

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

TYLER GRIFFIN,

Plaintiff,

v.

CITY OF ATLANTA, DONALD
VICKERS, MATTHEW ABAD, and
JOHN DOE NO. 1-5,

Defendants.

CIVIL ACTION

FILE NO. 1:20-cv-02514-TWT

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF’S RENEWED MOTION TO COMPEL**

INTRODUCTION

This is an excessive force case under 42 U.S.C. § 1983 against two police officers and the City of Atlanta. Plaintiff seeks to hold the City liable for its widespread practice of failing to discipline police officers who use excessive force. *See Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). To prove *Monell* liability, Plaintiff must show that the “moving force” behind his injuries was the City’s widespread practice of failing to discipline officers who use excessive force. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

Plaintiff files his Renewed Motion to Compel against the City of Atlanta to get documents related to his *Monell* claim.¹ To date, the City has unilaterally limited the scope of Plaintiff's requests to the records of the individual Defendants. Those records (and many found on the internet, but not produced by the City) show APD's widespread practice of failing to discipline officers for using excessive force. However, much of the evidence that would address the widespread nature of this problem remains solely within the City's control, and the City has refused to produce it.

On October 21, 2020, Plaintiff served his Third Set of Requests for Production of Documents relating to his *Monell* claims.² These requests targeted situations in which an officer used objectively unreasonable force, but the City let the officer off the hook.³ On November 20, 2020, the City served its responses.⁴ Of the seven requests, the City provided a substantive response to only *one*.⁵ The

¹ This motion is substantively similar to Plaintiff's Initial Motion to Compel, which was filed on December 2, 2020. *See* ECF No. 53. On March 3, 2021 (i.e., earlier today), the Court denied Plaintiff's Initial Motion to Compel "for failure to comply with Local Rule 37.1(A)." *See* Doc 76. Upon receiving the Court's Order, the undersigned closely reviewed Local Rule 37.1(A) and has carefully revised this brief to comply with it. The undersigned apologizes for that error of noncompliance.

² Pl.'s 3rd RPDs (Ex. A).

³ *Id.*

⁴ Def.'s Resp. to 3rd RPDs (Ex. B).

⁵ *Id.*, RPD No. 42.

City produced *a single page*.⁶ As to the six other requests, the City provided no substantive response and produced no documents.

On November 21, 2020, Plaintiff wrote to the City about the discovery responses.⁷ On November 23, 2020, the parties spoke on the phone. The City refused to respond further, erroneously claiming that the requests were overly broad and that it could validly withhold evidence relating to excessive force allegations against its officers if the officer in question had used a baton, firearm, or pepper spray.

Plaintiff's *Monell* claim focuses on *how the City reacted* to its officers' use of excessive force. In other words, the central question is whether the City made reasonable efforts to protect the citizens of Atlanta from excessive force, or whether the City swept its officers' excessive force violations under the rug. It does not matter whether an officer used excessive force with a fist, a foot, or a baton—the relevant issue is *how the City reacted to it*. The City's position—*i.e.*, the City's contention that it may withhold evidence relating to occasions on which its officers used excessive force with batons, pepper spray, or firearms—is a

⁶ See City of Atlanta Document Production, at GRIFFIN v. COA 2252 (Ex. C).

⁷ MRK to Nair 11/21/20 (Ex. D).

distinction without a difference. It is not the “type” of force used that matters—*what matters is what the City did about it.*

This evidence is important because it bears directly on Plaintiff’s *Monell* claim. The evidence already in Plaintiff’s possession reveals two occasions *before the subject incident* on which Defendant Vickers used excessive force but faced no serious consequences. Plaintiff believes that the records at issue here will show that Defendant Vickers was not an isolated example—*i.e.*, the City has a widespread practice of failing to discipline police officers who use excessive force.

