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

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-cv-01717
	)	Judge Franklin U. Valderrama
	)	Magistrate Judge Sheila M. Finnegan

THIS DOCUMENT RELATES TO ALL CASES

DEFENDANT OFFICERS' REPLY IN SUPPORT OF THEIR CORRECTED SUPPLEMENT TO THEIR RESPONSE TO THE COOK COUNTY STATE'S ATTORNEY'S OFFICE'S MOTION TO QUASH THE SUBPOENA FOR DEPOSITIONS OF ERIC SUSSMAN, JOSEPH MAGATS, MARK ROTERT, AND NANCY ADDUCI

Defendant Officers, by and through their attorneys, hereby submit this Reply in response to the Cook County State's Attorney's Office's response to Defendant Officers' Corrected Statement. Dkt. 777. In support thereof, Defendant Officers state as follows:

INTRODUCTION

Contrary to the arguments made by Cook County State's Attorney's Office ("CCSAO") in its Response, the CCSAO has not established that the deliberate process privilege applies to the instant situation or that its fulsome disclosure of its deliberative process to COPA did not serve to waive any privilege assertion in its entirety. The CCSAO's assertion that it can selectively waive the deliberative process privilege, despite voluntarily sharing information about why it chose to agree to vacate certain convictions, is baseless and an unreasonable, unwarranted extension of existing law. In addition, the CCSAO has not otherwise demonstrated that its assertion of the deliberative process privilege was proper. Finally, because the CCSAO has been given an opportunity to respond to the Defendant Officers' Amended Supplement, there is no prejudice to

the CCSAO resulting from the Defendant Officers' supplemental arguments, and this Court should evaluate said arguments.

I. The CCSAO's Disclosure to COPA Waives Any Claim of Privilege.

The CCSAO, by virtue of its expansive and detailed interviews with COPA, a third party, about a significant number of Watts Coordinated Proceedings cases, has waived any claim of privilege. While the CCSAO argues that this Court should find that it has only selectively waived the deliberative process privilege, this argument should be rejected because the Seventh Circuit and virtually all other Circuits have failed to recognize the existence of a "selective waiver." Lastly, because COPA's interviews with the CCSAO took place after the CCSAO had already agreed to vacate certain convictions, and the CCSAO has failed to address in its Response whether said interviews were predecisional, the CCSAO has now waived any argument that the interviews were predecisional, and therefore it has waived any privilege.

A. The CCSAO has waived all claims of privilege based on its interviews with COPA regarding cases that are part of the Watts Coordinated Proceedings.

The CCSAO argues against a complete waiver, which it refers to as a "subject matter waiver," citing to what it believes to be evidence of a limited disclosure. CCSAO Response to Defendant Officer's Corrected Supplement ("CCSAO Resp."), Dkt. 777, pp. 11-12. A review of the documents provided to the CCSAO, however, belies that contention[1] - the CCSAO's fulsome disclosure to COPA waives any privilege the CCSAO may have had.

As discussed below, the Seventh Circuit has not recognized the concept of selective waiver, and the CCSAO has provided no basis for this Court to conclude the CCSAO has the option of

1 The COPA documents speak plainly, and are so replete with examples of the CCSAO's waiver of deliberative process that the Defendant Officers could essentially include them herein in their entirety. However, because the Court has been provided the documents at issue under seal, Defendant Officers will not restate their contents here so the Court is not burdened with reviewing the same material in two locations.

advancing a selective waiver argument. Perhaps in light of this, the CCSAO now posits that revealing the details for why it agreed to vacate almost two dozen convictions was a "limited waiver." Dkt. 777, pp. 11-12. In support of this argument, the CCSAO claims that former ASA Rotert allowed COPA to review memoranda and a spreadsheet comparing the facts of each case, but he "was not comfortable providing COPA with physical copies of any deliberative documents." *Id*. at 12. Regardless of whether ASA Rotert "was not comfortable" with providing copies of these documents to COPA, that did not stop him from allowing then-Conviction Integrity Unit Assistant State's Attorney Nancy Adduci ("ASA Adduci") to share her "deliberative process" on the cases, and certainly did not prevent that information from ultimately being shared with COPA. The CCSAO's assertion that "Adduci primarily spoke to COPA about factual similarities in specific cases" is patently false. *Id*. The documents, including the spreadsheet created by COPA, shows that there were far more than just "factual similarities" being discussed. ASA Adduci provided to COPA the way in which she reviewed the cases in general; how she reviewed them (including discussion of her legal analysis); and what she looked for when reviewing a case. All of these facets of the interviews led to her fully and wholly explaining her decision-making as to whether or not the CCSAO would oppose a request to vacate a conviction in the underlying criminal cases for what now comprise the Watts Coordinated Proceedings.

