the numerous tape recordings that are a substantial part of this action's discovery record.

Earlier this summer, the City Defendants requested that Officer Schoolcraft review his deposition and provide further specificity as to which tapes contained information about the various subject matters he was asked about during his deposition. The City Defendants did *not* identify any specific questions that they claimed needed further amplification; indeed, as noted above, the examination was so poorly organized and conducted that any such specificity was impossible. Accordingly, we reviewed the transcript, and reviewed the tapes over a sustained period of time, and then provided in good faith the amplification that we believed was required. (*See* Response to Court Order, dated July 1, 2013; attached as Exhibit A to the City Defendants' August 21, 2013 letter.)

Now the City Defendants claim that Officer Schoolcraft failed to provide specific answers to "specific" questions. As noted above, the City Defendants in their first request did not identify any specific questions that needed amplification. Moreover, in this second request for the same information the City Defendants again fail to point to any *specific* question that needs to be answered. And that is precisely because the substance of the information has been provided and the City could not, did not and has not pointed to any specific question that remains unanswered. Thus, the City Defendants are simply seeking to burden the plaintiff with wheel-spinning exercises that have no good faith element to them. We ask the Court to inform the City Defendants that meritless discovery complaints are subject to cost-shifting under Rule 37 of the Federal Rules of Civil Procedure.

* * *

The AEO designations should be lifted because Officer Schoolcraft has a right to review the statements of witnesses and parties and the other evidence in the record, and the genuinely sensitive information about arrestees and about employee medical histories have already been redacted. His property should be returned to him because no justification for keeping it exists. And the City Defendants discovery complaints should be dismissed with a warning that sanctions can be imposed for meritless applications. Attached as Exhibit F is a proposed order resolving these letter applications.

Respectfully submitted,

Nathaniel B. Smith

By Hand
cc: All Counsel by email

Sweet, J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADRIAN SCHOOLCRAFT,

Plaintiff,

THE CITY OF NEW YORK, et al.

Defendants.

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STIPULATION AND PROTECTIVE ORDER FOR ATTORNEYS EYES ONLY

10 CV ~~4228~~ (RWS)

6005

WHEREAS, plaintiff seeks certain documents from defendants the City of New York, and NYPD defendants Deputy Chief Michael Marino, Assistant Chief Gerald Nelson, Deputy Inspector Steven Mauriello, Captain Theordore Lauterborn, Lieutenant Joseph Goff, Sgt. Frederick Sawyer, Sergeant Kurt Duncan, Lieutenant Christopher Broschart, and Sergeant Shantel James, (collectively referred to herein as "City Defendants") in discovery in this action, documents which City Defendants deem confidential;

WHEREAS, the City of New York deems certain of these documents, which include information regarding non-parties to this litigation that is or may be sealed pursuant to N.Y. C.P.L. §160.50, that implicates the privacy interests and safety concerns of non-parties to this action, that is of a confidential and sensitive nature, that is subject to the investigative, law enforcement, and deliberative process privileges;

WHEREAS, the production of documents subject to the Attorneys' Eyes Only Stipulation and Protective Order is not a waiver of the abovementioned privileges;

WHEREAS, the City of New York objects to the disclosure of this information and production of any documents containing this information unless appropriate protection for the confidentiality of such information is assured;

WHEREAS, the City of New York has previously produced records to pursuant to a

Confidentiality Agreement, which was so-ordered by the Court on March 12, 2012, and which governs the disclosure of confidential materials in this action; and

WHEREAS, the City of New York wishes to ensure that the production of any additional confidential documents produced during discovery will not be disclosed to any third parties, including the plaintiff and any individually named defendants in this action, unless and until such disclosure is expressly authorized by the Court; and

WHEREAS, all parties to this action wish to proceed forward with discovery in an expeditious and timely manner, without any further delays:

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for plaintiff and defendants, as follows:

1. Until such time as the Court orders otherwise, the production of any confidential information from this point onward should be for ATTORNEYS' EYES ONLY, and should be disseminated only to plaintiff's and defendants' counsel, to investigators working for and at the direction of plaintiff's and defendants' counsel, and to expert witnesses who may in the future be retained and work for and at the direction of plaintiff's and defendants' counsel;

