UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Watts Coordinate Pretrial Proceedings, et al., Plaintiff, vs. Kallatt Mohammed, et al., Defendants.	Case No.: 19-cv-1717 Honorable Andrea R. Wood

MOTION TO QUASH SUBPOENA FOR THE DEPOSITIONS OF ERIC SUSSMAN, JOSEPH MAGATS, MARK ROTERT AND NANCY ADDUCI

Third Party Respondent Cook County State's Attorney's Office ("CCSAO"), by its attorney, Kimberly M. Foxx, State's Attorney of Cook County, through her Assistant State's Attorneys, Lyle Henretty and Mia Buntic, pursuant to Fed. R. Civ. P. 26 and Fed. R. Civ. P. 45, brings this motion to quash the subpoena for the depositions of Eric Sussman, Joseph Magats, Mark Rotert, and Nancy Adduci in the above-referenced case. In support, the Respondent states as follows:

I. Relevant Procedural History

The CCSAO is not a party to this litigation, but seeks to move to quash four subpoenas to testify issued to (1) the former First Assistant State's Attorney Eric Sussman, (2) the former First Assistant State's Attorney, Joseph Magats, (3) the former Director of the Convictions Integrity Unit, Mark Rotert, and (4) the current Director of the Convictions Integrity Unit, Nancy Adduci. The CCSAO's motion in this case is one of several the Office has had to file in the past few years due to repeated efforts by defense counsel to pierce the veil of the Office's deliberative process privilege, in some cases in direct defiance of clear, express rulings by the court. The undersigned

has reached out to defense counsel to understand which information they seek to elicit from above named individuals, that is non-privileged and not available by less intrusive means. Initially, the Defendants refused to provide any specific topics, or any indication as to why it was necessary to depose all four witnesses instead of just one. At the urging of this Court, defense counsel provided a general list of deposition topics. (A copy of the deposition topics is attached hereto as **Exhibit 1**). The list of topics is so overly broad as to render its production meaningless. Effectively, it is Defendants position that they can ask any question, regarding any topic, and the CCSAO is not entitled to a single privilege or protection. This is especially unfortunate, given that the Defendants and the CCSAO have litigated these issues for years at this point, and the Northern District has repeatedly affirmed the CCSAO's privileges.

The Court initiated a coordinated pretrial proceeding for a number of cases involving similar claims and the same Defendants on March 12, 2019. [ECF No. 1]. In February 2023, counsel for the Defendants issued four subpoenas for the depositions of one current and three former high-ranking officials in the Cook County State's Attorney's Office. On April 13, 2023, this Court advised counsel for the Defendants to provide the CCSAO with a list of anticipated topics for the Deponents, and advised the parties to confer about claims regarding the deliberative process privilege and whether these are "apex" witnesses. [ECF No. 491]. The CCSAO made several attempts to understand the nature of the information sought by counsel for the Defendants in order to have fruitful discussions regarding the assertion of the deliberative process privilege. Each time, however, counsel for the Defendants claimed that they are entitled to question each witness about any of the extremely broad list of topics outlined in Exhibit 1**.**

Based on these conversations and correspondence between the CCSAO and counsel for the Defendants, Defendants specifically intend to depose Mr. Sussman, Mr. Magats, Mr. Rotert and

Ms. Adduci regarding the factors taken into account, deliberations, reasoning behind, and ultimate bases for the CCSAO's decision to voluntarily dismiss charges against Plaintiffs, and any information the individuals may possess regarding the CCSAO's decision-making with respect to the Plaintiffs' post-conviction proceeding and petitions for certificates of innocence ("COI"). The nature of this testimony that Defendants intend to elicit from them is protected by the deliberative process privilege, and the mental impressions work product privilege doctrines.

Defendants claim that all privilege has been waved based on press statements. However, they have failed to identify any statements or comments that constitute a waiver of the deliberative process privilege with respect to the above referenced topics. Moreover, attorneys for the Defendants have previously sought to elicit privileged testimony from Mr. Sussman, Mr. Magats and Mr. Rotert, despite previous findings by the Northern District of Illinois that they are not entitled to this information. [1] The Defendants have solicited testimony involving privileged matters in some of these cases, even after the Court clearly and expressly ordered them not to do so[2]. Thus, this motion is brought in order to quash Plaintiffs' subpoena for Mr. Sussman, Mr. Magats, Mr, Rotert, and Ms. Adduci to testify in this case, and in furtherance of the CCSAO's interest in protecting valuable privileges that are necessary for the CCSAO to make quality, measured decisions without the threat of harassing litigation.

