

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

Derrick Schaeffer,

Plaintiff,

vs.

City of Chicago, *et al.*,

Defendants.

Case No. 19 C 7711

Jeffrey T. Gilbert
United States Magistrate Judge

ORDER

This matter is before the Court on Plaintiff's Motion to Compel [ECF No. 44]. For the reasons discussed below, Plaintiff's Motion is granted without prejudice to third-party subpoena recipient Cook County State's Attorney's Office ("CCSAO") providing Plaintiff with a proper privilege log that includes all of the information necessary to determine whether any privileges recognized by applicable law authorize CCSAO to withhold from production any documents (or portions of documents) that otherwise would be responsive to Plaintiff's subpoena. Absent production of such a revised privilege log on or before August 27, 2020, the documents subject to Plaintiff's subpoena (and/or any documents or portions of documents not listed in a revised privilege log that are responsive to Plaintiff's subpoena) must be produced by August 31, 2020.

Just as a party asserting privilege to a discovery request must compile a privilege log under Federal Rule of Civil Procedure 26(b)(5), so does Federal Rule 45(e)(2)(A)(ii) require a non-party withholding subpoenaed information under a claim of privilege to "describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." *See* FED. R. CIV. P. 45(e)(2)(A)(ii); *see also* FED. R. CIV. P. 26(b)(5). Consistent with the procedures set forth on this Court's webpage that are to be followed in cases assigned or referred to Magistrate Judge Gilbert, a privilege log must be detailed enough to enable any other party to assess the applicability of the privilege asserted and should include: (1) the name and capacity of each individual from whom or to whom a document and any attachments were sent or otherwise disclosed (including which persons are lawyers); (2) the date of the document and any attachments; (3) the type of document; (4) the Bates numbers of the documents; (5) the nature of the privilege asserted; and (6) a description of the subject matter contained in the document in sufficient detail to determine if legal advice was sought or received or if the document constitutes attorney work product. *See* <https://www.ilnd.uscourts.gov/judge-info.aspx?QZFvv1igiJ0=> (citing *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992)). Furthermore, if any party or non-

party submits a privilege log that does not comply with applicable law, then the failure to provide a proper privilege log may result in waiver of any asserted privilege.¹

The Court has reviewed the privilege log submitted by third-party CCSAO. That privilege log clearly does not comply with the Federal Rules of Civil Procedure and applicable law. For example, the privilege log does not identify any assistant state's attorney by name or provide any creation dates for any of the documents listed on the purported "privilege log." The privilege log does not indicate to whom any document may have been sent, copied, or disclosed, or how many pages each document comprises. The log lumps into a general category documents described as "attorney notes" without any indication of the dates on which those notes were created, who created them, and to what they relate. There is no way to determine from the CCSAO's privilege log the volume of documents being withheld. The privilege log also does not contain adequate descriptions of the subject matter contained in the documents being withheld or provide enough specificity to permit Plaintiff (or the Court) to assess the privileges claimed and to determine if, in fact, the privileges are being asserted properly. Simply identifying the privilege claimed and inserting case or statutory citations to support such a claim of privilege is not enough. The CCSAO must supply the information necessary to fully characterize the documents being withheld, describe with more particularity the subject matter of the documents or portions of documents being withheld, and provide an explanation as to why the documents or portions of the listed documents are privileged.

The Court, therefore, orders third-party CCSAO to produce the documents it has withheld on the basis of privilege by August 31, 2020, unless it produces a revised privilege log that complies with the Federal Rules of Civil Procedure and the applicable law discussed in this Order by August 27, 2020. If CCSAO chooses to serve a revised privilege log rather than produce the documents at issue, the Court urges the CCSAO to give due consideration to the arguments made in Plaintiff's Motion to Compel [ECF No. 44] and to consider whether it properly is asserting privileges that are applicable in this case and/or recognized in federal court, and whether certain potentially private or privileged information could be redacted from certain documents thus allowing the remainder of the document(s) to be produced in unredacted form. If CCSAO provides a revised privilege log and disputes remain, third-party CCSAO shall meet and confer in good faith and in a timely manner with Plaintiff's counsel to attempt to resolve those disputes in accordance with Local Rule 37.2 before any further motion practice relating to CCSAO's documents. If disputes remain after the meet and confer, then Plaintiff may renew his motion to compel.

¹ See e.g., *United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003) ("The mere assertion of a privilege is not enough; instead, a party that seeks to invoke the attorney-client privilege has the burden of establishing all of its essential elements."); *Rao v. Bd. of Trustees of the Univ. of Illinois*, 2016 WL 6124436, at *7 (N.D. Ill. Oct. 20, 2016) ("A timely and adequate privilege log is required by the federal rules, and the failure to serve an adequate and timely privilege log may result in a waiver of any protection from discovery."); *Buonauro v. City of Berwyn*, 2011 WL 3754820, at *8 (N.D. Ill. Aug. 25, 2011) ("A litigant cannot withhold documents after it is served with discovery requests based merely on its own decision that a privilege exists, and the failure to provide a privilege log can result in a waiver of the protection that would otherwise be available."); *Babych v. Psychiatric Solutions, Inc.*, 271 F.R.D. 603, 608 (N.D. Ill. 2010) ("[A] timely and adequate privilege log is required by the federal rules, and ... failure to serve an adequate privilege log may result in a waiver of any protection from discovery.").

For all of these reasons, Plaintiff's Motion to Compel [ECF No. 44] is granted without prejudice to third-party CCSAO providing Plaintiff with a privilege log that includes all of the information necessary to determine whether any privileges recognized by applicable law authorize CCSAO to withhold from production to Plaintiff any documents (or portions of documents) that otherwise would be responsive to Plaintiff's subpoena. Absent production of such a revised privilege log on or before August 27, 2020, the documents subject to Plaintiff's subpoena (and/or any documents or portions of documents not listed in a revised privilege log that are responsive to Plaintiff's subpoena) must be produced by August 31, 2020, in accordance with this Order. Plaintiff shall provide the CCSAO with notice of the entry of this Order on the date the Order is entered. If the parties agree to different dates than those set in this Order, they can file a stipulation or agreed schedule with those dates, and the Court will enter the parties' agreed dates.

It is so ordered.



Jeffrey T. Gilbert
United States Magistrate Judge

Dated: August 12, 2020