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

Derrick Schaeffer	)	
	)	
	)	Case No. 19-CV-7711
Plaintiff,	)	
	)	Judge Robert M. Dow, Jr.
v.	)	
	)	Magistrate Judge Jeffrey T. Gilbert
City of Chicago, et al.	)	
	)	
Defendants.	)	

COOK COUNTY STATE'S ATTORNEY'S OFFICE'S
RESPONSE TO PLAINTIFF'S RENEWED MOTION TO COMPEL

Non-Party Cook County State's Attorney's Office ("CCSAO"), by its attorney, KIMBERLY M. FOXX, State's Attorney of Cook County, through her Assistant State's Attorney Seyon Flowers, submits the following response to Plaintiff's Renewed Motion to Compel and states the following.

Background

This is a malicious prosecution and §1983 suit brought against the City of Chicago and individual police officers. Non-Party CCSAO was served with a subpoena on February 4, 2020, to which it responded. On July 15, 2020, Plaintiff filed a Motion to Compel CCSAO to produce documents withheld in its response to Plaintiff's subpoena. (*Dkt 44*.) On August 12, 2020, the Court granted the motion without prejudice subject to CCSAO providing a revised privilege log by August 27, 2020. (*Dkt. 50*.) On August 31, 2020, the CCSAO provided a revised privilege log to Plaintiff. On September 8, 2020, Plaintiff filed a Renewed Motion to Compel ("MTC"). (*Dkt. 56*.) On September 8, 2020, the Court set a briefing schedule directing the CCSAO to file a

Response to Plaintiff's Renewed MTC by September 22, 2020. (*Dkt. 58.*) On October 2, 2020, the Court ordered that any motion to extend time to respond filed by the CCSAO must comply with Rule 6(b)(2) of the Federal Rules of Civil Procedure, and that if the CCSAO did not file the motion by 4:00 p.m. on October 5, 2020, then the Court would grant Plaintiff's MTC. (*Dkt. 67.*) On October 5, 2020, the CCSAO filed its Agreed Motion to Extend and following the direction of the court, it tendered 146 pages out of a total of 171 pages (bates-stamped CCSAO #1-171) to Plaintiff. (*Dkt. 70.*) The only remaining issues are the non-disclosure of the 25 pages of LEADS data (CCSAO *#68, 69, 95-97, 122-134 & 156*) and the redactions of personal identifying information (CCSAO *#18, 30, 31, 33, 37, 39, 41, 42, 44-46, 52, 53, 55, 57-60, 62, 65-67, 70-78, 84, 87, 89-94, 103, 104, 111-115, 117-119, 148 and 163*) and statements that are protected by the attorney work product and deliberative process doctrines (CCSAO *#21 and #32*).

Argument

In Plaintiff's renewed MTC, they challenged various privileges. We subsequently produced additional documents in response and disclosed bates-stamped pages CCSAO #18-30; 65, 86, 88, 101, 103, 104, 111, 114, 117-119, 166-170 and 171. (*See Plaintiff's Renewed MTC, ¶¶ 11,14,19, 22, 23, 38, 41, 42 and §§ V, VI and VII*). Due to this production, most of Plaintiff's arguments are now *moot*. The remaining issues for this Court to decide are whether the LEADS records inquiry as to the criminal history of Plaintiff and certain witnesses (CCSAO *#68, 69, 95-97, 122-134 & 156*); as well as CCSAO #21 and CCSAO #32, which both contain partial redactions of work product and deliberative process should also be disclosed. (*See Exhibit A*). We have also redacted personally identifying information of victims, witnesses and the defendant including social security numbers, phone numbers, home addresses, driver's license

numbers and other private information in the remaining tendered documents pursuant to this Court's direction. (*See Plaintiff's Renewed MTC, ¶ 11*).

CCSAO's Withholding of LEADS (Law Enforcement Agencies Data System) documents pursuant to 20 Ill. Adm. Code 1240.80(d) is proper and must not be disclosed

As stated above, CCSAO has withheld from disclosure 25 pages of specific records related to the criminal history of certain witnesses, specifically, Cheryl T. Young; Janice Branscomb and Plaintiff, Derrick Schaeffer. (*See Exhibit A, bates-stamped CCSAO 68, 69, 95-97, 122-134 & 156*). It is well settled that LEADS data shall not be disseminated to any individual or organization *that is not legally authorized* to have access to the information. Parties can only receive such data if the Illinois State Police itself authorized such receipt.

