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

DIANE BOND,	)	
	)	
Plaintiff,	)	
	)	No. 04 C 2617
v.	)	
	)	Judge Joan Humphrey Lefkow
CHICAGO POLICE OFFICER EDWIN UTRERAS, et. al.,	)	
	)	
	)	Magistrate Judge Arlander Keys
Defendants.	)	

NOTICE OF FILING

TO: Mary S. McDonald
Assistant General Counsel
City of Chicago
30 North LaSalle Street
Chicago, Illinois 60602

Craig B. Futterman
Mandel Clinic
6020 South University Avenue
Chicago, Illinois 60637

PLEASE TAKE NOTICE that on May 30, 2006, we filed with the Clerk of the United States District Court for the Northern District of Illinois, the "Response of Non-Party Jamie Kalven to Defendants' Petition and Motion Directed to Him," a copy of which is attached hereto and served upon you.

JAMIE KALVEN

By :s/ David P. Sanders
One of his attorneys

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CERTIFICATE OF SERVICE

David P. Sanders, an attorney, hereby certifies that he caused a copy of the foregoing **Notice of Filing** and **"Response of Non-Party Jamie Kalven to Defendants' Petition and Motion Directed to Him"** to be served on the persons identified in the Notice of Filing, by faxing a copy to them on May 30, 2006, and by depositing a copy of them in the United States mail, proper first-class postage prepaid, at One IBM Plaza, Chicago, Illinois, on May 30, 2006.

s / David P. Sanders
David P. Sanders

CHICAGO_1409821_1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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CHICAGO POLICE OFFICER EDWIN UTRERAS, et. al.,	)	
	)	
	)	Magistrate Judge Arlander Keys
Defendants.	)	

RESPONSE OF NON-PARTY JAMIE KALVEN IN OPPOSITION TO DEFENDANTS' PETITION AND MOTION DIRECTED TO HIM

Non-party Jamie Kalven ("Kalven"), by his attorneys, respectfully submits this response in opposition to the (1) Petition for Issuance of a Rule to Show Cause and to Compel Production of Any and All Documents Sought in the Subpoena filed by the defendants in this action (the "Petition"), and (2) Defendants' Motion to Compel Responses to Certain Deposition Questions Directed to Witness Jamie Kalven (the "Deposition Motion").

Introduction

This is a civil rights action asserting various claims against the City of Chicago and Chicago police officers ("Defendants"). Mr. Kalven is an award-winning professional journalist whose works have been published in a wide variety of magazines, newspapers and other publications. (*See* Declaration of Jamie Kalven ("Decl."), attached hereto as Ex. 1, at ¶ 1-5.) He has spent much of his recent professional career, involving thousands of hours, investigating and reporting on living conditions of residents in Chicago public housing, including alleged police abuses. (Decl. ¶¶ 6-8.) He is not a party to this lawsuit. Any information he has regarding this case was acquired in his capacity as a journalist. (Decl. ¶ 9.)

Defendants took Mr. Kalven's deposition in this case on April 12, 2005, more than one year ago. Thereafter, they served a document subpoena on Mr. Kalven (the "Subpoena"). The Subpoena seeks to compel him to produce "any and all documents, notes, reports, writings, computer files, audio tapes, video tapes, or any written or recorded item" regarding or relating to 24 persons, ranging from ordinary citizens to police officers, and even to one of the lawyers for plaintiff in the very case. The Subpoena also required him to produce documents relating to "any allegations of misconduct by any police officer at the Stateway Gardens in Chicago, Illinois." (Petition, Ex. C.) Thus, the Subpoena was not limited in any way to documents bearing on specific factual issues in the case.

Pursuant to Rules 45(c) and 26(c) of the Federal Rules of Civil Procedure, Mr. Kalven served written objections to the Subpoena (the "Objections") on June 24, 2005. As set forth in the Objections, Mr. Kalven opposed the compelled production of the materials requested in the Subpoena on several grounds, including that the Subpoena sought information that was not relevant under the standards governing civil discovery; was overbroad; was unduly burdensome and oppressive; and sought his confidential research materials. (Petition, Ex. E.)

Although the Petition asserts that the materials Defendants seek in the Subpoena are crucial to their defense, Defendants did nothing to pursue the Subpoena until March 13, 2006, nearly ten months after Mr. Kalven served the Objections. At that time, counsel for the Defendants requested the materials again. (Petition, ¶ 9.) On March 29, 2006, Mr. Kalven responded in writing, re-asserting the Objections. (Petition Ex. E.)

Defendants have now filed the Petition, in which they seek to hold Mr. Kalven in contempt for persisting in the Objections. What is most telling about the Petition is that despite Mr. Kalven's relevance and overbreadth objections, Defendants have neither sought to narrow

the Subpoena, nor provided any meaningful justification in the Petition for their requests. Rather, the Petition contains only two conclusory sentences purporting to justify Defendants' request for compelled production of all of the materials requested in the Subpoena:

> The production of Kalven's notes, reports, writings, etc. are clearly relevant for purposes of establishing what plaintiff and/or plaintiff's witnesses have been saying as to what transpired on the dates of the alleged events stated in plaintiff's complaint. Kalven has been listed as a witness by plaintiff in her 26(a)(1) disclosures and his failure to produce documents responsive to defendants' subpoena could possibly compromise defendants' defense.

