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

Derrick Schaeffer,	)	
	)	
Plaintiff,	)	No. 19-cv-7711
	)	
-vs-	)	*(Judge Dow)*
	)	
City of Chicago, et al.	)	*(Magistrate Judge Gilbert)*
	)	
Defendants.	)	

REPLY IN SUPPORT OF PLAINTIFF'S RENEWED MOTION TO COMPEL STATE'S ATTORNEY OF COOK COUNTY

At the eleventh hour, and after months of obstruction, the State's Attorney has withdrawn nearly all objections to producing documents responsive to plaintiff's subpoena. The State's Attorney, however, persists in three objections. Plaintiff shows below that the Court should overrule each one.

I. Work Product and Deliberative Process

The State's Attorney seeks to withhold portions of two different handwritten notes—one on CCSAO 000021 and one on CCSAO 000032—under the work product doctrine (ECF No. 74 at 4-6) and the deliberative process privilege. (*Id.* at 6-9.) Neither privilege applies, and the attempt to withhold the portion of CCSAO 000032 comes too late; the State's Attorney did not seek to withhold this information until one month after plaintiff filed it as an attachment to his motion to compel. (ECF No. 56-3.)

Plaintiff showed in his renewed motion to compel that neither privilege applies (ECF No. 56 ¶¶ 22-32, 45-47), and the State's Attorney cannot rebut this showing. The State's Attorney candidly admits that it has not produced the affidavit required to assert the deliberative process privilege. (ECF No. 74 at 8-9.) The State's Attorney's argument for the work product privilege relies only on boilerplate assertions of why the privilege applies. (ECF No. 74 at 4-6.) The Court should therefore overrule these undeveloped claims of privilege.

The Court should also order production of CCSAO 000021 without redactions because the portion of that document that the State's Attorney seeks to withhold is public information. Plaintiff attaches the redacted version of CCSAO 000021, a page of notes, as Exhibit 5. As the notes show, and as counsel for the State's Attorney explained to undersigned counsel, the redacted portion of the page reports the outcome of a "402 Conference." Under Illinois Supreme Court Rule 402(d), a judge may participate in plea discussions and recommend an appropriate sentence. Plaintiff learned the judge's recommendation after the "402 Conference," and the recommendation was discussed on the record in open court. (Exhibit 6, Report of Proceedings, April 2, 2018 at 5) (discussing judge's offer of six year sentence.) The Assistant State's Attorney memorialized the recommendation in the

notes marked as CCSAO 000021, attached as Exhibit 5. There is no basis for the State's Attorney to withhold this purely factual material, which was already disclosed to plaintiff and discussed in open court.

There is also no basis for the State's Attorney's tardy attempt to withhold material contained in CCSAO 000032. Plaintiff attaches the redacted version of CCSAO 000032 as Exhibit 7. The State's Attorney produced the unredacted version of CCSAO 000032 on March 23, 2020, and plaintiff filed the unredacted page on the Court's public docket on September 8, 2020. (ECF No. 56-3.) The State's Attorney made a belated and ineffectual attempt to claw-back the document by sending a letter on October 13, 2020 and referring to the letter in a footnote in its response. (ECF No. 74 at 4 n.1.) The Court should reject this attempted claw-back because raising an argument in "a passing reference in a footnote" is a waiver. *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989).

In addition, the State's Attorney's efforts fall far short of the requirements of Federal Rule of Civil Procedure 26(b)(5)(B). The State's Attorney has not attempted to show that it "took reasonable steps to prevent disclosure" or "took reasonable steps to rectify the error," as required by Federal Rule of Evidence 502(b). In a case cited favorably by the Seventh Circuit, the magistrate judge found that a two-week delay between learning of the

disclosure of a document and sending a letter requesting its return was a "lax" attempt to rectify the error. *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D. Ill. 1996) (cited in *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 389 (7th Cir. 2008).) The State's Attorney's efforts here are equally lax.

For all these reasons, the Court should overrule the State's Attorney's attempts to assert the work product doctrine and the deliberative process privilege.

