ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION"

June 16, 2017

Hon. Katharine H. Parker
United States Magistrate Judge
500 Pearl Street, Room 1950
New York, New York 10007

Re: Winfield et al. v. City of New York, 15-CV-5236 (LTS) (KHP)

Your Honor:

I write on behalf of plaintiffs to reply to the City's June 12 opposition letter (ECF 136, "City Letter") to plaintiffs' June 5 application that Professor Andrew A. Beveridge's expert report (the "Beveridge Report"), submitted to Your Honor on June 1, 2017 via e-mail, be permitted to be filed publicly on ECF. Critically, it is uncontroverted that the Beveridge Report contains *no* individually identifiable information. Moreover, the City's letter conspicuously omits any claim whatsoever (let alone proof) of *concrete* injury that would result from the Beveridge Report being publicly filed. Just as striking, the City's letter fails to address, much less apply, the governing standards for protective orders or for the treatment of documents filed with the Court. The Beveridge Report, along with plaintiffs' letter of June 1 explaining its relevance to the scope and timing of discovery being weighed by the Court (also filed by email with Chambers), should be properly classified as non-confidential and be permitted to be filed on ECF.

As a preliminary matter, we note that the Beveridge Report fits none of the criteria for being subject to a protective order under Rule 26(c). *See In re Terrorist Attacks on Sept. 11, 2001*, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006) (citation omitted) (holding that, "[o]rdinarily," good cause for a protective order requires a showing of "clearly defined, specific and serious injury"). There is no such injury present. This is not the circumstance where a corporate entity may have business secrets to protect, or where privacy concerns come into play. On the contrary, this lawsuit concerns the conduct of the City's very public business, specifically the City's outsider-restriction policy in its affordable housing lotteries that plaintiffs' claim, *inter alia,* causes a disparate impact and perpetuates segregation on the basis of race. The City simply has no legitimate interest in keeping secret the subjects of the Beveridge Report, to wit: (a) the extent, if at all, to which the odds of insiders (those who live in the community preference area for a lottery) in competing for affordable housing are better than the odds of outsiders (New Yorkers who live outside the community preference area); (b) the extent, if at all, to which the City effectively bestows better odds to compete[1] on the racially dominant group in the community district

[1] The City Letter, at 4 and 4 n.4, reflects a basic failure to appreciate the fact that perpetuation of segregation in *outcomes* is a separate and additional injury from the denial of the opportunity to compete without regard to race. That is why the Court, in denying the City's motion to dismiss, distinguished as an "injury" the "denial of the opportunity to compete on an equal footing for fair housing in their desired neighborhoods, rather than from the failure to achieve a successful result

where the housing is being built; and (c) the extent, if at all, to which applicants for affordable housing lotteries have demonstrated their interest in applying for housing outside of their community district, or even their borough of current residence.

It is not a surprise that the City wants the report kept secret, but, "[w]ithout a concrete showing of harm that would result from public disclosure, the mere fact that the defendants wish to shield from public view [the documents] does not justify a protective order" because if "a party could obtain a protective order based merely on an assertion that it would prefer to keep a document from public view, Rule 26(c)'s 'good cause' requirement would be meaningless." *Schiller v. City of New York* ("*Schiller I*"), 2007 WL 136149, at *8 (S.D.N.Y. Jan. 19, 2007).

Here, of course, the Beveridge Report has been filed with the Court. As such, the standard for keeping the report secret is even more onerous on defendant. As the Second Circuit has plainly held:

> A "judicial document" or "judicial record" is a filed item that is "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) . . . . Such documents are presumptively public so that the federal courts "have a measure of accountability" and so that the public may "have confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) . . . .

Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 139 (2d Cir. 2016). The Beveridge Report is entirely relevant to the performance of the judicial function and useful in the judicial process.

The Court has stated at Conference after Conference that the data analyzed by the Beveridge Report are at the core of the case, are integral to both the intentional discrimination claims on the one hand and the disparate impact and perpetuation of segregation claims on the other, and are critical to the Court's own understanding of the