(Petition ¶ 8.)

Defendants thus try to justify their dragnet subpoena solely on the grounds that the documents *might* disclose *something* about what plaintiff and the 24 persons identified in the subpoena "have been saying" about certain events, without any explanation of why they have any reason to believe that Mr. Kalven's journalistic work product would contain any critical evidence. Defendants do not even address their obviously overbroad request in the Subpoena for documents relating to *any allegations* of misconduct by *any police officer* at the Stateway Gardens in Chicago, Illinois. Nor do they explain anywhere in the Petition why any of the information they seek through the Subpoena is unavailable to them through normal discovery procedures directed to the witnesses themselves, or why their inability to review Mr. Kalven's notes and other materials would "compromise" their defense, as they contend in the Petition.

Defendants also have moved to compel Mr. Kalven to answer certain deposition questions, identified in paragraphs 3 through 8 of the Deposition Motion, that Defendants claim he "refused to answer." The transcript of Mr. Kalven's deposition shows, however, that he in fact did answer the vast majority of the questions asked of him at his deposition, including many that are the subject of the Deposition Motion, and that the few that he declined to answer were beyond the scope of permissible discovery.

The Court should deny the Petition and Discovery Motion under the Federal Rules of Civil Procedure because Defendants' discovery requests are unreasonable. They have not shown any real need for the discovery they seek, much less a need that outweighs the undue burden that compelled disclosure of their discovery requests would impose on Mr. Kalven, and the impairment of First Amendment values that would result. In reality, Defendants are improperly seeking to utilize Mr. Kalven, a professional journalist, as an unwilling investigatory arm of government, rather than doing their own investigation. The discovery rules provide ample discretion to this Court to prevent such an abuse.

ARGUMENT

I. THE COURT SHOULD QUASH THE SUBPOENA BECAUSE IT IS UNDULY BURDENSOME AND OPPRESSIVE ON MR. KALVEN.

Under Rule 45(c)(3)(A)(iv), a court "shall" quash a subpoena that "subjects a person to undue burden." Similarly, Rule 45(c)(3)(B)(i) provides that a court may quash a subpoena that requires disclosure of "confidential research." And, under Rule 26(c)(1), a "person from whom discovery is sought" may obtain relief in the form of an order that "disclosure or discovery not be had" to protect the person from annoyance, embarrassment, oppression or undue burden. Here, the Court should quash the Subpoena and order that the discovery requested in it "not be had" based on these rules, because the discovery that Defendants seek through the Subpoena, and in the questions at issue in the Discovery Motion, is clearly overbroad, seeks irrelevant information, and is unduly burdensome and oppressive to Mr. Kalven.

The recent decision by Judge Gottschall in *Patterson v. Burge*, 2005 WL 43240 (N.D. Ill., Jan. 6, 2005) (attached hereto as Exhibit 2) is both highly instructive and applicable here. In *Patterson*, the plaintiff, who had sued the City and certain police officers for civil rights violations, spoke to television journalists about the issues in the case The defendants in that

case, like Defendants here, served a subpoena on the news organizations seeking outtakes of their interviews of the plaintiff, transcripts of the plaintiff's statements to them, notes, and other materials. The journalists moved to quash the subpoena for this unpublished journalistic work product on a variety of grounds, including Rule 45(c) of the Federal Rules of Civil Procedure.

Applying Seventh Circuit authority, Judge Gottschall recognized that her task was to determine whether the subpoena served on the non-party journalists was reasonable under the circumstances, and that this task required the court to engage in a balancing process weighing the issuing party's need for the discovery at issue in the subpoena against the "burden" on the non-party from compliance. She noted that the analysis of the "burden" in this context "means more than mere administrative hardship. It encompasses the interests that enforced production would compromise or injure." *Id.* at *1.

Judge Gottschall then undertook the required balancing. She first recognized that while relevance is a key concept in determining a party's "need" for information, "non-parties are not treated exactly like parties" in the discovery context, and "the possibility of mere relevance may not be enough; rather, non-parties are entitled to somewhat greater protection" in discovery than parties. She then carefully examined the Defendants' arguments as to why the materials that the defendants were seeking was relevant. She concluded that the Defendants had advanced only "meager" justifications for the subpoena, which amounted to little more than the conclusory contention that the materials "may contain relevant information" because they related to the allegations of the complaint. She also gave little weight to the argument that the materials containing evidence of what the plaintiff had said to the journalists could uncover relevant information useable as admissions by the plaintiff or for cross-examination of the plaintiff. *Id.* at *2.

Against these "weak justifications" for the journalistic work product they were seeking, Judge Gottschall carefully examined the burden of compelled disclosure on the journalists, which she correctly described as "significant." As she appropriately recognized, requiring journalists to turn over the fruits of their investigative efforts, based on a standard of mere or possible relevance, will turn journalists, as professional information gatherers, into frequent and unwilling investigative arms of civil litigants. *Cf. Gonzales v. Nat'l Broadcasting Co.* 195 F.3d 29, 35 (2d Cir. 1999) (acknowledging same concerns over compelled production of journalistic work product). Moreover, she recognized that a subpoena for journalists' notes and other documents, even those reflecting information provided by identified sources, necessarily intrudes into the journalists' editorial judgments, which constitute their "commercial and intellectual stock in trade," and would severely impair their efforts to maintain independence and gain the trust of sources.

