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Public Records Still Secret

Miami police play terrorism card in refusing to release plan for handling last year's FTAA protests

May 18, 2004 By: Steve Ellman
Larry Handfield, chairman of the Miami Civilian Investigative Panel

Access to the police operations plan for last November's Free Trade Area of the Americas conference in Miami has become the focus of an intense legal battle among South Florida law enforcement agencies, city and county civilian investigative panels and the American Civil Liberties Union.

The Miami Police Department has refused public records requests for the plan from the city's Civilian Investigative Panel, the Miami-Dade County Independent Review Panel and the American Civil Liberties Union of Florida.

CIP members and ACLU attorneys say examination of the plan is critical to their investigations of alleged police abuses during the FTAA conference, as well as the prosecution of a number of civil lawsuits focusing on the alleged police misconduct.

The CIP is investigating 17 formal complaints of police misconduct during the conference. The ACLU has sent notices of intent to file nine civil suits against the city and other defendants and expects to file more.

Examination of the plan is significant because protesters and police officials alike see the so-called Miami Model as a state-of-the-art national model for controlling protests. Police officials and their lawyers say disclosure of the FTAA security operations plan would jeopardize law enforcement efforts during future protest events around the country.

Everyone involved says judges will likely decide the issue of disclosure of the plan after examining the documents confidentially as a result of lawsuits to enforce investigators' subpoenas and in the discovery phase of police misconduct lawsuits.

The controversial security operations plan was devised by Miami police under the direction of Chief John Timoney. Timoney's department assumed the role of lead agency in a coalition of 44 law enforcement agencies created to deal with security for the trade conference. The plan outlines the coalition's staffing, logistics, strategy and tactical options for police in a variety of emergency situations.

Critics of the plan say it is a blueprint for suppression utilizing

overwhelming force and mass, illegal arrests. Supporters say it is merely a variation of long-standing police plans for emergencies, as well as an appropriate response to the mayhem caused by anarchists acting behind a veneer of legitimate protest groups.

The CIP — created by Miami voters in a November 2001 ballot initiative to monitor police conduct — formally requested copies of the plan in letters to Miami police on April 12, April 22 and May 4. The full panel will meet tonight and hear updates from four subcommittees investigating police handling of the FTAA, including the issue of the security operations plan.

The city's formal reply to the CIP is still being drafted by police legal counsel George Wysong. But in a March 10 letter of reply to ACLU staff attorney Rosalind Matos, Wysong repeated the city's previous, informal reply to the ACLU that the operations plan is exempt from disclosure under the state public records law.

In an interview, Wysong said it was also important to shield the plan from discovery in a federal civil rights class action against the city brought by FTAA protesters in U.S. District Court in Miami.

Wysong said elements of the Miami security operations plan may well be used in organizing security for this summer's national political party conventions, including the Democratic Party's National Convention in Boston. "The focus of [the class action plaintiffs'] strategy is to defeat the Miami Model and go on to Boston," he said. "If they get the operations plan, they get our playbook."

On the county level, the Miami-Dade Independent Review Panel and the ACLU have issued public records requests to the Miami-Dade Police Department for copies of the security operations plan and have been turned down. The ACLU has made similar requests to the Hialeah Police Department.

In an April 26 letter to Matos, Miami-Dade police legal counsel Thomas Guilfoyle adopted the same position as the Miami police.

Wysong said the fate of the nation's struggle against terrorism hinges partly on the effectiveness of the police security operations plan. "This is bigger than the FTAA," he said. "The plan outlines police response to extreme situations. It could enable actions to cripple that response."

But CIP chairman Larry Handfield rejected that argument. "With all due respect," he said, "you can't constantly use terrorism as an umbrella to hide under." He said the CIP has instructed its lawyers to prepare to subpoena it.

Observers say another key to examining police conduct during the FTAA conference is the mutual aid agreements between Miami police and other agencies in the law enforcement coalition that provided security for the trade conference.

The agreements are boilerplate arrangements whereby the city allows law enforcement agencies that ordinarily have no jurisdiction inside city boundaries, such as the Broward Sheriff's Office and the police departments of nearby municipalities, to operate inside Miami.

Unlike the operations plan, the mutual aid agreements between Miami police and other law enforcement agencies in the FTAA security force were quickly made public.

Interpretation of the agreements could prove decisive in determining liability in FTAA civil suits, since they attempt to limit responsibility for police officers' actions to the home agencies they work for rather than to the Miami police, which was lead agency in the plan, or to the law enforcement coalition collectively.

