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

REPLY IN SUPPORT OF CCSAO'S 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, submits this reply in support of its motion to quash the subpoena for the depositions of Eric Sussman, Joseph Magats, Mark Rotert, and Nancy Adduci ("motion to quash") in the above-referenced case. In support, the Respondent states as follows:

INTRODUCTION

Deep into their oversized Response brief, the Defendant Officers ("Defendants") make the astonishing claim that the "lawsuits against the Defendant Officers only exist because of the decisions of the CCSAO." (Dkt. 567, p. 28).[1] These are the same Defendants who have been accused, in nearly 180 lawsuits (*Id.*, p. 2), of extorting the law-abiding citizens of Cook County and framing innocent men and women who refused to pay. Their goal in taking the depositions of

[1] In fact, the theme of the Defendants entire motion is that it was somehow the State's Attorney's Office that wronged these Defendants. (Dkt. 567, pp. 1; 2; 5-6; 28). Defendants' attempt to eschew any role in the alleged wrongful convictions actively ignores the allegations and evidence in these cases.

four current and former high-ranking CCSAO employees is not to discover facts, but to shift blame and attempt to punish the Office for the positions it has taken with respect to the prosecutions of the underlying Plaintiffs. Defense counsel has made no secret that they want to pierce the CCSAO's privileges and influence decisions that are solely within the discretion of the State's Attorney. We ask that this Court protect the CCSAO's privileges with respect to its mandate to ensure the integrity of current and past convictions.

In their Response, Defendants attempt to paint the CCSAO and the undersigned attorneys as unreasonable. Yet the CCSAO immediately offered to work with the Defendants' counsel to help them get information and evidence to which they are entitled. As indicated in the motion to quash, the CCSAO initially offered to produce current Director of the Convictions Integrity Unit Nancy Adduci or a 30(b)(6) witness for a deposition to provide *factual* information related to the process underlying: (1) the CCSAO's decision to vacate the underlying convictions, and (2) the process by which the CCSAO treats COIs.[2] Defendant Officers refused and insisted that they are entitled to depose all four witnesses, without limitation.[3] It was not until the order of this Court that any topic list was tendered at all. The list, however, was broad to the point of uselessness. Instead, Defendants attempted to place the onus on the CCSAO to edit the proposed list, without indication as to the exact information they seek from each of the witnesses. Finally, in the face of the underlying motion to quash, Defendants, for the first time, attempt to identify the specific

[2] During the meet and confer period of this case, the CCSAO offered to present Director Adduci for a deposition on a limited list of topics as agreed upon by the parties. Defendants, however, refused to provide a workable list of topics, instead insisting on deposing all four witnesses on a broad list of topics. As such, the CCSAO was forced to file its motion quashing all four subpoenas, including Director Adduci.

[3] Defendant Officers admit that they were reluctant to provide a list of topics and insisted that they were entitled to depose the witnesses on any topic. (Dkt. 567 at 16).

information they seek from these witnesses. However, this information can be obtained through other sources and witnesses or is otherwise protected by the deliberative process privilege.

Defendants also fail to establish that the CCSAO's privileges were waived. On this front, the Defendants have made it difficult to engage productively. Prior to filing the underlying motion, the CCSAO requested that Defendants provide documentation of any alleged waivers of privileges. Defendants provided links to some news articles and CCSAO press releases. None of them established a waiver. Defendants seem to tacitly agree, as they now rely largely on new sources of the alleged waiver that they had not provided previously. These sources are not persuasive either, but it is difficult for the CCSAO to negotiate with the Defendants when the Defendants refuse to be consistent and specific in their position. Moreover, it is difficult to have a meaningful and productive R. 37.2 dialogue on constantly shifting sands.

As set forth in greater detail in the underlying motion and below, the Defendants do not need the depositions of all four current and former high-ranking CCSAO officials, and they have failed to establish that they are entitled to privileged information. To the extent that the Defendants seek reasonable, discoverable information from the CCSAO, the CCSAO will work in good faith to provide it. But the Defendants should not be permitted to make the CCSAO *de facto* Defendants. The CCSAO asks this Court to quash the subpoenas.