Interestingly, although the CCSAO erroneously claims the Defendant Officers engaged in "tactical gamesmanship," its own actions (or lack thereof) strongly suggest that it was not candid, at best, in the previous meet and confers on deposition topics that preceded the filing of its Motion. There is no dispute that these interviews took place, and it does not appear that the CCSAO ever inquired of former ASAs Rotert, Adduci, or anyone else, about whether there were any discussions between them and COPA, or any other third-party, about the Watts-related cases, nor was it

discussed what exactly took place during their interviews with COPA. The CCSAO should not be allowed to rely on its own failure to make this inquiry as a shield to prevent inquiry into the deliberative process. *C.f., United States v. Craig*, 178 F.3d 891, 896 (7th Cir. 1999) (discussing the "ostrich instruction" in criminal proceedings, which is given "to inform the jury that a person may not escape criminal liability by pleading ignorance if he knows or strongly suspects he is involved in criminal dealings but deliberately avoids learning more exact information about the nature or extent of those dealings.") (citation omitted); *Waterstone Mortgage Corp. v. Offit Kurman P.A.*, 2020 WL 1066788, at *5 (E.D. Wisc. Mar. 5, 2020) ("A plaintiff cannot employ an 'ostrich defense,' closing their eyes to reasonable accessible information and refusing to investigate his suspicions of a potential injury.") (citations omitted); *Bardney v. United States*, 959 F. Supp. 515, 522 (N.D. Ill. Mar. 17, 1997) (noting that the "'ostrich defense' does not 'fly' in federal court" in the context of an attorney's effort to avoid sanctions by claiming not to have had notice of a court order).

B. The CCSAO should not be allowed to assert selective waiver of the deliberative process privilege.

The CCSAO should not be permitted to assert a "selective waiver" of the deliberative process privilege when "selective waiver" is only recognized in the Eighth Circuit, not here, and where it had no reasonable expectation of confidentiality in its conversation with COPA, its reliance on *Jaffe* and the Eighth Circuit is not instructive and misplaced, and its purported policy considerations are not supported here.

1. This Circuit does not recognize "selective waiver" of the deliberative process privilege.

The CCSAO argues that it can, and did, *selectively* waive the deliberative process privilege when it was interviewed by COPA, in significant detail, across multiple days regarding almost two

dozen cases. The law of this Circuit, however, has not recognized selective waiver, and this Court should reject the CCSAO's effort to have this Court do so here.

Allowing selective waiver is contrary to the law in every Circuit, other than the Eighth, something that even the CCSAO's own cited case acknowledges. *Jaffe Pension Plan v. Household Intern.* 244 F.R.D. 412, 430 (2006). The CCSAO argues that the inquiry into whether selective waiver is proper is decided on a case-by-case basis, but fails to cite to a single case that is factually similar to the instant situation, nor does it articulate why this Court should disregard the lack of authority in this Circuit recognizing this type of waiver. The CCSAO states that Defendant Officers "incorrectly assert that the Seventh Circuit has rejected selective waiver." This, however, is incorrect. Dkt. 777, p. 4. Indeed, as discussed further below in Section II.B.3., the CCSAO's sole basis for this assertion is citation to a single case (*Jaffe*) and even that case acknowledges that "courts in this district have not viewed it with particular favor." *Jaffe*, 244 F.R.D. at 432. The CCSAO has failed to cite any cases in which the Seventh Circuit (or even any other district court within this Circuit) has called into question the holdings in *Dellwood Farms v. Cargill*, 128 F.3d 1122 (7th Cir. 1997) or *Burden-Meeks v. Welch*, 319 F.3d 897 (7th Cir. 2003), or sought to revisit the issue of selective waiver. It is disingenuous that the CCSAO attempts to distinguish *Dellwood Farms* and *Burden-Meeks* as involving the attorney-client privilege, when they both addressed that very issue, and instead relies on *Jaffe*. The CCSAO's assertion that the window has been "left open" for selective waiver to be accepted is of no value, and should carry no weight with this Court.

