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

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

DEFENDANT CITY'S SUPPLEMENTAL RESPONSE TO PLAINTIFF'S MOTION TO COMPEL

I. Because Plaintiffs allege that an express policy of the City of Chicago, in the form of Chicago Police Department Special Order S06-12-02, caused their constitutional injury, "deliberate indifference" is not an element required to be proved by Plaintiffs.

In its response to Plaintiffs' motion to compel [ECF No. 67], Defendant argues, *inter alia*, that the requested documents are not relevant, because the reasons for the City implementing a given policy are not relevant to Plaintiffs' *Monell* claim. At the hearing on Plaintiff's motion, the Court raised the prospect of Plaintiffs needing to prove that the City was deliberately indifferent to Plaintiffs' rights. At the hearing, counsel for the City indicated that he did not believe that such a showing was necessary, given the particular *Monell* theory advanced here. The City now reiterates this stance in writing.

To prevail on a *Monell* claim, a Plaintiff must show, in part, that "through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997) (emphasis in original). Like in this case, "[w]here a plaintiff claims that a particular municipal action *itself* violates

federal law…resolving these issues of fault and causation is straightforward…proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." *Id.* at 405 (emphasis in original); *see also First Midwest Bank v. City of Chicago*, 988 F.3d 978, 986-87 (7th Cir. 2021) (contrasting the explicit policy-type *Monell* claim with the "widespread practice"-type *Monell* claim where a showing of deliberate indifference is required).

To be clear, the City is not taking the position that a showing of deliberate indifference is not required in this case as a litigation tactic to make the Task Files irrelevant; it is the City's position that when an explicit policy is at issue, deliberate indifference is not required (and a lack of deliberate indifference will not cause the City to prevail).

II. The Deliberative Process Privilege exists with respect to municipalities as a matter of Federal common law, thus making it available under Federal Rule of Evidence 501.

The second issue raised by the Court at the motion hearing was whether the deliberative process privilege exists with respect to municipalities like the City, such that it can be claimed under Federal Rule of Evidence 501. Rule 501 states that "The common law—as interpreted by United States court in the light of reason and experience—governs a claim of privilege" unless the Constitution or a Federal statues provides otherwise. No statute, nor any constitutional provision, deals with the deliberative process privilege; the contours of the privilege are governed by Federal common law.

To begin, the deliberative process privilege exists as a matter of Federal common law. *Department of the Interior v. Klamath Water Users Protective Association* recognizes that a privilege, which it refers to as the deliberative process privilege, protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." 532 U.S. 1, 8 (2001) (citing *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). While Plaintiffs may argue that both *Klamath* and *Sears, Roebuck* were Federal FOIA cases, applying exemptions under the FOIA statute, such an argument is misguided. Both cases dealt with Exemption 5 in the FOIA statute, 5 U.S.C. §522(b)(5), which states that "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency" are exempt from disclosure under FOIA. This exemption therefore imports "civil discovery privileges" into FOIA. *Klamath*, 532 U.S. at 8. In applying Exemption 5, both the *Klamath* court and the *Sears, Roebuck* court applied the deliberative process privilege as a civil discovery privilege, that is, as a privilege recognized by Rule 501 in civil litigation.

The purpose of the privilege is explained well by the *Sears, Roebuck* court: "the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public…human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances to the detriment of the decision making process." 421 U.S. at 150-51 (cleaned up). The privilege "rests on the obvious realization that officials will not communicate candidly

among themselves if each remark is a potential item of discovery and front page news." *Klamath,* 532 U.S. at 8-9. "Reason and experience" show that private discussions are candid ones, and candid discussions lead to better policy. This is no less true for bodies of local government than it is for Federal agencies, so there is no reason that the privilege should not extend to municipalities.