2. As used herein, "Confidential Materials-Attorney's Eyes Only" shall mean all documents and the information contained therein as to which a party believes good cause under Fed. R. Civ. P. 26(c) exists for limiting public access. Subject to any challenge that may be brought under this order, City defendants shall designate as "Confidential Materials-Attorney's Eyes Only" all documents and the information contained therein relating to personnel of the New York City Police Department ("NYPD"), other than plaintiff in this action, except where otherwise specified in subsection (a), including, but not limited to, (a) (a) New York City Police Department ("NYPD") personnel and disciplinary-related records, and records of investigations regarding the conduct of Members of the Service of the NYPD conducted by the NYPD, the

Civilian Complaint Review Board, or other agencies; (b) files maintained by the NYPD's Quality Assurance Division ("QAD") with respect to any investigation, including but not limited to plaintiff; (c) personnel files and the information contained therein including, but not limited to, information regarding, promotions, discipline, evaluations; (d) copies of any documents containing information about any actual or potential personnel action taken with respect to personnel of NYPD other than plaintiff in this action, including, but not limited to, copies of investigation files, disciplinary files, Employee Management Division ("EMD") files; (e) Civilian Complaint Review Board Records; (f) any other documents identified by City defendants as confidential under the "good cause" standard of Fed. R. Civ. P. 26(c).; (g) any documents that the Court directs to be produced subject to this order; (h) any testimony concerning subsection (a), (b), (c), (d), (e), (f), and (g) and documents and the information contained therein; and (i) any other documents that the defendants may in the future in good faith deem "Confidential Materials-Attorneys' Eyes Only" pursuant to this Order because of privacy, security, law enforcement, or governmental interests.

3. Documents and information shall not be deemed "Confidential Materials-Attorneys' Eyes Only" to the extent, and only to the extent, that they are (a) obtained by plaintiff from sources other than defendants; (b) obtained by plaintiff from defendants but not designated "Confidential Materials – Attorneys' Eyes Only" (c) are otherwise publicly available, or (d) if this Order or any Confidentiality Order in this case is superseded by Order of the Court.

4. The "Confidential Materials – Attorneys' Eyes Only" shall not be disclosed to any of the parties to this action until such time these documents become publicly available or ordered by the Court.

5. The defendants shall designate in good faith particular documents "Confidential Materials-Attorneys' Eyes Only" by labeling such documents "Confidential Materials-Attorneys'

Eyes Only" and/or by designating such documents by Bates Number in a writing directed to plaintiff's counsel. The City Defendants shall have a reasonable time to inspect and designate as "Confidential Materials-Attorneys' Eyes Only" documents sought by subpoena from third parties that are represented by the Office of Corporation Counsel of the City of New York, and such documents, if produced to plaintiff, shall be treated as "Confidential Materials-Attorneys' Eyes Only" during such reasonable period. If plaintiff objects to the designation of particular documents as "Confidential Materials-Attorneys' Eyes Only" plaintiff shall state such objection in writing to the defendants within 60 days of receipt, and the parties shall endeavor in good faith to resolve such objection. If such objection cannot be resolved, then the plaintiff shall move for an order approving such designation.

6. Neither plaintiff, plaintiff's attorney, nor the Co-Defendants or their attorneys in this matter shall use the Confidential Materials for any purpose other than for the preparation or presentation of plaintiff's case or defendants' defense in this action. In addition, any party may use the Confidential Materials for cross-examination or impeachment purposes, and Confidential Materials maybe used in support of, or opposition to, any summary judgment motions, provided that the Confidential Materials are appropriately redacted for ECF filing, pursuant to the provisions of paragraph 6, *infra*. To the extent that confidential records are used by either side in the trial of this action such records shall no longer be deemed confidential under the terms of this agreement and maybe used by any party without restriction. A party intending to use any confidential records at trial shall provide prior notice of intent to use the confidential records to all other parties, and provide the all other parties the opportunity to address the Court regarding whether documents should be excluded from evidence or admitted only in redacted form.