2. The CCSAO had no reasonable expectation of privacy in its interviews/conversations with COPA.

The CCSAO next argues that selective waiver is appropriate because there was an "expectation of confidentiality." Dkt. 777, p. 6. In support of this statement, the CCSAO asserts

that it "reasonably understood that the information would be kept confidential." *Id*. However, it fails to show what this belief was based on. Nothing has been offered by the CCSAO that would even remotely support any such an understanding. There is no confidentiality agreement; memorandum of understanding; affidavit; declaration; or other document provided to show that any steps were taken that would support the CCSAO's contention that it intended for any information it shared with COPA to be kept confidential. The CCSAO cites to COPA's Rules and Regulations from COPA's public website, as purported support for this presumed confidentiality, but there is nothing to show that the CCSAO and COPA entered into the interviews with presumed confidentiality, that CCSAO relied on these, or that the CCSAO believed any conversations would be confidential. Whatever limits COPA places on files or reports *COPA provides to agencies or persons outside of COPA*, does not compel a *quid pro quo* with documents or information that are *provided to COPA*. There is simply zero indication that the CCSAO was operating under some belief that its conversations with COPA were confidential.

3. *Jaffe* is not helpful to this Court's analysis, as it addresses issues that are distinguishable from the case at bar.

The CCSAO relies on *Jaffe*, discussed *infra*, as an example of when a party *did not waive* attorney-client or work product privileges. However, the instant facts are distinguishable. In *Jaffe*, the court addressed an alleged waiver of attorney-client privilege, and there a confidentiality agreement which governed the disclosure of confidential information – neither issue is implicated here. Also, the *Jaffe* court noted that the lack of evidence that restrictions on the documents' use were "loose in practice," supported applying selective waiver. *Jaffe*, 244 F.R.D. at 433. The CCSAO cited to protective orders entered in connection with COPA's production in the Watts Coordinated Proceedings as evidence of "measures to ensure confidentiality." Dkt. 777, p. 7. Those protective orders, however, arise from COPA's efforts to ensure confidentiality of its own

investigation and conclusions, a practice undertaken in civil lawsuits regardless of the CCSAO's involvement in the lawsuit or the underlying investigation. Therefore, the CCSAO's attempt to argue the existence of a protective order in the underlying civil litigation as evidence of any effort to make information shared in the COPA-CCSAO interviews is misplaced and not proper. There were no such protective orders sought by the CCSAO or COPA at the time the interviews took place back in 2018, and it is ludicrous to suggest that protective orders sought in this litigation somehow support a retroactive intent to make the interviews confidential. Moreover, the attorney-client privilege is not at involved in this case.

4. The CCSAO's reliance on the Eighth Circuit is not instructive.

The CCSAO attempts to argue that a privilege is not waived by disclosure to a government agency during an investigation, but fails to support this argument with analogous facts or law. The sole case cited is an Eighth Circuit case that addressed the voluntary disclosure of an internal investigation prepared by a law firm regarding allegations of bribery. In *Diversified Indust. Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978), the Eight Circuit Appellate Court found that a company's voluntary disclosure of an internal investigation by a law firm to the Securities and Exchange Commission ("SEC"), during an SEC investigation, did not waive the attorney-client privilege. *Id.* at 611. There is no attorney-client relationship implicated in the creation of the CCSAO's opinions, conclusions and recommendations that were voluntarily shared with COPA. Additionally, there is no attorney-client relationship the CCSAO can claim exists between it and COPA such that it can argue the communications between the two entities are protected from disclosure. Thus, that privilege is of no import here.

5. The CCSAO's policy considerations should be disregarded.

The CCSAO then resorts to a policy-based argument by asserting that selective waiver is

"consistent with the purpose of the deliberative process privilege," but this ignores the lack of any authority from the Seventh Circuit, or even district courts within this Circuit on this issue, and fails to explain why this Court should accept this argument. *See Global Technology & Trading, Inc. v. Satyam Computer Services Ltd*., 09-cv-5111, 2014 WL 4057374, at *3 (N.D. Ill. Aug. 14, 2014) ("Whatever the merits of these policy arguments may be, this [c]ourt will follow the prevailing Seventh Circuit rule.").

