

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

Derrick Schaeffer,	)	
	)	
<i>Plaintiff,</i>	)	No. 19-cv-7711
	)	
-vs-	)	(Judge Dow)
	)	
City of Chicago, et al.	)	(Magistrate Judge Gilbert)
	)	
<i>Defendants.</i>	)	

**PLAINTIFF'S MOTION TO COMPEL**

Plaintiff moves the Court to compel defendants to produce transcripts from plaintiff's state court criminal proceedings that are in defendants' possession and that defendants concede are relevant to this case. The parties agree that further attempts to resolve this discovery dispute in accordance with Local Rule 37.2 will be futile. (ECF No. 52 at 2.)

Grounds for this motion are as follows:

1. This lawsuit concerns plaintiff's wrongful prosecution for burglary. Plaintiff contends that defendants, Chicago police officers, fabricated evidence that caused the wrongful prosecution.
2. Between plaintiff's arrest on February 1, 2017 and May 6, 2019, when the Cook County State's Attorney's Office dismissed the case, plaintiff made more than 20 appearances in Cook County Circuit Court.

3. Defendants are in possession of transcripts from 22 of these court appearances. (Exhibit 1, Defendants' MIDP Responses at 8.)

4. Defendants concede that these transcripts are relevant to this case, listing them in response to Mandatory Initial Discovery Request 3, which seeks material "that you believe may be relevant to any party's claims or defenses." (Exhibit 1, Defendants' MIDP Responses at 8.)

5. Nevertheless, defendants refuse to produce the transcripts based on the following objection: "they are equally available to Plaintiff and the dissemination of them through Defendants would deprive the court reporter of income to which he or she is entitled." (Exhibit 1, Defendants' MIDP Responses at 8.) The Court should overrule these objections.

6. Courts have repeatedly rejected the "equally available" objection, describing it as "insufficient to resist a discovery request." *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000.) The well established rule is that "parties cannot avoid their discovery obligations by stating that 'the discovery sought ... can be obtained from some other source.'" *S2 Automation LLC v. Micron Tech., Inc.*, No. CIV 11-0884, 2012 WL 3656454, at \*37 (D.N.M. Aug. 9, 2012); *see also* 8 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 2014; *Hill v. Gonzalez*, No. 11 CV 1071, 2015 WL 1657781, at \*6 (E.D. Cal. Apr. 14, 2015); *Charter Practices Int'l v.*

*Robb*, No. 12 CV 1768, 2014 WL 273855, at \*2 (D. Conn. Jan. 23, 2014); *Hill v. Asset Acceptance LLC*, No. 13 CV 1718, 2014 WL 3014945, at \*7 (S.D. Cal. July 3, 2014).

7. Nearly all documents requested in discovery in police misconduct cases are “equally available” through subpoenas, Freedom of Information Act requests, or public record searches.

8. Defendants’ own requests for production in this case seek transcripts, as well as many other “equally available” documents. For example, Request 1 seeks:

1. Any and all documents relating to the events alleged in the operative complaint, including, but not limited to, any and all statements, email or letter correspondence, reports, photographs, investigative reports, court records, transcripts, orders, pleadings or any court papers, and/or opinions and statements of Plaintiff, any witnesses or police officer regarding the events alleged in the operative complaint, with the exception of documents protected by attorney-client privilege or attorney work product doctrine.

(Exhibit 2, Defendants’ Requests for Production at 1.)

9. Plaintiff responded to this request by providing the transcript from his criminal proceeding that was in his possession.

10. In addition, plaintiff has provided to defendants copies of the documents he obtained from the Cook County Public Defender before filing his lawsuit and copies of the documents he obtained from the Cook County

State's Attorney in response to a subpoena. These documents were all "equally available" to defendants.

11. Defendants seek to justify their "equally available" objection under Federal Rule of Civil Procedure 26(b)(1), which states that one consideration in determining the scope of discovery is "the parties' relative access to relevant information." But the scope of discovery is not at issue; defendants concede that the transcripts are relevant and are already in their possession. The Court should therefore reject defendants' "equally available" objection.

12. The Court should also reject defendants' "court reporters' rights" objection. As the Tenth Circuit stated in rejecting this position:

In broad terms, [the court reporter's] fee claim rests on the tacit premise that court reporters in some legal sense own the content of the transcripts they prepare, such that they are entitled to remuneration whenever a copy of a transcript is made (even if they played no role in making the copy). To accept this premise would effectively give court reporters a "copyright" in a mere transcription of others' statements, contrary to black letter copyright law. See 2 William F. Patry, *Patry on Copyright*, Ch. 4 Noncopyrightable Material, § 4.88 (Updated Sept. 2008) (court reporters are not "authors of what they transcribe and therefore cannot be copyright owners of the transcript of court proceedings").

*United Transp. Union Local 1745 v. City Of Albuquerque*, 352 F. App'x 227, 231 (10th Cir. 2009).

13. There is no merit in any argument by defendants that they are bound by some form of contractual rights held by the court reporter. Private contracts cannot modify the Federal Rules of Civil Procedure. *E.g.*, *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 922 (D. Nev. 2006) (discussing the “unremarkable proposition that confidentiality agreements will not stand as a barrier to discovery”). Nor can private contracts bind non-parties. *E.g.*, *EEOC v. Waffle House*, 534 U.S. 279, 294 (2002).

14. Plaintiff's position is consistent with the rules for transcripts of proceedings in federal court, which are made publicly available 90 days after transcription without further payment to the court reporter. U.S. COURTS, *Federal Court Reporting Program*, <https://www.uscourts.gov/services-forms/federal-court-reporting-program>.

15. Defendants' position is contrary to the federal procedure. It is also contrary to the many court rules requiring the public filing of transcripts. For example, state court transcripts like those being withheld by defendants must be filed in response to a federal habeas petition, RULES GOVERNING § 2254 CASES, RULE 5(c), deposition transcripts must be filed at summary judgment, FED. R. CIV. P. 56(e); Local Rule 56.1(a)(1), and transcripts must be filed as part of the record on appeal. FED. R. APP. P. 10(a)(2).

The Court should therefore overruled defendants' objection and order defendants to produce the transcripts in their possession.

Respectfully submitted,

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