7. Plaintiff's attorneys shall not disclose the "Confidential Materials-Attorneys' Eyes Only" to any person who is not a member of the staff of their law office, an investigator

working at the direction of plaintiff's counsel, or to expert. In the event a conflict arises between the parties as to whether plaintiff's attorneys may disclose the information or documents to a potential deponent, or other person whom counsel reasonably believes may have knowledge of the information described or referred to in the "Confidential Materials-Attorneys' Eyes Only", plaintiff's attorneys agree not to do so until such time that the parties can obtain a ruling from the Court in this regard. Before any disclosure is made to any investigator and/or expert witness, plaintiff's attorneys shall provide each person with a copy of this Stipulation and Protective Order for Attorneys' Eyes Only", and such person shall consent in writing, in the form annexed hereto as Exhibit "A", not to use the Confidential Materials for any purpose other than in connection with their own work performed in connection with this case, and not to further disclose the "Confidential Materials-Attorneys' Eyes Only". The signed consent shall be retained by plaintiff's attorneys and copies provided to counsel for the defendants upon written request for same.

8. Deposition testimony concerning any Confidential Materials which reveals the contents of such materials shall be deemed confidential, and the transcript of such testimony, together with any exhibits referred to therein, shall be separately bound, with a cover page prominently marked "CONFIDENTIAL MATERIAL-ATTORNEYS' EYES ONLY." Such portion of the transcript shall be deemed to be Confidential Materials within the meaning of this Stipulation and Protective Order.

9. If any paper which incorporates any Confidential Materials or reveals the contents thereof is filed in this Court, those portions of the papers shall be delivered to the Court enclosed in a sealed envelope bearing the caption of this action, an indication of the nature of the contents, and the following legend:

CONFIDENTIAL MATERIAL-ATTORNEYS' EYES ONLY

This envelope contains documents or information designated confidential pursuant to an order entered by the United States District Court for the Southern District of New York in the above-captioned action. This envelope shall not be opened or unsealed without the express direction of a judge of this Court, and its contents shall not be displayed or revealed except as the Court may order. This envelope and its contents shall at all times be maintained separate and apart from the publicly available files of this case.

10. With the exception of any documents or deposition testimony which are used during the trial of this action or otherwise no longer deemed Confidential Materials by the Court, as authorized in this agreement, the parties agree that within thirty (30) days after the termination of this case (including any appeals) or upon written request of the City Defendants, whichever is later, the Confidential Materials, including all copies, notes, and other materials containing or referring to information derived therefrom, shall be returned to City defendants' attorney or, upon their written consent, destroyed, and all persons who possessed such materials shall verify their return or destruction by affidavit or certification furnished to City defendants' attorney; plaintiff's and Co-Defendants' attorneys shall represent that all Confidential Materials have been returned; provided that notes and other materials that are or contain the work product of attorneys may be retained. However, any such retained work product shall not be used by said attorneys for any purposes unrelated to this litigation.

11. Should the City Defendant's produce any Confidential Materials that have portions redacted for privilege grounds, such documents or materials shall be accompanied by a log describing the contents of the redacted portions and the grounds on which the City Defendants are redacting such portions of the materials so that the parties can properly raise objections to said redactions with the City Defendants. If such objection cannot be resolved without the Court's involvement, then any party may move for an order removing such

redactions. Nothing in this Stipulation and Protective Order shall prevent plaintiff's counsel from making an application to the Court in the matter of Stinson, et al. v. City of New York, et al., 10-Civ.-4228 (RWS), or any other matter against the City of New York, for disclosure of materials that would otherwise be subject to this Protective Order.

12. The parties may seek modification of this Stipulation and Protective Order, and the parties may seek review of confidentiality designations under this Order by application to the Court for good cause shown at anytime during the course of this litigation.

13. Facsimile signatures or signatures transmitted electronically shall have the same force and effect as if signed in the original.

14. This stipulation shall be binding upon the parties immediately upon signature, and shall be submitted to the Court for entry as an Order.

15. Nothing in this Stipulation and Protective Order shall be construed to limit City Defendants' use of the Confidential Materials in any manner.

Dated: September 19, 2012
New York, New York

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SO ORDERED:

10.3.12

U.S.D.J.

EXHIBIT A

The undersigned hereby acknowledges that he is an investigator and/or expert witness working for and at the direction of plaintiff's or defendant's counsel in the action title Schoolcraft v. City of New York, et al., 10 CV 4228 (RWS), has read the Stipulation and Protective Order entered in the United States District Court for the Southern District of New York on September 19, 2012, in that action, and understands the terms thereof. The undersigned agrees not to use materials designated "Confidential Materials-Attorneys' Eyes Only" as defined therein for any purpose other than to locate non-party witnesses in connection with the prosecution or defense of this case, and will not further disclose such information.

_____ _____

Date Signature

_____

Print Name

_____

Occupation