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

Anthony Murdock, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	20-cv-1440
-vs-	)	
	)	*(Judge Feinerman)*
City of Chicago,	)	
	)	
Defendant.	)	

PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF "TASK FILES"

Plaintiffs request the Court to order defendant City of Chicago to produce the "task files" generated in connection with the preparation of and amendments to Chicago Police Department Special Order S06-12-02.

I. Introduction

Plaintiffs, individually and for a putative class, challenge an express policy of the City of Chicago contained in Police Department Special Order S06-12-02, current version attached as Exhibit 1.

Under Illinois law, an arrest warrant must "[s]pecify the amount of bail." 725 ILCS 5/107-9(d)(7). Before adopting Special Order S06-12-02, defendant City allowed any person arrested on a warrant to secure release by posting bail at a police station.[1] The City changed this policy when it adopted Special Order S06-12-02.

[1] General Order 97-12 IV(5)(a), effective January 1, 1998, stated as follows: "[If] the bond amount is indicated on the warrant … the person will be allowed to post the indicated bond and not [be] transported to the Central Detention Section." (Exhibit 2 at 8.)

Under Section IV(B)(3) of Special Order S06-12-02, two groups of people arrested on warrants may not post bail at a police station: persons arrested on a warrant issued by a judge outside of Cook County and persons arrested on weekends or holidays on a warrant issued by a Cook County judge. (Exhibit 1 at 5.) The policy requires these persons to remain in custody until the morning after arrest when they are transported to "Central Bond Court."[2] Plaintiff contends that this policy results in a wholesale violation of Fourth Amendment rights: once a person has been arrested on a warrant and is able to post the bail set on the warrant, the government "has no legitimate interest in detaining persons for an extended period of time." *Driver v. Marion County Sheriff*, 859 F.3d 489, 491 (7th Cir. 2017).

The City created its present written policy in 2012 and amended it in 2013 and 2019. The present motion to compel arises from plaintiffs' efforts to learn the reasons for the change in policy.

The Chicago Police Department documents its work in promulgating written policies in a document known as a "task file." Plaintiffs have requested production of these files for Special Order S06-12-02. The "task file" generated for the 2019 revision consists of 386 pages.[3] Defendant City of Chicago claims a "deliberative process" privilege to withhold production of 331 pages of these 386 pages.[4] Plaintiffs attach the City's revised privilege log as Exhibit 3.

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[2] "Central Bond Court" is in the Leighton Courthouse, at 2600 South California Avenue.

[3] The City numbered the task file as FCRL 1472 through FCRL 1857 (386 pages) in its privilege log. (Exhibit 4)

[4] The City also claims that 43 of these pages are shielded by the attorney-client privilege. (FCRL 1787-1790 and FCRL 1793-1831, Exhibit 3 at 9.)

The parties have exchanged letters and spoken by telephone to narrow their differences and have fully exhausted the meet and confer requirements of Local Rule 37.2. The parties' final consultation occurred by telephone conference on June 10, 2021 at about 3:00 p.m. Kenneth Flaxman participated for the plaintiffs. Nicholas Peluso, Bret Kabacinski, and Stephanie Sotomayor participated for defendant. The parties have made good faith attempts to resolve their differences and they are unable to reach an accord.[5]

The Seventh Circuit has never recognized a "deliberative process" privilege in civil litigation against a municipality. The Court has only applied the privilege in FOIA cases, where it is a statutory exemption, and in cases involving the federal government.[6] The states within the Seventh Circuit have refused to recognize the privilege.[7] Rule 501 of the Federal Rules of Evidence, which directs the Court to consider "[t]he common law — as interpreted by United States courts in the light of reason and experience" requires rejection of the claimed privilege. The Court should therefore order production of the complete "task file."[8]

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[5] The exchange of correspondence and an agreed summary of the meet and confer are attached as Exhibits 4a, 4b, and 4c.

[6] Plaintiffs summarized the FOIA cases in their Rule 37.2 letter, Exhibit 4A at 5-6. The cases prosecuted by the government are *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993), *United States v. Zingsheim*, 384 F.3d 867, 872 (7th Cir. 2004), and *Menasha Corp. v. U.S. Dept. of Justice.*, 707 F.3d 846, 847 (7th Cir. 2013).

