UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.
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ORDER

15-CV-05236 (LTS) (KHP)

KATHARINE H. PARKER, UNITED STATES MAGISTRATE JUDGE

Plaintiffs in this case challenge New York City's Community Preference Policy applicable to lottery applicants for certain affordable housing projects. They contend that the City's policy is discriminatory and perpetuates segregated housing across the City. A major component of Plaintiffs' proof will include opinions from its expert based on statistical analysis of lottery applicant data, which Plaintiffs contend will support their allegations of discrimination. The City, in turn, will present its own statistical expert in defense of its position that the policy is lawful and non-discriminatory. Presently before the Court is Plaintiffs' motion to modify the Protective Order and de-designate information contained in their expert reports and the expert reports themselves as confidential.

BACKGROUND

At the outset of this case, the Court issued a pre-trial conference order directing the parties not to file expert disclosures on ECF.[1] (ECF No. 53) Shortly thereafter, on February 10,

[1] Expert reports themselves generally are not admitted at trial on the grounds that they are hearsay or contain information that is redundant of testimony. Rather, experts testify and may introduce certain exhibits to explain their opinions on issues relevant to the claims and defenses or damages. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); See, e.g., *Engebretsen v. Fairchild Aircraft Corp.,* 21 F.3d 721, 729 (6th Cir. 1994) (holding that admission of expert reports was erroneous; explaining that experts are entitled to testify as

2018, this Court issued a Stipulated Protective Order governing pre-trial discovery pursuant to Federal Rule of Civil Procedure 26(c). (ECF No. 82) The Protective Order states that "counsel for any party may designate any document or information, in whole or in part, as 'CONFIDENTIAL' if counsel determines, in good faith, that such designation is necessary to protect . . . otherwise sensitive non-public information." *Id*. ¶ 1. Extracts and summaries of information designated as "CONFIDENTIAL" also must be treated as confidential. *Id*. ¶ 14. Date from the City's Housing Connect database, data and information about lottery applicants and lottery outcomes and similar data from other data are specifically designated as "CONFIDENTIAL."[2] *Id*., Addendum to the Protective Order. "Analyses derived from or obtained" from such data may not be used except in connection with this action and must be treated as confidential. *Id*. The party receiving party may challenge another party's designation of confidentiality and seek relief from the Court from the restrictions on confidentiality.[3] *Id*. ¶¶ 3, 17. The Protective Order explicitly provides that "[n]otwithstanding the designation of information as 'CONFIDENTIAL' in discovery, there is no presumption that such information shall be filed with the Court under seal." Id. ¶ 9. If a designating party makes public

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to their opinions and rely on inadmissible evidence, but neither their written opinions nor the materials on which they relied are admissible under FRE 702 and 703); *but see NAACP v. A.A. Arms, Inc.,* 2003 WL 2003750, at *1 (E.D.N.Y. Apr. 4, 2003) ("As a general matter the admission of written expert reports into evidence when the expert has testified orally at trial is not redundant. Having available an expert's comprehensive written report may help a jury to more fully understand and evaluate that expert's testimony and conclusions and their impact on the case. Oral testimony is often chopped up and hard to follow. In some instances, the proponent may simply offer the report, subject to cross examination") (cited in The Litigation Manual: Supplement 1998–2004 518 (Priscilla Anne Schwab, 3rd ed. 2007); *Sommerfield v. City of Chicago,* 2008 U.S. Dist. LEXIS 88760, at *38–41 (N.D. Ill. 2008)).

[2] The data is not available to the general public through the Freedom of Information Law in order to both safeguard the confidentiality of highly sensitive private information and prevent the incorrect manipulation of complex, sensitive data. (ECF No. 148)

[3] Indeed, this Court ruled that Plaintiffs would be permitted to seek leave to publicly file their data analyses later in the litigation, if necessary. (Doc. No. 85 at 19:23-20:22).

information previously designated as confidential, the receiving party in no longer restricted from disclosing the information. *Id*. ¶ 12.

In June 2017, Plaintiffs' counsel moved for permission to file on ECF a preliminary report from their statistical expert in connection with a motion to compel certain discovery. The expert report analyzed Housing Connect and lottery applicant data and was clearly confidential pursuant to the Protective Order. This Court denied that request, stating "[i]f and when final expert reports may need to be filed with the Court, the parties can address whether the Protective Order should be lifted and the reports publicly filed. In the meantime, analyses of the confidential affordable housing lottery data will remain subject to the Protective Order." (ECF No. 148)

Plaintiffs now move for modification of this Court's prior orders and removal of any designation of confidentiality as to information in their statistical expert's reports and their statistician's analyses to be removed. There are four such reports, one dated April 1, 2019, one dated May 10, 2019, a June 2019 "supplement" to the April 2019 report, and the Preliminary Report from 2017 which is also attached to the April report. The City does not object to removal of the confidentiality designation on the May 10, 2019 report. The City also agrees to the removal of the confidentiality designation to the majority of the April 1, 2019 report and its attachments and has submitted a version showing limited redactions to "prevent the disclosure of private information about housing lottery applicants and recipients."[4] None of the reports

[4] The City seeks redactions to Exhibits 3 and 8, as well as small portions of Exhibits 2, 4 and 7 to the April 1, 2019 report, and 2 columns of Exhibits 4 and 5 (the same material being redacted in Exhibits 4 and 5) to the Preliminary Report (annexed to the April 1, 2019 report as a Supplement). In addition, the City seeks minimal redactions of 2 paragraphs of the Preliminary Report and 2 paragraphs from the April 1, 2019 report.