These requests are not unduly burdensome. The evidence that Plaintiff seeks with this motion matters, for the reasons explained above, and the evidence that Plaintiff has already obtained proves that these discovery requests are no mere fishing expedition. The City has made no showing that producing this evidence would be unduly “difficult” or “inconvenient” (to use the City’s phrasing) except for its bare assertion of difficulty. That bare assertion is insufficient, as this Court has previously held.⁸

⁸ See *Fudali v. Pivotal Corp.*, No. 1:09-2354-RWS-SSC, 2009 WL 10668516, at *6 (N.D. Ga. Oct. 30, 2009) (quoting *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3rd Cir. 1982) (“[T]he mere statement by a party that the [discovery request was ‘overly broad, burdensome, oppressive and irrelevant’ is not adequate to voice a successful objection to [it].”).

DISCUSSION

1. The Court should compel a complete response to Request No. 37.

1.1. Verbatim Quote of Request and Objection

Plaintiff's Request for Production No. 37

Please produce all documents, including, but not limited to memos, letters, and reports, whereby a City of Atlanta Police Department employee recommended, requested, or demanded, that a police officer's final disposition following an OPS investigation into the use of excess force be changed from "sustained" to "not sustained," "exonerated," or "unfounded," from January 1, 2015 through the present.

The City's Objection

RESPONSE: The City objects to Request for Production No. 37 on the grounds that it is overly broad, unduly burdensome, and not sufficiently limited to lead to the discovery of relevant or admissible evidence.

[The City produce no documents in response to this request.]

1.2. Argument & Authority

1.2.1. RPD No. 37 seeks evidence relevant to Plaintiff's *Monell* Claim

Request No. 37 asks for documents showing each time that an APD supervisor changed the result of an OPS investigation to protect a police officer over the last five years. These documents are probative of Plaintiff's allegations that the City has a widespread practice of failing to discipline its police officers. In an ideal world, the City's response to such a request would be, "we have no

documents because that does not happen,” but that is not the case. We know this happens.

The evidence in this case shows that this has happened on two separate occasions with Defendant Vickers. That is, OPS twice investigated Defendant Vickers *before* the subject incident and concluded that he used excessive force, but each time, Vickers’ supervisor changed the finding from “sustained” to “not sustained.”

The record shows that this is not a random or isolated scenario limited to this case. The same issue appears in other cases against the City putting to rest any notion that Plaintiff is on a “fishing expedition.” For example, this issue came up in *Rogers v. City of Atlanta*. In *Rogers*, there was a situation where OPS investigated an officer and recommended that he be terminated, but the officer’s supervisor rejected the recommendation.⁹ During a hearing before Judge Brown, the City’s attorney admitted that type of information is relevant to a *Monell* claim.¹⁰ It is also relevant in this case.

⁹ *Rogers v. City of Atlanta*, Case No. 1:17-cv-04850-MLB, Disc’y Hr’g Tr., 20:10-20, Apr. 24, 2018, ECF No. 53-9.

¹⁰

THE COURT: Ms. Cherry, do you understand [Plaintiff’s] contention that there is a situation in which OPS recommended termination of an

1.2.1. RPD No. 37 is not unduly burdensome.

Plaintiff seeks a finite number of documents reflecting the scenario where a supervisor changed an OPS finding of excessive force to “not sustained” in the five years before the subject incident. The City’s purported burden is simply not that great.

To illustrate, in 2015 there were 371 instances in which OPS “sustained” a finding of excessive force.¹¹ In 2016, there were 358 and in 2017 there were 195. The City has not provided the data for 2018 or 2019. The City admits that the “OPS IAPro system compiles and tracks all complaints submitted to OPS.” Opp. Brief at 3, ECF No. 66. Further, the City keeps data regarding the outcome of

officer for excessive force and that the chief of police rejected that recommendation? Do you agree --

MS. CHERRY: Yes, I understand that.

THE COURT: Do you agree that that type of information would be relevant and discoverable given the Monell claim in this case, which apparently involves the excessive use of force?

MS. CHERRY: **Yes, of course, Your Honor.** But that’s not what plaintiff is asking for in RPD Number 5

Id.