ARGUMENT

I. The Apex Doctrine Protects Mr. Sussman and Mr. Rotert from Depositions in This Matter.

The apex doctrine applies to both current and former officials and therefore applies to the depositions of former First Assistant State's Attorneys Sussman and Magats. *See Lee v. City of Chicago*, No. 20 CV 1508, 2021 U.S. Dist. LEXIS 109939, at *15 (N.D. Ill. June 11, 2021) ("rationales for the apex doctrine remain appl[icable] to former officials and current officials with

equal force.") If Defendants were given the opportunity to depose any agency official on any topic, as they attempt here, it would weaken the integrity of the decision-making process and discourage people from accepting positions of public service. *Id. See also DeLeon-Reyes v. Guevara/Solache v. City of Chi.*, 18-cv-2312/18-cv-1028, hearing June 28, 2023, at 59:12-17)[4] ("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 *(sic)* and everybody is going to want their piece of this person in every other case.")

As set forth below and in the underlying motion, any relevant and non-privileged information that Mr. Sussman and Mr. Magats could provide is either protected by the deliberative process privilege or could be readily obtained from other sources. Defendants fail to support their claim that Mr. Sussman and Mr. Magats have personal knowledge that is not protected by the deliberative process privilege. For instance, Defendants claim that Mr. Sussman has "unique personal knowledge" regarding the decision to vacate eighteen convictions in November 2017, and the decision to direct Ms. Adduci to compile a list of officers involved in those convictions. (Dkt. 567 at 12). First, both these topics fall squarely in the realm of information regarding the decision-making process. Second, in support of their claim that Mr. Sussman has unique factual information regarding these topics, Defendants only reference two emails that show Mr. Susman, among others, received information prepared by other Assistant State's Attorneys. (Dkt. 567 at 12, Exhibit 1, Exhibit 11). Defendants have made no attempts to obtain the information from the ASAs who prepared the documents, but instead claim that they are entitled to depose Mr. Sussman for seven hours regarding a variety of topics based on this vague correspondence. This is simply not enough. *See Hudkins v. City of Indianapolis*, No. 1:13-CV-01179-SEB, 2015 U.S. Dist. LEXIS

[4] As noted in the underlying motion, these transcripts are currently restricted due to their recency. A copy will be provided at the Court's request.

103039, 2015 WL 4664592, at *7 (S.D. Ind. Aug. 6, 2015) (blocking deposition of police chief despite the fact that he viewed the video of the underlying incident and ordered an investigation).

The topics Defendants propose for Mr. Magats are equally vague and explicitly involve the decision-making process. (Dkt. 567, at 13). There is no evidence in the record that the CCSAO disclosed any information regarding the decision-making process of the November 17, 2017 or April 4, 2018 letters drafted by Joe Magats informing the Chicago Police Department Legal Affairs Office that certain police officers would not be called as witnesses. (Dkt No. 567, Exhibit 3). Defendants' refusal to narrow the deposition topics in a meaningful way has made it difficult to understand what information they seek from each individual witness, and what information, if any, could not be obtained by deposing Nancy Adduci or a 30(b)(6) witness. The depositions of former First Assistants Sussman and Magats should be quashed.

II. The CCSAO's Deliberative Process Privilege Has Not Been Waived and the Defendants Cannot Show Particularized Need Sufficient to Overcome the Privilege.

The deliberative process privilege exists to protect the decision-making process within governmental organizations. *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (citing *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 150-152). It covers communications surrounding the process, though not the underlying factual information. *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1016 (N.D. Ill. 2016). Here, the Defendants claim that the information that they seek is factual in nature, where very clearly it is not. Their alternative assertion that the privilege has been waived is no more compelling; the statements they cite are generalized and do not speak to the decision-making process. Finally, while the deliberative process privilege may be overcome where the party shows a particularized need for the information, the Defendants here cannot overcome

the government's interest in keeping the information confidential. *Ferrell v. U.S. Dep't of Housing & Urban Dev.*, 177 F.R.D. 425, 429 (N.D. Ill. 1998).