[1] *See Fulton v. City of Chicago*, et al., 17-cv-8696; *Coleman v. City of Chicago*, et al., 18 C 998; *Almodovar v. City of Chicago*, et al., 18 C 2341; *Negron.v. City of Chicago*, et al., 18 C 2701; *Brown v. City of Chicago*, 18-cv-07064; *Solache v. City of Chicago, et al.,* 18-cv-2312*; Reyes v. Guevara, et al.,* 18-cv-1028.

[2] For instance, in the *Fulton v. City of Chicago* matter, this Court significantly limited the types of questions the Defendants could ask Mr. Sussman during his deposition. Despite the clear instruction, the parties in *Fulton* disregarded the Court's instructions consistently throughout the deposition, and Mr. Sussman had to be instructed not to answer a number of questions (in whole or in part). *See* March 25, 2021 Deposition of Eric Sussman, pp. 25, 60-61, 72, 76, 85, 88, 93, 110, 113-114, 121-122, 136, 211, 229-231, 249-250, 263, 272-273, 283-286, 289, 291-293,297, 299, and 302. This deposition was marked CONFIDENTIAL. The CCSAO will provide a copy to the Court upon request. Tellingly, despite stating several times during the deposition that they would dispute these objections with the magistrate judge, the Defendants never followed up with the Court.

II. Argument

The Respondents move to quash the subpoena because: 1) Sussman, Magats, and Rotert were former high ranking public official who will not be unable to provide any relevant non-privileged evidence; and Nancy Adduci is a current high ranking public official who will not be able to provide relevant non-privileged information 2) the communications sought are protected by the deliberative process privilege; and 3) any mental impressions related to the privileged communications are likewise protected by the mental process privilege and work-product doctrine.

1. Defendants Have Not Identified any Relevant, Non-Privileged Testimony that Could Be Provided by Sussman, Magats, Rotert or Adduci.

High-ranking governmental officials should not be subject to giving depositions unless the testimony sought will lead to admissible evidence relevant to the disposition of the case. *See, e.g., Stagman v. Ryan*, 176 F.3d 986, 994-95 (7th Cir. 1999), *cert. denied*, 528 U.S. 986 (1999) (holding that plaintiff was not entitled to depose the Illinois Attorney General regarding his employment discrimination claim) (*Gauthier v. Union Pac. R.R. Co.*, 2008 U.S. Dist. LEXIS 47199, at *15 (E.D. Tex. June 18, 2008) (applying to both current and former high-level officials)). *See also Lee v. City of Chicago*, 20 C 1508, Docket No. 57 (Tharp, J.)("[t]he apex doctrine is no less applicable to former officials than it is to current officials."). Mr. Sussman and Mr. Magats were the First Assistant State's Attorney, overseeing the seven bureaus of the CCSAO. Mr. Rotert was the former Director of the Convictions Integrity Unit. Nancy Adduci is the current Director of the Convictions Integrity Unit. Whatever non-privileged information they could provide is available from other sources, namely, the Assistant State's Attorney assigned to the case at the time, or a 30(b)(6) deposition. The Defendants are well aware of this. In fact, identical attempts in similar cases by other defendants and the City of Chicago to depose First Assistant's about similar subject matter