In this case, CCSAO is not aware of any authorization that was extended to Plaintiff to receive this data. As such, any arguments that Plaintiff has or will advance as to the reasons for a *voluntary* disclosure of these documents, must be rejected and his motion to compel disclosure of these documents must be denied.

CCSAO's Partial Redaction of the Personal Identifying Information Contained in the tendered documents was proper and cannot be disclosed absent authorization/permission or pursuant to court order

As stated above, the CCSAO has tendered 146 pages out of 171 to Plaintiff's counsel. These pages contain partial redactions of personal identifying information, such as the witness' address; date of birth; social security number; phone number, email address and driver's license numbers. (*See Exhibit A*).

It is anticipated that Plaintiff may raise concerns about the redaction of the phone numbers for some of the witnesses, noting that CCSAO has no legal basis to withhold a witnesses' phone number that was contained within these documents. CCSAO asserts that phone numbers of non-party witnesses are personal identifying information. *(See Rule 45(e)(2)(a)).*

CCSAO has no authorization, permission or court order to disclose such information to Plaintiff. CCSAO also asserts that the personal identifying information of the witnesses, including their phone numbers, was withheld at the direction of the court and pursuant to *Rule 45(e)(2)(a)*. (*See also Plaintiff MTC, ¶ 11*). Additionally, the State's Attorney Office is a criminal prosecution agency, we have practical concerns about sharing victim and witness contact information directly with a current or former criminal defendant.

As such, the CCSAO has no issue with producing unredacted personal identifying information pursuant to authorization and/or permission of the witnesses or pursuant to the entry of a protective order.

The Partial Redaction of Handwritten Notes Contained in CCSAO #21 and #32 are Protected from Disclosure by the Work Product Doctrine

In its production, CCSAO produced a partially redacted note from CCSAO #21 and #32.[1] These specific notes are protected pursuant to the attorney opinion work product doctrine, and this Court should deny Plaintiff's renewed MTC its disclosure for the reasons stated below.

The Illinois Supreme Court has held that "the work product doctrine protects materials prepared for any litigation or trial so long as they were prepared by or for a party to the subsequent litigation." *Fischel & Kahn v. van Straaten Gallery*, 189 Ill. 2d 579, 591 (2000). More specifically, the Court observed that, "the unrelatedness of the subsequent litigation provides an insufficient basis for disregarding the privilege." *Id* at 592. Therefore, the Court found that, "the work product privilege extends to all subsequent litigation. *Id.* Here, the Court was specifically addressing the substance of the subsequent litigation, and not the nature of the parties in each case. The Court issued an unqualified ruling, upholding the privilege for

[1] The latter CCSAO #32 was produced unredacted in error. A claw back letter was tendered to all parties, specifically related to the last sentence of the unredacted handwritten note. The Plaintiff and non-party CCSAO also engaged in a conference call pursuant to Local Rule 37.2 on October 13, 2020 to finalize any remaining issues.

subsequent litigation. There are no Illinois cases addressing the privilege as asserted by prosecutors.

However, Federal Courts have specifically addressed application to a prosecutor's files. The federal opinion work product provision similarly applies to "the mental impressions, conclusions, opinions, or legal theories of an attorney or a party's representative." *Timmerman's Ranch & Saddle Shop, Inc. v. Pace*, 2016 U.S. Dist. LEXIS 40493 at *5 (2016). Judge Zagel in that case found "that the SA is entitled as a non-party to invoke the work-product privilege." *Id.* at *6.