[7] *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998); *Popovich v. Indiana Dept. of State Revenue*, 7 N.E.3d 406, 416 (Ind. T.C. 2014); *Sands v. Whitnall Sch. Dist.*, 312 Wis. 2d 1, 754 N.W. 2d 439, 458 (2008).

[8] The present motion is directed at a request to produce the "task file" generated for the 2019 amendment to the special order. The City has acknowledged that it asserts the same claims of privilege to plaintiffs' request for production of earlier task files. (Exhibit 4(c).)

II. The Importance of the "Task File" to Plaintiffs' Case

Plaintiffs challenge Section IV(B)(3) of Police Department Special Order S06-12-02 because this "express policy causes a constitutional deprivation when enforced." *Spiegel v. McClintic*, 916 F.3d 611, 617 (7th Cir. 2019) (cleaned up). Plaintiffs intend to establish their *Monell* claim by showing that the express policy set out in the Special Order is unconstitutional. *Howell v. Wexford Health Sources, Inc.*, 987 F.3d 647, 655 (7th Cir. 2021).

The City may defend the constitutionality of its policy by arguing that it is reasonable to require persons held on warrants issued outside of Cook County to appear before a judge before being permitted to post cash bail set in the warrant. Defendant may likewise assert that it is reasonable to require persons arrested on a Cook County warrant on a weekend or holiday to similarly appear before a judge before being permitted to post bail. The "task file" created when this policy was adopted and amended will likely contain relevant information about why the City adopted this policy, rather than continue the former policy of General Order 97-12 IV(5)(a), set out above at note 1. Plaintiffs require this information to compare it to any justifications for the policy that defendants may proffer in litigation.

Defendant may also argue that plaintiffs must prove that the City engaged in "deliberate conduct," *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997), when it discontinued its former policy, set out in General Order 97-12 IV(5)(a). A slightly different argument succeeded in *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998) and *Levy v. Marion County Sheriff*, 940 F.3d 1002 (7th

Cir. 2019). Even if defendant stipulates that plaintiff need show only that the express policy set out in the Special Order is unreasonable, the intent of defendant in changing the policy will be relevant to any defense that defendant may raise.

III. The Materials in a "Task File"

The City produced (without any claim of privilege or request for confidentiality) a "task file" in *Smith v. City of Chicago*, 14-cv-7718, attached as Exhibit 5. This file documents the creation of Chicago Police Department Special Order S04-16, set out at Exhibit 5, 1-5.

The chronology of the creation of the order is set out in the "task record" that appears at page 6 of Exhibit 5. This "task record," a standard form in the Police Department ("CPD-15.104"), describes the task, the "approach/methodology," the actions taken in performing the task, and includes a closing summary.

The "task file" for Special Order S04-16, shows that work on the new order began on October 2, 2000 (Exhibit 5 at 6), and that after five meetings,[9] and consideration of four legal questions (*id.* at 79, 100-02, 192-94), a draft policy was circulated to supervisory personnel on December 1, 2000. (*Id.* at 51-70.) Further exchange of memos on December 5, 2000 (*id.* at 49), December 6, 2000 (*id.* at 71), meetings on January 23, 2001 (*id.* at 189, 245), and March 23, 2001 (*id.* at 32, 230), resulted in the final version of the order (*id.* at 1-5), which was published within the police department on March 6, 2001. (*Id.* at 6.) Following a further exchange of

[9] The file contains notes from meetings on September 15, 2000 (Exhibit 5 at 198-99), October 19, 2000 (Exhibit 5 at 200-04), October 23, 2000 (Exhibit 5 at 196-97), November 2, 2000 (Exhibit 5 at 195, 251-58), November 13, 2000 (Exhibit 5 at 249-50), November 29, 2000 (Exhibit 5 at 190-91), and December 1, 2000. (Exhibit 5 at 246-48.)

memos in April of 2001 (*id.* at 220-229, 231-39, 259), the Police Department revised one paragraph of the new order. (*Id.* at 243.)

Plaintiffs believe that the task file produced in *Smith v. City of Chicago* is typical of task files created in the Chicago Police Department in connection with revisions to General and Special Orders. Each task file likely begins with completion of Form "CPD-15.104" identifying the task to be performed, the plan to perform that task, the actions taken, and a closing summary. In addition to the form, the file contains records of meetings, creation and circulation of drafts, exchange of comments, and revisions of the proposed rule. Production of the "task files" in this case is reasonably calculated to show the concerns of the drafters of the rule and their reasons for the changes made in Special Order S06-12-02.

