

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)	CASE NO.: 1:15-CV-01046
)	
Plaintiff,)	JUDGE SOLOMON OLIVER, JR.
vs.)	
)	<u>CITY OF CLEVELAND’S RESPONSE</u>
CITY OF CLEVELAND,)	<u>TO THE “MOTION TO ENFORCE</u>
)	<u>THE CLEVELAND COMMUNITY</u>
Defendant.)	<u>POLICE COMMISSION’S RIGHT TO</u>
)	<u>ACCESS INFORMATION” FILED BY</u>
)	<u>THE UNITED STATES OF AMERICA</u>

I. Introduction

On July 15, 2021 the United States of America unexpectedly filed the pending “Motion To Enforce the Cleveland Community Police Commission’s [“CPC”] Right to Access Information.” (Dkt. 365, “Motion”). The City of Cleveland (“City”) herein responds in opposition.

The City is a Party to the Consent Decree (Dkt. 7-1), as is the United States. The Motion filed by the United States argues for a broadening of the role and authority of the CPC beyond the authorizing language of the Consent Decree, which provides the mandate for the CPC. The language is not to be read expansively as but a starting point for expanding the CPC’s authority, as previously suggested by counsel for the United States. Rather, the negotiated language limits and expressly defines the role of the CPC. The Commission was created to provide an important forum for the many communities making up Cleveland to understand and have input in the reforms being accomplished.

Formally, the CPC was tasked to make recommendations regarding policies and practices relating to community and problem oriented policing (“CPOP”), bias free policing, and police transparency (Dkt. 7-1, para. 15(a); to work with the “many communities that make up Cleveland” to develop recommendations for CDP policies and practices that reflect an “understanding of the values and priorities of Cleveland residents,” and to report to the City and community to provide transparency on CDP reforms. *Id.*, para. 15(b)-(c). Additional specific duties and authority are addressed in paragraphs 17 and 18 of the Consent Decree.

The CPC was created to provide a forum and voice for the many Cleveland communities.

Those who have more critical views of the police are just as represented, currently, in the Cleveland population as those who have more positive views. The Consent Decree, by its own terms, created the CPC to be a forum for the “many communities that make up Cleveland” to “develop[] recommendations for police practices that reflect an understanding of the values and priorities of Cleveland residents.” [FN omitted]. The existence of the Commission reflects, then, that references to “the community” is are [sic] references to the many diverse communities that make up the larger fabric of Cleveland.

* * *

In short, the CPC, like any other community organization, does not speak for “the community” because a democratic population is not a singular, monolithic entity. However, unlike other community organizations, the CPC is charged with being a forum in which all points of view within the community are given voice and due consideration – and can influence the substantive development of CDP policies, practices, procedures, and training. The success of reform depends on CPC becoming singularly focused on this task rather than bureaucratic mechanics, personalities, or other understandable but ultimately non-consequential diversions or distractions.

(Dkt. 135, Monitor’s Third Semiannual Report, p. 16 of 77). The Monitor has succinctly identified the CPC’s fundamental function as being:

“to promote public trust and confidence in the CDP” and to “make recommendations to the Chief of Police and the City, including the Mayor and City Council” based on the “values and priorities of Cleveland residents.”

(Dkt. 214, Fifth Semiannual report, p. 13, citing Dkt. 7-1, para. 15).

The United States engages in overstatement and hyperbole in arguing that the City “has impaired the CPC’s ability to carry out its mandate under the SA [Consent Decree].” (Motion at p.3). While the City and the CPC have had differences regarding the scope of responsibilities and duties provided by the Consent Decree,¹ the City has continued to meet and work with the CPC on a regular basis. The CPC has provided multiple reports and recommendations pursuant to the direction in the Consent Decree addressing a variety of issues and policies over the years, to include reports addressing (by year)²: use of force (2016), bias free policing (2016, 2017), discipline/accountability (2017-2020), community engagement and community and problem oriented policing (2017-2019), staffing and recruiting plans (2018), search and seizure (2018), CDP’s civilian oversight structure (2019), and police training curricula (2020). While not every recommendation has been adopted there has been continuous discussion and review of all recommendations among the CPC, the Parties, and the Monitor.

