

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

Derrick Schaeffer,
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 Renewed Motion to Compel Non-Party State's Attorney of Cook County [ECF No. 56]. For the reasons discussed below, Plaintiff's Renewed Motion [ECF No. 56] is granted. See the Statement below for further details.

STATEMENT

This is Plaintiff's second attempt to obtain relevant documents in response to a third-party subpoena served on the Cook County State's Attorney's Office ("CCSAO") pursuant to Federal Rule of Civil Procedure 45. In a previous order entered on August 12, 2020, this Court ordered the CCSAO to provide Plaintiff with a revised privilege log that included all the information necessary to determine whether any privileges recognized by applicable law authorized the CCSAO to withhold any documents (or portions of documents) that otherwise would be responsive to Plaintiff's subpoena. *See* August 12, 2020 Order [ECF No. 50]. The Court also ordered that any responsive documents subject to Plaintiff's subpoena not listed in the revised privilege log must be produced by August 31, 2020. *See* August 12, 2020 Order [ECF No. 50].

It appears that the CCSAO did not produce any documents on August 31, 2020, per the Court's Order [ECF No. 50], but it provided a revised privilege log to Plaintiff on that date. That revised privilege log was not materially different than the first one the CCSAO provided. On September 8, 2020, Plaintiff filed this Renewed Motion to Compel Non-Party State's Attorney of Cook County [ECF No. 56], and the Court ordered the CCSAO to respond by September 22, 2020. *See* [ECF No. 58]. The CCSAO did not file a timely response to Plaintiff's Renewed Motion [ECF No. 56]. On October 1, 2020, however, Plaintiff's counsel sent an email to the Court's courtroom deputy, copied to CCSAO's counsel, indicating that the CCSAO intended to file a motion to extend the time for it to respond to Plaintiff's Renewed Motion to Compel [ECF No. 56]. *See* [ECF No. 67]. In response, the Court entered an order on October 2, 2020, which stated that any motion to extend the time to respond to Plaintiff's Renewed Motion to Compel [ECF No. 56] that might be filed by the CCSAO must comply with Federal Rule of Civil Procedure 6(b)(2), and if the CCSAO did not file such a motion by 4:00 pm on October 5, 2020, then the Court would grant Plaintiff's Renewed Motion to Compel. *See* [ECF No. 67].

On October 5, 2020, CCSAO filed an agreed motion to extend the time for it to respond to Plaintiff's Renewed Motion [ECF No. 56] and only at that time did the CCSAO finally produce some documents to Plaintiff. *See* [ECF No. 70]. Specifically, the CCSAO produced 146 pages of the 171 pages it previously had been withholding, many if not all of which were documents the CCSAO originally claimed were privileged. The CCSAO also said it would produce a "revised" privilege log. The CCSAO continued to maintain its assertions of privilege over 25 pages and some redacted material, including: (1) 25 pages of data from the Law Enforcement Agencies Data Systems ("LEADS"); (2) redactions of personal identifying information; and (3) redactions of statements that allegedly are protected by the attorney work product and deliberative process doctrines.

The Court will address each category of documents being withheld in turn.

1. LEADS Data

CCSAO has withheld 25 pages of LEADS records relating to the criminal history of certain witnesses and Plaintiff arguing that "[i]t 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." CCSAO Resp., [ECF No. 74], at 3. The CCSAO, however, does not cite any authority for that proposition of "well-settled" law. In addition, the CCSAO has not identified any specific privilege that would prevent the disclosure of these documents in this federal question civil rights lawsuit. As another judge of this court recently recognized in *Andersen v. City of Chicago*, 2019 WL 423144 (N.D. Ill. Feb. 4, 2019) (Harjani, MJ), production of LEADS data is "warranted under the relevance and proportionality standards in the Federal Rules of Civil Procedure." 2019 WL 423144, at *3 (citing FED. R. CIV. P. 26(b)(1)). That court recognized "as a general rule, criminal history may be used to impeach a witness's credibility . . . pursuant to Federal Rule of Evidence 609." *Id.* The court also noted that the state statute and regulations relied on by the defendant in that case "did not govern discoverability of the document from the Law Enforcement Agencies Data System of the Illinois State Police (PRB 34-38) in this federal question case." *Id.* The court then ordered that the LEADS data be produced subject to the court's confidentiality order that was entered in that case. *Id.*

This Court similarly agrees in this case that the LEADS data is not protected by any cognizable federal privilege authorizing the withholding of the documents at issue here, and that the 25 pages of LEADS documents should be produced to Plaintiff. In fact, it appears that such information previously was produced to Plaintiff in discovery in Plaintiff's underlying criminal case which further undercuts the CCSAO's position in response to Plaintiff's Renewed Motion [ECF No. 56]. *See* Plaintiff's Reply [ECF No. 78-4]. The Court also notes that to the extent the CCSAO believes it cannot produce this information to Plaintiff voluntarily, it is not doing so here. Rather, the information is being produced in response to a document subpoena served pursuant to Federal Rule 45 and now pursuant to this Court's order. Accordingly, the CCSAO is ordered to produce the 25 pages of LEADS data to Plaintiff.

