LAW OFFICES
KENNETH N. FLAXMAN P.C.

June 1, 2021

Nicholas Peluso
Assistant Corporation Counsel
City of Chicago, Department of Law
Federal Civil Rights Litigation Division
2 North LaSalle, Suite 420
Chicago, Illinois 60602

re: Murdock v. City of Chicago, 20-cv-1440

Dear Mr. Peluso:

Thank you for providing a description of the documents that make up Task File 19-004. The letter is intended to initiate the meet and confer procedure of Local Rule 37.2.

I. The Ineffective Claim of Privilege

Defendant has tendered a 13-page document entitled "Privilege Log" in which it seeks to assert a "deliberative process privilege" for each of the 385 pages that make up the "Task File." Defendant also invokes the attorney-client privilege for 41 pages of emails in the file.

Defendant has not in other litigation claimed any privilege for production of the "Task File" from the Research and Development Division of the Chicago Police Department. Defendant produced "Task Record 00-113" as FCRL 000264-517 in *Christopher Smith v. City of Chicago,* 14-cv-7718. We previously asked that your client explain its change of position, but we have not received a response.

To properly assert any "deliberative process privilege:"

> [T]hree things must happen: (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.

K.L. v. Edgar, 964 F.Supp. 1206, 1209 (N.D. Ill. 1997). The City of Chicago has long been aware of this standard. *See, e.g., Rodriguez v. City of Chicago*, No. 17 C 7248, 2019 WL 3562683, at *3 (N.D. Ill. Aug. 1, 2019) (declaration from Deputy Chief Administrative Officer of COPA); *Turner v. City of Chicago*, No. 15 CV 06741, 2017 WL 552876, at *3 (N.D. Ill. Feb. 10, 2017); *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1016-17 (N.D. Ill. 2016) (same). Please comply with this

Kenneth N. Flaxman (312) 253-7189 knf@kenlaw.com **Joel A. Flaxman** (312) 253-7207 jaf@kenlaw.com

200 South Michigan Ave, Suite 201, Chicago, Illinois 60604 • T:(312) 427-3200 • F:(312) 427-3930 • www.kenlaw.com

requirement by the close of business on June 7, 2021 or explain why it no longer applies to the City of Chicago.

II. The Inadequate Privilege Log

Rule 26(b)(5)(A)(ii) of the Federal Rules of Civil Procedure requires that a privilege log must "describe the nature of the documents, communications, or tangible things not produce or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Defendant's log identifies various Police Department Forms (CPD 31-219, CPD 31.217, 31.272, 31.273), Police Department Special Orders, and Circuit Court of Cook County Forms as subject to the "deliberative process privilege." These documents are publicly available, so it is difficult to see how a privilege of any sort can be asserted.

The "privilege log" is likewise defective in its attempt to invoke the attorney-client privilege because there is no indication of the subject matter of the "internal e-mails" (FCRL 1718-1786, 1787-1790, 1793-1831.) Nor is there any indication that these e-mails involved a licensed attorney, rather than a non-lawyer assigned to the "Police Department's Office of Legal Affairs."

Judges in this district have frequently reminded litigants that a privilege log of the sort provided by defendant in this case is "wholly deficient and do[es] not comply with the Federal Rules of Civil Procedure and applicable law." *Schaeffer v. City of Chicago*, 19 C 7711, 2020 WL 7395217, at *4 (N.D. Ill. Dec. 15, 2020).

Please provide a complete privilege log by the close of business on June 7, 2021.

III. Deliberative Process Privilege

Plaintiffs dispute the existence of any "deliberative process privilege" in this case. Congress declined to include this privilege in the Federal Rules of Evidence and, as reflected in the reasoning of the Illinois Supreme Court in *People ex rel. Birkett v. City of Chicago,* 184 Ill.2d 521, 705 N.E.2d 548 (1998), it cannot be said that this privilege should be recognized "in the light of reason and experience," as required by Rule 501 of the Federal Rules of Evidence. *See Allen v. Chicago Transit Authority,* 198 F.R.D. 495, 502 (N.D. Ill. 2001) ("we cannot find [the law] has established the existence of a federal common law deliberative process [privilege] for municipal agencies").

The Seventh Circuit has not recognized a "deliberative process privilege" under Rule 501 of the Federal Rules of Evidence. The Court of Appeals applied the privilege in seven cases brought under the federal Freedom of Information Act, where a "deliberative process privilege" is one of the exemptions recognized by the statute in 5 U.S.C. § 552(b)(5). These cases are identified in a list attached to this memorandum.

The Court of Appeals applied the privilege to two cases involving attempts to require the Untied States Attorney to disclose "deliberative or pre-decisional materials." *In re United States*, 398 F.3d 615, 618 (7th Cir. 2005); *United States v. Zingsheim,* 384 F.3d 867, 872 (7th Cir. 2004), and applied the privilege in *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) to an attempt to obtain documents leading to the decision by the federal government to initiate a lawsuit.

