

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

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

**DEFENDANT CITY OF CHICAGO'S RESPONSE TO PLAINTIFFS' MOTION TO
COMPEL PRODUCTION OF "TASK FILES"**

Defendant City of Chicago (Defendant City), by and through its attorney, Celia Meza, Corporation Counsel for the City of Chicago, respectfully requests that this Honorable Court deny Plaintiffs' Motion to Compel Production of "Task Files"¹ and, in response to Plaintiffs' motion, states as follows:

STATEMENT OF FACTS

Plaintiffs brings suit against Defendant City alleging that an express policy of the Chicago Police Department (CPD) violated Plaintiffs' constitutional rights. Doc. No. 56 at ¶15. During the course of written discovery, Plaintiffs requested "[a]ll documents relating to the creation, preparation, modification, review, or revision of Chicago Police Department Special Order S06-12-02 from July 6th, 2015. . . ." *See Exhibit A at ¶1, Plaintiff's First Request for Production of Documents.* Defendant City responded to Plaintiffs' first request with the 2013 and 2019 versions of Special Order S06-12-02, which denoted revisions between the two versions by italicizing and underlining the revisions. *See generally Exhibit B, FCRL 1458-1471.* Defendant City also

¹ "Task Files" are files created by the Chicago Police Department's Research and Development Division when creating or modifying Chicago Police Department directives.

produced various, non-privileged, documents from the task file at issue, Task File 19-004. *See* Exhibit C, FCRL 1484-1521, 1555-1558, 1562-1564, 1614, 1630, 1657-1658, 1672-1673, 1684-1686. Plaintiffs later requested earlier task files for S06-12-02, to which Defendant City is in the process of responding. Defendant City withheld deliberative material and communications seeking, rendering, or discussing legal advice from Task File 19-004 and produced a privilege log. *See* Exhibit D, Privilege Log for Task File 19-004.

STATEMENT OF LAW

When claims arise under federal law, the federal common law of privileges applies. *See Mem'l Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981). “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 deliberative process privilege is a qualified privilege that can be overcome where a sufficient showing of a particularized need outweighs the reasons for confidentiality. *Id.*

To determine if the deliberative process privilege applies, courts undertake a two-step process. *K.L. v. Edgar*, 964 F. Supp. 1206, 1209 (N.D.Ill.1997). Courts determine if (1) the government has demonstrated that the deliberative process privilege applies and (2) the requestor has demonstrated a particularized need for the material. *Id.*

State and local government defendants are able to assert the federal deliberative process privilege. *See Tumas v. Bd. of Educ. of Lyons Twp. High Sch. Dist. No. 204, Cook County Ill.*, 06 C 1943, 2007 WL 2228695, at *5 (N.D. Ill. July 31, 2007); *Bobkoski v. Bd. of Educ. of Cary Consol. Sch. Dist. 26*, 141 F.R.D. 88, 92 (N.D. Ill. 1992); and *Moorhead v. Lane*, 125 F.R.D. 680, 686 (C.D. Ill. 1989).

ARGUMENT

A. Defendant City Has Properly Asserted the Deliberative Process Privilege

To determine if the deliberative process privilege has been properly asserted, this Honorable Court should first determine that Defendant City demonstrated that the privilege applies. *See K.L.*, 964 F. Supp. at 1209. To properly assert the privilege, the government must have the department head with control over the matter (1) formally assert the privilege, after personal consideration of the matter, (2) demonstrate, typically by affidavit, precise reasons for preserving the confidentiality, and (3) specifically identify and describe the documents. *Id.*

Rodriguez v. City of Chicago is instructive on how the deliberative process privilege is properly asserted. *Rodriguez v. City of Chicago*, 17 C 7248, 2019 WL 3562683, at *1 (N.D. Ill. Aug. 1, 2019). In *Rodriguez*, the plaintiff brought a §1983 claim against the City of Chicago. *Id.* The plaintiff sought documents contained in a “log file.”² *Id.* The court stated that in order to assert the privilege, the City had to establish a *prima facie* case that the privilege applies. *Id.* at 2. The City provided the court with an affidavit from the Deputy Chief Administrative Officer of the Civilian Office of Police Accountability (COPA) asserting that the withheld documents are privileged based on the Deputy Chief’s professional experience and personal review of the records withheld. *Id.* at 3. The Deputy Chief’s affidavit also asserted that the dissemination of the withheld documents would inhibit the COPA’s ability to conduct fair and effective investigations. *Id.*