¹¹ Annual Use of Force Reports for 2015-2019 at 33, 34, 38, 46 ECF No. 68-2.

excessive force investigations.¹² All the City would have to do is look through the “sustained” OPS files for letters from supervisors dismissing OPS’s findings. The City’s only ‘support’ for its claim of burden is an unsworn statement by counsel that it “would require countless manhours to perform the case-by-case analysis of hundreds of investigations . . .” Opp. Brief at 3, ECF No. 66. That is not enough. *E.g., Cottone v. Cottone*, No. 1:15-CV-3584-MHC, 2017 WL 9250366, at *5 (N.D. Ga. Oct. 11, 2017) (objecting part must show undue burden “by submitting affidavits or offering evidence revealing the nature of the burden.”); *Hammon v. Cherokee Cty., Georgia*, No. 1:06-CV-839-JTC, 2008 WL 11333688, at *2 (N.D. Ga. Mar. 25, 2008); *DL v. D.C.*, 251 F.R.D. 38, 46 (D.D.C. 2008) (requiring “specific estimates of staff hours needed to comply.”).

The evidence Plaintiff seeks in RPD No. 37 is important to his *Monell* claim. It will take some time to look through the OPS files to look for instances where a supervisor reversed an OPS finding. However, “it cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary.” *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 238 (S.D. Cal. 2015) (internal citation omitted); *accord Cottone*, 2017 WL 9250366, at *5 (N.D. Ga. Oct. 11, 2017)

¹² *Id.*

(quoting 8 Wright & Miller § 2214, at 647-48) (“The mere fact that compliance . . . will cause great labor and expense or even considerable hardship . . . does not of itself require denial of the motion.”).

The City has not met its obligation of showing an undue burden. However, if the City will agree to produce all the “sustained” OPS files, Plaintiff will incur the time reviewing the files. The City must not be allowed to use a claim of undue burden to shield critical evidence. The information Plaintiff seeks is relevant and important to his *Monell* claim against the City.

2. The Court should compel a complete response to Request No. 38.

3.1. Verbatim Quote of Request and Objection

Plaintiff’s Request for Production No. 38

Please produce all documents relating to OPS investigations into the use of excessive force where the City of Atlanta Police Department received a letter from the Atlanta Citizen Review Board recommending that an allegation of excessive force be “sustained,” but the City of Atlanta found otherwise, e.g., “not sustained,” “exonerated,” or “unfounded,” from January 1, 2015 through the present.

The City’s Objection

RESPONSE: The City objects to Request for Production No. 38 on the grounds that it is overly broad, unduly burdensome, and not sufficiently limited to lead to the discovery of relevant or admissible evidence.

[The City produced no documents in response to this request.]

3.2. Argument & Authority

2.2.1. RPD No. 38 seeks evidence relevant to Plaintiff's *Monell* claim.

Request No. 38 asks for documents showing each time that ACRB investigated and found excessive force, but the City rejected the finding within the past five years. This evidence is indisputably relevant to Plaintiff's claim that the City has a widespread practice of failing to discipline officers who use excessive force. Then-Chief of Police Erika Shields admitted so in her deposition:

Q. If, looking at the same investigations, ACRB frequently finds excessive force and sustains allegations, but OPS dismisses the same allegations, is that problematic?

A. Yes.¹³

The evidence in this case shows that disagreement between ACRB and the City is not random or isolated, but rather, a pattern. Request No. 38 was based on *seven* instances Plaintiff was able to find on the internet where ACRB investigated an APD officer's use-of-force and concluded it was excessive based on the City's Standard Operating Procedures, but the City dismissed the allegations. Plaintiff's request seeks evidence relevant to his *Monell* claims and the request is based on objective evidence. *See Dixon v. County of Cook*, 819 F.3d 343, 348 (7th Cir. 2016) (in general, systemic misconduct is relevant to *Monell* liability).

¹³ Shields Dep., 74:21-25, ECF No. 60-1.

2.2.2. RPD No. 38 is not unduly burdensome.

Plaintiff seeks a finite number of documents reflecting the scenario where ACRB recommended an officer be reprimanded for using excessive force, but the City did *nothing*. The request, like the others, is limited to the past five years. The City's claim of undue burden is impermissibly vague and conclusory.