Based on these concerns, Judge Gottschall concluded that "surely some good justification should be advanced before these journalistic and editorial judgments can be examined by outsiders" in a civil lawsuit. *Id.* at *3. In words strikingly appropriate to the case at bar, involving as it does Mr. Kalven's reporting on allegations of police abuse in public housing communities, Judge Gottschall acknowledged (*id.* at *3):

> In this case, where the subject matter of the civil suit raises issues of immense public importance, the press' efforts to shed light on the non-public recesses of certain police station activities has value to the entire City. To the extent the news organizations' resources are squandered providing information to civil litigants; or their ability to create sources hampered by judicial insensitivity to the value of their attempts to protect the confidentiality of the information they receive; or their motivation to develop their information and use it as they see fit; or the commercial value to the involved news organizations of the judgments involved in investigating and selecting material for publication dissipated as their "work product" becomes fair game for civil litigants in their

> relentless quest to "discover" everything, the news organizations become the indentured servant of the litigants, and their ability to do their important work will be severely impaired. The kind of discovery requested here not only burdens the news organizations but burdens the public interest in a robust press.

Applying these principles, Judge Gottschall quashed the subpoena, holding that the significant burden that compelled production imposed on these important and public interests outweighed the defendants' need for the production, given the defendants' weak showing of relevance and the lack of any compelling interest in disclosure. *Id.* *4.

The balancing considerations that Judge Gottschall relied on in quashing subpoena in *Patterson*—which recognized the crucial role that journalists play in a free society—are even more appropriate in this case. As Judge Gottschall recognized, non-parties are entitled to greater protection in discovery than parties, and as a result, something more than the mere possibility of relevance is required where press interests are implicated. Here, as in *Patterson*, there is no doubt that the Subpoena's document requests are far too general to be given weight in the balancing process.

For example, the Subpoena seeks to compel production of all information in Mr. Kalven's possession "relating to" a list of 24 persons, without any limitation tying the request to the limited issues or events raised in this single-plaintiff case. In fact, the list is so expansive that it even includes information *relating to the Defendants themselves*, as well as information relating to Mr. Futterman, who is one of the lawyers for the plaintiff in this case. Were there any doubt that Defendants are engaged in an effort to avoid normal discovery obligations, their motives are clearly exposed by their request for all documents relating to "*any allegations* of misconduct by *any police officer* at the Stateway Gardens," a request that on its face goes well beyond the specific issues in this case. (Emphasis added.) This language graphically

demonstrates that Defendants are conscripting Mr. Kalven to be their unwilling investigative tool and not truly pursuing information relevant to the events at issue in this case.

A subpoena like this is a "classic fishing expedition for something that might be helpful," which is not entitled to be given weight. *Hobley v. Burge*, 223 F.R.D. at 499, 505 (N.D. Ill. 2004). Not surprisingly, Defendants offer no credible justification in the Petition as to why the requests in the Subpoena have any specific relevance. Instead, they submit a self-serving, conclusory assertion that Mr. Kalven's documents are "clearly relevant" to establish what the persons listed in the Subpoena "have been saying" on unspecified topics. If anything, this justification for disclosure is far weaker than the " weak justifications" – amounting to little more than a claim of mere relevance – which Judge Gottschall found insufficient in *Patterson*. The subpoena in *Patterson* was at least limited to documents reflecting statements made by the plaintiff himself, which might have constituted admissions of a party or contained potentially significant impeachment of the plaintiff. In contrast, Defendants in this case seek information about persons who *are not parties* and may not even have personal knowledge of events at issue, including one of plaintiff's lawyers.

Moreover, the required balancing of the need for the information requested in a subpoena against the burdens it imposes requires consideration of "whether the information is necessary and unavailable from any other source." Wright & Miller, *Federal Practice and Procedure: Civil 2d* ¶2463 at 72 (West 1995). Defendants have not even attempted to show in the Petition that they cannot obtain the information they are seeking through the Subpoena from the persons identified in the Subpoena, or through means other than a subpoena on a journalist. This alone warrants quashing the Subpoena under the required balancing standards, particularly with respect to subpoenas served on journalists. In *In re Daimlerchrysler AG Securities Litigation*, 216 F.R.D

395 (E.D. Mich. 2003), for example, the court considered a subpoena that the plaintiff had served on journalists for unpublished information such as notes, source materials, and other items used in connection with their reporting. The court acknowledged that the journalists' materials were relevant to the subject matter of the litigation. Nonetheless, in deciding whether to enforce the subpoenas, the court, like Judge Gottschall, recognized the status of the recipients of the subpoenas as journalists, and as a result, that freedom of press concerns should be considered in the balancing process. 216 F.R.D. at 403. Like Judge Gottschall, the court then conducted a careful balancing of the plaintiff's purported need for the information requested against the burden on the journalists and press interests from compelled disclosure. Based on this balancing, the court quashed the subpoenas, in part because the plaintiff failed to show that he could not obtain the same information by other means. *Id.* at 403-06. *See also Hobley,* 223 F.R.D. at 505-06 (quashing subpoena on journalist's notes because burden of compelled production outweighed litigants' need for information).