Among the reasons release would inhibit the COPA’s investigations, the Deputy Chief asserted that producing edits and preliminary drafts of reports would have a chilling effect on the COPA investigators and supervisors to “engage in free, open, collaborative discussions” prior to a final determination. *Id.* Lastly, the Deputy Chief described material as “draft summary reports

² “Log Files” are files documenting investigations into various types of allegations.

and findings[,]” “draft allegations and notes[,]” “preliminary” drafts, and “edits to preliminary draft summary reports[.]” *Id.* Based on the affidavit and *in camera* review, the court held that the City demonstrated a *prima facie* case for all but one document. *Id.* at 4.

i. Formal Assertion of the Deliberative Process Privilege

Similar to the Deputy Chief in *Rodriguez*, Director Karen Conway is the Director of Research and Development at the CPD. *See Exhibit E, Affidavit of Director Karen Conway.* Like the formal assertion of privilege in *Rodriguez*, Director Conway formally asserted the deliberative process privilege by way of affidavit on June 9th, 2021. *Id.* at ¶5. As such, like in *Rodriguez*, Defendant City has met the first requirement.

ii. Rationale for Preserving Confidentiality of Deliberative Material

Analogous to *Rodriguez*, Director Conway demonstrated precise reasons for asserting the privilege in her affidavit. *Id.* at ¶¶ 3, and 6-8. Like the Deputy Chief’s exercise of her professional experience and personal review of the items in *Rodriguez*, Director Conway, under penalty of perjury, stated that she reviewed the documents at issue and considered the documents in light of her professional experiences. *Id.* at ¶¶ 3 and 5. Like the Deputy Chief’s assertion in *Rodriguez* that release would inhibit the COPA’s ability to investigate, Director Conway determined that releasing the material would “have a chilling effect on the ability of CPD personnel to engage in free, open, collaborative discussions” and that such discussions are “critical . . . because they allow individuals to freely exchange and challenge differing opinions.” *Id.* at ¶ 7. Similarly, Director Conway further stated that “[e]nsuring that final departmental policy determinations are well-reasoned is important to all individuals interested in well-reasoned law enforcement policies.” *Id.* at ¶ 8. Like in *Rodriguez*, by having Director Conway personally review the file and determine, based her review and her professional experience and understanding of the importance of the

deliberative process, that release of the deliberative documents would cause a chilling effect and explain the reasons for maintaining the confidentiality, Defendant City has met the second requirement.

iii. Specific Identification and Description of the Documents

Like the Deputy Chief's description of the documents withheld in *Rodriguez*, Director Conway attached and incorporated Defendant City's privilege log to her affidavit, which specifically identifies the Bates number, document identifier, document description, and the privilege asserted. *See Exhibit D and Exhibit E at ¶5.* Contrary to Plaintiffs' assertion, the privilege log attached to Director Conway's affidavit is replete with deliberative identifiers such as "draft," "comments," "notes" and likewise. *See generally Exhibit D.*

Like the Deputy Chief's declaration in *Rodriguez*, Defendant City has met the third requirement to apply the deliberative process privilege based on Director Conway's affidavit and attached privilege log.

As Defendant City has formally asserted the deliberative process privilege, demonstrated the need to apply the privilege, and specifically identified and described the documents, this Honorable Court should find that Defendant City has met its burden and shown that the deliberative process privilege is applicable to the instant matter.

