

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

Derrick Schaeffer,)	
)	
)	
<i>Plaintiff,</i>)	No. 19-cv-7711
)	
-vs-)	(<i>Judge Dow</i>)
)	
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
Joel A. Flaxman
ARDC No. 6292818
Kenneth N. Flaxman
200 S Michigan Ave Ste 201
Chicago, IL 60604-2430
(312) 427-3200
Attorneys for Plaintiff

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.

/s/ Joel A. Flaxman
Joel A. Flaxman
ARDC No. 6292818
Kenneth N. Flaxman
200 S Michigan Ave Ste 201
Chicago, IL 60604-2430
(312) 427-3200
Attorneys for Plaintiff

Exhibit 1

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois

Derrick Schaeffer, _____)
Plaintiff _____)
v. _____)
City of Chicago, et al. _____)
Defendant _____)
Civil Action No. 19-cv-7711

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To: Chief, General Litigation Division
c/o Cook County State's Attorney's Office, 50 W. Washington St., Room 500, Chicago, IL 60602

(Name of person to whom this subpoena is directed)

✓ **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment

Place: 200 S. Michigan Ave., Ste. 201 Attn: Joel Flaxman Chicago, IL 60604	Date and Time: 02/28/2020 9:00 am
--	--------------------------------------

Inspection of Premises: **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place: _____ Date and Time: _____

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 1/31/20

CLERK OF COURT

OR


Attorney's signature

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (*name of party*) Plaintiff _____, who issues or requests this subpoena, are: _____

Joel Flaxman, 200 S Michigan Ave, Ste. 201, Chicago, IL 60604, 312-427-3200, jaf@kenlaw.com

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

**Attachment to Subpoena in
Schaeffer v. Chicago, et al., No. 19-cv-7711**

Any and all records arising out of the investigation resulting from the criminal prosecution in the case of **People v. Derrick Schaeffer, 17-CR-27710**, including but not limited to felony review notes, pleadings, motions, discovery, orders, correspondence, photographs, medical records, employment records, school records, police department records, crime lab records, medical examiner records, depositions, statements, transcripts, jacket, and any documents in the file.

This request includes all event reports related to the investigation.

COMPLIANCE BY POSTAL OR ELECTRONIC MAIL IS SUFFICIENT.

Exhibit 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Derrick Schaeffer,)
Plaintiff,)
v.) No. 19 CV 7711
)
City of Chicago, Officer James A. Brandon,)
#7634, Officer Mario Perez #18936,)
Officer James Kinsey #16189, Detective)
Jocelyn Gregoire-Watkins #20974,)
Defendants.)
COOK COUNTY STATE'S ATTORNEY'S)
OFFICE,)
Respondent in Discovery.)

PRIVILEGE LOG FOR THE COOK COUNTY STATE'S ATTORNEY'S CRIMINAL
FILE 17 CR 2771, THE PEOPLE OF THE STATE OF ILLINOIS V. DERRICK
SCHAEFFER, BATES STAMPED PAGES CCSAO 001-0171.

ABBREVIATIONS USED:

CCSAO	=	COOK COUNTY STATE'S ATTORNEY'S OFFICE
CPD	=	CHICAGO POLICE DEPARTMENT
DOB	=	DATE OF BIRTH
SSN	=	SOCIAL SECURITY NUMBER
VIN	=	VEHICLE IDENTIFICATION NUMBER
ID	=	STATE ISSUED IDENTIFICATION NUMBER (non-criminal identifier)
HIPAA	=	HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT
NCIC	=	NATIONAL CRIME INFORMATION CENTER
PC	=	PERSONAL COMPUTER

Bates number(s) Document-privilege asserted Author Entire page
redacted

18,	<u>Blue Back</u>	Assistant State's Attorney	Yes
-----	------------------	-------------------------------	-----