Judge Zagel based his finding on the Seventh Circuit's dictum from *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006). Similarly, Judge Mark Filip, followed the Seventh Circuit in the matter of *Jackson v. City of Chicago*, 2006 U.S. Dist. LEXIS 56675, with the following analysis:

> Defendants also maintain that the work product doctrine does not apply at all because Plaintiff's criminal case is over and work product protection does not extend to concluded litigation. (D.E. 124 at 11 (*citing Research Inst. for Med. & Chem., Inc. v. Wis. Alumni Research Found.*, 114 F.R.D. 672, 680 (W.D. Wis. 1987)).) [*19] With all respect, this position is not persuasive in light of recent Seventh Circuit teaching. *See, e.g., Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) ("HN5 A majority of courts have held. . . . that the privilege endures after termination of the proceedings for which the documents were created, especially if the old and new matters are related.") (collecting circuit precedents). To be sure, the statement in *Hobley* is technically dictum, because the issue was not challenged there; however, the Seventh Circuit's statement in recent dictum that is on-point, and the dictum is supported by two federal appellate citations from other circuits. The Court will follow that federal appellate precedent and the Seventh Circuit's recent dictum over a relatively old district court decision addressing the issue. *See generally United States v. Foxworth*, 8 F.3d 540, 545 (7th Cir. 1993) (holding that dictum from superior court can be a meaningful source of guidance if it speaks to the issue at hand); *accord, e.g., Humphrey's Executor v. United States*, 295 U.S. 602, 627, 55 S. Ct. 869, 79 L. Ed. 1611 (1935) (similar).

Id. at *19.

Based on the above, the CCSAO asks this court to deny Plaintiff's renewed MTC the unredacted notes contained in CCSAO #21 and #32 pursuant to the attorney opinion work product doctrine.

The Partial Redaction of Handwritten Notes Contained in CCSAO #21 and #32 are Protected from Disclosure pursuant to the Deliberative Process Privilege

In its production, CCSAO produced a partially redacted note from CCSAO #21 and #32 These specific notes are protected pursuant to the deliberative process privilege this Court should deny Plaintiff's renewed MTC its disclosure for the reasons stated below.

It is well established that the deliberative process privilege "protects communications that are part of the decision-making process of a governmental agency." *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993). The privilege rests on the realization that officials will not communicate candidly among themselves if every thought and comment is discoverable. *Saunders v. City of Chicago*, 12 C 9158, 2015 U.S. Dist. LEXIS 105571 (N.D. Ill. Aug. 12, 2015). The privilege's objective is to enhance the quality of agency decisions by protecting open and frank discussion among agency employees. *Id*. (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001)). In order to protect these deliberations, the privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." *Id*. Documents that reflect *post*-decision deliberations are not protected by this privilege or exemption. *Farley*, 11 F.3d @1389.

As with the work product doctrine, the burden is on the party invoking the privilege to establish the protection. To determine whether the privilege applies, federal courts generally employ a two-part analysis. First, the court must decide whether the government has shown that the privilege applies to the documents the government seeks to protect. *Saunders v. City of Chi.*,

No. 12 C 9158, 2015 U.S. Dist. LEXIS 105571, at *30 (N.D. Ill. Aug. 12, 2015 (citing *Ferrell v. U.S. Dep't of Housing and Urban Dev.*, 177 F.R.D. 425, 428 (N.D. Ill. 1998)). For the government to satisfy its *prima facie* threshold showing, the government must do three things: "1) the department head with control over the matter must make a formal claim of privilege, after personal consideration of the problem; 2) the responsible official must demonstrate, typically by affidavit, precise and certain reasons for preserving the confidentiality of the documents in question; and 3) the official must specifically identify and describe the documents." *Id.* Once the government makes this showing, the Court is free to conduct an *in camera* review of the withheld documents or information. If the court determines that the deliberative process privilege applies, the party seeking the documents must demonstrate a "particularized need" for them. *Id*. In undertaking such an analysis, the court balances the plaintiff's need for disclosure against the government's need for secrecy, considering such factors as: "1) the relevance of the documents to the litigation; 2) the availability of other evidence that would serve the same purpose as the documents sought; 3) the government's role in the litigation; 4) the seriousness of the litigation and the issues involved in it; and 5) the degree to which disclosure of the documents sought would tend to chill future deliberations within government agencies, that is would hinder frank and independent discussion about governmental policies and decisions." *Id*.

As with the work-product doctrine, the production of purely factual matters contained within deliberative documents can be compelled. Discussions of objective facts, as opposed to opinions and recommendations, generally are not protected by the privilege. *Id.* (citing *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87-88 (1973) ("[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery.")). As such, to be

considered "deliberative," a document should reflect policy or decision-making processes rather than be purely factual. *Id.* If, however, the facts and deliberation cannot be separated because they are "inextricably intertwined," or because disclosure of the facts would reveal the deliberative process, then the entire document can be withheld. *Id*; *see also Enviro Tech Int'l, Inc. v. U.S. E.P.A.*, 371 F.3d 370, 374 (7th Cir. 2004).