The CCSAO attempts to further support its policy-considerations argument by stating that it is not the only source of information, but this presumption is based on the faulty premise that the information sought is purely factual. Dtk. 777, pp. 12-13. As discussed above, ASA Adduci shared her (and therefore the CCSAO's) insight and views on what made a conviction a candidate for vacation. The CCSAO also argues that there is no other source of the non-factual information, but maintains that the information sought is shielded from disclosure by the deliberative process privilege, so therefore it does not have to disclose it. *Id*. In the same paragraph, however, the CCSAO then concedes that there is no other source of that information, albeit because the information is privileged. *Id*. This argument is circular and nonsensical, and should be rejected by this Court.

C. The COPA interviews with the CCSAO were not predecisional and thus the CCSAO's waiver claim fails.

The CCSAO's waiver argument also fails based on the undisputed fact that the COPA interviews took place after the convictions were vacated. As an initial matter, the CCSAO has waived any argument on this issue as it failed to address it in its Response. *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) ("Longstanding under our case law is the rule that a person waives an argument by failing to make it before the district court. We apply that rule where a party fails to develop arguments related to a discrete issue ....") (internal citations omitted). A

document is predecisional if it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. at 168, 184 (1975). A number of circuits, including the Seventh Circuit, apply a temporal test in deciding whether a document is predecisional. *See Enviro Tech Int'l*, 371 F.3d at 375 (stating that a predecisional document is "'actually [a]ntecedent to the adoption of an agency policy,'") (citations omitted).[2]

In *Cherokee Nation v. Salazar*, 986 F. Supp. 2d 1239 (N.D. Okla. 2013), the defendants sought the return of inadvertently produced documents, including a briefing paper, based on the attorney-client and deliberative process privileges. *Cherokee Nation*, 986 F. Supp. 2d at 1241-1243. The plaintiffs disagreed. *Id.* at 1243. The district court, addressing the predecisional prong of the deliberative process test, found that the defendants had not shown the privilege applied, and noted that certain language in the briefing paper indicated the decision at issue had already been made and that the briefing paper "was intended to serve as a talking points memorandum." *Id.* at 1246-1247. The same situation is present here. The CCSAO's decisions to seek vacatur of the convictions at issue took place well before the CCSAO allowed ASA Adduci to be interviewed by COPA. Consequently, the documents produced here contained information that was communicated by the CCSAO *after* the decision(s) had already been made. Moreover, the information provided by ASA Adduci to COPA could reasonably be viewed in the same way as "talking points," as she was providing to COPA aspects of each case that COPA may choose to rely upon as part of its ongoing investigation, and were not part of a dialogue on how the CCSAO

[2] Other circuits that apply this test include: *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir.1995); *National Wildlife Fed'n v. United States Forest Svc.*, 861 F.2d 1114, 1117 (9th Cir.1988); *Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary Comm. v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C.Cir.1987) (holding that "[a] document is 'predecisional' if it precedes, in temporal sequence, the 'decision' to which it relates.").

would be proceeding on these cases.

II. Defendant Officers Have Not Waived Any Deliberative Process Privilege Argument Because the CCSAO Has Not Been Prejudiced and Had the Opportunity to Respond.

In an effort to walk back the free flow of information from the CCSAO to COPA, the CCSAO argues that any arguments regarding the CCSAO's privilege waiver should have been previously made and, because they were not, the argument that the CCSAO waived the deliberative process privilege by sharing detailed information about why it agreed to vacate almost two dozen convictions (and quite possible almost 200 more) has been waived. However, this assertion is incorrect under well-established law and its waiver argument fails.

As an initial matter, the CCSAO suggests that there was "tactical gamesmanship" regarding the previously produced documents from COPA and arguments being made here. Dkt. 777, pp. 4-5. Not only did the Corrected Supplement explain the reason for the mistake in the originally filed Supplement, but the undersigned personally spoke directly to ASAs Wasserman and Henretty, explained the reason why those documents were not identified prior to submitting the Supplement[3], and explicitly agreed that there was no dispute that the spreadsheet, which is approximately eight pages of the 143,008 pages produced by COPA in this litigation, was previously produced in discovery in this case. Therefore, any suggestion of "gamesmanship" is disingenuous and not in good faith.