The burden from compelled disclosure of Mr. Kalven's notes and other work product is every bit as real and serious as the courts in *Patterson*, *Daimlerchrysler* and *Hobley* contemplated. As his declaration details, any knowledge Mr. Kalven has about this case was acquired in his capacity as a journalist. (Decl. ¶ 9.)[1] The Subpoena seeks information from Mr. Kalven about some persons with whom he did not even speak about the issues in this case. (Decl. ¶ 11.) But even persons with whom he did speak about matters that might touch on the issues in this case spoke based on the expectation that he would use his judgment and not disclose anything more about what they said to him than what he would attribute to them in what he published. (*Id.* ¶ 11.)

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[1] He has agreed to speak publicly about his conversation with the plaintiff concerning certain events in issue only because she gave him permission to do so. (Decl. at ¶10.)

Mr. Kalven writes on highly sensitive issues -- the impact of police abuse in public housing communities. No one could credibly argue that this reporting is not a matter of enormous public concern in our society. Mr. Kalven's ability to do this reporting depends on his sources and the trust they repose in him, based on years of his effort, that he will be highly selective in publishing what they tell him. Mr. Kalven's work also is ongoing, and he has a continuing need to develop sources. Were he now compelled to turn over documents revealing the content of communications with his sources, his relationship of trust would be seriously undermined, threatening his ability to gather and publish important information of public importance. (Decl. ¶¶ 12-13.)

Similarly, the documents requested in the Subpoena, consisting of Mr. Kalven's unpublished notes, drafts and other resource materials, reflect his editorial judgments on a range of matters. (Decl. ¶ 14.) As Judge Gottschall recognized, "surely some good justification should be advanced before these journalistic and editorial judgments can be examined by outsiders and made public in the context of a civil lawsuit." *Patterson* at *3-*4. *See Hobley*, 223 F.R.D. at 505 (recognizing that reporter's resource materials are protected under Rule 45). These materials also constitute Mr. Kalven's confidential research and journalistic work product, reflecting thousands of hours of work (Decl. ¶¶ 12-13), which the courts have recognized are entitled to protection under Rule 45. *Id.* Defendants have not shown any such justification.

In short, under the balancing test required by Rule 45(c) and the general discovery standards of Rule 26(c), this Court should quash the Subpoena and dismiss the Petition.[2]

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[2] Mr. Kalven also submits that the Court should recognize a qualified reporter's privilege under the First Amendment and federal common law protecting against the compelled disclosure of a journalist's confidential sources and unpublished information in civil cases. However, Mr. Kalven recognizes that *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), seems to reject the existence of the First Amendment privilege for certain non-confidential information, at least in criminal cases. Mr. Kalven respectfully submits that *McKevitt* was wrongly decided, and, in any event, does not

II. DEFENDANTS' MOTION TO COMPEL RESPONSES TO CERTAIN DEPOSITION QUESTIONS IS MERITLESS.

Defendants have also moved this Court to compel Mr. Kalven to answer certain questions they posed to him at his pre-Subpoena deposition. The face of the Deposition Motion, as amplified by the exhibits to it, show that the Court should deny the Motion either because Mr. Kalven answered, rather than "refused to answer," the questions in issue (set forth in paragraphs 3 through 8), or because Mr. Kalven was entitled not to answer them based on the same Rule 45 standards limiting the scope of permissible discovery discussed in *Patterson*. Mr. Kalven addresses the questions by reference to the relevant paragraph numbers in the Motion:

Paragraphs 3-4

Defendants contend that Mr. Kalven refused to answer the questions referenced in Paragraph 3, relating to testimony at pages 54 (lines 6-23) and 55 (line 7). The transcript shows, however, that he answered every question posed to him on those pages. Similarly, Mr. Kalven did not refuse to answer the questions about Dr. Green at page 55, lines 19 to 20; he specifically testified that "I don't recall" when asked if he took notes.

Paragraphs 5-6 and 7-8

Paragraphs 5 and 6 refers to testimony at pages 65-66 relating to conversations between Mr. Kalven and Mike Fuller, while paragraphs 7 and 8 refer to testimony at pages 89-90 and 22-23, concerning his conversations with Willie Murphy. As the transcript makes clear, Mr. Kalven was willing to testify concerning information he obtained as a journalist relating to communications *with the plaintiff* in this case (and, in fact, he did testify fully as to these matters), but was not "comfortable" recounting conversations he had with the persons *who were*

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govern a subpoena in a civil action, particularly for a journalist's own resource materials. Because Mr. Kalven firmly believes that this Court can and should deny the Petition and Discovery Motion based on the Federal Rules of Civil Procedure, he asserts the First Amendment and common law privileges in order to preserve that issue for future appeal in the event that should become necessary.

not parties (*e.g.,* Dep. Tr. 66, 90), or with responding to peripheral questions, such as whether certain persons he interviewed "have problems with drugs" (Dep. Tr. at 90).

