

2002 WL 31619035

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United States District Court,  
S.D. New York.

Barbara HANDSCHU, Ralph Digia, Alex McKeiver, Shaba OM, Curtis M. Powell, Abbie Hoffman, Mark A. Segal, Michael Zumoff, Kenneth Thomas, Robert Rusch, Anette T. Rubenstein, Michey Sheridan, Joe Sucher, Steven Fischler, Howard Blatt and Ellie Benzzone, on behalf of themselves and all others similarly situated, Plaintiffs,  
Rev. Calvin BUTTS, Sonny Carson, C Vernon Mason, Michael Warren, Intervenors,  
v.

SPECIAL SERVICES DIVISION, a/k/a Bureau of Special Services, William H.T. Smith, Arthur Grubert, Michael Willis, William Knapp, Patrick Murphy, Police Department of the City of New York, John V. Lindsay and various unknown employees of the Police Department acting as under-cover operators and informers, Defendants.

No. 71 Civ. 2203(CSH). | Nov. 19, 2002.

## Opinion

### **MEMORANDUM AND ORDER**

HAIGHT, Senior J.

\*1 I do not propose to change the scheduling order in this case, created by the Court's memorandum endorsement on October 11, 2002 of the joint proposal of counsel for the parties contained in the Corporation Counsel's letter dated October 10. It follows that the defendants will file and serve their reply submission on November 26, 2002.

But I conclude that the Court should deal at this time with the defendants' separate but related request that the Court grant them "leave to submit an additional, supplemental declaration by Deputy Commissioner David Cohen, under seal, for *in camera* review by the Court alone." Letter of Special Assistant to the Corporation Counsel Gail Donoghue dated September 25, 2002 at 1. That single sentence manages to say in three different ways that defendants do not wish counsel for the plaintiff class to read Cohen's additional declaration. The defendants'

asserted justification for their application is that Cohen's supplemental declaration "contains factual information which is supportive of defendants' request for modification, but which is based upon confidential or sensitive information which cannot be divulged to the public at large without compromising both the viability of an ongoing investigation and the lives and safety of confidential informants." *Id.*

Counsel for the plaintiff class resist defendants' request. They quote Judge Stanton's rejection of an assertedly comparable application in *United States v. Aviv*, 1995 WL 758756 at \*2 (S.D.N.Y. Dec. 22, 1995), which in Judge Stanton's view "goes beyond advocacy; it approaches effrontery." Class counsel conclude their brief at 21 by saying that "[i]f the drastic action requested by defendants is to be considered, plaintiffs would request an opportunity for discovery concerning its necessity." Counsel do not suggest how discovery into the necessity for non-disclosure could be structured so as to avoid disclosing what defendants insist should not be disclosed.

The Court will hold a hearing on Tuesday, December 3, 2002, at 2:30 p.m. in Room 17C, 500 Pearl Street, at which counsel will be expected to make oral submissions limited to whether the Court should grant defendants' application that the Court examine Cohen's supplementary declaration *in camera* and consider its contents, without revealing them to counsel for the plaintiff class, in deciding the defendants' underlying motion to modify the *Handschu* Consent Decree and implementing Guidelines. The hearing may explore possible alternative approaches and procedures. In saying that, I intimate no present view on the merits of defendants' application. I will not press defendants' counsel at this public hearing to reveal the substance of what it is that they seek to shield from public disclosure. Nonetheless, I think that such a hearing will serve a useful purpose.

Depending upon the Court's resolution of the question of this subsidiary issue, supplemental affidavits or briefs of counsel in addition to those called for by the October 11, 2002 scheduling order may or may not be called for. Eventually the Court will schedule oral argument on the merits of defendants' underlying motion, but that scheduling order is deferred for the present.

\*2 It is SO ORDERED.