Illinois Association of Defense Trial Counsel
Springfield, Illinois | www.iadtc.org | 800-232-0169
IDC Quarterly | Volume 18, Number 2 (18.2.13)

Civil Rights Update

By: David A. Perkins and John Heil, Jr.
Heyl, Royster, Voelker & Allen

Do Not Forget About the Law Enforcement Investigatory Privilege

Civil rights cases are routinely filed against police officers, their departments, and the municipalities they serve. On occasion, written discovery requests or deposition questions directed at the defendants may tread into a category of information that needs to be aggressively protected: ongoing criminal investigations. Information of concern may include logs, preliminary reports, or even notes that could potentially compromise ongoing operations, lead to discovery of particular investigative techniques, or jeopardize the safety or effectiveness of confidential informants. Therefore, in addition to any other common law or statutory privileges, it is important to consider asserting the law enforcement investigatory privilege when faced with a discovery request.

The law enforcement investigatory privilege is "a judge-fashioned evidentiary privilege," *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1124 (7th Cir. 1997), the purpose of which is to protect law enforcement efforts from possible harm arising from public disclosure of investigatory files. *Doe v. Hudgins*, 175 F.R.D. 511 (N.D. Ill. 1997); *see also In re United States Dept. of Homeland Security*, 459 F.3d 565, 569 n.2 (5th Cir. 2006). Its scope extends beyond the mere protection of the identities of confidential informants. *Dept. of Homeland Security*, 459 F.3d at 569. It also protects from dissemination the information contained in files related to both civil and criminal law enforcement investigations. *See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *Black v. Sheraton Corp. of America*, 564 F.2d 531, 542 (D.C. Cir. 1977). This privilege prohibits the release of governmental information – whether through documentary evidence or oral testimony – that would harm an agency's investigative or enforcement efforts. *See In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) (public interest in safeguarding integrity of investigations supports application of law enforcement investigatory privilege to both documents and testimony).

Federal Law

In its *Dellwood Farms* decision, the United States Court of Appeals for the Seventh Circuit considered the federal government's appeal of an order compelling production of materials collected during its investigation into agricultural price fixing. *Dellwood Farms*, 128 F.3d at 1124. At the time the trial court ordered production of the materials, the Department of Justice was actively engaged in its investigation, and several of the defendants in the civil suit were either indicted or soon-to-be-indicted criminal defendants. *Id.* The plaintiffs sought the materials, which consisted of both videotapes and audiotapes, in the hope that it would contain evidence of an illegal conspiracy. *Id*. On appeal, the Seventh Circuit acknowledged the applicability of the law enforcement investigatory privilege. In recognizing that it is not absolute, the court nevertheless cautioned that "there ought to be a pretty strong presumption against lifting the privilege." *Id*. at 1125.

The Seventh Circuit also found that the federal Freedom of Information Act (FOIA) contains an instructive statutory example of the privilege. *Id*. Although FOIA provides persons with the legal right to certain information in the government's possession, it also contains an exception for information collected and utilized

for law enforcement purposes. *Id.*; 5 U.S.C. § 552(b)(7). The exception applies in a number of situations, including when production "could reasonably be expected to interfere with enforcement proceedings," "could reasonably be expected to disclose the identity of a confidential source," "would disclose techniques and procedures for law enforcement investigations or prosecutions," or "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7).

The court in *Dellwood Farms* stated that it is inappropriate for courts to "mediate [the plaintiffs'] desire to expedite their civil litigation and the government's conduct of its criminal investigation." *Dellwood Farms*, 128 F.3d at 1125. Important separation of powers considerations weigh heavily against the courts' control over government investigations, which are strictly within the control of the executive branch. *Id*. Judicial intervention, the court reasoned, should only occur "as may be necessary to secure constitutional and other recognized legal rights of suspects and defendants." *Id*.

The plaintiffs in *Dellwood Farms* were neither suspects in the governments' investigation nor defendants in the civil suit. In the view of the Seventh Circuit, this meant the plaintiffs had "no definite legal right to force the government to tip its hand to criminal suspects and defendants by disclosing the fruits of the . . . surveillance." *Id*. Accordingly, the court disallowed production of the materials. *Id*. at 1128.

As it applies specifically to civil rights cases, application of the law enforcement investigatory privilege is governed by the factors laid out in *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973):

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen 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 or from other sources; and (10) the importance of the information sought to the plaintiff's case.

59 F.R.D. at 344. Although courts are given leeway in the manner in which they balance the *Frankenhauser* factors, the failure to balance them at all requires remand for consideration of the parties' respective interests. *In re Sealed Case*, 856 F.2d at 272.

Illinois Law

The law enforcement investigatory privilege was first formally acknowledged in Illinois in the Illinois Appellate Court First District's opinion in *In re Marriage of Daniels*, 240 Ill. App. 3d 314, 331, 607 N.E.2d 1255 (1st Dist. 1992). The *Daniels* court looked far and wide for evidence that Illinois recognized the exception. As the Seventh Circuit did in *Dellwood Farms*, the court noticed an analogous exception under the state and federal FOIAs. *Daniels*, 240 Ill. App. 3d at 325; 5 U.S.C. § 552(b)(7); 5 ILCS 140/7(1)(c)(i). Illinois common law support under FOIA was found in the Illinois Supreme Court's opinion in *Marshall v. Elward*, 78 Ill. 2d 366, 399 N.E.2d 1329 (1980) (the qualified law enforcement investigatory privilege codified in the federal FOIA statute originated under the common law). The court further found support in § 7 of the Criminal Identification Act, 20 ILCS 2630/7, which outlaws the release of files and records of the Illinois State Police except as provided therein. *Daniels*, 240 Ill. App. 3d at 328.

Since *Daniels*, Illinois courts have routinely recognized the law enforcement investigatory privilege as a qualified privilege available under Illinois common law. *See, e.g., In re Consensual Overhear*, 323 Ill. App. 3d 236, 753 N.E.2d 389 (2nd Dist. 2001) (petition by newspaper seeking access to sealed court records of information gained from an electronic eavesdropping device in a criminal investigation denied based on the enforcement investigatory privilege); *Castro v. Brown's Chicken and Pasta, Inc.*, 314 Ill. App. 3d 542, 732

N.E.2d 37 (1st Dist. 2000) (law enforcement investigatory privilege barred discovery of police files of ongoing investigation into mass murder because disclosure could thwart the goal of apprehending the perpetrators).

Conclusion

The law enforcement investigatory privilege may not be the first privilege one thinks of in one's day-to-day practice of civil rights law, but it is available in the event it is needed. Protection of ongoing investigations, techniques and the identities of confidential sources weigh heavily on any police officer or department burdened with civil litigation. Protect them by asserting their common law privilege to conduct their investigations without unnecessary intrusion by curious plaintiffs.

About the Authors

David A. Perkins is a partner in the Peoria firm of *Heyl, Royster, Voelker & Allen*. He concentrates his practice in the areas of civil rights, municipal liability, insurance fraud, and first party property claims. Mr. Perkins received his B.A. in 1985 from the University of Illinois at Springfield and his J.D. from the University of Iowa in 1987. He is a member of the Peoria County, Illinois State, and American Bar Associations.

John Heil Jr. is an of-counsel attorney with Heyl, Royster, Voelker & Allen. He joined the firm in November 2007 after serving eleven years an Assistant State's Attorney in Cook County, Illinois. He received his J.D. from Chicago-Kent College of Law in 1996 and his B.S. from Bradley University in 1993. His practice includes the defense of civil rights actions, municipal liability, and general negligence matters.