IV. Defendant's Position

The City resists production of the task files based on the following:

> 7. Releasing Task Files would have a chilling effect on the ability of CPD personnel to engage in free, open, collaborative discussions precedent to CPD"s final policy determination. These discussions and internal thought processes are critical to the deliberative process because they allow individuals to freely exchange and challenge differing opinions.

(Exhibit 6, Declaration of Karen Conway, ¶ 7.) This "rote, boilerplate recitations of the deliberative rationale," Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 876 (1990), is difficult to credit after the City produced the task file in *Smith* without any claim of privilege or request for confidentiality. The Illinois Supreme Court rejected this argument in *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998),

discussed below at 11-12. Finally, the United States Supreme Court considered the identical argument ("confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate") when it rejected a "peer review privilege" in *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 192 (1990). This Court should reach the same conclusion and reject the "deliberative process" privilege asserted by defendant.

V. Federal Rules of Evidence 501 Requires Rejection of a "Deliberative Process" Privilege over Explanations of How a Municipality Implements a Policy

A. The "Deliberative Process" Privilege

The deliberative process privilege "is a form of executive privilege," *U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). It covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (cleaned up).

The privilege "was unknown in the United States federal courts until 1958 and represents a body of ideas that was conveyed, first, from the British House of Lords and from Dwight Eisenhower's principles of military leadership to the United States Court of Claims and, then, from the Court of Claims to the federal district courts." Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 857 (1990). The genesis of the privilege shows that it a poor fit to a case challenging a municipal policy. Documents produced without any claim of confidentiality or assertion of any privilege in *Smith v.*

City of Chicago, 14-cv-7718, attached as Exhibit 5, illustrate the type of documents contained in a task file.

Exhibit 5 shows how the Police Department went about "[r]evising General Order 89-9 entitled 'Stop Orders' to implement the new CHRIS Stop Order system which was developed by the CHRIS group." (Exhibit 5 at 6.) Thus, rather than explaining why defendant chose a particular policy, the task file describes how defendant implemented that policy.

In Rule 37.2 discussions, defendant sought to justify its claim of privilege by citing (Exhibit 4B at 2) *Rodriguez v. City of Chicago*, 17 C 7248, 2019 WL 3562683, at *2 (N.D. Ill. Aug. 1, 2019), which applied an earlier decision in that case that had assumed the existence of a "federal common law deliberative process privilege." *Rodriguez v. City of Chicago*, 329 F.R.D. 182, 186 (N.D.Ill. 2019). Defendant also relied on *Guzman v. City of Chicago*, 09 C 7570, 2011 WL 55979 (N.D. Ill. Jan. 7, 2011), which similarly assumed the existence of the privilege. *Id.* at *2.

The authority on which defendant relies are typical of "the large number of decisions written by the general federal courts in the last 30 years [where] the question of whether there ought to be a privilege has received only the most perfunctory and stylized attention." Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. at 875. That is, the privilege "has managed, in all the cases in which it has been applied, to escape full and careful scrutiny." *Id.* at 883. *Compare Evans v. City of Chicago*, 231 F.R.D. 302, 316 (N.D.Ill. 2005) (assuming that the deliberative process privilege can be invoked by

any governmental agency) *with Allen v. Chicago Transit Authority*, 198 F.R.D. 495, 502 (N.D.Ill.2001) ("we cannot find [that the common law] has established the existence of a federal common law deliberative process for municipal agencies").

The most frequent invocation of the deliberative process privilege is in Freedom of Information Act cases, where the privilege is included in § 552(b)). *See U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). Another common application of the privilege is in cases involving prosecutorial decisions, such as *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993), where the Court of Appeals held that a referral memorandum from the FTC staff to the Department of Justice—"documents [which] were clearly part of the deliberative process leading to the decision to sue"—was protected by the privilege.

Whether the Court should recognize a federal common law deliberative process privilege for municipalities starts with the Rule 501 of the Federal Rules of Evidence, discussed below.

