IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN DOE,	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:17-cv-147**
	)	
COUNTY OF FAIRFAX, VIRGINIA,	)	
Defendant.	)	
	)	

TEMPORARY RESTRAINING ORDER

The matter came before the Court on plaintiff John Doe's emergency motion for a temporary restraining order pursuant to Rule 65, Fed. R. Civ. P. On February 6, 2017, a telephonic hearing on the motion for a temporary restraining order was held. During the course of the hearing, counsel for both parties presented argument. For the reasons stated during the telephonic hearing, and for the reasons elucidated in this Order, plaintiff's motion for a temporary restraining order must be granted, and a preliminary injunction hearing will be promptly scheduled for Thursday, February 9, 2017.

I.

Plaintiff, a Fairfax County police officer, was recently involved in an incident involving the use of deadly force and is currently on standard administrative leave. Importantly, pursuant to a policy adopted by the Fairfax County Board of Supervisors, the Chief of Police must disclose to the public the name, rank, assignment, tenure, and status of any officer involved in any incident involving the use of deadly force. This disclosure policy dictates that the Chief of Police release the officer's personal identifying information within 10 days of the incident, unless the Chief determines that a "credible threat to the officer's safety and/or the safety of their family cannot be fully investigated or mitigated." Compl. Ex. 1. Here, the Chief of Police recently

issued a public statement that the police department would delay disclosure of plaintiff's identifying information pending completion of an appropriate investigation. Yet, the Chief of Police is now poised to disclose plaintiff's identity to the public.

On February 3, 2017 plaintiff, seeking to prevent the Chief of Police from publicly disclosing plaintiff's personal identifying information, filed a verified complaint for injunctive relief against the County of Fairfax, Virginia, pursuant to 42 U.S.C. § 1983. In essence, plaintiff invokes the doctrine of "state-created danger," contending that the County must be enjoined from disclosing plaintiff's name or other identifying information to the public because such disclosure would violate the Due Process Clause of the 14th Amendment by creating—or increasing the risk of—danger to plaintiff. *See Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015) (discussing the "state-created danger" doctrine). Specifically, plaintiff argues that disclosure of his personal identifying information could subject him—and his family—to threats of harm and reprisal.

II.

To begin with, jurisdiction and venue are proper in this district. Personal jurisdiction exists because defendant is a government entity located in this district.[1] Federal question jurisdiction exists because plaintiff's § 1983 claim arises under federal law. *See* 28 U.S.C. § 1331. Moreover, defendant may properly be sued under § 1983 for injunctive relief against the implementation of an official municipal policy. *See, e.g., Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999). Finally, venue is proper in this district pursuant to 28 U.S.C. § 1391(c)(2).

[1] Defendant's counsel, during the February 6, 2017 telephonic hearing, represented that defendant had not yet been served, but did not challenge personal jurisdiction in this case. Counsel for plaintiff has represented in the motion for preliminary injunction that defendant was served via hand delivery to the Office of the County Attorney for Fairfax, Virginia.

A temporary restraining order is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To receive a temporary restraining order, plaintiff must show: (1) that he is "likely to succeed on the merits" of his § 1983 claim, (2) that he is "likely to suffer irreparable harm in the absence of [a temporary restraining order]," (3) that "the balance of equities tips in his favor," and (4) that a temporary restraining order "is in the public interest." *Winter*, 555 U.S. at 20; *see also* Rule 65(b)(2), Fed. R. Civ. P. (stating that a court must describe why the movant's injury is immediate and irreparable before issuing a temporary restraining order).

For the reasons that follow, plaintiff has satisfied each element and thus has made a clear showing of entitlement to a temporary restraining order.

A.