Contrary to the inference contained in the Motion, the City has provided a great

¹ An example of a difference occurred when the CPC requested in July 2020 to the US Attorney that the DOJ open a separate investigation and probe in to CDP following the events of May 30. This was beyond the CPC’s designated mandate, duties, and authority. CDP was still in the midst of its own internal investigation at the time and the request was unwarranted and divisive.

² See clecpc.org/our-work/

deal of information to the CPC during the years of the Consent Decree, but the City has also questioned at times whether certain of CPC's time-consuming, burdensome, and extensive research requests to the CDP are correctly found within its "mandate, authority, and duties." Paragraph 19 of the Consent Decree establishes that the City is to provide information requested by the CPC "related to its mandate, authority, and duties unless it is law enforcement sensitive, legally restricted, or would disclose a personnel action." (Dkt. 7-1). The CPC was not created to be an oversight agency with authority over CDP operations, nor was it installed as an auditing agency – the independent Monitor Team fills that role.

II. The City Has No Responsibility to Provide Discipline Records to the CPC as Such Records Address Personal Actions, Documents Specifically Excluded By Paragraph 19 of the Consent Decree.

The CPC's request for all disciplinary letters issued by the CDP from 2014 to the present is a prime example of the CPC demanding an extraordinary and burdensome amount of paperwork and records unrelated to its "mandate, authorities, and duties." The United States mistakenly, and without more, simplistically labels the City's position in questioning the scope and burden of the CPC's request for years of discipline records as "spurious."

First, language as used in the Consent Decree means what it says. The Consent Decree is the result of a negotiated settlement agreement reached by the City and the United States, and it is recognized concerning agreed upon plain and unambiguous contract language that "we enforce the terms as written." *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C.*, 159 Ohio St.3d 194, 2019-Ohio-4716, 150 N.E.3d 28, ¶ 13. The

United States’ argument attempts to do an end-run around the plain terms of paragraph 19 which provide:

The City will provide access to all information requested by the Commission related to its mandate, authority, and duties unless it is law enforcement sensitive, legally restricted, or would disclose a personnel action. (Dkt. 7-1) (emphasis added).

The CPC’s request for discipline records is not within the scope of the CPC’s mandate under the terms of the Consent Decree. Specifically Paragraph 19 of the Consent Decree provides the City is not required to provide “information” requested by CPC that would disclose a “personnel action”. There can be no debate but that “personnel action” includes “disciplinary or corrective action”. (See e.g. 5 USC § 2302(a)(2) “(A) “personnel action” means— (i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of this title or other disciplinary or corrective action...). The Consent Decree provides no authorization for the CPC to request a library of voluminous discipline records issued by the CDP for any period, much less for the seven years referenced in the Motion.

While individual discipline letters are, as noted by the United States, subject to production as public records, Ohio’s “Public Records Act does not contemplate that any entity has the right to a complete duplication of voluminous files kept by government agencies.” *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17 (quotation omitted)). As discussed with the CPC, the DOJ, and Monitor Team, a request for all individual discipline letters going back to 2014 would be extraordinarily burdensome, would consume many CDP man hours to complete, and take officers away from other duties. CPC has provided no cogent justification for wanting copies of every CDP discipline letter going back to January 2014.

The language of the Consent Decree clearly and without confusion limits the CPC's authority to request documents from the City addressing "personnel actions." Contrary to the suggestion of the United States (Motion, p. 5), the language of Paragraph 19 does not speak in terms of "confidential personnel information", it singularly references "or would disclose a personnel action." Notwithstanding the City's continuing and substantive "scope" argument, the City has agreed to a compromise that it believed would resolve the issue and would provide CPC with discipline letters issued by CDP for the period January 2019 and after. As part of this compromise the United States provided the CPC with discipline records it had received for 2019 and 2020, with the Monitor agreeing to provide the CPC with 2021 and subsequent discipline letters as received going forward. Though the compromise reached preserved the City's scope/mandate objection; the United States now requests that this Court enter an Order specifically requiring the City to directly provide the CPC with such discipline records. The request of the United States is not supported by the Consent Decree.

