

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

DELLACE HOLTEN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 02 C 50201
)	
CITY OF GENOA, JOHN KLINK, and ROBERT SMITH,)	Philip G. Reinhard
)	P. Michael Mahoney
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

The Illinois State Police (“ISP”), a non-party, has objected to the discovery requests of Dellace Holten (“Holten”). The ISP has moved to quash a subpoena seeking documents regarding and relating to the investigation of the shooting of Holten. For the reasons set forth below, ISP’s January 20, 2006 Motion to Quash is denied.

Background

Holten’s Complaint, filed May 22, 2002, alleges that Holten was shot multiple times on May 6, 2002 without justification or provocation by City of Genoa police officers. Holten’s six count amended complaint alleges, among other things, that City of Genoa police officers used excessive force in violation of 42. U.S.C. § 1983.

Since August 2002, there has also been a continuing criminal investigation pending against Holten for possession of stolen property in DeKalb County; and burglary, criminal damage to property, and reckless conduct in allegedly attempting to run over a police officer with his car in Ogle County. Both of these investigations relate, to some extent, to the shooting incident in Plaintiff’s complaint.

This court held an Initial Pretrial Conference in this case on July 19, 2002. Fed. R. Civ. P.

26(a)(1) disclosures were ordered to be made by August 30, 2003, and Fact Discovery was ordered closed by February 14, 2003. Fact Discovery was extended on February 12, 2003 to March 31, 2003, and later to December 31, 2003.

On August 1, 2003, the ISP moved to quash Plaintiff's first subpoena for documents regarding the ISP investigation. The court noted on page five of its September 11, 2003 written Opinion granting ISP's Motion and quashing Plaintiff's subpoena that "[a]fter balancing Holten's need of the information with the need to keep the information private pending the investigation, this Court finds that non-disclosure outweighs Holten's interest." *Holten v. City of Genoa*, 02 C 50201 (N.D. Ill. Sept. 11, 2003). However, this court accepted the offer of the ISP that once the criminal proceedings in DeKalb and Ogle counties against Holten were complete, the ISP will disclose all the information sought in Request #1. *Id.* In the court's September 11, 2003 Order, ISP was also ordered to turn over all closed files within a reasonable time relating to any investigation of a City of Genoa police officer's use of a firearm over the last five years. *Id.*

Plaintiff again moved to compel production of the ISP file on February 2, 2002, but the court denied Plaintiff's Motion in a February 20, 2004 Minute Order, which stated:

After reviewing the material submitted by all parties, this court reaffirms its September 2003 order because both the DeKalb and Ogle county cases against Holten are still ongoing. However, this court also is aware that the DeKalb county case is approaching the two year mark and the Ogle county case is not too far behind and this court will not wait forever for these respective counties to complete their cases against Holten. At this time, non-disclosure still outweighs Holten's interest, but not for long.

Holten v. City of Genoa, 02 C 50201 (N.D. Ill. Feb. 20, 2004).

Discovery deadlines were further delayed in this case through November 2, 2005, when the court set an April 30, 2006 fact discovery deadline and a June 30, 2006 dispositive motion deadline.

Plaintiff's request for leave to resubmit his subpoena to the ISP was also granted by the court on November 2, 2005. All parties to this lawsuit indicate they must have the ISP documents to complete discovery.

The ISP again moved to quash Plaintiff's subpoena on January 20, 2006. This court has delayed ruling on ISP's Motion for six months, in hopes of learning that the criminal proceedings pending since 2002 were nearing completion. However, as it was the parties' May 12, 2006 indication that no quick resolution of the criminal proceedings was expected, the court will address ISP's Motion to Quash. All parties agreed to the court's *in camera* inspection of the ISP file to aid in resolution of the ISP's Motion.

A. *Holten's Subpoena*

Holten's subpoena seeks the following from the ISP:

1. Any and all Documents regarding the Illinois State Police investigation of the May 7, 2002 shooting of Dellace Holten, filled number 02-13723. This request includes, but is not limited to, a request for access to any and all *original* video and audio recordings in the possession of the Illinois State.
2. Any and all Documents relating to any other Illinois State Police investigation of a City of Genoa police officer's use of a firearm.

B. *ISP's Motion to Quash*

The ISP's Motion to Quash asserts objections to both of Holten's requests. With regards to Request #1, the ISP argues that the information sought in Request #1 is protected by the law enforcement investigatory privilege. Specifically, the ISP argues that although it has concluded its investigation of the shooting of Holten, it is the ISP's understanding that criminal investigations and

prosecutions regarding the facts and circumstances contained in ISP's investigation are still pending in DeKalb and Ogle Counties. Additionally, the ISP argues that releasing the information sought in the subpoena to a potential defendant (namely Holten) before Dekalb and Ogle counties have completed their investigations and prosecutions could hinder their efforts. With respect to Request #2, the ISP asserts that its search revealed no relevant documents.

C. *Holten's Response*

Holten notes that twenty-nine months have passed since this court first quashed Plaintiff's subpoena to the ISP based upon the factors set forth in *Kampinen v. Individuals of Chicago Police Department*, No. 00 C. 5867, 2002 WL 238443, at *4 (N.D. Ill. Feb. 19, 2002). Holten argues that he has waited long enough to conduct fact discovery in his civil case, and that the *Kampinen* factors now balance in his favor. *Id.*

Discussion

As an initial matter, the court assumes familiarity with its September 11, 2003 Memorandum Opinion and Order discussing the applicability of the law enforcement privilege in this case. The court immediately turns to its determination of whether the ISP has met its burden of justifying the application of the law enforcement privilege. *See Doe v. Hudgins*, 175 F.R.D. 511, 514 (N.D. Ill. 1997). The court will balance the need for secrecy¹ against Holten's need for access to the information sought. *See Hernandez v. Longini*, No. 96 C 6203, 1997 WL 754041, at *3 (N.D. Ill.