B. Rule 501 of the Federal Rules of Evidence

"Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting 'common law principles ... in the light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996). The Supreme Court has refused to use the authority of Rule 501 "expansively." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). Both before and after adoption of Rule 501, the Court declined to create any privilege not recognized at common law: the Court has recognized a common law privilege for trade secrets, *E.I. DuPont De*

Nemours Powders Co. v. Masland, 244 U.S. 100, 103 (1917), a common law privilege for military secrets, *United States v. Reynolds*, 345 U.S. 1 (1953), but turned down requests for a news gatherer's privilege, *Branzburg v. Hayes*, 408 U.S. 665 (1972), an accountant's privilege, *Couch v. United States*, 409 U.S. 322 (1973), an editorialist's privilege, *Herbert v. Lando*, 441 U.S. 153 (1979), a state legislator's privilege, *United States v. Gillock*, 445 U.S. 360, 367 (1980), an accountant's work product privilege, *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984), and an academic peer-review privilege. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990).

In considering a new privilege, as in *Jaffee*, or in evaluating a request to narrow an existing privilege, as in *Trammel v. United States*, 445 U.S. 40, 48 (1980), the Court has looked to the acceptance of the privilege in state and federal courts. The Court observed in *Jaffee* "that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." 518 U.S. at 12. Similarly, in narrowing the federal privilege for adverse spousal testimony in *Trammel*, the Court noted that only 24 states allowed a privilege to prevent adverse spousal testimony. 445 U.S. at 49 (1980).

The Illinois Supreme Court refused to adopt a "deliberative process privilege" in *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998). The Court noted, among other things, that the privilege recognized for the federal government was rooted in national interests and in the separation of powers, which do not apply to the City of Chicago. 705 N.E.2d at 53.

Courts in other states have likewise refused to fashion a "deliberative process privilege" for units of local government. *See, e.g.*, *Rigel Corp. v. State*, 225 Ariz. 65, 234 P.3d 633, 640–41 (Ariz. Ct. App. 2010); *Popovich v. Indiana Dept. of State Revenue*, 7 N.E.3d 406, 416 (Ind. T.C. 2014); *Babets v. Sec'y of the Exec. Office of Human Servs.*, 403 Mass. 230, 526 N.E.2d 1261, 1264 (1988); *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7, 20 (1992); *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, 283 P.3d 853, 860, 863–64 (N.M. 2012); *Sands v. Whitnall Sch. Dist.*, 312 Wis. 2d 1, 754 N.W. 2d 439, 458 (2008). Other state courts have recognized the privilege. *See, e.g.*, *City of Colorado Springs v. White*, 967 P.2d 1042, 1049–50 (Colo. 1998); *Aland v. Mead*, 327 P.3d 752, 763 (Wyo. 2014). Although this list may be incomplete, it cannot be said that a "deliberative process privilege" is generally accepted.

The Rule 501 analysis also asks whether the asserted privilege "serves public ends." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Illinois Supreme Court carefully analyzed this question in *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998). As in this case, the City did not seek a "narrowly tailored [privilege], protecting communications given directly to high-level government officials, containing advice bearing heavily on the final decision or policy." 705 N.E.2d at 52. Instead, the City advocated for an "unreasonably broad" privilege that would extend to any communication concerning a planned airport expansion "no matter how trivial or routine." *Id.* at 53. And, as in this case, the City did "not restrict the privilege based upon the importance or relevance of

the particular communication to the decision or decisions, or to the level of the official either compiling or relying upon the communication." *Id.*

In *Birkett*, as in this case, "the City provides no real evidence that governmental officials would withhold giving advice they believe is necessary and correct, based merely upon the remote possibility that it could some day be produced in litigation." *Birkett*, 705 N.E.2d at 53. The "real evidence" is to the contrary: the City produced a "task file" in *Smith v. City of Chicago*, 14-cv-7718 without any claim of privilege or confidentiality. *Birkett*, while not binding on this Court, makes the City's case for recognizing a deliberative process privilege especially weak: If documents would not be protected in litigation in state court, why should they be protected in federal litigation? Similarly, if the Illinois Supreme Court has concluded that disclosure of these documents would not "chill" the City of Chicago, why should this Court reach the contrary conclusion?