2. Redactions of Personal Identifying Information

Of the 146 pages that the CCSAO did produce, some of these pages “contain partial redactions of personal identifying information, such as the witness’ [sic] address; date of birth; social security number; phone number, email address and drivers’ license numbers.” *See CCSAO Resp.*, [ECF No. 74], at 3. The Court recognizes that while some of this personal information may be private and/or confidential information, none of the redacted information is privileged, and the CCSAO has not asserted any legal basis to withhold any of this personal information. In its response, the CCSAO concedes that it does not have an issue with producing the unredacted personal identifying information with permission from the witnesses or pursuant to the entry of a protective order. *See CCSAO Resp.*, [ECF No 74], at 4.

The Court agrees with Plaintiff that this information should be produced to him and disagrees with the CCSAO that it needs witness authorization or a court order to do so. This information should and could have been produced long ago, marked confidential, and subject to the confidentiality order already entered in this case. *See [ECF No. 41]*. Otherwise, in an abundance of caution, the CCSAO could have requested entry of a separate (and most likely agreed) protective order to be entered by this Court with respect to this specific material. In any event, the CCSAO is now ordered to produce the documents at issue in unredacted form pursuant to the confidentiality order entered in this case. *See [ECF No. 41]*.

3. Handwritten Notes on CCSAO 000021 and CCSAO 000032

The CCSAO produced Bates-stamped documents CCSAO 000021 and CCSAO 000032 with partial redactions. In its response to Plaintiff’s Renewed Motion to Compel, the CCSAO contends that the redacted portions of the two documents contain handwritten notes that are the mental impressions, deliberations, and the opinions of the assistant state’s attorneys working on the matter. The CCSAO argues that the redacted information is protected by the attorney work product doctrine and the deliberative process privilege and, therefore, should not be produced to Plaintiff. The CCSAO’s arguments rely on boilerplate assertions of law as to what the attorney work product doctrine and the deliberative process privilege embody, but the CCSAO does not provide much more than this boilerplate and sweeping conclusions that the information the CCSAO has redacted falls within the confines of a recognized privilege.¹

¹ The Court agrees with Plaintiff, as a threshold matter, that the CCSAO has not properly invoked the deliberative process privilege as a procedural matter for the reasons set forth in Plaintiff’s submissions. *See Plaintiff’s Renewed Motion*, [ECF No. 56], at 5-8 and 1; Plaintiff’s Reply, [ECF No. 78], at 2. The Court also finds for similar reasons as discussed in *Bahena v. City of Chicago*, 2018 WL 2905747 (N.D. Ill. June 11, 2018), that Plaintiff has shown a particularized need for the information in CCSAO 000032. *Id.* at *4-5. The sentence that was redacted from CCSAO 000032 relates to the reason the charges against Plaintiff in this case were dismissed and is central to Plaintiff’s claims here. There is no other contemporaneous evidence that would substitute for this document. The Court also does not agree that production of the unredacted document will have a “chilling effect” on prosecutors in future cases. “It is a prosecutor’s sworn duty to pursue justice and to prosecute individuals, or not, based on an objective and fair assessment of the evidence.” *Bahena*, 2018 WL 2905747, at *4.

As an initial matter, the Court finds that the CCSAO’s entries on its revised privilege log as to documents CCSAO 000021 and CCSAO 000032 are fundamentally deficient in asserting any claim of privilege. In its response to Plaintiff’s Renewed Motion to Compel, the CCSAO described the redactions as a “partially redacted note,” but the CCSAO did not provide any description of the documents on its actual revised privilege log. *See Revised Privilege Log* [ECF No. 74-1].

As the Court said in its previous Order [ECF No. 50], Federal Rule 45(e)(2)(A)(ii) requires 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)*. Specifically, 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. *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992)). 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.

The Court has reviewed the CCSAO’s revised privilege log and the entries for CCSAO 000021 and CCSAO 000032. The Court finds that the CCSAO’s entries for these documents are wholly deficient and do not comply with the Federal Rules of Civil Procedure and applicable law. In its brief in response to Plaintiff’s Renewed Motion to Compel, the CCSAO says the documents consist of “partial redacted note[s],” but the CCSAO does not say anything about notes on its actual revised privilege log. *See Revised Privilege Log*, [ECF No. 74-1], at 1. The revised privilege log contains only four identifying categories—Bates number(s), Document-privilege asserted, Source, and Partial Redaction. *See Revised Privilege Log*, [ECF No. 74-1], at 1. The privilege log does not contain any description of the type of notes or the subject matter of the information that was redacted. The CCSAO also does not provide any date on which the notes were created and to what they relate. Simply identifying the privilege claimed without more description of the information being withheld and context is not enough.² The Court gave the CCSAO ample opportunity to

² 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.”).

provide additional information so the Court (and Plaintiff) could assess the claimed privileges and determine if, in fact, any privilege is being asserted properly. The CCSAO failed to so do.

