

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

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

Plaintiff moves the Court to compel the State's Attorney of Cook County to produce the 101 pages it continues to withhold in response 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 false witness statements fabricated by defendants, Chicago Police Officers.

2. The wrongful prosecution against plaintiff ended when the Cook County State's Attorney dismissed the case.

3. As in *Bahena v. City of Chicago*, No. 17 C 8532, 2018 WL 2905747 (N.D. Ill. June 11, 2018), where this Court overruled an assertion of

privilege by the State's Attorney, plaintiff has a particularized need for the evidence created by the State's Attorney while prosecuting plaintiff and investigating the burglary.

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. The district court's recent ruling on summary judgment in *Bahena* confirms the importance of such evidence; the court in *Bahena* specifically relied on the prosecutor's memo that this Court had ordered produced over the State's Attorney's objection. *Bahena v. City of Chicago*, No. 17 C 8532, 2020 WL 5076658, at \*6 (N.D. Ill. Aug. 26, 2020).

### **I. The Court's First Ruling**

6. Plaintiff filed his first motion to compel the State's Attorney on July 15, 2020. (ECF No. 44.)

7. The Court granted the motion on August 12, 2020:

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.

(ECF No. 50 at 1.)

8. The Court ordered the State's Attorney to produce a revised privilege log that complies with the Federal Rules of Civil Procedure and applicable law on or before August 27, 2020. (ECF No. 50 at 3.)

9. The State's Attorney produced a revised privilege log on August 31, 2020. Plaintiff attaches the revised privilege log as Exhibit 1.

10. Plaintiff shows below in paragraphs 19-21 that the revised privilege log also fails to comply with the Federal Rules of Civil Procedure and applicable law.

11. The Court's ruling directed the State's Attorney

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.

(ECF No. 50 at 2.)

12. Notwithstanding the Court's suggestion, the State's Attorney did not make any change to its overly broad assertions of privilege, and the State's Attorney has not modified the documents it produced in any way.

13. As explained below in paragraphs 22-47, plaintiff renews his request that the Court overrule these assertions of privilege.

14. Finally, the Court's Order directed that the State's Attorney "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." (ECF No. 50 at 2) (emphasis in original.)

15. Plaintiff's undersigned counsel spoke to Assistant State's Attorney Dana Brisbom by phone on September 2, 2020 at about 3:30 p.m. in an attempt to comply with the Court's Order and the requirements of Local Rule 37.2. Plaintiff attaches counsel's declaration as Exhibit 2.

16. ASA Brisbom stated he would produce copies of pages 100-102, which are labeled in the privilege log as "Criminal Code." (Exhibit 2 ¶ 3.)

17. The State's Attorney has not yet produced those pages. (Exhibit 2 ¶ 4.)

18. ASA Brisbom stated that the State's Attorney would not reconsider any other objection that it had raised and agreed that further attempts to resolve the parties' differences will be futile. (Exhibit 2 ¶¶ 5, 6.)

## **II. The State's Attorney's Revised Privilege Log is Deficient**

19. The State's Attorney's revised privilege log, while containing more of the background information required by the Federal Rules of Civil Procedure and applicable law for some of the documents withheld, continues

to assert the same 51 separate claims of privilege to withhold the same 101 pages.

20. 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).*

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

### **III. Deliberative Process Privilege**

22. The State’s Attorney invokes the deliberative process privilege nine times in its revised privilege log, including Page 171, identified as “ASA Internal Memo” (Exhibit 1 at 12-13) and Pages 88 and 104, identified as “CCSAO Investigative Report.” (Exhibit 1 at 10-11.)

23. The State’s Attorney did not follow the Court’s direction to provide additional information about these documents. This failure requires that the Court order production of these documents without any redactions.

24. In addition, 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).

25. 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).

26. Finally, a party seeking to assert the deliberative 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).

27. The State's Attorney demonstrated its awareness of the affidavit requirement in *Bahena v. City of Chicago*, No. 17 C 8532, 2018 WL 2905747, at \*2 (N.D. Ill. June 11, 2018), where it submitted the "Declaration of Joe Magats in Support of Deliberative Process Privilege"

28. In this case, the State's Attorney has not submitted any affidavit or declaration, nor made any attempt to show why the deliberative process privilege applies. Plaintiff explained this failure in the first motion to compel. (ECF No. 44 ¶ 12.) Thus, the Court should find that this privilege is waived.

29. The Court's reasoning in *Bahena* overruling an assertion of the privilege supported by affidavit is equally applicable here.