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in any particular lottery," underscoring that "[t]his distinction was recognized by the Second Circuit in *Comer* . . . ." *Winfield v. City of New York*, 2016 WL 6208564, at *4 (S.D.N.Y. Oct. 24, 2016). In trying to relegate *Comer* to be "only" a standing case, the City ignores not only Judge Swain's decision, but also the fact that *Comer defined* a cognizable injury, one that the Beveridge Report specifically speaks to, as follows: "The injury is not the failure to obtain housing assistance in the suburbs, but is the missed opportunity to compete for suburban housing on an equal footing with the local residents." *Comer v. Cisneros*, 37 F.3d 775, 794 (2d Cir. 1994). This right to compete equally – independent of bottom-line outcome – has been recognized by the Supreme Court. *See Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (holding that "[t]he suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual [black] respondents the opportunity to compete equally with white workers on the basis of job-related criteria"); *see also Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 653 n.8 (1989) (holding where particular practice has disparate impact, case exists "notwithstanding the bottom-line racial balance"), *superseded by statute on other grounds as recognized by Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

case. As such, the Beveridge Report will unquestionably "materially assist the public in understanding the issues before the . . . court, and in evaluating the fairness and integrity of the court's proceedings." *Id.* (citation omitted).

Moreover, plaintiffs explained in their letter accompanying the Beveridge Report why the conclusions of the report commanded broad and speedy discovery. Plaintiffs also made these arguments about the discovery requirements of the case in light of the Beveridge Report at the June 5 Conference.[2] Whether or not the Court accepts plaintiffs' arguments about the discovery needs of the case, the Beveridge report is inextricably linked to those arguments, and the Court has considered them. Just as the Beveridge Report speaks to the central issues of the case, the arguments about discovery for which the report has been used relate to a dispute between the parties about the scope of the case that began months ago and that is still ongoing. The report is inescapably relevant to what the Court will and has decided about the scope and timing of discovery – an essential part of the judicial function – and useful in the judicial process.

The Beveridge Report is the incarnation of what the Court anticipated back in February: "[T]he city is still going to have to justify that it should be filed under seal separately, that's a totally separate question in connection with any public filing. So you [plaintiffs] may very well be filing things publicly, aggregate analysis publicly, as part of filings." Feb. 10, 2017 Conf. Tr. at 20, ECF 85. The City has entirely failed to meet its burden to justify filing under seal. The applicable analysis requires an examination of the role of the material at issue in the exercise of Article III judicial power and the competing considerations, such as "'the danger of impairing law enforcement or judicial efficiency' and 'the privacy interests of those resisting disclosure.'" *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (citations omitted). As already discussed, the Court has identified the material as fundamental to the Court's understanding of plaintiffs' claims, and it will also help inform its discovery decisions. By contrast, the City has not identified any countervailing law enforcement or privacy interest – because there is none.

The City complains that the Beveridge Report is misleading. As it happens, its critique is misguided for a variety of reasons, including the facts that: (a) the issue of outcomes is different from the issue of opportunity to compete; and (b) the City does not determine eligibility in the first instance, but instead ends its distinct first phase of the lottery process by passing along all applicants – identified by, *inter alia*, insider or outsider status – who compete to be selected for the developer's consideration in their respective

[2] *See, e.g.,* June 5, 2017 Conf. Tr. at 10 (after setting out Beveridge Report findings at 7-9, explaining why "from a discovery point of view we think this evidence makes it even more important for discovery to be robust and to be attacked without further delays"); at 67 (describing how Beveridge Report contradicts Deputy Mayor's explanation of what she meant by "diverse" and requires that her explanation be probed); at 91-92 (arguing in connection with discovery from City Council members that the Beveridge Report is powerful evidence that requires the "fullest possible exploration"); and at 95 (speaking to scope of disparate impact and to continuing violation). Because some of these pages reflect Professor Beveridge's analysis, plaintiffs have not attached them as an exhibit at this time. We stand ready to provide them at the court's direction.

"classes" (set-aside and preference applicants must be processed before other applicants).[3]

But even if the report were subject to dispute, that would not be a basis for sealing since, by definition, most of what is presented in litigation is contested (and the Beveridge Report, unlike the circumstances that obtained in *United States v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995) or *Dorsett v. Cty. of Nassau*, 762 F. Supp. 2d 500 (E.D.N.Y. 2011), does not contain any unproven accusations or information about individuals that could harm their reputations). *Cf. Bernstein*, 814 F.3d at 143 (noting that unsealing does not assume the truth of allegations and that the logic behind the argument that unreliability should be grounds for sealing, followed to its logical conclusion, would lead to an "untenable result" of sealing complaints whenever defendants ultimately prevailed).