"The State's Attorney is the representative of the People and has the responsibility of evaluating the evidence and other pertinent factors and determining what offense can properly and should properly be charged." *People v. Rhodes*, 38 Ill. 2d 389, 396 (1967). Under Illinois law, the State's Attorney is "vested with the exclusive discretion in the initiation and management of criminal prosecution." *Spiegel v. Rabinovitz*, 121 F.3d 251, 257 (7th Cir. 1997)(citing *Hunt v. Jaglowski*, 926 F.2d 689, 692 (7th Cir. 1991)).

Additionally, in his MTC, Plaintiff states that the Deliberate Process Privilege asserted in CCSAO #171, 88, 104, 19-30 should be waived as the privilege only applies to memoranda and discussions with the Executive Branch leading to the formation of an official position. He also states that we failed to submit an affidavit or declaration, unlike in *Bahena*, nor did we show why the deliberative process privilege applies in this case. *See MTC, ¶¶s 25-28*.

Plaintiff's arguments are without merit. First, as stated above, we have already produced CCSAO #171, 88, 104, 19-30. Second, in both *Bahena* and *Saunders*, the Declarations presented by the Executive Staff (***i.e***, First Assistant Joseph Magats and former State's Attorney Anita Alvarez) were submitted because both had particularized knowledge and direct involvement in the deliberative process and decision to *Nolle Prosecui* or oppose/deny a Certificate of Innocence in those murder cases. *See Plaintiff's MTC ¶¶ 26-28*; *see also, Saunders v. City of Chicago,* No. 12 C 9158; 12 C 91702; No. 12 C 91584, 2015 WL 4765424, at *37 (N.D. Ill. August 12, 2015).

Unlike *Bahena* and *Saunders*, this is not a murder case but a burglary, and the Executive Staff, specifically, the Chief of the Criminal Bureau, likely had no direct involvement in the deliberative process before the *Nolle Prosecui* of the underlying criminal matter. Nonetheless, we still believe the deliberative process is applicable here because Plaintiff has failed to show a particularized need for this information to prove his claims." In *Saunders*, the Court noted that "in SA Alvarez's declaration she declared that the reinvestigation documents and information must be protected from disclosure (in part) to ensure that the SAO has "freedom to conduct investigations," and to avoid a "disincentive" to an "open and thorough investigation." (*Doc. 167-1 ¶ 10*). She also expressed concern that disclosure "could have a chilling effect on future State's Attorneys who decide to investigate a case where a defendant has been convicted but claims innocence on the basis of new evidence." (*Id. ¶ 10*)." *Id*. The dissemination of this information without a particularized need may have a "chilling effect" on future deliberations if this information is disclosed.

This discretion and deliberations necessarily include the decision, as in this case, whether to dismiss a prosecution. The handwritten notes that were redacted from CCSAO #21 and #32 contain the mental impressions, deliberations and opinions of the Assistant State's Attorneys working on the matter, which are clearly protected under this doctrine and should not be disclosed. Therefore, based on the reasons stated above, Plaintiff's Renewed Motion to Compel must be denied or in the alternative, we ask that this Court conduct an *in camera* inspection of the unredacted information in question to determine whether or not its disclosure is necessary, since there is other evidence available that serves the same purpose.

WHEREFORE, Respondent Cook County State's Attorney's Office respectfully requests that this Court denies Plaintiff's Renewed Motion to Compel for all the reasons stated above.

Dated: October 15, 2020

Respectfully Submitted,

Kimberly M. Foxx
State's Attorney of Cook County

By: s/ ***Seyon Flowers***
Assistant State's Attorney
Supervisor, Worker's Compensation
Cook County State's Attorney's Office
500 Richard J. Daley Center
Chicago, Illinois 60602
312-603-6124
seyon.flowers@cookcountyil.gov

Attorney for Non-Party Cook County State's Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on October 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 counsel of record who are deemed to have consented to electronic service.

/s/ Seyon Flowers
Assistant State's Attorney