The principles so well articulated by Judge Gottschall in *Patterson* protecting third parties generally -- and journalists in particular -- from oppressive discovery into any marginally relevant information apply equally to the Discovery Motion. It will be highly burdensome on Mr. Kalven, as a professional journalist, to compel him to answer questions about the unpublished content of his conversations with persons who are not even parties to this case. This is all the more true when Defendants have not articulated a single valid reason for their inquiry, have not set forth why they have been unable to get the information they seek from Mr. Kalven through alternative means, and appear merely to be fishing for dirt on the plaintiffs' witnesses, rather than seeking truly relevant information.

As noted above, Mr. Kalven gathers information that is clearly in the public interest – information about the impact of police activities on the lives of Chicago public housing community residents. His ability to gather this information turns on his independence and the trust community members repose in him. (Decl. ¶¶ 13-14.) As Judge Gottschall cogently recognized in *Patterson*, the type of discovery Defendants are pursuing from Mr. Kalven here hampers journalists' ability to create sources and "protect the confidentiality of the information they receive," interferes in their motivation to develop information, and turns them into "indentured servants of the litigants." Allowing a deposition inquiry into Mr. Kalven's conversations would harm the ability of journalists to do their important work and "burdens the public interest in a robust press." *Id.* at *3.

CONCLUSION

For the reasons set forth above, Mr. Kalven respectfully requests that this Court enter an order denying the Petition[3] and Discovery Motion and quashing the Subpoena.

Respectfully submitted,

JAMIE KALVEN

By: s/ David P. Sanders
One of his attorneys

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[3] Rule 45(c) of the Federal Rules of Civil Procedure governs the enforcement of subpoenas on non-parties. The Petition violates that rule. Kalven filed an objection to the Subpoena. Under Rule 45(c)(1)(B), "If objection [to a subpoena] has been made, the party serving the subpoena may . . . move. . .for an order to compel the production." Here, as the face of the Petition shows, Defendants seek to hold Mr. Kalven in contempt without first undertaking the intermediate step of filing a motion to compel, which would have allowed him to assess his options upon hearing the Court's views on the discovery dispute. This is an additional reason to deny the Petition.

EXHIBIT 1

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

DIANE BOND,	)	
	)	
Plaintiff,	)	
	)	No. 04 C 2617
v.	)	
	)	Judge Joan Humphrey Lefkow
CHICAGO POLICE OFFICER	)	
EDWIN UTRERAS, et. al.,	)	Magistrate Judge Arlander Keys
	)	
Defendants.	)	

DECLARATION OF JAMIE KALVEN

Jamie Kalven, for his declaration, states as follows:

1. I am a professional journalist. My work has appeared in a variety of publications, including the *Nation*, *Slate*, *New Republic*, *Progressive*, *Bulletin of the Atomic Scientists*, *Chicago Times*, *University of Chicago Magazine*, *Chicago Reader*, and *Chicago Sun-Times*.

2. In addition, I am the author of *Working With Available Light: A Family's World After Violence*, published in 1999 by W. W. Norton. I also am the editor of *A Worthy Tradition: Freedom of Speech in America* by Harry Kalven, Jr., published in 1988 by Harper & Row.

3. My work as a journalist has received support from a number of philanthropic institutions, including writing fellowships from the Open Society Institute and the John D. and Catherine T. MacArthur Foundation.

4. I am a contributor to Chicago Public Radio. Steve Edwards, the host of the program "Eight Forty-Eight," and I were awarded the 2002 Peter Lisagor Award for Exemplary Journalism in the category of "in-depth reporting" by the Chicago

chapter of the Society of Professional Journalists for our radio portrait of a former drug dealer at the Stateway Gardens public housing development.

5. In 2001, my colleagues and I launched the web publication *The View From The Ground*. In the tradition of human rights reporting, the mission of *The View* is to deepen public discourse by providing reliable information about conditions on the ground in public housing communities. Most of my reporting in recent years has appeared on *The View*.

6. In addition to my own reporting, I have facilitated reporting by other journalists in the setting of public housing. Among the news organizations I have worked with are the *Chicago Tribune*, *Chicago Sun-Times*, *New York Times*, *Wall Street Journal*, *Boston Globe*, *Christian Science Monitor*, National Public Radio, PBS, CBS's "60 Minutes," and local television stations.

7. In recent years, the primary focus of my reporting has been patterns of police abuse in Chicago public housing communities. "Kicking the Pigeon," an article published in seventeen installments on *The View From The Ground*, reports on the allegations of police abuses in *Bond v. Utreras, et al.*, and explores the broader contexts in which those abuses are alleged to have occurred.

8. "Kicking the Pigeon" is one of several journalistic inquiries that will be absorbed into a book I am currently writing on patterns of human rights abuses by the police and the dynamics of official denial.

9. I acquired all the information I have with respect to this case in my capacity as a journalist. I do not possess any information not available to the parties in this case through their subpoena power.

10. When asked, I agreed to be a witness for the plaintiff in *Bond v. Utreras, et al.* I saw this as my duty as a citizen. Having been given permission by the plaintiff to do so, I agreed to answer any and all questions regarding what she told me about the various incidents alleged.