	<p><u>CCSAO Trial preparation/ Attorney notes</u></p> <p>Privileged from disclosure pursuant to 725 ILCS 5/112-6</p> <p>Work product/ mental impression/ deliberative process</p> <p>Supreme Court Rule 201(b)(2)</p> <p><i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i>, 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i>, 329 U.S. 495 (1947)</p> <p><i>King Koil Licensing Co. v. Harris</i>, 2017 IL App 1st 161019 ¶78-79</p> <p><i>BorgWarner, Inc. v. Kuhlman Electric Corp.</i>, 2014 IL App (1st) 131824, ¶ 24, 387 Ill. Dec. 819, 23 N.E.3d 511</p> <p>Rule 26(b)(3) of the Federal Rules of Civil Procedure</p> <p><i>Timmerman's Ranch and Saddle Shop, Inc. v. Pace</i>, 2016 U.S. Dist. LEXIS 40493</p> <p><i>Hobley v. Burge</i>, 433 F.3d 946, 949 (7th Cir. 2006).</p> <p><i>Sandra T.E. v. South Berwyn School Dist. 100</i>, 600 F.3d 612 (7th Cir. 2010)</p> <p>Privilege: Non-Offender phone number</p> <p>725 ILCS 120/4</p>		
19 - 30	<p><u>Grand Jury Information</u></p> <p>Privileged from disclosure pursuant to 725 ILCD 5/112-6 (Secrecy of Grand Jury Proceedings</p>	Assistant State's Attorney	Yes

20,	<p><u>CCSAO Trial preparation/ Attorney notes</u></p> <p>Work product/ mental impression/ deliberative process</p> <p>Supreme Court Rule 201(b)(2)</p> <p><i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i>, 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i>, 329 U.S. 495 (1947)</p> <p><i>King Koil Licensing Co. v. Harris</i>, 2017 IL App 1st 161019 ¶78-79</p> <p><i>BorgWarner, Inc. v. Kuhlman Electric Corp.</i>, 2014 IL App (1st) 131824, ¶ 24, 387 Ill. Dec. 819, 23 N.E.3d 511</p> <p>Rule 26(b)(3) of the Federal Rules of Civil Procedure</p> <p><i>Timmerman's Ranch and Saddle Shop, Inc., v. Pace</i>, 2016 U.S. Dist. LEXIS 40493</p> <p><i>Hobley v. Burge</i>, 433 F.3d 946, 949 (7th Cir. 2006).</p> <p><i>Sandra T.E. v. South Berwyn School Dist. 100</i>, 600 F.3d 612 (7th Cir. 2010)</p>	Assistant State's Attorney	No
21-23, 25, 103	<p><u>CCSAO Trial preparation/ Attorney notes</u></p> <p>Work product/ mental impression/ deliberative process</p> <p>Supreme Court Rule 201(b)(2)</p> <p><i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i>, 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i>, 329 U.S.</p>	Assistant State's Attorney	Yes

	<p>495 (1947)</p> <p><i>King Koil Licensing Co. v. Harris</i>, 2017 IL App 1st 161019 ¶78-79</p> <p><i>BorgWarner, Inc. v. Kuhlman Electric Corp.</i>, 2014 IL App (1st) 131824, ¶ 24, 387 Ill. Dec. 819, 23 N.E.3d 511</p> <p>Rule 26(b)(3) of the Federal Rules of Civil Procedure</p> <p><i>Timmerman's Ranch and Saddle Shop, Inc., v. Pace</i>, 2016 U.S. Dist. LEXIS 40493</p> <p><i>Hobley v. Burge</i>, 433 F.3d 946, 949 (7th Cir. 2006).</p> <p><i>Sandra T.E. v. South Berwyn School Dist. 100</i>, 600 F.3d 612 (7th Cir. 2010)</p>		
30,	<p><u>Felony Minute Sheet Form 101</u></p> <p>Privacy: Witness address, phone number</p> <p>725 ILCS 120/4</p> <p>Attorney work product & attorney/client privileges</p> <p>Deliberative process/Investigative privilege</p> <p>Supreme Court Rule 201(b)(2)</p> <p><i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i>, 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i>, 329 U.S. 495 (1947)</p> <p><i>King Koil Licensing Co. v. Harris</i>, 2017 IL App 1st 161019 ¶78-79</p> <p><i>BorgWarner, Inc. v. Kuhlman Electric</i></p>	<p>Assistant State's Attorney</p>	Yes