Just as critical for purposes of deciding the matter before the Court, defendant has the ability – as it demonstrated in its letter – to put forward its own view of the evidence. That is true now, and will certainly be true at trial, when defendant will be entitled both to put forward its own experts and to cross-examine plaintiffs' experts.[4]

In truth, the City is crying crocodile tears when it frets about potential publicity. The City itself has disseminated aggregated data about lottery applicants when doing so has served its purposes. Thus, the City was prepared to provide the *New York Times* – both the reportorial side and the editorial side – with data on the race and ethnicity of housing lottery applicants *overall*, but did not, for example, provide data on how, if at all, the racial demographics of insider applicants for each lottery differ from the racial demographics of all applicants for each lottery.[5] There is nothing wrong with the City shaping the

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[3] That the City states that "large percentages of applicants are not eligible" (City Letter at 4) does not mean that the gap between insider and outsider odds narrows. In any event, the taking of a diverse citywide pool and, as alleged by plaintiffs, replacing that with much more monochromatic community-district based pools cannot help but have a disparate impact in terms of outcomes. *See Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 62 (D. Mass. 2002) ("[T]he overarching intuitive principle" is that, "where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants to its Section 8 program, a selection process that favors its residents *cannot but* work a disparate impact on minorities.").

[4] The City has apparently abandoned its "jury taint" argument, making no reference to it in its letter, but that argument would be to no avail in any event. *See, e.g.*, *Schiller v. City of New York* ("*Schiller II*"), 2007 WL 1299260, at *4-6 (S.D.N.Y. May 4, 2007) (rejecting City's argument that removal of confidentiality designations would "mak[e] it difficult to find jurors who have not seen or heard of [the Documents] before trial" or "have any prejudicial effect upon its right to a fair trial" and finding that generally 'the appropriate course to follow when the spectre of prejudicial publicity is raised is not automatically to deny access but to rely primarily on the curative device of voir dire examination ....' *United States v. Criden*, 648 F.2d 814, 827 (3d Cir.1981); *accord In re Application of National Broadcasting Co.*, 635 F.2d 945, 953-54 (2d Cir.1980) ('The opportunity for voir dire examination still remains a sufficient device to eliminate from jury service those so affected by exposure to pre-trial publicity that they cannot fairly decide issues of guilt or innocence')").

[5] This information is found in an email produced by the City with the Control ID 19107. *See also* Shay Weaver, *City's Affordable Housing Lotteries Favor Young Single People, Stats Show*, DNA

information it gives the press (including sharing the Been declaration with its justifications of the outsider-restriction policy); it is just powerfully disingenuous to conduct a media campaign – arrogating to itself the determination of what a "fair" presentation of aggregated data consists of – while complaining of the prospect of the public taking an interest in the Beveridge Report.

The City's remaining arguments are meritless and often circular.[6] First, it argues that all that the parties have been doing is exclusively in aid of settlement (City Letter at 2). In fact, the parties have been engaged in extensive disputes over discovery that is in aid of plaintiffs' proof on its claims and defendant's proof on its defenses (*i.e.,* litigating the case). The fact that the Court has also encouraged and identified settlement as a laudatory goal does not magically transform this entire litigation into a protracted and protected settlement discussion. Second, the fact that a scheduling order is in place and plaintiffs have moved in an expeditious manner to quickly produce its first expert report in advance of the deadline does not preclude or diminish the report's importance in assisting the Court in understanding the core proof on plaintiffs' claims, or in determining what discovery rulings are to be made. Third, the existence of a Protective Order does not itself mean the materials must remain under seal. The Court was careful to note back in February when it entered a broad Protective Order that it was doing so primarily because it could not know what any aggregate analysis would actually look like or "how sensitive" it would be, and stressed that Plaintiffs could always make an application at the point in time that the aggregate analysis was in fact ready since the City would need to justify sealing it.[7] Finally, the City's characterization of plaintiffs' expert report as "one-sided" (City Letter at 3) cannot provide the basis for keeping it under seal.

The Court should determine that the Beveridge Report and plaintiffs' June 1 letter are non-confidential and allow plaintiffs to file them on ECF.

Respectfully submitted,

Craig Gurian

Craig Gurian
Attorney for Plaintiffs

Info N.Y., Nov. 16, 2016, ECF 74, Ex. 3. The data published, obtained via a FOIL request, include race, age, income and household size. Defendant apparently chose not to share whether the racial composition of winners varied by development.

[6] The cases cited by the City are an attempt to divert the Court from both the *Bernstein* and Rule 26 protective order standards (*In re Zyprexa Inj.*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007), for example, dealt with deliberately illegal theft and distribution of documents covered by protective order and ruled that such circumstances merited return of documents and permanent injunction on further distribution). The Beveridge Report is simply not properly categorized as a document that meets Rule 26(c) standards in the first instance, and it is properly considered a judicial document.

[7] Feb. 10, 2017 Conf. Tr. at 20, ECF 85.