A. The Public Statements Identified by Defendants Do Not Constitute Waiver of Deliberative Process Privilege.

Defendants argue that the CCSAO has waived the deliberative process privilege as to *every single* decision that it made with respect to all 180 prosecutions involving Sgt. Watts and the other defendants. Defendants posit that any general statement wherein the CCSAO referenced these underlying cases generally constitutes waiver of the entire process: every discussion, every question, every thought of every prosecutor involved in these cases, including the State's Attorney herself. Defendants, who themselves represent a government body and its employees, are effectively arguing that the deliberative process privilege should be gutted, as the most innocuous press release about a decision waives the privilege. This is a troubling precedent for a privilege that is intended to encourage robust discussion about matters of public importance and to protect public employees from being haled into court by every civil litigant who disagrees with a policy decision.

Defendants have compiled 16 news articles, radio segments, and press releases that they believe constitute some waiver of the deliberative process privilege.[5] However, these statements are broad generalities that discuss the underlying facts of the cases rather than the process through which the decisions are made. While these facts may be unfavorable to Defendants, they are nonetheless outside of the scope of the deliberative process privilege and therefore cannot constitute a waiver. Stating that "the police were not being truthful" and engaged in "corrupt

[5] In an email to Mr. Lyle Henretty on February 16, 2023, Counsel for Defendant Officers purported to explain why they believe the privilege was waived by sending 14 links to news articles and press releases. Only two of the news articles offered in this initial explanation overlap with the 16 offered by Defendant Officers in the latest Response.

activity" is simply explaining the circumstances under which the cases came to be reviewed. (Dkt. 567, at 22). It does not explain the process through which decisions were made with respect to any individual case. Indeed, one of the cited articles for these statements further noted that "Rotert declined to speak about specific evidence that led State's Attorney Kim Foxx to move to ask the courts to drop the charges." (Def. Ex 13 pt.1, dkt. 568-1, at 57). References to "the behavior of Sergeant Watts and his crew," explanations of the arrests, or descriptions of misconduct are similarly unrelated to the actual deliberative process involved in the vacations of convictions. (Dkt. 567, at 23).

Statements of the underlying facts upon which the decisions are based are not covered by the deliberative process privilege. *Mink*, 410 U.S. at 88. Logically, the privilege cannot be waived by discussion of material that never fell within the ambit of the privilege in the first place. Unlike Defendants' cited cases that contain officials discussing the details of particular cases, here the CCSAO has spoken only broadly about the underlying circumstances that have led to the overturned convictions. These highly generalized and purely factual statements cannot constitute a waiver of the deliberative process privilege where they do not cover the decision-making process in the first place.

B. The Defendants' Characterization of the Information Sought as "Purely Factual" Is Disingenuous, and the Factual Information Sought Is Largely Available from Other Sources.

Defendants correctly note that the deliberative process privilege does not cover "purely factual material." *EPA v. Mink*, 410 U.S. 73, 88 (1973). However, Defendants' requested topics are far from "purely factual." Indeed, some topics cited by the Defendants in their Response as "containing factual information" are functionally synonymous with "deliberative process." For example, requesting "each witness's involvement" in the making of several different types of

decisions goes to the heart of the decision-making process. (Dkt. 567, at 20). "[E]ach witness's involvement in determining the criteria upon which the CCSAO used to evaluate cases" is precisely the type of communication that is intended to be covered by the privilege. *Id.* "[T]he CIU's policies and procedures when investigating claims of innocence and whether those policies were followed here" asks for a specific description of the deliberative process itself. *Id.*

Even those requests that could be considered "purely factual" are largely available from sources other than the CCSAO. For example, "public statements made by the witnesses" should, by definition, be publicly available. (*Id.*). "[T]he media's and Plaintiffs' counsels' criticisms of the CCSAO and the timing thereafter of decisions to vacate convictions and/or take no position on petitions for COIs" should similarly be relatively straightforward to determine from available media coverage and public records. (*Id.*) "Communications with Plaintiff's counsel" ought to be available from the Plaintiff's counsel, a representative of a Party to the suit, rather than from the CCSAO, a Third-Party Respondent.