	<p><u>Corp., 2014 IL App (1st) 131824, ¶ 24, 387 Ill. Dec. 819, 23 N.E.3d 511</u></p> <p>Rule 26(b)(3) of the Federal Rules of Civil Procedure</p> <p><i>Timmerman's Ranch and Saddle Shop, Inc., v. Pace</i>, 2016 U.S. Dist. LEXIS 40493</p> <p><i>Hobley v. Burge</i>, 433 F.3d 946, 949 (7th Cir. 2006).</p> <p><i>Sandra T.E. v. South Berwyn School Dist. 100</i>, 600 F.3d 612 (7th Cir. 2010)</p>		
31	<p><u>Disposition Work Sheet</u></p> <p>Privacy: Witness address, DOB</p> <p>725 ILCS 120/4</p>		No
33, 34, 35, 62 – 64, 158	<p><u>CPD Original Case Incident Report</u></p> <p>Privacy: Victim DOB, age, Place of Birth, phone number; Witness address, DOB, age, place of birth, phone number; Officer PC number</p> <p>725 ILCS 120/4</p>	Chicago Police Department	No
36 - 40, 161 - 164	<p><u>CPD Arrest Report</u></p> <p>ASA Handwritten Notes</p> <p>Privileged from disclosure pursuant to 725 ILCS 5/112-6</p> <p>Work product/ mental impression/ deliberative process</p> <p>Supreme Court Rule 201(b)(2)</p>	Chicago Police Department	No

	<p><i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i>, 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i>, 329 U.S. 495 (1947)</p> <p><i>King Koil Licensing Co. v. Harris</i>, 2017 IL App 1st 161019 ¶78-79</p> <p><i>BorgWarner, Inc. v. Kuhlman Electric Corp.</i>, <u>2014 IL App (1st) 131824, ¶24</u>, 387 Ill. Dec. 819, 23 N.E.3d 511</p> <p>Rule 26(b)(3) of the Federal Rules of Civil Procedure</p> <p><i>Timmerman's Ranch and Saddle Shop, Inc., v. Pace</i>, 2016 U.S. Dist. LEXIS 40493</p> <p><i>Hobley v. Burge</i>, 433 F.3d 946, 949 (7th Cir. 2006).</p> <p><i>Sandra T.E. v. South Berwyn School Dist. 100</i>, 600 F.3d 612 (7th Cir. 2010)</p> <p>Privacy: Victim DOB, age, Place of Birth, phone number, non-offender phone number; Witness address, DOB; Officer PC number</p> <p>725 ILCS 120/4</p>		
41 - 49	<p><u>CPD Case Supplementary Report</u></p> <p>Privacy: Victim DOB, Illinois ID, age, Place of Birth, phone number, Witness address, DOB, age, Place of Birth, phone number; Officer PC number</p> <p>725 ILCS 120/4</p>		No
52, 53	<p><u>Answer to People's Motion for Pre-trial Discovery</u></p>	Office of Cook County Public	No

	Privacy: Witness address, DOB 725 ILCS 120/4	Defender	
55	<u>Subpoena Request Form</u> Privacy: Witness address, DOB 725 ILCS 120/4	Assistant State's Attorney	Yes
57 – 59, 66, 87, 112, 115	<u>Subpoena</u> Privacy: Witness address, email address, phone number 725 ILCS 120/4	Assistant State's Attorney	No
67, 89	<u>DL/ID Image Retrieval</u> Privacy: Witness DOB, phone number, SSN, address, Driver License/ID number 725 ILCS 120/4		No
68, 69, 95 – 97, 105 – 110, 122 – 134, 156	<u>LEADS Criminal Background</u> Protected from disclosure for law enforcement purposes only. 20 Ill. Admin Code. 1240.110 Deliberative process/Work product Privacy: Witness DOB, phone number, SSN, address, Driver License/ID number 725 ILCS 120/4	Assistant State's Attorney	Yes
70 – 78, 90 – 94, 113	<u>Lexis Nexis Person Report</u> Privacy: Witness DOB, phone number, SSN, address, Driver License/ID number, VIN, License	Assistant State's Attorney	Yes