11. I have not talked about this case to several individuals specified in the subpoena. I did speak about this case to other persons specified in the subpoena. I believe, based on my communications with them, that they spoke to me with the expectation that I would not disclose information about them other than what I attribute to them in the published version of "Kicking the Pigeon."

12. I have spent many years, covering thousands of hours, researching and gathering information relating to allegations of police abuses in public housing communities. My work is ongoing, and I have a continuing need to develop sources.

13. My ability to do the kind of reporting I have focused on—and to serve as a resource for other journalists—depends on the trust of my sources. That trust has been built over many years. I believe that when my sources share information with me, they do so because they trust that I will not disclose information about them other than what I attribute to them in my published work. Accordingly, were I compelled to comply with the subpoena and disclose the content of my communications with my sources, it would undermine my relationships with my sources and thereby damage my ability to do my job as a journalist. It would also impair my ability to serve as a resource for other journalists in the setting of public housing.

14. The subpoena seeks a broad range of materials that are integral to my process of journalistic composition, such as notes of my communications with sources and drafts. What I decide to include in published material from my resource materials reflects my editorial judgments. I consider these unpublished materials to be my confidential research and journalistic work product reflecting many years of my work. Were I compelled to surrender these materials, it would severely inhibit my ability to function as a professional journalist and author.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 30, 2006.

Jamie Kalven

Jamie Kalven

EXHIBIT 2

Not Reported in F.Supp.2d, 2005 WL 43240 (N.D.Ill.), 33 Media L. Rep. 1200
(Cite as: Not Reported in F.Supp.2d)

H
Briefs and Other Related Documents

United States District Court,N.D. Illinois, Eastern Division.
Aaron PATTERSON, Plaintiff,
v.
Former Chicago Police Lt. Jon BURGE, et al.
Defendants.
No. 03 C 4433.

Jan. 6, 2005.

Michael Edward Deutsch, G. Flint Taylor, Jr., Joey L. Mogul, People's Law Office, Standish E. Willis, Law Office of Standish E. Willis, Chicago, IL, Demitrus Evans, Evanston, IL, for Plaintiff.
Richard Thomas Sikes, Jr., Oran Fresno Whiting, Terrence J. Sheahan, Richard Bruce Levy, Freeborn & Peters, Patrick T. Driscoll, Jr., Patrick T. Driscoll, Jr. P.C., Cook County State's Attorney, Louis R. Hegeman, Cook County State's Attorney's Office, John Patrick Goggin, Steven M. Puiszis, Robert Thomas Shannon, Corinne D Cantwell, Hinshaw & Culbertson, Chicago, IL, for Defendants.

Memorandum Opinion and Order

GOTTSCHALL, J.
***1** On August 5, 2004, plaintiff Aaron Patterson was arrested on federal drug and weapons charges. Patterson's arrest and comments about it he made in interviews with a number of journalists have been highly publicized. On October 18, 2004, defendants in this lawsuit served subpoenas on various news organizations, specifically, the Chicago Tribune Company, WGN Continental Broadcasting Company and WMAQ-TV ("the news organizations ") seeking all videotape and audiotape footage, including outtakes, and any and all documents, including notes and transcripts, reflecting statements made by Patterson between August 6, 2004 and August 19, 2004.[FN1] The three news organizations have moved to quash the subpoenas, arguing that the subpoenas violate the Illinois Reporter's Privilege Act, the First Amendment to the United States Constitution and the Illinois Constitution, and further require quashing or modification under Rule 45(c). In their Response to the Motion to Quash, the defendants have withdrawn their request for notes, having learned that there are sufficient video and audiotapes to render any interview notes cumulative. In addition, the court is under the impression that the news organizations have already made available to the defendants all broadcast footage and published interviews. If that is not the case, such materials should immediately be turned over since none of the arguments advanced by the subpoena respondents justify the withholding of any previously-published materials.[FN2]

FN1. This description generalizes the requests, although there were minor differences in the requests to each of the news organizations.

FN2. If the parties cannot negotiate an agreement covering the costs of any such materials, they can seek the assistance of the court.

In *McKevitt v. Pallasch,* 339 F.3d 530 (7th Cir.2003), the Seventh Circuit stated that it could find no basis, in law or fact, for recognizing a reporter's privilege under federal or state law cognizable in federal proceedings. Rather, it stated that instead of invoking a privilege, "courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances." This court will therefore pretermit consideration of the news organizations' statutory and constitutional arguments and analyze the motion to quash under the standards of Rule 45(c).

The Seventh Circuit has recently dealt with Rule 45(c) standards in *Northwestern Memorial Hospital v. Ashcroft,* 362 F.3d 923 (7th Cir.2004). Recognizing that "pretrial discovery is a fishing expedition and one can't know what one has caught until one fishes," the court noted that when the fish objects under Rule 45(c), the fisherman is called upon to justify his pursuit. 362 F.3d at 931. In this circumstance, the court must engage in a balancing process, balancing the burden of compliance against the benefits of the requested production. *Id.* at 927. Put in a fish-free way, non-parties are not treated exactly like parties in the discovery context, and the possibility of mere relevance may not be enough; rather, non-parties are entitled to somewhat greater protection. *See Builders Ass'n of Greater Chicago v. City of Chicago,* 2001 WL 664453 at *7 n. 4 (N.D.Ill. June 12, 2001). That protection encompasses weighing the need for the material subpoenaed against the burden involved in its production. Burden in this context means more than mere administrative hardship. It encompasses the interests that enforced production would compromise or injure. *Northwestern Hospital, supra,* at 928-29.