B. Plaintiffs Have Not Demonstrated Any Particularized Need for the Protected Material

After determining that Defendant City has shown that the deliberative process privilege applies here, this Honorable Court must determine if Plaintiffs have demonstrated a particularized need for the withheld information. *See K.L.*, 964 F. Supp. at 1209. In making such a determination, courts in this district consider the following factors:

(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.

i. The Withheld Documents Are Not Relevant, Other Evidence Serves the Same Purpose, and Production of the Withheld Documents Would Tend to Chill Future Deliberations

Tumas is instructive on weighing the factors Plaintiffs must show in order to defeat the deliberative process privilege. In *Tumas*, the plaintiff brought a civil rights action against the defendants, a board of education, for discrimination and retaliation. *Tumas*, 06 C 1943, 2007 WL 2228695, at *1. The defendants sought a protective order to prevent the plaintiff from obtaining discovery on closed sessions of the defendants, where the defendants discussed errors the plaintiff made on her retirement form, the legal implication of the errors, and whether the defendants had a duty to the plaintiff. *Id.* The defendants asserted that the deliberative process privilege protected the discovery at issue. *Id.* When weighing the plaintiff's purported need for the material, the court determined the material was irrelevant because the deliberations withheld could not help plaintiff prove her claim, as the defendants were not able to correct the errors the plaintiff made. *Id.* at 6. The court further held that, because the defendants provided the plaintiff with minutes from the closed sessions and referenced other non-protected information that other evidence existed that would serve the same purpose. *Id.*

The *Tumas* court did hold that the plaintiff brought forward a serious civil rights case, but that the factor did not weight heavily in favor of the plaintiff. *Id.* The court further noted although

the plaintiff's case involved serious issues, that does not automatically trump the defendant's interest in protecting the information. *Id.* at 7.

The last factor considered by the *Tumas* court was balancing the need for disclosure against the need to for confidentiality. *Id.* The *Tumas* court held that the need to keep information regarding the pending litigation confidential outweighed plaintiff's need for it. *Id.* The *Tumas* court further held that disclosure would hinder future conversations regarding litigation. *Id.* In reaching that conclusion, the court wrote: "As Defendants note, "requiring the Board to disclose such communications would temper its ability to handle legal matters, including the present legal matter, as its members will undoubtedly hesitate to openly and candidly discuss such matters in the future.'" *Id.*

Ultimately, the *Tumas* court held that this final factor again weighed heavily in the defendants' favor. *Id.*

The instant matter is analogous to *Tumas*. Like the closed meeting records sought in *Tumas*, here Plaintiffs are seeking confidential deliberative information relating to S06-12-02. Like the *Tumas* court holding the records sought irrelevant, here the task files at issue are equally irrelevant, as the express policy Plaintiffs are attacking is reflected in the final and published version of S06-12-02. Like the minutes provided to the plaintiffs in *Tumas* as an appropriate substitute, here Defendant City has tendered the 2013 and 2019 versions of S06-12-02, which reflect the addition, removal, modification, and retention of aspects of the policy. Like the undoubtable hesitation to discuss matters openly and frankly if the privilege was broken in *Tumas*, here requiring Defendant City to produce the task files will chill open and frank discussions and collaboration over the polices of the second largest police department in the country. Like the court in *Tumas*, here this Honorable Court should deny Plaintiffs' motion to compel as the

deliberative process privilege has been appropriately applied and the need for the continued confidentiality outweighs Plaintiffs' alleged need for it.

ii. Plaintiffs' Arguments Are Speculative Instead of Particularized

Plaintiffs attempt to persuade this Honorable Court that they have a need for the withheld material by proffering arguments that Plaintiffs may have to make in rebuttal to arguments Defendant City "may" make. Doc. 67 at 4. Plaintiffs' own motion shows that any "need" is, at best, speculative and, by speculation's very nature, cannot be called "particularized." *See United States v. Edelson*, 581 F.2d 1290, 1291 (7th Cir. 1978) (holding that a criminal defendant's speculation of prosecutorial misconduct was not sufficient to show a "particularized need" for disclosure of grand jury proceedings).