The ACRB investigates complaints of misconduct under the APD Standard Operating Procedures. Once ACRB concludes its investigation, it sends a letter to the City outlining the facts of the investigation, a finding, and a recommended punishment. An example of such a letter can be found at ECF No. 68-3. The City, through OPS, then conducts its own investigation. Once the City concludes its investigation, it sends a letter to ACRB, outlining the outcome of the OPS investigation. An example of such a letter can be found at ECF No. 68-4.

Plaintiff's request asks for these letters. The request does *not* require the City to create "a running tally of cases in which OPS and the [ACRB] disagree" or "search the databases of two City agencies to determine how often the two agencies . . . disagree." Therefore, the City has not met its "burden of demonstrating that th[is] request[] [is] 'unduly burdensome.'" *Cottone v. Cottone*, No. 1:15-CV-3584, 2017 WL 9250366, at *5 (N.D. Ga. Oct. 11, 2017).

3. The Court should compel a complete response to Request No. 40.

3.1. Verbatim Quote of Request and Objection

Plaintiff's Request for Production No. 40

For every City of Atlanta police officer whom OPS investigated for the use of excessive force and recommended the allegation be sustained from January 1, 2015 through the present, please produce that officer's Performance Evaluation for the period in which the use of excessive force occurred. **Note:** For example, if OPS investigated and recommended an allegation of excessive force be sustained against Officer John Smith arising from an incident that occurred on June 5, 2018, Officer's Smith's 2018 Performance Evaluation would be responsive.

The City's Objection

RESPONSE: The City objects to Request for Production No. 40 on the grounds that it is overly broad, unduly burdensome, and not sufficiently limited to lead to the discovery of relevant or admissible evidence

[The City produced no documents in response to this request.]

3.2. Argument & Authority

3.2.1. RPD No. 40 seeks evidence relevant to Plaintiff's *Monell* claim.

Request No. 40 asks for the relevant performance evaluations of APD officers who were "sustained" on allegations of excessive force in the past five years. This evidence is relevant to Plaintiff's claim that the City has a widespread practice of failing to discipline officers who use excessive force. Specifically, it is relevant to Plaintiff's claim that APD's performance evaluations perpetuate inadequate discipline by failing to denote excessive force incidents.

Request No. 40, like the other requests, is based on objective evidence. For example, use-of-force expert Scott DeFoe opined that APD failed to document the subject incident in both Defendants' performance evaluations, which "can be seen as endorsing and perpetuating inadequate discipline, training, and failure to enforce written policies and established standards."¹⁴ Request No. 40 is also based on the City's Rule 30(b)(6) testimony:

Q. Would you agree that if bad cops get good reviews, the department needs to change something about its performance evaluation process?

A. I would say that if that is the case, then, yes, they would need to review that.

Q. Would you agree that if bad cops get good reviews, the department needs to be held accountable?

A. I would say yes, they do.¹⁵

The relevance of Plaintiff's request is clear. *See Dixon*, 819 F.3d at 348 (in general, systemic misconduct is relevant to *Monell* liability).

3.2.2. RPD No. 40 is not unduly burdensome.

Request No. 40 seeks a single document from the file of each APD officer who was "sustained" on allegations of excessive force. The burden of pulling a single document from each officer's file is simply not that great and cannot serve

¹⁴ Rule 26 Report of Scott DeFoe at 36-37, ECF No. 68-5.

¹⁵ Reese 30(b)(6) Dep., 52:17-24, ECF No. 52-5.

as a basis for withholding these important documents. However, Plaintiff makes the same offer as with Request No. 37. If the City wants to safe time reviewing the documents, it can provide all the files and Plaintiff will review them. This is another example of the City’s attempt to use a claim of undue burden to withhold important evidence. That is not proper. The City has not met its “burden of demonstrating that th[is] request[] [is] ‘unduly burdensome.’” *Cottone*, 2017 WL 9250366 at *5.

4. The Court should compel a complete response to Request No. 41.

4.1. Verbatim Quote of Request and Objection

Plaintiff’s Request for Production No. 41

Please produce all complaints, grievances, or other documents, where a City of Atlanta police officer complained that he or she experienced retaliation, retribution, or other negative treatment, after he or she either: (a) reported another officer for the use of excessive force, (b) offered a statement adverse to another officer accused of excessive force, or (c) testified in an official proceeding in a manner adverse to another police officer accused of excessive force.