	plate number, court filings 725 ILCS 120/4		
79 - 81	<u>Office of Emergency Management and Communication CPD Event Query Report</u> Privacy: Witness phone number, DL; Officer PC number, CPD employee identification number 725 ILCS 120/4		No
100 - 102	<u>Criminal Code</u> Privileged from disclosure pursuant to 725 ILCS 5/112-6 Work product/ mental impression/ deliberative process Supreme Court Rule 201(b)(2) <i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i> , 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i> , 329 U.S. 495 (1947) <i>King Koil Licensing Co. v. Harris</i> , 2017 IL App 1 st 161019 ¶78-79 <u><i>BorgWarner, Inc. v. Kuhlman Electric Corp.</i>, 2014 IL App (1st) 131824, ¶ 24, 387 Ill. Dec. 819, 23 N.E.3d 511</u> Rule 26(b)(3) of the Federal Rules of Civil Procedure <i>Timmerman's Ranch and Saddle Shop, Inc., v. Pace</i> , 2016 U.S. Dist. LEXIS 40493 <i>Hobley v. Burge</i> , 433 F.3d 946, 949 (7th Cir. 2006).	Assistant State's Attorney	Yes

	<i>Sandra T.E. v. South Berwyn School Dist. 100</i> , 600 F.3d 612 (7th Cir. 2010)		
65, 86, 103, 111, 114, 117 - 119	<p><u>CCSAO Investigations Bureau Request Form</u></p> <p>Privacy: Witness phone number, DL; Officer PC number, CPD employee identification number</p> <p>725 ILCS 120/4</p>	Assistant State's Attorney	Yes
88, 104	<p><u>CCSAO Investigative Report</u></p> <p>Privileged from disclosure pursuant to 725 ILCS 5/112-6</p> <p>Work product/ mental impression/ deliberative process</p> <p>Supreme Court Rule 201(b)(2)</p> <p><i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i>, 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i>, 329 U.S. 495 (1947)</p> <p><i>King Koil Licensing Co. v. Harris</i>, 2017 IL App 1st 161019 ¶78-79</p> <p><i>BorgWarner, Inc. v. Kuhlman Electric Corp.</i>, 2014 IL App (1st) 131824, ¶ 24, 387 Ill. Dec. 819, 23 N.E.3d 511</p> <p>Rule 26(b)(3) of the Federal Rules of Civil Procedure</p> <p><i>Timmerman's Ranch and Saddle Shop, Inc., v. Pace</i>, 2016 U.S. Dist. LEXIS 40493</p> <p><i>Hobley v. Burge</i>, 433 F.3d 946, 949 (7th Cir. 2006).</p>	Assistant State's Attorney	Yes

	<p><i>Sandra T.E. v. South Berwyn School Dist.</i> 100, 600 F.3d 612 (7th Cir. 2010)</p> <p>Privilege: Non-Offender phone number</p> <p>725 ILCS 120/4</p>		
95 - 97	<p><u>Interstate Identification Index</u></p> <p>Privacy: Witness address, DOB,</p> <p>725 ILCS 120/4</p>	Assistant State's Attorney	No
120, 121	<p><u>Cook County Sheriff Inmate Web Page</u></p>	Cook County Sheriff	Yes
166 – 170	<p><u>Crimes Summary Sheet</u></p> <p>Privileged from disclosure pursuant to 725 ILCS 5/112-6</p> <p>Work product/ mental impression/ deliberative process</p> <p>Supreme Court Rule 201(b)(2)</p> <p><i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i>, 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i>, 329 U.S. 495 (1947)</p> <p><i>King Koil Licensing Co. v. Harris</i>, 2017 IL App 1st 161019 ¶78-79</p> <p><i>BorgWarner, Inc. v. Kuhlman Electric Corp.</i>, 2014 IL App (1st) 131824, ¶24, 387 Ill. Dec. 819, 23 N.E.3d 511</p> <p>Rule 26(b)(3) of the Federal Rules of Civil Procedure</p> <p><i>Timmerman's Ranch and Saddle Shop, Inc., v. Pace</i>, 2016 U.S. Dist. LEXIS 40493</p>	Assistant State's Attorney	Yes