C. Deliberative Process Privilege Applies to State and Local Governments

Plaintiffs argue that the deliberative process privilege does not apply to municipalities and, as such, many courts in this district have not properly analyzed the privilege under Federal Rule of Civil Procedure (FRCP) 501. Doc. 67 at 12. That is simply not the case.

Tumas is again instructive on this issue. In *Tumas*, the plaintiff argued that the deliberative process privilege does not apply to state or municipal agencies. *Tumas*, 06 C 1943, 2007 WL 2228695, at *5. The *Tumas* plaintiff argued that *Allen v. Chicago Transit Authority*, 198 F.R.D. 495 (N.D. Ill. 2001), held that the deliberative process privilege was not available to municipalities. *Tumas*, 06 C 1943, 2007 WL 2228695 at *5. The *Tumas* court disagreed with the plaintiff's interpretation of *Allen*. *Id.* The court stated that *Allen* did not adopt prior federal court holdings that applied the deliberative process privilege to states after the Illinois Supreme Court's holding in *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521. *Tumas*, 06 C 1943, 2007 WL 2228695 at *5. The *Tumas* court further stated that, contrary to the plaintiff's stance, the *Allen* court **did**

not hold that the privilege was unavailable to municipalities. *Id.* (emphasis added). Instead, the *Tumas* court stated that the *Allen* court held that the *Allen* defendant did not meet his burden of showing that the privilege applied. *Id.*

The *Tumas* court went on to state that several courts have specifically held that the privilege applies to state and municipal agencies. *Id.* See also *Bobkoski*, 141 F.R.D. at 9 and *Moorhead*, 125 F.R.D. 680 (C.D.Ill.1989). The *Tumas* court concluded its analysis by stating that cases subsequent to *Allen* have applied the deliberative process privilege to state and municipal governments. *Tumas*, 06 C 1943, 2007 WL 2228695 at *5. Based on the *Tumas* court's analysis of *Allen* and the willingness of other courts to apply the privilege, the court rejected the plaintiff's argument that the privilege was not applicable to municipalities. *Id.*

The *Tumas* court's analysis is directly applicable to Plaintiffs' instant arguments. Like in *Tumas*, here Plaintiffs argue that the federal deliberative process privilege should not be applied to a municipality. Doc. 67 at 7. Like in *Tumas*, Plaintiffs here cite to *Allen*. *Id.* at 9. However, Plaintiffs, like the plaintiff in *Tumas*, appear to misinterpret and misquote *Allen*. *Id.* Plaintiffs, in a parenthetical, quotes the *Allen* court as saying "we cannot find **[that the common law]** has established the existence of a federal common law deliberative process for municipal agencies[.]" *Id.* (emphasis added). However, Plaintiffs' insertion of "[that the common law]" is not compatible with what the *Allen* court said, and the *Tumas* court correctly analyzed. The full quote from *Allen* is: "As the **CTA** proceeded no further than these cases in its argument, we cannot find **it** has established the existence of a federal common law deliberative process for municipal agencies." *Allen*, 198 F.R.D. 502 (emphasis added). As the *Tumas* court explained, the "it" which Plaintiffs transplant with their bracket, means the *Allen* defendant, CTA, not the common law. See *Tumas*, 06 C 1943, 2007 WL 2228695 at *5.

As such, like in *Tumas*, this Honorable Court should find the deliberative process privilege applicable to municipalities in conformity with federal privilege law and the holdings of other courts in this district. *See, e.g., Rodriguez*, 17 C 7248, 2019 WL 3562683; *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1014 (N.D. Ill. 2016) (holding agency established *prima facie* existence of deliberative process privilege); *Guzman v. City of Chicago*, 09 C 7570, 2011 WL 55979, at *3 (N.D. Ill. Jan. 7, 2011) (holding that Illinois state court holdings against deliberative process privilege do not apply in federal court overseeing federal claims and that municipality validly asserted the deliberative process privilege); *Moorhead*, 125 F.R.D. 680 (holding that the deliberative process privilege is available to state agencies); and *Bobkoski*, 141 F.R.D. 88 (holding the deliberative process privilege is available to municipal agencies).