have been denied in the past. See, e.g., 10/17/19 Order, *Gray v. City of Chicago*, 18-cv2624, (Docket No. 184) (quashing subpoena for Mr. Magats seeking his testimony regarding the CCSAO's decisions related to plaintiff's post-conviction litigation). See 12/4/20 Order, *Fulton, Coleman v. Foley, City of Chicago, et al.*, 17-cv-8696/18-cv-998 (Docket No. 290.) (denying motion to quash but prohibiting defendants from eliciting any testimony from Mr. Sussman protected by deliberate process privilege and work product doctrine that had not been waived) (*citing* Judge Pallmeyer's 7/28/20 Order, *Brown v. City of Chicago, et al*., 18-cv-7064)[3]; *See* 7/22/21 (Docket No. 457) and 6/28/23 (Docket No. 502) Orders, *Solache, Reyes v. City of Chicago, Guevara, et al.,* 18-cv-2312/18-cv-1028) (granting in part motion to quash the deposition of Mr. Sussman and limiting the parameters of the questions; granting the motion to quash the subpoena for the deposition of the current First Assistant State's Attorney*)*. Further, to the extent the Defendants intend to depose any of these individuals regarding their personal opinions vis-à-vis the underlying facts or use them to challenge the decisions made by the CCSAO, this line of questioning would be wholly inappropriate and irrelevant to any claim or defense in this case. Mr. Sussman, Mr. Magats, Mr. Rotert and Ms. Adduci are not "expert witnesses," and elicited opinions regarding the merits of the instant litigation, including whether or not the Plaintiffs or Defendants engaged in wrongdoing, would invade the province of the jury.

In a good faith attempt to resolve this matter, CCSAO offered to produce Nancy Adduci as a witness to testify about a predetermined list of topics. The Defendants refused. The CCSAO then inquired whether the Defendants would accept a Federal Rule of Civil Procedure 30(b)(6) witness to testify regarding non-privileged issues pertaining to Plaintiffs' underlying criminal proceedings. The Defendants rejected this offer and made no counterproposal. Instead, they insisted that all four

[3] A copy of the transcript containing Judge Pallmeyer's 7/28/20 rationale in *Brown* is attached hereto as **Exhibit 2**.

individuals had unique information and the Defendants were entitle to all four depositions, at seven hours per deposition. The Defendants have refused to elaborate on what unique factual information Messrs. Sussman, Magats, and Rotert would have that Director Adduci or another ASA would not have, or that could not be covered by a 30(b)(6) deponent.

On June 28, 2023, less than two weeks before this writing, Judge Seeger granted the CCSAO's motion to quash the city defendants' subpoena of the current First Assistant State's Attorney, Risa Lanier in the *Solache/Reyes* matter. (18-cv-2312, Docket No. 502). Judge Seeger explained why Courts should tread lightly in ordering apex depositions of CCSAO personnel:

> "Getting discovery from the Cook County State's Attorney's Office [is] a serious thing. They have a job to do. They've got a really important job to do. Discovery is distracting and disruptive and burdensome for anybody, let alone a public agency. So anytime you're in the territory of getting discovery from a public agency, it's -- it's serious business, let alone a prosecutor's office. I mean, there is a real public interest in having them devoted to their mission. That's not to say there aren't other interests at play. There obviously are. But you start from the standpoint that they've got a pretty important job to do, and distracting them and burdening them is something you don't do lightly. I think everybody would probably agree with that… I do think, in general, federal courts need to tread lightly when invading the province of state prosecutors. So it's not something I do lightly. This particular would-be deponent is the first assistant. I understand it's the number two person in the Cook County State's Attorney's Office. Sometimes high-ranking people are deposed, but, again, you don't do it lightly. I have some concern that once a high-ranking person is deposed in one case, it could be a bursting of the damn and everybody is going to want their piece of this person in every other case."[4]

The fact that three of these deponents are former employees is of little consequence. There is no doubt that were these depositions to proceed as Defendants request, the burden on non-party CCSAO would be considerable. The topics identified are so overly broad that the witnesses would have to be prepared on each of the consolidated cases, the office would have to carefully review each of the files, and at least two attorneys would need to be present (one for the witness and one

[4] *Solache, Reyes v. City of Chicago, Guevara, et al.,* 18-cv-2312/18-cv-1028. The transcript of the proceedings has not yet been finalized and is not available on the public docket. The CCSAO will provide a copy to the Court upon request.

to make objections on behalf of the CCSAO itself). While the CCSAO understands that it must sometimes participate in litigation to which it is not a party, the Defendants in this and myriad other cases are abusing the process in order to affect CCSAO policy and decision-making.

In addition, as set forth below, the great majority of the information sought by the Defendants (as set forth in Exhibit 1) is subject to the deliberative process, mental impression, and work product privileges. There is no valid basis to depose Mr. Sussman, Mr. Magats, Mr. Rotert or Ms. Adduci at this time. As such, the subpoenas for their depositions should be quashed.