First, plaintiff has made the requisite showing that he is likely to succeed on the merits of his "state-created danger" claim arising under 42 U.S.C. § 1983 and the Fourteenth Amendment. Section 1983 imposes liability on state actors who cause a "deprivation of any rights, privileges, or immunities secured by the Constitution" of the United States. 42 U.S.C. § 1983. As the Fourth Circuit has recognized, "these constitutional rights include a Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity." *Rosa*, 795 F.3d at 436-37. And, as the Fourth Circuit observed in *Rosa*, the due process right to bodily integrity may give rise to a viable "state-created danger" claim under § 1983. *Id.* at 439.

Specifically, "to establish § 1983 liability based on a state-created danger theory, a plaintiff must show [1] that the state actor created or increased the risk of private danger, and [2] did so directly through affirmative acts, not merely through inaction or omission." *Id.* In other

words, "'state actors may not disclaim liability when they themselves throw others to the lions,' but that does not 'entitle persons who rely on promises of aid to some greater degree of protection from lions at large.'" *Id.* (quoting *Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir. 1995) (en banc)).

Not surprisingly, the merits of a "state-created danger" claim typically turns on whether the state actor acted *affirmatively* to put plaintiff in a *worse* position than he was in already. *See id.* at 440 (no § 1983 liability for "state-created danger" where defendant "did not make the [plaintiffs'] danger any worse" than it already was). In this respect, the Fourth Circuit has held that a plaintiff stated a plausible "state-created danger" claim where (i) the defendant police officer frustrated the execution of an arrest warrant of the decedent's abusive husband, (ii) the officer advised the husband on how to evade arrest, and (iii) shortly thereafter, the husband killed the decedent. *Robinson v. Lioi*, 536 F. App'x 340 (4th Cir. 2013). Similarly, the Ninth Circuit has permitted a § 1983 claim to proceed on a state-created danger theory where the defendant police officer (i) stopped a car in which the plaintiff was a passenger, (ii) arrested the driver and impounded the vehicle, and (iii) left the plaintiff in a known high-crime area where (iv) she was subsequently assaulted. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989).

Perhaps the most apposite case, however, arose in the Sixth Circuit. *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1059 (6th Cir. 1998). There, a municipality turned over three undercover officers' personnel files—which files included the officers' addresses, phone numbers, driver's licenses, and information about the officers' family members—to defense counsel in a violent drug conspiracy case pursuant to a FOIA request. The Sixth Circuit in *Kallstrom* concluded that the municipality violated the officers' constitutional right to personal security under the Fourteenth Amendment's Due Process Clause, and thus the city was liable

under § 1983. *Id.* at 1069-70. In this regard, the Sixth Circuit in *Kallstrom* observed that the "constitutional violation arises when the release of private information about the officers places their personal security, and that of their families, at substantial risk without narrowly serving a compelling state interest." *Id.* at 1069. Thus, the *Kallstrom* court held that the officers were entitled to injunctive relief prohibiting the city from again disclosing such personal identifying information without first providing the officers meaningful notice to seek a further injunction. *Id.* at 1069-70.

These principles, applied here, demonstrate that plaintiff has made the requisite showing that he is likely to succeed on the merits. Indeed, defendant's act would be "affirmative," because the Police Chief would reveal information that is currently unavailable to the public. And this disclosure would likely create or increase the risk of private danger—as the verified complaint and incorporated exhibits demonstrate, there are several examples of Fairfax County police officers who have faced substantial threats of harm stemming from defendant's disclosure policy. Upon receiving these disclosures, some members of the public have even threatened the officers while disseminating the officers' home addresses, purported house blueprints, and family members' names. And one need only look to the police department's response to these threats to appreciate their significance—in fact, the Fairfax County police department has provided protective services to some of these threatened officers.

To be sure, the examples that plaintiff cites may differ from the instant case. The instances cited in the complaint may well have involved different circumstances—such as inter-racial police shootings—that sparked a level of furor that might not ensue here. But on the current record, plaintiff has made the requisite showing that he is likely to succeed on the merits of his § 1983 claim: plaintiff was involved in a deadly shooting, it appears that the victim was of

a different race or ethnicity from plaintiff, and the Chief of Police has already delayed disclosing plaintiff's identifying information because of potential safety concerns. Thus, at this stage, it does not appear that plaintiff's case differs meaningfully from those plaintiff has cited in his verified complaint.