	<p><i>Hobley v. Burge</i>, 433 F.3d 946, 949 (7th Cir. 2006).</p> <p><i>Sandra T.E. v. South Berwyn School Dist. 100</i>, 600 F.3d 612 (7th Cir. 2010)</p>		
171	<p><u>ASA Internal Memo</u></p> <p>Privileged from disclosure pursuant to 725 ILCS 5/112-6</p> <p>Work product/ mental impression/ deliberative process</p> <p>Supreme Court Rule 201(b)(2)</p> <p><i>Fischel & Kahn, Ltd. v. Van Stratten Gallery, Inc.</i>, 189 Ill. 2d 579, (2000), citing <i>Hickman v. Taylor</i>, 329 U.S. 495 (1947)</p> <p><i>King Koil Licensing Co. v. Harris</i>, 2017 IL App 1st 161019 ¶78-79</p> <p><u><i>BorgWarner, Inc. v. Kuhlman Electric Corp.</i>, 2014 IL App (1st) 131824, ¶24, 387 Ill. Dec. 819, 23 N.E.3d 511</u></p> <p>Rule 26(b)(3) of the Federal Rules of Civil Procedure</p> <p><i>Timmerman's Ranch and Saddle Shop, Inc., v. Pace</i>, 2016 U.S. Dist. LEXIS 40493</p> <p><i>Hobley v. Burge</i>, 433 F.3d 946, 949 (7th Cir. 2006).</p> <p><i>Sandra T.E. v. South Berwyn School Dist. 100</i>, 600 F.3d 612 (7th Cir. 2010)</p>	<p>Assistant State's Attorney</p>	Yes

Exhibit 3

—LAW OFFICES—
KENNETH N. FLAXMAN P.C.

By Email

June 1, 2020

Dana Brisbon
Workers' Compensation
Civil Actions Bureau
Cook County State's Attorney's Office
500 Richard J. Daley Center
Chicago, IL 60602

Re: Subpoena Response in Schaeffer v. Chicago, 19-cv-771

Dear Counsel:

This is a follow up on the documents you produced on behalf of the State's Attorney's Office in this matter.

Your privilege log identifies 101 pages that you are withholding on 51 separate claims of privilege. The log, however, 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 & Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, 334 F.R.D. 149, 164 (N.D. Ill. 2020).

I therefore ask that you provide a privilege log that complies with the Federal Rules within 14 days. I also suggest that you withdraw the following asserted privileges, each of which is wholly without merit:

1. You object to 46 documents on grounds of "deliberative privilege." This 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). As applied to federal claims, this privilege covers memoranda and discussions within the Executive Branch leading up to the formulation of an official position. *United States v. Zingsheim*, 384 F.3d 867, 872 (7th Cir. 2004). It is unlikely that anything in the State's Attorney file can meet this standard.
2. You object to 83 pages by invoking 725 ILCS 120/4. This claim of privilege is frivolous. The Illinois statute respecting the rights of crime victims has nothing to do with discovery. You appear to have withheld 8 documents ("CCSAO Investigations Bureau Request Forms," pages 65, 86, 103, 111, 114, 117-119) solely on the basis of this claimed privilege. Please produce those documents within the next 14 days.
3. You have asserted five separate objections to production of pages 88 and 104, "CCSAO Investigative Reports." Several of these objections, such as reliance on 725 ILCS 120/4 and Illinois Supreme Court Rule 201(b)(2) are

Kenneth N. Flaxman (312) 253-7189 knf@kenlaw.com

Joel A. Flaxman (312) 253-7207 jaf@kenlaw.com

Dana Brisbon, ASA
June 1, 2020
Page 2

plainly frivolous. Moreover, as I am sure you know, “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). Please produce those two pages within the next 14 days.

