

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

FILED

FEB 21 2006

JEANNE MYHRE, individually and as mother)
and next friend of JAMES COFIELD,)
MICHELLE MCKEE, as mother and next)
friend of JUSTIN MCKEE)

MICHAEL W. DOBBINS, CLERK
UNITED STATES DISTRICT COURT

Plaintiffs,)

Case No.: 05 C 50074

vs.)

KURT DITZLER, GLEN HEIDENREICH,)
DENNIS COX, VINCENT LINDBERG,)
MATTHEW JARVIS, TODD ESCHEN, PETER)
DALPRA, JASON NEWELL, and UNKNOWN)
SHERIFF'S OFFICERS in their individual and)
official capacity, THE COUNTY OF)
WINNEBAGO, and RICHARD MEYERS, in)
his individual and official capacity,)

Magistrate Judge
P. Michael Mahoney

Defendants.)

MEMORANDUM OPINION AND ORDER

This matter is before the court on Plaintiffs' December 5, 2005 Motion for Order Compelling Disclosure. For the reasons stated below, Plaintiffs' Motion is granted in part and denied in part.

I. Background

Plaintiffs' Complaint is brought pursuant to 42 U.S.C. §§ 1983 and 1988. It alleges violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. More specifically, Plaintiffs allege that following a homicide that occurred at approximately 11:00 p.m. on February 6, 2005, Defendant officers went to the home of fourteen year old Justin McKee and placed Justin McKee under arrest. (First Amend. Comp., at 3).

Plaintiffs maintain that Defendants lacked any credible information to suggest that Justin McKee was involved in the murder and further misled Justin McKee's father in order to take Justin McKee into custody for questioning. (First Amend. Comp., at 3, 11).

During Justin McKee's questioning, Plaintiffs allege that a "variety of coercive, misleading and improper interrogation techniques" were used to convince Justin McKee to falsely admit to homicide and name James Cofield as an accomplice. (First Amend. Comp., at 3, 11). Justin McKee later recanted his confession and statement of Cofield's involvement. (First Amend. Comp., at 4). According to the Complaint, Justin McKee was deprived of his right to counsel and the right to have a parent or juvenile officer present during his detention and questioning. (First Amend. Comp., at 11). Plaintiffs also allege Justin McKee was wrongfully charged with first degree murder and imprisoned in Winnebago County Jail for approximately two weeks. (First Amend. Comp., at 6). Charges against McKee were ultimately dismissed; presumably because he was exonerated. (First Amend. Comp., at 12).

According to Plaintiffs' Complaint, Defendant officers also went to the home of seventeen year old James Cofield and arrested him. (First Amend. Comp., at 4). Allegedly, officers entered Cofield's home without permission and removed James Cofield to the Winnebago County Safety Building. (First Amend. Comp., at 4). When Jeannie Myhre, Cofield's mother, objected to the officers' actions, she was pushed against the wall and threatened with arrest. (First Amend. Comp., at 4, 15). At the Safety Building, officers allegedly questioned James Cofield despite Cofield's statement he did not wish to talk and despite Cofield's attorney's admonition not to speak to Cofield outside of his presence. (First Amend. Comp., at 4). Plaintiffs claim Defendants used psychological coercion and threats in an attempt

to extract a confession from James Cofield. (First Amend. Comp., at 6). Cofield was later charged with first degree murder and imprisoned in Winnebago County Jail for approximately two weeks. (First Amend. Comp., at 6). Charges against Cofield were also ultimately dismissed. (First Amend. Comp., at 6).

Plaintiffs' *Monell* claims put forth in the Complaint allege that the County of Winnebago and Sheriff Richard Meyers failed to provide adequate training and discipline of law enforcement officers, and that the "unlawful arrest, detention and interrogation" of James Cofield and Justin McKee "were the result of policy, custom and practice of Defendants . . . to inadequately train, supervise and discipline their officers." (First Amend. Comp., at 8, 12).

II. Discovery Requests at Issue

The discovery requests that are the subject of this Motion were served by Plaintiffs on September 20, 2005. Defendant Meyers responded to the Requests on November 1, 2005, but objected to the following five Requests to Produce that Plaintiffs now move to compel: (1) field notes of any of the members of the Winnebago County Sheriff's Department compiled in the investigation that occurred February 6, 2005; (2) video and audio tapes made in conjunction with the investigation; (3) photo array prepared for viewing by Joyce Metcalf; (4) reports generated by Sheriff's Department in conjunction with the investigation; and (5) documents compiled that pertain to other incidents where Sheriff's Department obtained confessions to crimes which later proved to be false.