On its merits, the CCSAO's waiver argument fails. Failure to make an argument "only results in waiver if the other party is prejudiced as a result." *See Schmidt v. Eagle Waste & Recycling, Inc.,* 599 F.3d 626, 632 (7th Cir. 2010) (delay in raising an affirmative defense did not prejudice the opposing party because it had the chance to respond). "The key factor in determining

3 A prior iteration of the Corrected Supplement noted that a software-related search issue failed to return results that included the spreadsheet memorializing COPA interviews with the CCSAO (CCSAO's Exhibit 1, filed under seal).

prejudice under Seventh Circuit case law is whether the plaintiff had an opportunity to respond to the argument." *Global Technology & Trading, Inc.*, 2014 WL 4057374, at *2. Where the opposing party has the opportunity to respond, courts in this Circuit have found no waiver. *See, e.g.*, *Schmidt,* 599 F.3d at 632; *Garofalo v. Village of Hazel Crest,* 754 F.3d 428, 437 (7th Cir. 2014) (finding no waiver of affirmative defense first raised in summary judgment brief because plaintiff "had the opportunity to challenge this argument in their own summary judgment submissions" and in response to the defendants' motion for summary judgment brief); *Hardy v. Ill. Nurses Ass'n.*, 18-cv-552, 2023 WL 1069836, at **6-7 (N.D. Ill. Jan. 27, 2023) (finding no prejudice where the defendant raised collateral estoppel argument for the first time in its summary judgment brief because the plaintiff "had the opportunity to respond on the merits."); *West v. United States,* 08-646-GPM, 2010 WL 4781146, at *3 (S.D. Ill. Oct. 25, 2010) (allowing assertion of affirmative defense, even though there is "some question about why the government has waited," because the plaintiff cannot claim significant prejudice where he "had the opportunity to respond in writing to the government's motion to amend and motion for summary judgment."); *Neuma Inc. v. Wells Fargo & Co.,* 515 F. Supp. 2d 825, 851 (N.D. Ill. 2006) (the plaintiff did not show prejudice because it had "ample opportunity" to respond to the raising of a statute of limitations defense in a motion for summary judgment); *McKeown v. Sears Roebuck & Co.* 335 F. Supp. 2d 917, 938 (W. D. Wisc. 2004) (finding no waiver of argument related to damages first raised in defendant's reply brief because the plaintiff was given the opportunity to respond to it). Furthermore, the fact that the case is significantly further along than when the argument is made does not establish prejudice. *Williams v. Lampe,* 399 F.3d 867, 871 (7th Cir.2005).

Here, the CCSAO was provided the opportunity to respond to Defendant Officers' argument related to the CCSAO-COPA interviews and waiver of the deliberative process privilege.

The CCSAO did file a response, which not only addressed the arguments raised by Defendant Officers, but also put forth its own arguments as to why it believed the deliberative process privilege was not waived. The CCSAO once again fails to cite a single case where waiver of an argument was at issue, or explain to this Court why the law of this Circuit does not apply to the instant situation. Because the CCSAO was able to address the Defendant Officers' arguments, it was not prejudiced and this Court should reject its claim of waiver.

CONCLUSION

For the reasons stated above and the reasons set forth in all prior briefs submitted by the Defendant Officers, Defendant Officers respectfully request that this Court find that: (1) the CCSAO waived any privilege regarding its decision-making process(es) in any of the Watts-related cases; (2) permit inquiry into why the CCSAO took the positions it did in all Watts-related cases; (3) deny the CCSAO's Motion; and (4) grant any other relief it deems proper.

Respectfully Submitted,

/s/ Anthony E. Zecchin
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CERTIFICATE OF SERVICE

I, Anthony E. Zecchin, hereby certify that on July 8, 2024, I electronically files the forgoing, DEFENDANT OFFICERS' REPLY IN SUPPORT OF THEIR CORRECTED SUPPLEMENT TO THEIR RESPONSE TO THE COOK COUNTY STATE'S ATTORNEY'S OFFICE'S MOTION TO QUASH THE SUBPOENA FOR DEPOSITIONS OF ERIC SUSSMAN, JOSEPH MAGATS, MARK ROTERT, AND NANCY ADDUCI with the Clerk of the Court using the ECF system, which simultaneously served copies on all counsel of record via electronic notification.

/s/ Anthony E. Zecchin