2. The Information Sought is protected by the Deliberative Process Privilege.

"The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency." *U.S. v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (*citing N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975)). The privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001) (internal quotations omitted). To this end, the privilege shields "communications that are part of the decision-making process of a governmental agency." *Farley*, 11 F.3d at 1389. Privileged communications include not only conversations, but "documents reflecting advisory opinions, recommendations, and deliberations comprising part of the process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 9 (2001) (citing *Sears, Roebuck & Co.*, 421 U.S. at 150). Although the deliberative process privilege does not justify the withholding of purely

factual material, it does prohibit the disclosure of "factual matters inextricably intertwined with such discussions." *Enviro Tech Int'l, Inc. v. U.S. E.P.A.*, 371 F.3d 370, 374-75 (7th Cir. 2004).

A two-step process exists for determining whether the deliberative process privilege applies. First, the government must show that the privilege applies to the information sought. *Ferrell v. United States HUD*, 177 F.R.D. 425, 428 (N.D. Ill. 1998). For the government to satisfy its prima facie threshold, three things must occur: (1) the department head with control over the matter at issue must, after personal consideration of the issue, make a formal claim of privilege; (2) the designated official must articulate, typically by affidavit, their reasons for preserving the confidentiality of the information sought; and (3) the official must specifically identify and describe the documents or information sought. *Id.*; *see also Evans v. City of Chicago*, 231 F.R.D. 302, 316 (N.D. Ill. 2005). Here, the CCSAO asserts formal claims of privilege over the deposition topics designated by the Defendants by way of the attached Declaration of Jessica Scheller, the CCSAO's Deputy Bureau Chief for the Civil Actions Bureau. (*See* Declaration of Jessica M. Scheller, attached hereto as **Exhibit 3**).

If the government makes out a prima facie case that the privilege applies, the burden then shifts to the party seeking disclosure to establish: (1) "a particularized need" for the information sought; and (2) that the party's need for the document outweighs the government's interest in confidentiality. *Farley*, 11 F.3d at 1389; Ferrell 177 F.R.D. at 428. In undertaking such an analysis, a court must balance the requestor's need for disclosure against the government's need for secrecy, considering such factors as: (1) the relevance of the documents to the litigation; (2) the availability of other evidence that would serve the same purpose as the documents sought; (3) the government's role in the litigation; (4) the seriousness of the litigation and the issues involved in it; and (5) the degree to which disclosure of the documents sought would tend to chill future deliberations within

government agencies, that it would hinder frank and independent discussion about governmental policies and decisions. *Ferrell*, 177 F.R.D. at 429; *see also Saunders v. City of Chicago*, 12 C 958, 2015 U.S. Dist. LEXIS 105571, at * 31-32 (N.D. Ill. Aug. 12, 2015).

The information sought from Mr. Sussman, Mr. Magats, Mr. Rotert and Ms. Adduci is unquestionably protected by the deliberative process privilege and has been previously held so by Courts in the Northern District. For instance, in *Saunders*, the plaintiff brought a motion to compel a high-ranking ASA to answer deposition questions about the content of the CCSAO's deliberations regarding the dismissals of charges and its decisions regarding plaintiff's petition for a COI. *Saunders*, U.S. Dist. LEXIS 105571, at * 58- 63. The plaintiff also sought to compel the ASA to answer questions regarding his personal beliefs about the plaintiff's guilt or innocence, the weight and significance of various evidence, and the relevance of newly discovered evidence. *Id*. at 63-67. The court, in holding that the deliberative process privilege was applicable to these inquiries, further held that, upon balancing the interests, the plaintiff had not overcome his burden to establish a particularized need that outweighed the government's interests. *Id*. at 76. *See also Fulton v. City of Chicago*, et al., *Brown v. City of Chicago*, 18-cv-07064; *Solache v. City of Chicago, et al., 18-cv-2312; Reyes v. Guevara, et al., 18-cv-1028.*