Defendant Meyers objected to the above Requests based on privilege and filed a privilege log that sets forth eighty-four items being withheld under the federal law enforcement investigatory privilege and the Illinois Juvenile Court Act, 705 ILL. COMP. STAT. 405/1-8, *et seq.*

Defendants state, however, that Meyer has produced “virtually all records for the period spanning February 6, 2005 through February 11, 2005.” (Def.s’ Resp., at 2). Defendants also maintain that Plaintiffs’ Requests for information about what transpired after charges were imposed on Justin McKee and James Cofield are irrelevant. Unsatisfied by Defendant Meyer’s Responses, Plaintiffs challenge Defendant’s claims of privilege and move to compel full responses to their discovery requests.

III. Analysis

Plaintiffs seek an order directing Defendants to produce discovery related to a homicide that is an open case. No one has been found guilty or plead guilty to this murder as far as the court can discern. Because the charges against Plaintiffs related to the homicide were dismissed after only two weeks, much of the materials related to the investigation of the homicide may not pertain to Plaintiffs, or their cause of action. Defendants have represented that production is complete, or “virtually complete,” with respect to records related to the investigation into James Cofield and Justin McKee. It is only with regard to the materials related to the investigation of other suspects in the homicide that the issue of privilege appears to be raised. Thus, for the purposes of this Motion, the court will address the two issues separately.

A. Investigation of James Cofield and Justin McKee

It is unclear which documents on the privilege log, if any, relate to the investigation into James Cofield and Justin McKee. From the Complaint and briefs filed, it does appear that Cofield and McKee were brought in for questioning on February 6 or 7 and released approximately two weeks later, but the court cannot state with certainty the actual date Plaintiffs were arrested and charged, nor the date of their release. Thus, Defendants’ statement that

Defendant Meyers has produced “virtually all records for the period spanning February 6, 2005 through February 11, 2005” (Def.s’ Resp., at 2) does not aid the court in its determination if production is complete with regard to the investigation of Justin McKee and James Cofield.

Defendants privilege log also fails to shed light on the issue. Almost all of the logged items are dated February 22, 2005 forward (possibly the date when McKee and Cofield were released), but Item #'s 10, 54, 56, 64, 67, and 84 are undated. More importantly, the court is unable to tell from the privilege log entries (dated or undated) whether the withheld documents mention or in any other way relate to Justin McKee and James Cofield. Simply because a document is dated on or after February 22, 2005 does not mean it contains no references to information relevant to Plaintiffs’ case. Defendants’ search for responsive documents must be controlled by the content of the document, not the date.

All materials that mention or refer to the events that occurred from the period of time of the murder to Plaintiffs’ release from custody are relevant to either liability or damages, and should be produced. Defendants do not appear to disagree. In fact, Defendant Meyer may have already fully responded to Plaintiffs’ Requests with regard to materials specifically related to the investigation of Justin McKee and James Cofield, but the court cannot tell with certainty if this is the case.

To ensure complete production, Defendant Meyer is given until March 14, 2006 to fully Respond to Plaintiffs’ September 20, 2005 Requests for Production with regard to materials that mention or refer to events that occurred from the date of the murder to the release of Plaintiffs. If Defendants intend to claim privilege for a particularized reason with regard to these materials, Defendant must supplement their privilege log so that it contains sufficient description to enable

the court to determine the particularized reason the privilege has been asserted and if an in camera inspection should take place. The court reminds the parties that Fed. R. Civ. P. 26(c) allows for a protective order that could prevent discovery materials from reaching the public domain. If necessary, privileged information could be redacted from materials that should otherwise be turned over to Plaintiffs.

B. Investigation of Other Suspects

In addition to the materials related to McKee and Cofield's investigation through their release, Plaintiffs move to compel production of all other materials of the Winnebago County Sheriff's Department compiled in the February 6, 2005 homicide investigation. This is a prosecution which is open and pending in Winnebago County Circuit Court. Defendants state the withheld documents are irrelevant to this lawsuit and privileged under the law enforcement investigatory privilege and the Illinois Juvenile Court Act, 705 ILL. COMP. STAT. 405/1-8, *et seq.*

In this case, the court has already taken measures to ensure that Plaintiffs receive complete discovery regarding the investigation of McKee and Cofield. *See infra*, Section A. This is because Plaintiffs' Requests regarding McKee and Cofield square with Plaintiffs' First Amended Complaint allegations and Defendants do not appear to assert privilege with respect to such discovery materials. Discovery materials related to the investigation of the Sheriff's Department into other suspects in the February 6, 2005 homicide after Plaintiffs' release is another issue altogether. Though Plaintiffs' Requests are reasonably calculated to lead to discoverable material as that phrase is used in Rule 26, in view of the pending prosecution for the February 6, 2005 homicide, the federal law enforcement privilege tips the scale in favor of Defendants. *See, e.g., Doe v. Hudgins*, 175 F.R.D. 511, 515-17 (N.D. Ill. 1997); *Holten v. City of*

Genoa, No. 02 C 50201, 2003 WL 22118941 (N.D. Ill. Sept. 12, 2003).