C. Defendant Has Not Properly Invoked any Deliberative Process Privilege

District courts applying a deliberative process privilege insist that the government official invoking the privilege provide "precise and certain reasons" for confidentiality. *See, e.g., DeLeon-Reyes v. Guevara*, 1:18-CV-01028, 2020 WL 3050230, at *5 (N.D. Ill. June 8, 2020); *Turner v. City of Chicago*, 15 CV 06741, 2017 WL 552876, at *3 (N.D. Ill. Feb. 10, 2017); *Lawrence E. Jaffe Pension Plan v. Household Intern., Inc.*, 239 F.R.D. 508, 515 (N.D. Ill. 2006).[10]

[10] The court in each of these cases assumed the privilege applied without undertaking the analysis required by Rule 501.

The privilege log produced by defendant fails to meet this "precise and certain reasons" standard. For example, the log describes the "task record" (a public example of which appears at page 6 of Exhibit 5) as a document that "shows the requested changes to S06-12-04, research methodology, and anticipated steps." (Exhibit 3 at 1.) Nothing in this description suggests that the "task record" shows "deliberations" of any sort. The same is true throughout the privilege log.

There is no merit in defendant's contention (Exhibit 4C at 2) that paragraphs 7 and 8 of Karen Rowan's affidavit (Exhibit 6) satisfy the "precise and certain reasons" standard. These paragraphs state the following:

> 7. Releasing Task Files would have a chilling effect on the ability of CPD personnel to engage in free, open, collaborative discussions precedent to CPD's final policy determination. These discussions and internal thought processes are critical to the deliberative process because they allow individuals to freely exchange and challenge differing opinions.
>
> 8. Insuring that final departmental policy determinations are well-reasoned is important to all individuals interested in well-reasoned law enforcement policies. Comparison of the current S06-12-02 and the 13 June 2013 version allows the parties, and the public, to see what changes were made, without create a chilling effect on the free flow of ideas and thoughts in future deliberations.

(Exhibit 6 at 1-2.)

These conclusory claims are no different from those rejected by the Illinois Supreme Court in *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998). And these claims cannot be reconciled with the City's production of a "task file" in *Smith v. City of Chicago*, 14-cv-7718 without any claim of

privilege or confidentiality. The Court should reach the same result as *Birkett* and reject this boilerplate as insufficient to invoke any deliberative process privilege.

VI. Any Deliberative Process Privilege Does Not Shield Materials Directly Relevant to Proof of Government Wrongdoing

One of the outcome determinative questions in this case is why the City of Chicago stopped permitting the members of the putative class from posting bail at police stations. This policy was in effect from at least January 1, 1998, when the City adopted General Order 97-12; the City abandoned this policy when it adopted Special Order S06-12-02. *See ante* at 1-3. The privilege claimed by the City would prohibit plaintiffs from learning the reason for the policy change. Any deliberative process that covers the documents here must give way to plaintiff's particularized need for the documents. *See N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975).

The deliberative process privilege, in cases where it applies, is inapplicable when the materials sought are relevant to showing government misconduct. "[I]f either the Constitution or a statute makes the nature of governmental officials' deliberations the issue, the privilege is a non sequitur." *In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) Thus, there is no privilege "when government misconduct is the focus of the lawsuit." *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134-35 (D.D.C. 2005). Nor is there a privilege when "the plaintiff's cases rests

on the … decisionmaking process itself." *United States v. Lake County Bd of Commissioners*, 233 F.R.D. 523, 528 (N.D. Ind. 2005).

VII. The Court Should Reject the Assertion of Attorney-Client Privilege

In addition to attempting to invoke a deliberative process privilege, defendant claims that 43 pages are attorney-client communications. (Exhibit 3, FCRL 1787-1790, FCRL 1793-1831.) The Court should reject this blanket claim.

Defendant's privilege log (Exhibit 3) does not identify the attorneys involved in the communications. Nor does it provide any information about the nature of the legal advice purportedly sought. The log fails to carry defendant's burden of showing that the communications "reflect the lawyer's thinking or are made for the purpose of eliciting the lawyer's professional advice or other legal assistance" *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007) (cleaned up). The Court should therefore reject defendant's conclusory assertion that the privilege applies: "The claim of privilege cannot be a blanket claim; it must be made and sustained on a question-by-question or document-by-document basis." *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (cleaned up).

VIII. Conclusion

The Court should therefore compel the production of the "task files."

Respectfully submitted,

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