or their exhibits contain any personally identifying information about individual lottery applicants or awardees. They City's stated concern is that an enterprising person could review the reports and other publicly available information to discern the race/ethnicity, address, and income status of individuals awarded affordable housing. The redactions generally cover:

- Text and an exhibit related to affordable housing unit types where there were at least five non-disability awards to households from within the Community District and no such awards to households from outside the Community District.
- Affordable housing project names and numbers.
- Demographics of the Community District or, in some cases, a slightly broader area for which the Community Preference was applied.
- The number of persons awarded affordable housing units from lotteries in a Community District "typology" (based on whether the Community District is majority White, Black, Hispanic or Asian).
- The address of an affordable housing project and text concerning how the Community Preference Policy impacted the building.
- For each affordable housing project analyzed, the number of lottery applicants, the percentage of such applicants from within the Community District by race/ethnicity, and the percentage of all such applicants by race/ethnicity.

The City also complains that Plaintiffs' counsel's motivation for removing the confidentiality designations has nothing to do with the litigation; rather it is to litigate the case through the press and the "court of public opinion." The City points to a news article regarding this very motion entitled "*Redacted: the Racial Data The DeBlasio Administration Doesn't Want You to See*," https://thecity.nyc/2019/redacted-the-racial-data-city-hall-doesnt-want-you-to-see.html. It states that it believes Plaintiffs' expert reports are "flawed, misleading and often irrelevant" and that discovery "should not be abused under the guise of facilitating 'public debate.'" (ECF No. 771, 753) It therefore asks that to the extent the confidentiality designations are removed, that they be removed effective after the close of expert discovery on August 29, 2019. Plaintiffs do not deny that they intend to speak with the press about this

litigation but ague that the City has attempted to shape public opinion throughout this litigation through tweets about new affordable housing being built in high-opportunity neighborhoods and commitment to fair housing. Indeed, there does not appear to be any purpose at all at this point in the litigation for filing the expert reports on ECF other than in connection with this motion and then to make them readily available to the public.

DISCUSSION

This Court previously found that there was good cause for entry of a Protective Order governing the information contained in Plaintiffs' expert reports and their analyses. (ECF no. 148) But, a court may modify a protective order if, at a later stage in the case, "more specific grounds for its continuance remain indiscernible." *See In re Terrorist Attacks on Sept. 11, 2001*, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006). At the same time, "discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 415 (E.D.N.Y. 2007).

In this case, the Court's prior orders were made prior to knowing the content of the final expert reports and at a very early stage in discovery. Expert reports are now final and expert depositions will be completed in less than six weeks. The City admits that there is not good cause for the vast majority of information and analyses in Plaintiffs' expert's reports to remain confidential. The only issues are (1) whether there is good cause for certain limited information and text in the April 1, 2019 report and its attachments to remain confidential; and (2) whether Plaintiffs should be prohibited from disclosing the reports and information therein until expert discovery closes.

As to the first issue, I find that more specific grounds for continuing to maintain the information as confidential are unpersuasive and do not constitute good cause. As Plaintiffs point out, the information in the reports is anonymized and aggregated. It would be extraordinarily difficult, verging on impossible, for a hypothetical person to identify a specific lottery applicant or awardee from the Reports, let alone such person's race/ethnicity, income or disability status. To the extent exhibits to the Reports list the total number of lottery applicants for each project, the Court notes that there are 2,000 to tens of thousands of applicants—numbers to vast to extrapolate individual identities and information using other publicly available sources of information. To the extent the Reports discuss awardees of affordable housing, they do so only in aggregate numbers and percentages within Community Districts or Community District typologies. Again, there is no way to extrapolate individual identities and information using other publicly available sources of information from this information.

As to the second issue, I find that what the City seeks is tantamount to a limited-time gag order. The Second Circuit has held that "though the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens or on the press, the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." *Salameh,* 992 F.2d at 447 (*citing Gentile v. State Bar of Nevada,* 111 S.Ct. 2720, 2737 & 2744–45) (internal citation omitted).

The City does not argue that the integrity of this Court or the City's right to a fair trial will be impacted by lifting of the confidentiality order six weeks before the close of expert

discovery. Rather, it asks for time to prepare press statements. This is not a sufficient basis to impose a prior restraint on speech, which is "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U .S. 539, 559 (1976); see also *U.S. v. Salameh,* 992 F.2d 445, 446 (2d Cir.1993).

The Court notes that Rule 3.6 of the New York Rules of Professional Conduct ("Rule 3.6") prohibits, *inter alia,* an attorney from making extrajudicial statements that are likely to prejudice a matter in which the attorney is participating. Rule 3.6(a). However, Rule 3.6 specifically provides for certain circumstances under which an attorney is permitted to speak about a pending case with the press, *see id.* at 3.6(c) & (d). The Court also notes that there has been considerable media and scholarly interest in this case and that Plaintiffs' counsel have made comments to the press; however, the City does not suggest, nor does this Court find, that Plaintiffs' counsel has come close to breaching their ethical obligations. Should Plaintiffs or their counsel engage in conduct that could prejudice this matter, the City may make an appropriate application at that time.

Accordingly, Plaintiffs' motion is granted. This terminates the motion at ECF No. 753.

SO ORDERED.

Dated: July 12, 2019
New York, New York

Katharine H Parker

KATHARINE H. PARKER
United States Magistrate Judge