Of the nearly two dozen topics identified by the Defendants as "cover[ing] factual information," only a small handful have the potential of producing non-privileged, "purely factual information." *Evans v. City of Chi.*, 231 F.R.D. 302, 318 (N.D. Ill. 2005). The CCSAO has already agreed to the deposition of Nancy Adduci or a Federal Rule of Civil Procedure 30(b)(6) deposition that would be sufficient to provide all the non-privileged purely factual information that Defendants seek in their list of requests. Defendants have refused to explain why a single deposition is insufficient to provide them with all of the factual evidence they require. That is because the Defendants are not interested in obtaining facts from these deponents. Their goal is to elicit privileged deliberative thought processes, communications, and opinions of multiple individuals.

While the deliberative process privilege does not extend to factual information used in making determinations, the requests here by Defendants extend far beyond the bounds of the "purely factual information" contemplated as the exception to the rule. *Evans*, 231 F.R.D. at 318. The CCSAO's offers of compromise should be more than adequate to allow for the discovery of information that is truly outside of the deliberative process privilege. However, the privilege still protects a significant portion of the information sought by Defendants, and four depositions are not justified here. Even if this Court orders that one or more of these depositions proceed, the CCSAO requests that this Court enters a protective order limiting the number of depositions, and significantly limiting the topics to factual issues only.

C. The Deliberative Process Privilege Was Not Waived by the CCSAO.

Defendants are quick to note that the deliberative process privilege can be waived, citing *Hobley v. Burge*, 445 F. Supp. 2d 990, 996 (N.D. Ill. 2006). However, the Court in *Hobley* goes on to note that "such a waiver 'should not be lightly inferred.'" *Id.* at 998-999 (quoting *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997). Additionally, the deliberative process privilege is distinct, in that "courts have said that release of a document only waives these privileges for the document or information specifically released, and not for related materials." *In re Sealed Case*, 121 F.3d at 741. This is contrary to what the Defendants seem to urge—a blanket waiver of the privilege akin to the waiver of attorney client privilege where "voluntary disclosure of privileged material . . . 'waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.'" *Id.* (making a distinction between the extent of the two privileges).

Additionally, the cases cited by Defendants in support of finding waiver are not comparable. For instance, the respondent in *Howard v. City of Chicago* did not properly invoke

the deliberative process privilege through the correct procedure. No. 03 C 8481, 2006 U.S. Dist. LEXIS 55796 at *15 (N.D. Ill. Aug. 10, 2006) ("[T]he PRB never submitted the type of formal claim of privilege by the department head that is the threshold requirement for a *prima facie* showing of deliberative process privilege.") Additionally, the Court noted that the Governor was improperly invoking executive privilege, which applies only to the President. *Id.* at *15-16. These issues are not present in the current case where the CCSAO has properly invoked the correct privilege for pre-decisional matters.

The analogy to *Hood v. City of Chicago* also fails. 16-cv-1970, Dkt. #247 (N.D. Ill. March 19, 2019). The Court in *Hood* rested its opinion not on waiver, but on the determination that the governor had not made an adequate *prima facie* showing that deliberative process privilege existed. *Id.*, at 7. Further, the single paragraph of dicta in which the Court discusses waiver was based on the governor "detail[ing] his decision to commute the sentence of the Plaintiff in a variety of public forums." *Id.*, at 7-8. Here, the statements are general, do not speak to the decision-making process, and with few exceptions do not mention specific cases. Defendants' reliance on *DeLeon-Reyes v. Guevara* is equally misplaced in arguing for a blanket waiver; there the court found that "limited waiver does not entitle Defendants to *carte blanche*" and determined that even if a waiver existed as to some topics, others were still privileged. No. 1:18-cv-01028, 2021 U.S. Dist. LEXIS 136736, at *19 (N.D. Ill. July 22, 2021). Specifically, the case determined that there was no waiver on the CCSAO's deliberative process for decision-making with respect to certificates of innocence even if some waiver was found in the area of dismissing criminal cases. The CCSAO denies that there has been a waiver on any subject, including the dismissal of criminal cases. Still, in the event that the Court finds the privilege waived as to some topics, there is no support in the existing case

law for Defendants' suggestion that there should be waiver regarding the decision-making process for certificates of innocence.