That said, two points merit mention. First, not all repercussions stemming from a police officer's use of deadly force are actionable. Indeed, any civil servant should expect to face criticism, scorn, or even demeaning language; thick skin is essential in public service. Yet, there must be a line drawn between *criticism* and *threats*. Plaintiff has shown a likelihood of proving the latter.

Second, nothing in this Order should be interpreted as stating that plaintiff is likely to succeed in requesting a *permanent* injunction. It would seem that if enough time passes between the use of deadly force and the disclosure of plaintiff's personal identifying information, there would be less (if any) risk that plaintiff would be subjected to threats of reprisal.

In sum, plaintiff has shown a likelihood of success on the merits at this stage.

B.

Because the questions of merits and irreparable harm are essentially the same in this case, plaintiff has also shown that he is likely to suffer irreparable harm if no temporary restraining order issues. To put it colloquially, it will be impossible to "un-ring the bell." If defendant discloses plaintiff's identifying information, then it will be publicly available and neither plaintiff nor a court can do much, if anything, to stop its dissemination. Indeed, any individual with internet access could type plaintiff's name in a search engine to reveal plaintiff's address and details about his family members. And it is this very risk of dissemination—particularly so

close to the incident involving deadly force—that increases the prospect of threats to plaintiff and his family. Thus, plaintiff has made the requisite showing of irreparable harm.

C.

Similarly, the balance of equities tips in plaintiff's favor. Whereas plaintiff faces an irreparable harm, the public, at most, faces a temporary one. This is because a preliminary injunction hearing will be promptly scheduled for Thursday, February 9, 2017. Thus, because defendant purportedly planned to release plaintiff's information on Tuesday, February 7, the public would suffer only a two-day delay. Notably, the Fairfax County Police Department has already delayed disclosing plaintiff's information. Another few days will not prejudice the public.

D.

Finally, it is in the public interest to grant a temporary restraining order until the forthcoming preliminary injunction hearing occurs. To be sure, the public has a significant interest in transparency regarding the police force. But a temporary restraining order would not prevent the police department from disclosing other salient details regarding the use of deadly force in this matter. And, because plaintiff is presently on administrative leave, there is no risk that plaintiff would endanger the public while on duty. Meanwhile, there is also a substantial public interest in ensuring the safety and well-being of law enforcement officers and their families—especially officers who have never been charged with any wrongdoing. A temporary restraining order would also further the public's interest in ensuring that the constitutional rights of any citizen, including a police officer, are vindicated. Furthermore, as plaintiff's verified complaint and attached exhibits disclose, denying a temporary restraining order may increase the

risk that qualified, innocent officers leave the police force out of fear of reprisal following defendant's public disclosures.

III.

Accordingly, and for good cause,

It is hereby **ORDERED** that plaintiff's motion for a temporary restraining order is **GRANTED.**

It is further **ORDERED** that defendant, and any persons or entities acting on defendant's behalf, are **RESTRAINED AND ENJOINED** from disseminating plaintiff's name, rank, assignment, tenure, or status to the public.

It is further **ORDERED** that a hearing is **SCHEDULED** for 1:00 p.m. Thursday, February 9, 2017 to address whether it is appropriate to vacate this Order and deny a preliminary injunction, or to convert this Order into a preliminary injunction.

It is further **ORDERED** that this Order shall remain in full force and effect until the close of business on Thursday, February 9, 2017, unless otherwise ordered.

No bond is required, as both parties agree that a bond is neither necessary nor appropriate.

The Clerk is directed to send a copy of this Order to all counsel of record, and to defendant.

Alexandria, Virginia
February 6, 2017

/s/
T. S. Ellis, III
United States District Judge