

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.)	
)	
<i>Defendants.</i>)	

**PLAINTIFF'S MOTION TO COMPEL NON-PARTY
COOK COUNTY STATE'S ATTORNEY'S OFFICE**

Plaintiff moves the Court to compel the Cook County State's Attorney's Office to produce the 101 pages it withheld in responding to plaintiff's subpoena.

Grounds for this motion are as follows:

1. This lawsuit concerns plaintiff's false arrest and wrongful prosecution for burglary. Plaintiff contends that the arrest and prosecution were the result of evidence fabrications by defendants, Chicago Police Officers.
2. The wrongful prosecution against plaintiff ended when the Cook County State's Attorney's Office dismissed the case.
3. Evidence created by the State's Attorney while prosecuting plaintiff and investigating the burglary is relevant to plaintiff's claims.

4. Evidence about why the prosecutor chose to dismiss the case is especially relevant to plaintiff's state law malicious prosecution claim, which requires proof that the State's Attorney dropped the case "for reasons indicative of the plaintiff's innocence." *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 102, 820 N.E.2d 455, 460 (2004).

5. Plaintiff attaches as Exhibit 1 the subpoena that he served on the State's Attorney's Office for records about his prosecution.

6. On March 23, 2020, Assistant State's Attorney Dana Brisbon responded to the subpoena by producing 96 pages of documents and the 11-page privilege log attached as Exhibit 2.

7. As shown in Exhibit 2, the State's Attorney's Office asserts 51 separate claims of privilege to withhold 101 pages.

8. This shotgun approach to asserting privileges does not comply with Federal Rule of Civil Procedure 26(b)(5) because it fails to provide enough specificity to permit plaintiff to assess the claimed privileges. *See, e.g., Urban 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, 334 F.R.D. 149, 164 (N.D. Ill. 2020).

9. Plaintiff lists below, as best he can, the specific assertions of privilege that the Court should overrule.

A. Deliberative Process Privilege

10. The deliberative process privilege does not apply to state law claims, such as plaintiff's malicious prosecution claim. *Simon v. Nw. Univ.*, 259 F. Supp. 3d 848, 852 (N.D. Ill. 2017).

11. Nor does the privilege apply to plaintiff's federal claims. *See United States v. Zingsheim*, 384 F.3d 867, 872 (7th Cir. 2004) (deliberative process privilege covers memoranda and discussions within the Executive Branch leading to the formulation of an official position).

12. Moreover, a party seeking to assert the privilege must show, "typically by affidavit, precise and certain reasons for preserving the confidentiality of the documents in question." *Rodriguez v. City of Chicago*, 329 F.R.D. 182, 186 (N.D. Ill. 2019). The State's Attorney's Office has not attempted to make this showing.

B. Grand Jury Secrecy

13. The State's Attorney relies on grand jury secrecy under Illinois law, 725 ILCS 5/112-6, even though plaintiff was prosecuted by information without any grand jury proceeding. There is no basis for the assertion of this privilege.

C. Rights of Crime Victims and Witnesses Act, 725 ILCS 120/4

14. The Court should reject the State's Attorney's attempt to invoke 725 ILCS 120/4, a statute that protects the rights of crime victims.

The statute has nothing to do with discovery and does not purport to create any privilege. Nor does the statute require that any subpoenaed documents be withheld as confidential. The State's Attorney appears to have withheld 8 documents ("CCSAO Investigations Bureau Request Forms," pages 65, 86, 103, 111, 114, 117-119) solely because of this claimed privilege.

D. Investigatory Material

15. The State's Attorney has raised five separate objections to producing other investigatory material, which it refers to as "CCSAO Investigative Reports," pages 88 and 104. Several of these objections, such as reliance on 725 ILCS 120/4 and Illinois Supreme Court Rule 201(b)(2), are plainly frivolous.

16. Moreover, "CCSAO Investigative Reports" are routinely produced in criminal matters by the State's Attorney's Office as "*Brady* material." *See, e.g., Boss v. Pierce*, 263 F.3d 734, 742 (7th Cir. 2001). There is no basis to withhold this material in response to plaintiff's subpoena.

17. These documents are likely to contain witness statements, which may be important evidence in this case.

E. Work Product Privilege

18. The work product privilege (which subsumes other asserted privileges of mental impressions, trial preparation, and attorney notes) does not apply where, as here, the State's Attorney's Office is not a party.

Ostrowski v. Holem, No. 02 C 50281, 2002 WL 31956039, at *4 (N.D. Ill. Jan. 21, 2002) (citing *Hernandez v. Longini*, No. 96 C 6203, 1997 WL 754041, at *2 (N.D. Ill. Nov. 13, 1997)).

19. The State's Attorney asserts this privilege for a document it described as "ASA Internal Memo," page 101. It is likely that this memorandum shows the State's Attorney's reasons for dropping the case against plaintiff, a crucial fact in this case.

20. Undersigned counsel has attempted to confer with ASA Brisbon about the above in order to resolve these disputes without court intervention. Counsel attaches his detailed letter as Exhibit 3 and follow-up email as Exhibit 4.

21. Undersigned counsel has also attempted repeatedly to confer by telephone and attaches counsel's declaration as Exhibit 5, showing that the attempts to confer were unsuccessful due to no fault of undersigned counsel.

22. Because of the State's Attorney's overly broad assertions of privilege and its refusal to engage in the conferral process required by Local Rule 37.2, the Court should overrule all assertions of privilege.

23. Plaintiff also respectfully requests that the Court order the State's Attorney's Office to pay, as a sanction, the fees incurred in the preparation and presentation of this motion.

Respectfully Submitted,

/s/ Joel A. Flaxman
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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties.

I hereby certify that I have served the foregoing on non-party Cook County State's Attorney's Office by email to Assistant State's Attorney Dana Brisbon, dana.brisbon@cookcountyil.gov.

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