Miami police claim that the agreements absolve them of liability for the actions of other agencies in the coalition, even if they occurred in the city's jurisdiction and as part of a force in which the Miami police were lead agency.

But Matos said that it "doesn't matter what the agreements say. They can't absolve the city of liability if the city was in control. The FTAA was Timoney's show."

The security plan and mutual aid agreements may also figure in the federal civil rights class action filed March 25 by FTAA protesters against the city in federal court in Miami if the suit withstands a motion to dismiss filed by city attorneys.

Plaintiff attorneys from the National Lawyers Guild plan to file a response to the motion this week.

If the plaintiffs defeat the motions for dismissal, the FTAA police operations plan will be the subject of discovery requests, according to Lake Worth attorney Robert Ross, a plaintiff co-counsel in the suit. But he expects the requests to encounter a "broad national security assertion" from the city.

In a related development, in a May 13 letter to the Miami City Commission, the CIP's Handfield complained that the city of Miami's underfunding of his panel and overly stringent controls on how it operates have "significantly

delayed and impeded” the CIP’s work. The panel only recently hired the Miami criminal defense team of Jay Levine and David Finger as independent counsel, and then just on a part-time basis.

City officials did not return calls for comment on Handfield’s charges.

Policy still in force

The city of Miami is basing its refusal to disclose the FTAA security operations plan on section 119.07(3)(d) of state public records law. That section exempts “comprehensive [police] policies or plans ... involved in responding to emergencies.” Elsewhere, emergencies are defined as “any occurrence, or threat thereof ... which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.”

But the ACLU’s Matos disputed that exemption claim in an April 14 letter to Wysong. “It is well known,” she wrote, that the FTAA protests caused no “injury or harm to the general population” or property losses. In addition, she argued, since the FTAA conference is over, any exemption claimed prior to the demonstrations based on anticipatory fear of injuries and damages “is no longer valid.”

In an interview, Wysong said that the FTAA operations plan is a continuing police policy for addressing emergencies and therefore cannot be released. “The ops plan has no beginning and end,” he said. “It’s a living document, with the next plan evolving from this one.”

Wysong also rejected Matos’ suggestion that police provide ACLU with a redacted version of the plan that would protect the more sensitive parts from public disclosure.

Matos said she doesn’t know how significant the operations plan is to the ACLU’s lawsuits. That’s precisely why the plan must be released as part of discovery in the civil suits or through an action to enforce the records request. “We don’t know what’s in it,” she said. “That makes it that much more intriguing.”

Wysong said Miami city officials will decide the police response to subpoenas and discovery requests. “My advice will be to fight,” he said. “I don’t think any non-law enforcement agency should get copies of the plan. And neither does the Legislature that wrote the [public records] law.”

Who’s responsible?

The language of the interagency mutual aid agreements may prove just as

important as the security operations plan to the outcome of the civil lawsuits.

The agreements define the different police agencies' liability for each other's misconduct under the agreements. In a section on liability, the language of the agreements states that each agency assumes responsibility only for the acts of its own employees.

Wysong said that means that plaintiffs can only sue the police agency that allegedly injured them — even if the agency was in Miami at the city's request. That could pose a legal hurdle for the many protester-plaintiffs who are not able to identify the individual officers who allegedly abused them, or even the police department to which the officers belonged.

“That's the way the courts have interpreted [mutual aid agreements],” Wysong said.

Wysong said that the designation of the Miami Police Department as the lead police agency during the FTAA demonstrations was misleading as to command responsibility. “It's not like we were at the top of the chain, like the joint chiefs of staff,” he said. “Other agencies weren't required to give all their information to us. It was shared informally, in ongoing discussions.”

In testimony to the county's Independent Review Panel, for example, Miami-Dade Police Capt. Steve Rasmussen stated that his force operated independently of Chief Timoney's command but responded to Timoney's requests.

But National Lawyers Guild attorney Ross said that the language in the mutual aid agreements wouldn't necessarily shield the Miami Police Department from liability for the other agencies. “Global liability” still could be established, depending on the facts, he said.

Another question arises from the fact that the mutual aid agreements stated that officers from police agencies with standards and procedures different from Miami's were bound by their home agencies' policies while operating in Miami during the FTAA conference. The Miami Police Department has a more restrictive policy on use of force than some other departments.

Wysong said this supports the city of Miami's position that it cannot be held liable for the acts of the other agencies.

“Even with a written agreement, they can't contract away the rights of plaintiffs,” Matos replied. “Ultimately, a judge will answer this question.”

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