For this reason alone, the CCSAO has failed to establish that these documents are privileged, and therefore, they shall be produced in unredacted form to Plaintiff. Putting aside the CCSAO's deficient revised privilege log, however, the Court also will address the substantive arguments raised by Plaintiff with respect to each document.

a. CCSAO 000032

Plaintiff states (and it is not disputed by the CCSAO) that CCSAO 000032 was produced without redactions on March 23, 2020.³ After the document was produced by the CCSAO, Plaintiff attached the document as an exhibit to a court filing on September 8, 2020. *See Plaintiff's Reply, [ECF No. 78], at 3.* The CCSO, however, did not seek to claw back the document to redact the allegedly privileged information until October 13, 2020, which is almost seven months after the document was first produced without redactions and over one month after the CCSAO became aware that Plaintiff had filed the unredacted document as an attachment to his initial motion to compel.

The CCSAO did not act promptly to notify Plaintiff that it claimed a privilege over document CCSAO 000032 when Plaintiff attached it to his reply brief in early September 2020. The CCSAO waited over a month until October 13, 2020, to attempt to claw back the document. And, of course, as noted above, that very same document had been produced to Plaintiff over six months earlier in March 2020 without any attempt by CCSAO to obtain the return of that document. The Court finds that the CCSAO waited too long and failed to take appropriate action to protect its claimed privilege in CCSAO 000032. *See Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 117 (N.D.Ill. 1996)* (holding that a two-week delay between learning of an inadvertent disclosure of a document and sending a letter to request its return was a "lax" attempt to rectify the error). The Court agrees with Plaintiff that the CCSAO's argument that the document is privileged comes too late, and CCSAO's waived its claim of privilege as to this unredacted document even if it had properly invoked the deliberative process privilege as a procedural matter, which the Court finds it also has not done. *See* footnote 1 *supra*.

b. CCSAO 000021

Plaintiff states that counsel for the CCSAO represented to Plaintiff's counsel that the redacted portion of CCSAO 000021 actually reports the outcome of the 402 Conference in Plaintiff's underlying criminal case.⁴ *See Plaintiff's Reply, [ECF No. 78], at 2.* As discussed

³ The CCSAO has failed to present any evidence to this Court that the production of CCSAO 000032 without redactions was inadvertent. It simply states in a footnote that the document "was produced unredacted in error." CCSAO's Resp., [ECF No. 74], at 4 n.1. That is not sufficient to satisfy its obligation to show that its production was inadvertent. Moreover, even if its production was inadvertent, the CCSAO also has failed to show that it took reasonable steps to rectify its disclosure. *See* FED. R. OF EVID. 502(b).

⁴ Under Illinois Supreme Court Rule 402(d), a judge may participate in plea discussions with the prosecutor and the defendant and his counsel and recommend an appropriate sentence.

above, because the CCSAO failed to provide any meaningful description of the document it was withholding and information it had redacted, the Court is unable to conclusively assess its claims of privilege. The Court, however, notes for the record that if Plaintiff's description of the document is accurate and the redacted note describes the outcome of the 402 Conference, then the Court again agrees with Plaintiff that such information is not privileged. The Court does not see how a discussion in a 402 Conference among the judge, an assistant state's attorney, defense counsel, and the defendant (who is the plaintiff in the present case), and any recommendation made by the judge as the result of such a conference, could ever be privileged under the work product doctrine or the deliberative process privilege. Regardless, however, in this case, Plaintiff has submitted as an exhibit a court transcript in which the judge publicly memorialized his sentencing recommendation after the 402 Conference on the record in open court. *See* Plaintiff's Reply, [ECF No. 78], at 2 (citing [ECF No. 78-2], at 4-5). The CCSAO appears to have redacted that sentencing recommendation from CCSAO 000021. *See* [ECF No. 78-1]. The Court cannot see how the CCSAO has any basis upon which to withhold CCSAO 000021 from production without redaction based on the arguments presented.

CONCLUSION

For all of the reasons discussed above, Plaintiff's Renewed Motion to Compel Non-Party State's Attorney of Cook County [ECF No. 56] is granted. The CCSAO is ordered to produce to Plaintiff the remaining documents at issue in Plaintiff's Renewed Motion to Compel without redactions 15 days after entry of this Order.

It is so ordered.



Jeffrey T. Gilbert
United States Magistrate Judge

Dated: December 15, 2020