¹The purpose of the law enforcement privilege is to "prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Hernandez v. Longini*, 1997 WL 754041, at *3 (N.D. Ill. Nov. 13, 1997)(quoting *In re Dept. of Investigation*, 856 F.2d 481, 485 (2d Cir. 1988)).

Nov. 13, 1997).

The factors to be considered when balancing the law enforcement privilege include: (1) whether disclosure will thwart governmental process by discouraging citizens from giving the government information; (2) the impact on persons who have given information of having their identities disclosed; (3) the degree to which government self-evaluation and improvement will be chilled; (4) whether the information is factual or evaluative; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding pending or likely to follow; (6) whether the police investigation has been completed; (7) whether any inter-department proceedings have or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery; and (10) the importance of the information sought to the plaintiff's case. *Kampinen v. Individuals of Chicago Police Department*, No 00. C 5867, 2002 WL 238443, at *4 (N.D. Ill. Feb. 19, 2002)(quoting *Friedman v. Bache Halsey Stuart Shields Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984)).

In this case, after an *in camera* inspection of the ISP documents at issue, this court's concern over the possibility of interfering with the on-going DeKalb and Ogle County criminal investigation and prosecution of Holten is outweighed by Plaintiff's need to conduct discovery in his civil case, pending since May 22, 2002.

Analyzing according to the factors set forth in *Kampinen*, first, the court finds that disclosure is not likely to thwart governmental process by discouraging citizens from giving the government information. This is not a case built on secret informants or witness testimony that would not otherwise be turned over to Plaintiff in the normal course of a criminal prosecution. Likewise, the impact on persons who have given information in this case of having their identities disclosed is

minimal.

Second, the degree to which government self-evaluation and improvement will be chilled by disclosure in this case is minimal because the documents turned over to the court for *in camera* inspection were not evaluative reports. The information contained in the documents was largely factual information, akin to incident reports or summaries of witness testimony. This is not a case where internal opinions were sought or rendered regarding the justification of the shooting of Holten. The court doubts that the information contained in the ISP reports will be new or different from the information already disclosed to Plaintiff.

Third, although the court is troubled by allowing disclosure of investigation information while criminal proceedings are pending, the court cannot stay discovery in Plaintiff's civil case indefinitely. The court has already delayed compelling disclosure of the ISP file since 2003, and further delayed ruling on ISP's second Motion to Quash the subpoena of the ISP file since January 2006. As of now, there is no indication of a quick resolution of the criminal proceedings or even an anticipated duration of delay. In the meantime, Plaintiff's civil case has been pending for over four years, yet discovery is at a stand-still. In addition, the ISP investigation was largely completed in May and June 2002. Only three documents, one each from 2003, 2004, and 2006, suggest the investigation is on-going, but even these documents appear to be follow-ups and closure on the old investigation; not new leads.

Fourth, it is not clear whether any inter-department proceedings have or may arise from this investigation. However, the documents submitted to the court did not indicate any inter-department proceedings.

Fifth, whether Plaintiff's suit is frivolous is not a judgment this court is prepared to make at

this time. However, Plaintiff was shot several times by an officer, so the court is not inclined to dismiss his complaints out of hand. The court also notes that the District Court denied Defendants' motion to dismiss and motion to stay on July 8, 2003.

Finally, the court does not know if the information sought by Plaintiff is available through other means, but the importance of the information sought to Plaintiff's case is clear. While the court suspects that most of information contained in the subpoenaed documents has already been disclosed in the criminal case against Plaintiff, the court cannot assume this is the case. As the documents the court inspected contain detailed reports of the shooting incident and several officer/witness descriptions of the events of the shooting and the preceding car chase, the documents' relevance to Plaintiff's case cannot be denied.

Accordingly, given the factual nature of the ISP file, the protracted nature of the criminal proceedings (to which no end is in sight), and the relevance of the materials requested to Plaintiff's Complaint, the court finds the ISP file should be produced to Plaintiff in its entirety by June 23, 2006. Plaintiff's request for *original* video and audio recordings in the possession of the ISP is denied as ISP states originals are not in its possession or control. Copies of said materials, however, should be provided to Plaintiff, if this production has not already occurred.

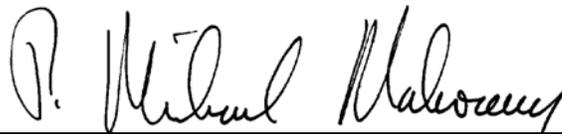
Regarding Request #2, ISP moves to quash Plaintiff's subpoena for documents relating to the ISP's other investigations of a City of Genoa police officer's use of a firearm. In support, the ISP noted that it hand searched its files twice and did not find any City of Genoa investigations. Obviously, the ISP cannot disclose that which does not exist, but that is not a valid reason to quash

Plaintiff's subpoena request. Rather, the court orders that the ISP conduct a reasonable search for responsive documents or confirm that a reasonable search was conducted, indicating the manner of the search, by June 23, 2006. The ISP is further ordered to produce responsive documents or confirm if no responsive documents exist by June 23, 2006. The ISP should file a privilege log under Fed. R. Civ. P. 26(b)(5) if it intends to assert any privilege over responsive documents.

Conclusion

For the above stated reasons, the ISP's Motion to Quash is denied. The ISP is to produce materials and documents, as noted above, by June 23, 2006.

ENTER:

A handwritten signature in black ink, appearing to read "P. Michael Mahoney", written over a horizontal line.

**P. MICHAEL MAHONEY, MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT**

DATE: June 6, 2006