***2** The justifications defendants have advanced for these subpoenas are meager, to say the least, and consist largely of arguing repeatedly, albeit in different verbal formulations, that the materials sought may contain relevant information. The defendants assert that the complaint alleges a continuing conspiracy to injure Patterson emotionally, and point out that in his statements to reporters, as well as in statements at his preliminary hearing, Patterson at times claimed that his 2004 arrest was part of that conspiracy. Defendants assert, "If plaintiff has made non-privileged statements about this alleged conspiracy, surely defendants are entitled to production of these statements so they can discover the basis for the claim." Response at 5. Defendants, however, suggest no basis for believing that there are statements other than those they already have and never explain why, if they are curious about the basis for this claim, they have not served a contention interrogatory asking for it. Further, defendants argue that because plaintiff may be claiming that the arrest was part of the conspiracy alleged in his complaint, "it is crucial that defendants be permitted access to statements made by Patterson to test his claims of conspiracy in this case." *Id.* This is obviously the same justification set forth above but stated in more urgent terms. Finally, defendants summarize their argument: " Given that the lawsuit contains a claim for an ongoing conspiracy to inflict emotional distress, Patterson's statements to the Journalists are absolutely relevant to this case." *Id.* The essence of this perseverative argument, as far as the court understands it, is that because Patterson has stated that his arrest relates to the allegations of his complaint, anything he may have said about his arrest is relevant to his civil case.

The remainder of defendants' argument appears to invoke other bases for discovery, but really does nothing more than flesh out their relevance argument: "Patterson's statements are relevant for a host of other reasons as well. Among other things, they may be used for impeachment; or fodder for cross-examination; [FN3] or lead to other admissible evidence; or possibly deemed an admission under Fed. Rule.Evid. 801(d)(2)." If possible relevance were the standard for enforcing the subpoenas, defendants would surely prevail. No one is arguing that the interview records do not contain relevant statements by Patterson. Moreover, it is possible that Patterson said something during those interviews that could be used to cross-examine him in the civil suit or be used as an admission. Defendants are simply speculating, however, that the news organizations' non-published materials contain impeachment information or admissions. Defendants have apparently served these subpoenas before questioning Patterson, by deposition or interrogatories, about his statements to the news organizations or his conspiracy theory. Thus, defendants can establish relevance in its broadest and weakest sense. They cannot establish that their subpoenas seek information they do not already have or that is not readily available from other sources. Of course, the fact that what the defendants seek is Patterson's own statements adds something to the "mere relevance" of their requests.

FN3. Again, defendants assert little more

> than different verbal formulations for the same claim. There is not much difference between evidence useful for impeachment, fodder for cross-examination and admissions of a party opponent.

***3** Against these weak justifications, the burden on respondents is significant. Granted, simply turning over the tapes from which their published materials were drawn does not represent a major administrative burden. But requiring such production would establish that simply on the basis of a showing of relevance (and merely *possible* usefulness, since there is no reason to believe that Patterson told the reporters anything in private that he has not said publicly), private parties in a civil suit can call on the press to turn over the fruits of its investigative efforts. Since the press is involved in collecting information about all manner of things and circumstances that frequently end up in litigation, if there is no standard higher than mere relevance which civil lawyers must satisfy to help themselves to reporters' records, news organizations will be very busy responding to civil subpoenas. Similarly, the news organizations' efforts to maintain their independence and gain the trust of sources is an interest that will be severely impaired if mere relevance, meaning as it does here a mere relationship to the subject matter of a civil suit, makes their non-public records available on request. Further, the journalistic and editorial judgments involved in deciding what to ask an interview subject, and in deciding what to use from the material gathered, are the commercial and intellectual stock in trade of the news organizations; surely some good justification should be advanced before these journalistic and editorial judgments can be examined by outsiders and made public in the context of a civil lawsuit. As Judge Brown stated in her September 16, 2004 ruling on the Chicago Reader's Motion to Quash Subpoena in *Hobley v. Burge,* No. 03 C 3678, Rule 45(c) explicitly permits the court to protect against the disclosure of trade secrets and other confidential commercial information, and "[t]here is nothing in the Federal Rules that suggests that research for the purpose of news reporting [not to speak of editorial judgments about what should and should not be published] is to be given *less* protection than research for the purpose of product development." (Order, p. 13.)

In this case, where the subject matter of the civil suit raises issues of immense public importance, the press' efforts to shed light on the non-public recesses of certain police station activities has value to the entire City. To the extent the news organizations' resources are squandered providing information to civil litigants; or their ability to create sources hampered by judicial insensitivity to the value of their attempts to protect the confidentiality of the information they receive; or their motivation to develop their information and use it as they see fit; or the commercial value to the involved news organizations of the judgments involved in investigating and selecting material for publication dissipated as their "work product" becomes fair game for civil litigants in their relentless quest to "discover" everything, the news organizations become the indentured servant of the litigants, and their ability to do their important work will be severely impaired. The kind of discovery requested here not only burdens the news organizations but burdens the public interest in a robust press.