The City notes, however, that even with such compromise and agreement for providing disciplinary letters for 2019 and after, the CPC "[is] not waiving its request for earlier letters." (Motion, p.5, fn 2). A workable compromise has been affected that resolves the City's concerns and provides the CPC with substantial detail concerning almost three years of discipline. The Court should deny the order proposed by the United States.

III. The City and CDP Disagree With the Characterization of the United States that They Have Unreasonably Delayed Providing Information to the CPC.

The United States places before the Court examples of reports and documents

requested by the CPC in 2020. (Motion, pp. 7-8). This particular year was quite difficult and unusual in that the City and State of Ohio were in the midst of a pandemic that greatly affected all governmental operations.

It is instructive that the United States spends time discussing multiple requests for information that were made by the CPC in 2020. As this Court is aware, progress on the Consent Decree has come in phases, starting with a focus on use of force in the first two years of the decree. The CPC requests identified in the Motion are often requesting voluminous detail and require research that distracts from CDP's immediate focus on matters that are either due to be completed or to be initiated to maintain progress in meeting the terms of the schedule going forward.

Addressing the issue of CDP's memoranda of understanding ("mou") with nine law enforcement agencies operating in Cleveland, it should be noted that the City responded in short order providing all of the requested mou's for the various agencies. Subsequently the City supplemented its response with the most recent amendments to the memoranda. The CPC's inquiries basically asking for all communications between the CDP and the various agencies for a period of four years (2018-2021) regarding the mou's is not within the scope of the CPC's mandate. As noted, the City has not yet further responded but will do so as appropriate.

The United States references a request in March 2021 seeking "the number of cases referred to internal affairs and how often those cases resulted in referral to prosecutors and in criminal charges against officers." (Motion at p.6). While there may be some confusion over the timing of the request, this Court should be aware that the Chair

for the CPC previously received the following information through Internal Affairs in February concerning the same subject:

<u>2019:</u>	<u>Total 17 officers arrested</u>
11 officers	convicted
5 officers	arrested, charged, case pending
1 officer	arrested [officer went into alcohol rehab, victim decline prosecution, charged dismissed]
<u>2020:</u>	<u>Total 16 officers arrested</u>
4 officers	convicted
10 officers	arrested and charged, case pending
	2 officers arrested [first officer grand jury did not indict and the second officer charged, community service and charges dismissed]

The Police Inspector reports referenced in the Motion were provided after they were collectively finalized for release, with the reports also having been published on the City’s website. The separate issue involving incident reports relating to police pursuits raised in the Motion was addressed on numerous occasions with the CPC. The CPC submitted its recommendations on vehicle pursuit policy to CDP on September 1, 2020. It should be noted that with the submission the CPC informed the public that “The CPC looks forward to continuing a dialogue with the City and CDP about these recommendations.”(<https://clecpc.org/press-releases/2020/09/01/cpc-submits-recommendations-on-cdp-vehicle-pursuit-policy/>)

IV. Conclusion

The City has legitimate concerns with burdensome requests for information that are outside the scope of the CPC’s mandate and authority. Where such circumstances arise the City engages with the CPC, United States, and the Monitor to discuss the issues presented. In short, the Motion filed by the United States is unnecessary as the positions

of the CPC and the City/CDP regarding various requests for information from the CDP discussed in the Motion filed by the United States have been previously addressed for review by the Court through the Monitor.

Respectfully submitted,

Barbara A. Langhenry (0038838)
Director of Law

By: /s/ Gary S. Singletary
Gary S. Singletary (0037329)
Chief Counsel
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
Tel: (216) 664-2800 Fax:(216) 664-2663
E-mail: blanghenry@city.cleveland.oh.us
gsingletary@city.cleveland.oh.us

Counsel for the City of Cleveland

CERTIFICATE OF SERVICE

The undersigned certifies that the City of Cleveland's Response to the Motion of the United States was filed electronically on July 29, 2017. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. Pursuant to the requirements of the Consent Decree the Monitor Team has been delivered a copy of this filing.

/s/ Gary S. Singletary
Gary S. Singletary (0037329)
Counsel for the City of Cleveland