D. State Court Holdings are Inapplicable

Plaintiffs reference the Illinois Supreme Court’s holding in *Birkett*, which held that the deliberative process privilege does not apply in **Illinois courts**. Doc 67 at 10 (emphasis added). As is well established, when a plaintiff brings a federal claim to federal court, the federal law on privileges applies. *Mem'l Hosp. for McHenry County*, 664 F.2d at 1061. When state court holdings are referenced in federal courts overseeing federal claims, the argument is usually regarding expanding federal privileges, not restricting them. *Id.* Specifically, federal courts should strongly consider recognizing state privileges when such recognition can be accomplished without substantial cost to federal substantive and procedural policy. *Id.*

However, here, Plaintiffs argue for the opposite rationale insofar as they ask this Honorable Court to restrict a federal privilege based on state court decisions. Doc. 67 at 12. As Plaintiffs’ claims are wholly federal, allowing *Birkett* to overrule a federally recognized privilege would

substantially cut against federal substantive and procedural policy. As such, this Honorable Court should refuse to apply the *Birkett* rationale here.

E. Defendant City Has Properly Asserted Attorney-Client Privilege

Plaintiffs also argue that Defendant City's privilege log does not properly assert attorney-client privilege. *Id.* at 15. Plaintiffs claim that Defendant City's log does not provide the specificity necessary to assert the attorney-client privilege. *Id.* In order to properly assert a privilege, the withholding party must describe the nature of the documents withheld in a manner that allows other parties to assess the claim, while avoiding information itself privileged or protected. FRCP 26(b)(5). Defendant City's privilege log provides the Bates ranges, item identifiers, document descriptions, and privileges asserted for each of the claimed documents. *See* Exhibit D. Specifically for the documents over which Defendant City asserts attorney-client privilege, the description of the withheld material provides the dates of the communications, identifies the individuals outside the CPD's Office of Legal affairs involved, and states that the communications either seek, facilitate, discuss, or provide legal advice. *Id.* at 9.

As Defendant City's privilege log is appropriate and allows Plaintiffs to assess Defendant City's claims of privilege, this Honorable Court should deny Plaintiffs' motion and uphold Defendant City's claim of privilege.

F. Production of a Task File in Different Litigation is Not Binding in Future Litigation

Lastly, Plaintiffs argue that the production of a task file in different litigation requires Defendant City to produce tasks files in this litigation and, presumably, every case in the future. *See* Doc. 67 at 5-7. However, Plaintiffs' reliance on such a proposition is not compelling, especially considering the task file previously produced is regarding a wholly different policy than the policy at issue here. As an initial matter, prior disclosure of **similar** information does not require production by a public body. *See White v. Executive Office of US Attorneys*, 444 F. Supp.

3d 930, 946 (S.D. Ill. 2020), *reconsideration denied*, 18-CV-841-RJD, 2020 WL 8880942 (S.D. Ill. Apr. 23, 2020), and *aff'd sub nom. White v. Fed. Bureau of Investigation*, 20-1798, 2021 WL 1118087 (7th Cir. Mar. 24, 2021) (emphasis added) (holding that the plaintiff failed to meet the requirements of a prior disclosure claim in a FOIA lawsuit).

While *White* dealt with disclosures in a FOIA context, the same rationale applies here, prior disclosures of **similar** material, especially in discovery, does not compel that every task file must therefore be disclosed in all litigation.

CONCLUSION

As the *Tumas* court, along with many others in this District, has established that the deliberative process privilege applies to municipalities, Defendant City has made a *prima facie* case to apply the privilege in this case, and Plaintiffs have shown no particular need for the withheld information, Defendant City asks this Honorable Court to deny Plaintiffs' motion to compel and enter and order in favor of Defendant or, in the alternative, conduct an *in camera* review of the withheld material.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served this notice and the attached document **Defendant City of Chicago's Response to Plaintiffs' Motion to Compel Production of "Task Files"** by causing it to be delivered by the Court's electronic filing system to all counsel of record on July 6th, 2021.

/s/ Nicholas T. Peluso
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