30. As in *Bahena*, the State’s Attorney has waived any privilege over material “about the process . . . the State’s Attorney’s Office went through before deciding to dismiss the charges.” *Bahena v. City of Chicago*, No. 17 C 8532, 2018 WL 2905747, at \*4 (N.D. Ill. June 11, 2018).

31. In *Bahena*, the assistant state’s attorney had already testified about the process leading to dismissal. Here, the State’s Attorney has already produced a handwritten document about the process leading to dismissal:

Witness Cheryl Young have a statement to PD Investigator recanting that she saw defendant in the victim’s garage. Vic Fields in court says he might have given defendant whom he knew from the neighborhood—permission to move stuff from his garage. Because of victim and witness inconsistency—MS Nolle Pros.

(CCSAO 000032, attached as Exhibit 3.) The phrase “MS Nolle Pros” means a motion by the state to nolle prosequi, or dismiss the case. Despite producing this document about the process leading to dismissal, the State’s Attorney is withholding other such documents. The Court should order these documents produced because the privilege is waived. *See Bahena v. City of Chicago*, No. 17 C 8532, 2018 WL 2905747, at \*4 (N.D. Ill. June 11, 2018)

32. Also, as in *Bahena*, plaintiff has a particularized need for material about the process leading to dismissal. *Bahena v. City of Chicago*,

No. 17 C 8532, 2018 WL 2905747, at \*4 (N.D. Ill. June 11, 2018). Each factor that the Court discussed in *Bahena* applies with equal force here:

- a. this is a civil rights case involving claims of unlawful detention and that the criminal charges were based on false testimony;
- b. there is no other evidence that would substitute for documents created at the time the decision was made to dismiss the charges;
- c. plaintiff's claims are serious—he spent almost 15 months in jail accused of burglary;
- d. this lawsuit questions the evidence that allegedly supported the charges and the State's Attorney's material likely “discusses that evidence and why the prosecutors ultimately decided that the evidence did not support the charges;” and
- e. there will not be any chilling effect from disclosing material created in a prosecution that concluded more than three years ago.

#### **IV. Grand Jury Secrecy**

33. 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.

34. Under Illinois law “[a]ll prosecutions of felonies shall be by information or by indictment.” 725 ILCS 5/111-2(a).

35. The State's Attorney's revised privilege log admits that the State's Attorney is withholding a copy of the information that was filed against plaintiff. (Exhibit 1 at 2-3.)

36. Plaintiff attaches as Exhibit 4 a copy of the information that was filed in court and produced in the Cook County Public Defender's file.

37. Although the information is 3 pages long, the State's Attorney is withholding 12 pages based on its claim of grand jury secrecy. (Exhibit 1 at 2-3.)

38. Because plaintiff was charged by information, the Court should overrule the State's Attorney's erroneous invocation of grand jury secrecy and order production of pages 19-30.

39. Plaintiff pointed out the State's Attorney's error in his first motion to compel. (ECF 44 ¶ 13.)

40. In assessing the State's Attorney's other claims of privilege, the Court should be mindful of the State's Attorney's refusal to correct this

error and its apparent willingness to mischaracterize the criminal proceedings against plaintiff.

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

41. 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 non-existent privilege.

**VI. Investigatory Material**

42. 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.

43. Moreover, "CCSAO Investigative Reports" are routinely produced in criminal matters by the State's Attorney 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.

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

## **VII. Work Product Privilege**

45. The work product privilege (which subsumes other asserted privileges of mental impressions, trial preparation, and attorney notes) does not apply in this case because the State's Attorney 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)).

46. In addition, the State's Attorney did not follow the Court's direction to provide additional information about many documents supposedly covered by this privilege, including pages 18, 30, 88, 104, 166-170, and 171. This failure requires that the Court order production of these documents without any redactions.

47. The State's Attorney asserts this privilege for, among others, a document it describes 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, which, as the Court recognized in *Bahena v. City of Chicago*, No. 17 C 8532, 2018 WL 2905747 (N.D. Ill. June 11, 2018), is a crucial fact in this case. Plaintiff showed above why such material must be produced.

## **VIII. Conclusion**

The State's Attorney has made overly broad assertions of privilege without basis in fact or law and has refused to withdraw any of those assertions despite the Court's admonition. Accordingly, plaintiff respectfully requests that the Court overrule all assertions of privilege, direct the State's Attorney to produce, without any redactions, all of the documents it has withheld, and order the State's Attorney to pay the fees incurred in the preparation and presentation of this motion and of plaintiff's first motion to compel.

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 September 8, 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 by email to Assistant State's Attorney Dana Brisbon, dana.brisbon@cookcountyclerkil.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*