The City’s Objection

RESPONSE: The City objects to Request for Production No. 41 on the grounds that it is overly broad, unduly burdensome, and not sufficiently limited to lead to the discovery of relevant or admissible evidence.

[The City produced no documents in response to this request.]

4.2. Argument & Authority

4.2.1. RPD No. 41 seeks evidence relevant to Plaintiff's *Monell* claim.

Request No. 41 asks for internal APD grievances where an officer experienced retaliation for reporting the use of excessive force. This evidence is relevant to Plaintiff's claim that "[t]he City's Code of Silence and persistent and widespread failure to take adequate disciplinary action against its officers' routine use of excessive force, properly supervise and train its officers, or enforce written policies resulted in the violation of Mr. Griffin's constitutional rights and proximately caused serious and permanent injury."¹⁶

Request No. 41, like the other requests, is based on objective evidence. In another excessive force case brought against the City of Atlanta, retired APD Major Harold B. Goldhagen submitted an affidavit outlining the City's unsavory practices.¹⁷ Some of the averments upon which Plaintiff's request is based include:

- "There is a golden rule in the Atlanta Police Department, a widespread practice, that if as an officer you place your hands on somebody you then arrest that person and charge them either with obstruction of police, resisting arrest and/or simple battery on a police officer, irrespective of the merits of such a charge."¹⁸

¹⁶ Pl.'s First Amended Compl., ECF No. 20 at ¶ 94.

¹⁷ Affidavit of retired Major Harold B. Goldhagen can be found at ECF No. 68-6.

¹⁸ Goldhagen Aff. ¶ 10.

- “There is an unwritten practice and custom among many Atlanta police officers of tolerating or not contesting the use of excessive force by other officers against civilians.”¹⁹
- “There is an unwritten policy, practice and custom among many Atlanta police officers of officer-to-officer loyalty.”²⁰
- “There is an unwritten practice and custom among many Atlanta police officers of engaging in a “code of silence” with respect to the excessive use of force.”²¹
- “It is my opinion that in many cases the “code of silence” and the officer-to officer loyalty hinder or obstruct OPS’s efforts at investigating officer misconduct and the excessive use of force.”²²
- “Not all police officers use excessive force. However, with respect to those police officers who do use excessive force against civilians, they, in most instances, are protected through this code of silence and practice of officer-to-officer loyalty.”²³

The relevance of Plaintiff’s request is clear, and the request is well-founded.

See Dixon, 819 F.3d at 348 (in general, systemic misconduct is relevant to *Monell* liability). The City has not carried its burden of demonstrating that the request is unduly burdensome. *See Cottone*, 2017 WL 9250366 at *5 (party asserting undue burden bears burden of demonstrating it).

¹⁹ Goldhagen Aff. ¶ 11.

²⁰ Goldhagen Aff. ¶ 12.

²¹ Goldhagen Aff. ¶ 13.

²² Goldhagen Aff. ¶ 14.

²³ Goldhagen Aff. ¶ 15.

CONCLUSION

Each of the requests seeks nonprivileged documents that are relevant to Plaintiff's *Monell* claims. To date, the City has unilaterally limited the scope of discovery to the records of the two individual Defendants. That is impermissible.

Evidence of a systemic problem already exists. It came from the individual Defendants' files and the undersigned's independent research. The evidence proves that Plaintiff's *Monell* claim is well-founded and that discovery relating to it is far more than a fishing expedition. The City must produce the requested evidence.

Plaintiff respectfully requests that the Court grant his Renewed Motion to Compel and order the City to produce the requested documents within fourteen days of the Court's Order.

Respectfully submitted this 3rd day of March 2021.

[SIGNATURE ON NEXT PAGE]

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CERTIFICATION OF FONT SIZE

I hereby certify that the foregoing has been prepared with one of the font and point selections approved by the Court in Rule 5.1(C) of the Civil Local Rules of Practice for the United States District Court for the Northern District of Georgia, specifically, Times New Roman 14 point.

BUTLER LAW FIRM

BY: /s/ Matthew R. Kahn
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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2021, I electronically filed

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RENEWED

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