The type of blanket waiver for which Defendants argue is simply unfounded. The Court should "not [. . .] lightly infer[]" the waiver of this privilege. *Hobley*, 445 F. Supp. 2d at 996. A waiver of the deliberative process privilege is limited only to that information which has been disclosed. *In re Sealed Case*, 121 F.3d at 741. The CCSAO denies that any public statements cited by the Defendants constitute a waiver of deliberative process privilege. *See* Section A *supra*.

D. Defendant Officers Cannot Show a Particularized Need for Information Sufficient to Overcome the Government's Interests to Pierce the Deliberative Process Privilege.

Finally, Defendants attempt to defeat the CCSAO's deliberative process privilege by claiming that they have a "particularized need" for the information. (Dkt. 567, at 26). It is true that a party may overcome the deliberative process privilege if they can demonstrate that they have a "particularized need" when "the court balances the plaintiff's need for disclosure against the government's need for secrecy." *Holmes*, 221 F. Supp. 3d at 1018 (quoting *Ferrell*, 177 F.R.D. at 429).

The Court generally applies a five-factor test in weighing whether the burden of showing particularized need has been met. *K.L. v. Edgar*, 964 F. Supp. 1206, 1209 (N.D. Ill. 1997). These recognized factors are:

> (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 is, would hinder frank and independent discussion about governmental policies and decisions.

Id. Here, the CCSAO does not dispute the seriousness of issues surrounding allegations of police misconduct and malicious prosecution claims. However, each of the other factors weighs against disclosure.

As to the first point, Defendants dismiss the Court's ruling in *Saunders v. City of Chicago* by focusing on one portion of the decision and omitting another. No. 12 C 9158, 2015 U.S. Dist. LEXIS 105571 (N.D. Ill. Aug. 12, 2015). The court in *Saunders* distinguishes between the defendant officers' attempt to introduce deliberations surrounding a governor's pardon in *Evans* on the one hand and the plaintiff's attempt to use evidence of deliberations surrounding granting of a certificate of innocence in *Saunders* on the other. *Id.* at *68-69. The Court considered the difference in need based on the party seeking the information before concluding that "[o]f course, the SAO deliberations would also be irrelevant since the court granted the certificates rather than the SAO." *Id.*, at *69.

The second factor goes to "availability of other evidence." *Edgar*, 964 F. Supp. at 1209. Here, there is an obvious alternative to the four vastly overbroad depositions that Defendants have demanded—the CCSAO has agreed to the deposition of ASA Nancy Adduci, or alternately a Rule 30(b)(6) deposition on agreed upon topics. Fed. R. Civ. P. 30(b)(6). Defendants have not identified any specific information that they seek which would not be available in one of these formats. Additionally, as noted above in section B *supra*, categories of information sought by Defendants including comments made to the media or communications with Plaintiff's counsel, to the extent

that they are discoverable, are available through alternate sources of media coverage or through a party to the suit.

The third factor, the government's role in the litigation, weighs against piercing the privilege in this case as well. Where the government "is not a party to this lawsuit, and its conduct does not bear on the question of whether the police officer defendants knowingly sought to procure the prosecution and conviction of an individual whom they knew to be innocent," this factor weighs against a finding of particularized need. *Evans*, 231 F.R.D. at 317.

Finally, the last factor of the degree to which it would "chill" or "hinder" the free flow of ideas to pierce the deliberative process privilege also weighs against finding particularized need in this case. While Defendants identify the length of time since the flow of vacated convictions stemming from Sgt. Watts began, this is not the crucial inquiry. In *Saunders*, the Court noted that "disclosure of information regarding the SAO's deliberations would have a chilling effect on the office's ability to engage in candid, robust discussions." 2015 U.S. Dist. LEXIS 105571 at *76. The Court further expressed concern that piercing the privilege would set a precedent that "in turn, would have a negative impact on the quality of prosecutorial decisions made by the State's Attorney and his or her staff." *Id.* In that case, the particularized need expressed by the Plaintiffs was not sufficient to overcome the government's interest in exercising the privilege. *Id.* Here, Defendants similarly have not met the burden of showing their need, and the government's interest in confidentiality should prevail.

CONCLUSION

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

Date: September 25, 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 September 25, 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