Defendants have properly raised the federal law enforcement investigatory privilege. To assert the privilege, “the responsible official in the department must lodge a formal claim of privilege, after actual personal consideration, specifying with particularity the information for which protection is sought, and explain why the information falls within the scope of the privilege.” See *United States v. Winner*, 641 F.2d 825, 831 (10th Cir. 1981); see also *Hernandez*, 1997 WL 754041, at *4; *Pontarelli Limousine, Inc. v. City of Chicago*, 652 F. Supp. 1428, 1431 (N.D. Ill. 1987). Here, Defendant Meyers invoked the law enforcement investigatory privilege when he responded to Plaintiffs’ Request for Production and supplied Plaintiffs with a privilege log. The privilege log specifies, by brief document description, the information that Defendants believe falls within the scope of the law enforcement privilege.

The next question for the court is whether Defendants should still be required to divulge the material despite the law enforcement privilege. Rather than an absolute privilege, the law enforcement privilege is a qualified common law privilege incorporated under Fed. R. Civ. P. 26(b).¹ As such, the party claiming the privilege bears the burden of justifying the application of the privilege. *Doe v. Hudgins*, 175 F.R.D. 511, 514 (N.D. Ill. 1997). Defendants, therefore, must explain with particularity the reasons that the information sought is privileged. Once done, the

¹ The 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.” *In re Dept. of Investigation of City of New York*, 856 F.2d 481, 485 (2d Cir. 1988).

court must balance the need for secrecy against Plaintiffs' need for access to the information.²

See Hernandez v. Longini, No. 96 C 6203, 1997 WL 754041, at *3 (N.D. Ill. Nov. 13, 1997); 6 *Moore's Federal Practice*, §26.48[3] (Matthew Bender 3d. ed. 2002).

The court is concerned about interfering with a criminal investigation and prosecution. While the murder investigation is currently idle, the criminal prosecution is still pending in Winnebago County. The need to maintain the privacy of investigatory records, including names, addresses, and statements of material witnesses, is very high given the potential consequences disclosure could have on the on-going prosecution. Plaintiffs' need of the investigatory materials is minimal. Thus, this court finds that the damaging effect disclosure could have on the ongoing prosecution and the need to keep investigatory records private outweighs Plaintiffs' need for information at this time. Accordingly, Plaintiffs' Motion to Compel discovery related to events after Plaintiffs' release is denied.

C. Other Discovery Concerns

The parties focused their brief on the issues discussed above. Yet, Plaintiffs do move to compel: (1) a photo array prepared for viewing by Joyce Metcalf that apparently included

²The 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)).

photographs of McKee and Cofield and (2) documents compiled that pertain to other incidents where Sheriff's Department obtained confessions to crimes which later proved to be false.

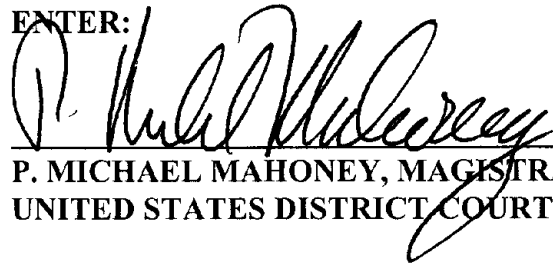
Neither party specifically addresses these Requests, but from the Responses to the September 20, 2005 Requests to Produce, the court knows that Defendant has produced the photographs of McKee and Cofield and the Complaint and Agreed Dismissal of the one case they have found pertinent to Request (2) above, but object to producing any other records.

This court finds that the Motion is not sufficiently developed by either party for the court to make a reasonable determination on Plaintiffs' Motion to Compel. If Plaintiffs want to pursue these Requests, the court will need a much clearer record. Plaintiffs' Motion to Compel a photo array prepared for viewing by Joyce Metcalf and documents compiled that pertain to other incidents where Sheriff's Department obtained confessions to crimes is denied without prejudice.

IV. Conclusion

For the reasons stated above, Plaintiffs' December 5, 2005 Motion for Order Compelling Disclosure is granted in part and denied in part. Defendant Meyer is given until March 14, 2006 to respond to Plaintiffs' September 20, 2005 Requests for Production as set forth in the Opinion and Order. All documents that mention or refer to events that occurred from the murder to Plaintiffs' release from custody shall be produced. Plaintiffs' Motion to Compel discovery related to events after Plaintiffs' release is denied. Plaintiffs' Motion to Compel a photo array prepared for viewing by Joyce Metcalf and documents compiled that pertain to other incidents where Sheriff's Department obtained confessions to crimes is denied without prejudice.

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: 2/21/06