***4** In *McKevitt v. Pallasch,* 339 F.3d 530 (7th Cir.2003), the court affirmed an order of the district court requiring news organizations to produce to plaintiff McKevitt tape recordings of an interview conducted with David Rupert by journalists who were writing Rupert's biography. McKevitt was being prosecuted in Ireland for terrorism-related activities and wanted the tape recordings to assist him in cross-examining Rupert, who was expected to be a key prosecution witness. The Seventh Circuit found that there was no interest in confidentiality being compromised, inasmuch as the source, Rupert, was known and had indicated that he did not object to disclosure. In the case at bar, similarly, the interest in confidentiality is weak, since the source, Patterson, is known. Further, his objection to disclosure is entitled to little weight if any weight at all inasmuch as he is the plaintiff in this case and has no cognizable interest in the privacy of things he says to third parties that bear, even tangentially, on the litigation. But the Seventh Circuit in *McKevitt* also cited the important public obligation to assist in criminal proceedings and the

federal interest in cooperating in the criminal proceedings of friendly foreign nations as factors favoring disclosure. Neither of those interests is operative in the present context.

In requiring the Reader to turn over Hobley's letters but not its reporter Conroy's notes of his interview with Hobley, Judge Brown observed that Hobley's letters were analogous to the tape recordings ordered disclosed in *McKevitt.* This court agrees with Judge Brown that tape recordings and letters have in common that the administrative burden involved in producing them is very limited. Beyond that, however, the court disagrees with any implication in Judge Brown's decision, which did not involve audio or video recordings, that such recordings of a non-public interview by a journalist are otherwise analogous to the letters ordered disclosed in *Hobley.* In many respects, such recordings are much more like the reporter's notes as to which Judge Brown quashed the *Hobley* subpoena. They reflect the journalist's thought processes, his or her method of investigation, and his or her choices about what should be published and what withheld. As Judge Brown observed regarding the reporter's notes in *Hobley,* "The only value of the notes to the Individual Defendants is the possibility that they *might* reflect something that Hobley said to Conroy that *might* be helpful to the Defendants." Order of September 16 at 12. Moreover, Judge Brown observed, the notes are the reporter's confidential work product, as is the case with the recorded interviews sought here. *Id.* at 13. Granted, compelled disclosure of reporters' notes is more invasive than the production of recordings since, as Judge Brown observed, the reporter involved would almost certainly have to be deposed to interpret the notes before any use could be made of them. But this court is of the view that recordings of interviews are in almost all important ways much more like interview notes than like unsolicited letters, and Judge Brown's analysis, applied here, counsels strongly against compelling disclosure.

***5** Given the weak showing of materiality made by defendants, the lack of any compelling public interest in disclosure such as was present in *McKevitt* and the significant burden on important private and public interests compelled production in this case would involve, this court, pursuant to the balancing of interests required by Rule 45(c), grants the news organizations' Motion to Quash.

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Briefs and Other Related Documents (Back to top)

- 2006 WL 549147 (Trial Motion, Memorandum and Affidavit) George H. Ryan's Reply in Support of his Motion to Quash Subpoena (Jan. 20, 2006)
- 2006 WL 549143 (Trial Motion, Memorandum and Affidavit) Certain Defendants' Response to Motion to Quash Subpoena Directed to George H. Ryan (Jan. 6, 2006)
- 2006 WL 549144 (Trial Motion, Memorandum and Affidavit) Certain Defendants' Response to Plaintiff's Motion for a Protective Order and Motion to Quash the Subpoena for the Prisoner Review Board's Findings and Recommendations Concerning Plaintiff's Pardon (Jan. 6, 2006)
- 2006 WL 549145 (Trial Motion, Memorandum and Affidavit) Certain Defendants' Response to Motion to Quash Subpoena Directed to the Illinois Prisoner Review Board (Jan. 6, 2006)
- 2006 WL 549146 (Trial Motion, Memorandum and Affidavit) City of Chicago's Reply Brief in Support of its Motion for Continued Protective Order Barring Deposition of Mayor Daley (Jan. 6, 2006)
- 2005 WL 3708713 (Trial Motion, Memorandum and Affidavit) City of Chicago's Motion for Continued Protective Order Barring the Deposition of Mayor Daley (Nov. 9, 2005)
- 2005 WL 3708712 (Trial Motion, Memorandum and Affidavit) Plaintiff's Response to Defendant City of Chicago's Motion to Supplement its Motion to Reconsider This Court's August 2, 2005 Order (Nov. 7, 2005)
- 2005 WL 3286304 (Trial Motion, Memorandum and Affidavit) Motion to Compel Plaintiff to Limit Rule 404(B) Evidence (Oct. 17, 2005)
- 2005 WL 3286299 (Trial Motion, Memorandum and Affidavit) City of Chicago's Reply Brief in Support of its Motion for Reconsideration (Oct. 5, 2005)

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