Although the court in *Saunders* conducted a full analysis, of particular significance to the court's holding was the policy underlying the privilege itself – the need to protect the quality of agency decisions by protecting open and frank discussions among its members. *Saunders*. at 76 ("Allowing Plaintiffs to have access to such evidence would set a precedent for others similarly situated to seek discovery of the [CCSAO's] confidential information and allow them to have full access to closed session discussions as fodder for potential [civil rights] claims. This, in turn, would have a negative impact on the quality of prosecutorial decisions made by the State's Attorney and

his or her staff.") (internal citations or quotation omitted). Ultimately upholding the CCSAO's objections, the court denied the portion of the plaintiff's motion seeking to compel the ASA to answer the questions posed. *Id*. As *Saunders* establishes, the CCSAO's deliberations regarding its decisions to seek to vacate a conviction or to dismiss charges are privileged. *See also Hill v. City of Chicago*, 13 C 4847, 2015 U.S. Dist. LEXIS 190661, at * 10-11 (N. D. Ill. May 28, 2015) (holding that the deliberations underlying a decision to bring criminal charges are privileged). Yet, the Defendants here will be seeking the exact same information—despite analogous precedent forbidding such disclosures.

Because the information sought is protected by the deliberative process privilege, and because the Defendants cannot overcome their burden to establish a particularized need, this Court should quash the subpoenas directed to Mr. Sussman, Mr. Magats, Mr. Rotert and Ms. Adduci.[5]

3. The Mental Impressions related to the Privileged Communications are Privileged.

It is clear from *Saunders*' opinion that, not only are the actual communications privileged, but so too are the internal thoughts and mental processes attendant to the deliberations. As the *Saunders* court noted, inquiries into personal beliefs cannot be separated from the actual deliberations, as the beliefs and opinions formed are necessarily shaped by the protected deliberations. *Saunders*, U.S. Dist. LEXIS 105571, at * 63-67 ("This Court finds that the privilege was properly invoked by Valentini in response to these irregular deposition questions. It is likely that during the SAO's deliberations about the prosecutorial decisions, they discussed the weight of the evidence and whether it was sufficient for a jury to convict, as well as the other questions posed to Valentini. Since Valentini was present for the deliberations, it is understandable that providing

[5] Should the Defendants articulate a reason to depose any of these individuals that would not intrude upon a privilege, the Respondents would respectfully request that this Court enter a protective appropriately limiting the topics/questions.

answers to the questions would reveal analysis, arguments, and discussion from the deliberations."). While the *Saunders* court did not invoke the actual term, the mental process and internal deliberation are likewise protected by the "mental processes privilege." See *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 326-26 (D.D.C. 1996) (holding that the mental processes privilege is "inextricably intertwined" with the deliberative process privilege and precludes "prob[ing] the mental process" of government officials); see also Mendez v. City of Chicago, 18 CV 5560, 2020 U.S. Dist. LEXIS 47530, at * 4 (N.D. Ill. Mar. 19, 2020) (quashing subpoena pursuant to the mental processes privilege seeking deposition of sitting judge regarding the reasoning for his decision). Because the mental processes privilege analysis is the same as the deliberative process privilege, see *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 527 (N.D. Ind. 2005), the Defendants are likewise prohibited from inquiring into the mental impressions of Mr. Sussman, Mr. Magats, Mr. Rotart and Ms. Adduci.

While the mental processes privilege is confined to pre-decisional deliberation, the common law work-product doctrine, a more expansive doctrine than the mental processes privilege, likewise prohibits inquiries into the deponents' mental processes. As the Supreme Court has long held, the mental impressions and "intangible" work product of attorneys are "inviolate." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). As such, the intangible work product that Mr. Sussman, Mr. Magats, Mr. Rotart and Ms. Adduci developed during their deliberations regarding Plaintiffs' post-conviction litigation and/or the COI process is privileged and protected deliberative process privilege, *see United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 527 (N.D. Ind. 2005), the Defendants are likewise prohibited from inquiring into their mental impressions.

III. **Conclusion**

For the reasons set forth herein, the Motion to Quash should be granted.

Date: July 10, 2023

Respectfully Submitted,

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On behalf of respondent Cook County State's Attorney's Office

CERTIFICATE OF SERVICE

The undersigned certifies that on July 10, 2023, he electronically filed the foregoing document with the Clerk of the Court for Northern District of Illinois, using the CM/ECF system of the Court.

/s/ Lyle Henretty