4. You raise a variety of objections to production of “Felony Minute Sheet Form 101” (page 30). We have seen this type of document in other litigation. Please provide within the next 14 days any factual basis for the claim that this simple form is protected by attorney work product privilege, attorney/client privilege, deliberative process privilege, or investigative privilege. Also, please indicate within the same 14-day period if you intend to continue to assert the claims of privilege that arise solely under state law.
5. You do not provide any details about page 101 other than to label it as “ASA Internal Memo.” More detail is required to justify the assertion of the “Work product/ mental impression/ deliberative process” claim of privilege you assert. It is possible that this “Internal Memo” shows that State’s Attorney dropped the criminal case against Mr. Schaefer “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). Please provide enough details about page 101 to enable plaintiff to assess the various privileges you claim for this document.

I look forward to hearing from you on or before June 15, 2020.

Sincerely,



Joel Flaxman

Exhibit 4

—LAW OFFICES—
KENNETH N. FLAXMAN P.C.

Joel Flaxman <jaf@kenlaw.com>

"Schaeffer subpoena - Requested documents

Joel Flaxman <jaf@kenlaw.com>

Thu, Jun 11, 2020 at 1:25 PM

To: "DANA BRISBON (States Attorney)" <Dana.Brisbon@cookcountyl.gov>

Cc: Kenneth Flaxman <knf@kenlaw.com>

Thanks for your attention to this matter. A response by 6/26/20 is fine. To the extent there are documents you are willing to produce before then, we would appreciate receiving them on a rolling basis.

One additional point that was not in the letter is that I do not believe there was a grand jury in this case. Mr. Schaeffer had a preliminary hearing and was charged by information, so we ask that you withdraw your objection to producing pages 19 - 30.

Thanks and take care,
Joel

Joel Flaxman
Law Offices of Kenneth N. Flaxman P.C.
200 S Michigan Ave, Ste 201
Chicago, IL 60604
(312) 427-3200
(312) 427-3930 (fax)
www.kenlaw.com

[Quoted text hidden]

Exhibit 5

DECLARATION OF COUNSEL

I declare under penalty of perjury that the following statements are true and correct:

1. My name is Joel Flaxman. I represent the plaintiff in *Schaeffer v. Chicago*, 19-cv-771.
2. On June 1, 2020, I sent a letter to ASA Dana Brisbon about his response to plaintiff's subpoena to the State's Attorney's Office. The letter is attached as Exhibit 3 to plaintiff's motion to compel.
3. On June 11, 2020, Mr. Brisbon requested until June 26, 2020 to respond to the letter.
4. I agreed to that request by email on June 11, 2020. The email is attached as Exhibit 4 to plaintiff's motion to compel.
5. Mr. Brisbon did not respond by June 26, 2020.
6. On June 30, 2020 at about 11:25 a.m., I spoke to Mr. Brisbon by phone. He explained why he needed additional time to respond, and he agreed to respond by the following day, July 1, 2020.
7. Mr. Brisbon did not respond on July 1, 2020.
8. On July 2, 2020, Mr. Brisbon stated by email that he would respond on July 6, 2020.
9. Mr. Brisbon did not respond on July 6, 2020.

10. On July 9, 2020 at about 1:15 p.m., I attempted to speak to Mr. Brisbon by phone. I had to leave a voicemail message.

11. Mr. Brisbon responded to my voicemail with a text message at about 2:15 p.m. on July 9, 2020. The message stated that he would respond the next day, July 10, 2020.

12. Mr. Brisbon did not respond on July 10, 2020.

13. On July 14, 2020 at about 11:15 a.m., I again attempted to speak to Mr. Brisbon by phone. I had to leave a voicemail message.

14. Mr. Brisbon has not responded to this voicemail message.

Dated: July 15, 2020

/s/ Joel A. Flaxman
Joel A. Flaxman