II. LEADS Records

The State's Attorney states that it is withholding 25 pages of records it obtained from the Law Enforcement Agencies Data System (LEADS), "a statewide, computerized telecommunications system designed to provide services, information, and capabilities to the law enforcement and criminal justice community in the State of Illinois." 20 ILL. ADM. CODE 1240.10(a) (1999).

The State's Attorney disclosed LEADS records to plaintiff during the criminal prosecution. Plaintiff attaches as Exhibit 8 the "Discovery Receipt" showing acknowledgement on March 9, 2017, that the State had tendered a 4-page "LEADS response." This material is routinely disclosed to criminal defendants. *See, e.g.*, *People v. Ackerman*, 2020 IL App (3d) 180188-U, ¶ 22

(allegations that State withheld LEADS report were sufficient to make out a claim that the State violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963).)

In this case, however, the State's Attorney refuses to disclose any LEADS records. Without providing any citation or explanation, the State's Attorney contends that it is "well settled" that it may withhold these records. (ECF No. 74 at 3.) The Court should overrule this objection because "perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived." *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

The State's Attorney may be attempting to rely on the following provision of the Illinois Administrative Code: "LEADS data shall not be disseminated to any individual or organization that is not legally authorized to have access to the information." 20 ILL. ADMIN CODE. 1240.80(d). This provision bars dissemination of LEADS records to the public, for example, in response to a request under the Illinois Freedom of Information Act. *See Better Gov't Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶ 25. In this case, however, there is a legal authorization for the dissemination of the records: plaintiff has served a subpoena on the State's Attorney under Federal Rule of Civil Procedure 45.

The Illinois State Police, which administers LEADS, routinely responds to subpoenas for LEADS records. Plaintiff attaches as Exhibit 9, a letter sent by the Illinois State Police in response to a subpoena in *Bell v. Dart*, 14-cv-8059, demonstrating as much. The State's Attorney cannot explain why it follows a different rule from the entity that administers LEADS.

To the extent there are any legitimate privacy concerns with disclosing the LEADS records, the Court should order their production under the confidentiality order already entered in this matter as ECF Number 41.

III. Redactions

Finally, the State's Attorney seeks to support its redaction of information about potential witnesses in plaintiff's criminal case. (ECF No. 74 at 3-4.) This information, which includes mailing addresses, phone numbers, and email addresses, is necessary to locate these witnesses. The State's Attorney's redactions include material that appears in publicly filed documents. Plaintiff attaches the Answer to Discovery filed by his criminal defense lawyer as Exhibit 10, which the State's Attorney redacted before producing. The stamp in the upper right-hand corner of the page shows that this page was publicly filed on October 24, 2017. There is no basis for redacting from a publicly filed document.

In support of its redactions, the State's Attorney seeks to rely on Federal Rule of Civil Procedure 45(e)(2)(A):

> (A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
>
> > (i) expressly make the claim; and
> >
> > (ii) 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.

This provision states what a party responding to a subpoena must do when it withholds privileged information. The State's Attorney is manifestly in error in arguing that the provision itself supports any specific privilege. This is another "perfunctory and undeveloped arguments," which the Court should overruled. *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

Another portion of Rule 45 applies when a subpoena seeks "a trade secret or other confidential research, development, or commercial information," FED. R. CIV. P. 45(d)(3)(B)(i), but none of these categories cover witnesses phone numbers and addresses. Perhaps the State's Attorney intends to invoke Federal Rule of Civil Procedure 5.2, which limits the public filing of an individual's social-security number and year of birth, but this Rule does not apply to discovery materials, which are not publicly filed. *E.g.*,

MBNA Am. Bank, N.A. v. Cioe & Wagenblast, P.C., No. 2:05 CV 216, 2006 WL 8452399, at *2 (N.D. Ind. May 15, 2006). Nor does the rule have any applicability to phone numbers and addresses.

The State's Attorney has failed to carry its burden to establish any claimed privilege over this material. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). To the extent there are any legitimate privacy concerns with disclosing this material, the Court should order their production under the confidentiality order already entered in this matter as ECF Number 41.

IV. Conclusion

For all these reasons, and those previously advanced, the Court should grant plaintiff's motion to compel.

Respectfully Submitted,

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