Other district courts in this circuit have upheld the existence of the privilege. *See, e.g., Holmes v. Hernandez,* 221 F. Supp. 3d 1011, 1018 (N.D. Ill. 2016) (relying on a Seventh Circuit FOIA decision, *United States v. Zingsheim,* 384 F.3d 867, 872 (7th Cir. 2004).) Judge Feinerman recognized the "deliberative process privilege" in *Illinois Coalition for Immigrant and Refugee Rights, Inc. v. Wolf,* 2020 WL 7353408, at *2 (N.D.Ill., 2020). *Wolf,* however, was a FOIA case, where the statute expressly includes a "deliberate process privilege."

The Seventh Circuit has never applied the "deliberative process privilege" to the City of Chicago or any other unit of state or local government. The question before the district court then is whether it should recognize this privilege "by interpreting 'common law principles ... in the light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (quoting Rule 501 of the Federal Rules of Evidence).

The Supreme Court recently described the "deliberative process privilege" as "a form of executive privilege." *U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). The privilege was fashioned in challenges to federal agency action which did "not directly call into question the agency's subjective intent." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency,* 145 F.3d 1422, 1424 (D.C. Cir. 1998), *opinion on denial of rehearing,* 156 F.3d 1279, 1280 (D.C. Cir. 1998).

Many courts have refused to apply the privilege when, as in this case, a plaintiff challenges a municipal policy. *See, e.g., Scott v. Board of Education of the City of East Orange,* 219 F.R.D. 333, 337 (D.N.J. 2004) ("'In a civil rights action where the deliberative process of State or local officials is itself genuinely in dispute, privileges designed to shield that process from public scrutiny must yield to the overriding public policies expressed in the civil rights laws.'"); *Dunnet Bay Const. Co. v. Hannig*, No. 10-3051, 2012 WL 1599893, at *3 (C.D. Ill. May 7, 2012) (privilege not available); *Anderson v. Marion County Sheriff's Dept.*, 220 F.R.D. 555, 560–61 (S.D. Ind. 2004) (privilege not available in employment discrimination cases).

To allow Judge Feinerman to resolve in one fell swoop our disagreement about the applicability of any "deliberative process privilege" to plaintiffs' challenge to the municipal policy in this case, we are today serving a new production request,

requesting "all documents generated in the relating to the creation, preparation, modification, review, or revision of Chicago Police Department Special Order S06-12-02 from the date Special Order S06-12-02 or any predecessor order was issued to June 13, 2013."

Very truly yours

Kenneth N. Flaxman

Seventh Circuit Cases Applying
"Deliberate Process Privilege" or "Deliberative Process Privilege"

Niemeier v. Watergate Spec. Prosecution Force, 565 F.2d 967, 969 (7th Cir. 1977) ("whether an undisclosed portion of a memorandum to the Watergate Special Prosecutor from the Counsel to the Special Prosecutor is exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552")

King v. I. R. S., 684 F.2d 517, 518 (7th Cir. 1982) ("whether an Internal Revenue Service (IRS) document labeled 'draft technical memorandum' is exempted from disclosure under the Freedom of Information Act")

Matter of Wade, 969 F.2d 241, 243 (7th Cir. 1992) (upholding district court in denying relief on FOIA request)

Becker v. I.R.S., 34 F.3d 398, 402-05 (7th Cir. 1994) (whether documents were exempt from disclosure under FOIA)

Enviro Tech Intern., Inc. v. U.S. E.P.A., 371 F.3d 370, 371 (7th Cir. 2004) (whether documents "were exempt from disclosure under section 552(b)(5) pursuant to the so-called deliberative process privilege")

Henson v. Dept. of Health and Human Services, 892 F.3d 868, 872 (7th Cir. 2018) (appeal from grant of summary judgment in FOIA litigation)

Natl. Immigrant J. Ctr. v. U.S. Dept. of J., 953 F.3d 503, 505 (7th Cir. 2020) (appeal from order denying access under FOIA "to all records of communications to and from the Attorney General in certain immigration appeals certified for executive decision").

United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993) ("After examining the documents, this Court concludes that the documents were clearly part of the deliberative process leading to the decision to sue. Document No. 244–C is the referral memorandum from the FTC staff to the Department of Justice. Having been rendered prior to the Department's decision to bring an action against Farley, the document is within the Department's deliberative process privilege.")

United States v. Zingsheim, 384 F.3d 867, 872 (7th Cir. 2004) ("The deliberative-process privilege covers memoranda and discussions within the Executive Branch leading up to the formulation of an official position." Described

in *In re United States*, 398 F.3d 615, 618 (7th Cir. 2005) (mandamus petition turning on whether the United States Attorney is "answerable to a judge for the deliberations among his staff"), as holding "that federal judges may not insist that prosecutors reveal deliberative or pre-decisional materials.")

Menasha Corp. v. U.S. Dept. of J., 707 F.3d 846, 847 (7th Cir. 2013) (Answering question of "whether the attorney work product privilege protects from pretrial discovery work product exchanged between Justice Department lawyers who are assigned to provide legal assistance to federal agencies that have conflicting interests," without ruling on claim of that documents were protected by the "deliberative process privilege." *Id.* at 852.)