Indeed, while both *Klamath* and *Sears, Roebuck* were cases dealing with federal agencies that wished to keep their internal deliberations secret, subsequent cases in this district make clear that the privilege is not limited to federal agencies. [See *K.L. v. Edgar,* 964 F. Supp. 1206, 1209 (N.D. Ill. 1997) (Finding that the deliberative process privilege applied to records from the Illinois Department of Mental Health and Developmental Disabilities where the records were "'predecisional'—generated before the adoption of agency policy—and 'deliberative'—reflecting the give and take of the consultative process, and where the plaintiffs did not establish a particularized need for the documents at issue that outweighed the defendants' interest in not disclosing them*); see also Rodriguez v. City of Chicago*, 329 F.R.D. 182 (N.D. Ill. 2019) (Determining that deliberative process privilege applied to withhold from disclosure internal police investigation communications reflecting strategy decisions); *see also Turner v. City of Chicago,* No. 15 CV 06741, 2017 WL 552876 (N.D. Ill. 2017) (The court rejected plaintiff's argument that she had a particularized need for documents protected by the deliberative process privilege, finding that "if this rational were accepted… the privilege would be overcome in any case in which the government's intent is called into question, rendering the deliberative process privilege a nullity in any [*Monell*] case.")].

The fact that Illinois does not recognize the deliberative process privilege[1] is not a reason to deny the privilege to the City, a litigant in Federal court dealing with Federal claims. Rule 501 itself states that the Court should look to Federal common law, not the common law of the forum state (as would be the case if the Court were dealing with a claim under state law, *See* Fed. R. Evid. 501). "Illinois law does not govern the assertion of the privilege in this case…When the principal claim arises under federal law, questions of privilege are governed by principles of federal common law." *Guzman v. City of Chicago*, No. 09 C 7570, 2011 WL 55979 at *3 (N.D. Ill. Jan. 7, 2011; Kocoras, J.). Even *Birkett* acknowledges that the deliberative process privilege is "widely recognized in the federal courts," and cites the same rationale as the Federal courts for its existence. *See Birkett*, 184 Ill.2d at 526-27. The court in *Birkett* goes on to state some concerns weighing against the privilege, concluding that the "establishment of a new [privilege] is a matter best deferred to the legislature," a tack that the court has "repeatedly" taken. *Id.* at 528. The court goes on to cite two previous decisions for the proposition that the "great majority of privileges recognized in Illinois are statutory creations." *Id.*

The opposite is true in the Federal system—*all* Federal privileges are creations of judge-made law. *See* Fed. R. Evid. 501. While the drafters of Rule 501 initially included a list of nine specific privileges, the rule as enacted contains no such list. Therefore, *Birkett*'s rejection of the privilege as something better left to the Illinois legislature is unpersuasive here, where the Federal courts do not rely on Congress to establish its privileges. Additionally, differences between federal and Illinois law can be found in privileges as commonplace as the attorney-client privilege—federal courts recognize a

[1] *See Birkett v. City of Chicago*, 184 Ill.2d 521 (1998).

broader attorney-client privilege than Illinois courts do. *See United States v. Farley*, 11 F.3d 1385 (7th Cir. 1993) (finding that (1) documents in question were within deliberative process privilege even though one of them was communicated from one agency to another, and (2) documents were not relevant to issue presented by the complaint or to defendant's affirmative defenses, and thus defendant could not show substantial need necessary to overcome privilege.); See also *Turner* at *6 (finding that, while there is no specific federal standard for attorney-client privilege, the Federal Rules of Evidence state that all privileges (except to the extent they pertain to claims or defenses governed by state law) are governed by "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). This difference is not a reason for federal courts to be more restrictive when granting attorney-client privilege.

III. Federal Courts Look to State Precedent to Expand Federal Privileges, Not Restrict Them

Mem'l Hosp. for McHenry County v. Shadur is instructive on how federal courts interact with state privilege rules. *Mem'l Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981). In *Shadur*, the principal claim was under the Sherman Act, so it was heard in federal court. *Id.* As the case was a federal claim in federal court, the court applied federal privilege rules. *Id.* Further, court found that, as it was a federal claim being heard in federal court, the district court did not need to apply state law in determining privileges. *Id.* The court noted that although federal courts did not need to recognize state privileges, there is a strong comity in federal courts recognizing state privileges when "it can be accomplished **at no substantial cost to federal substantive**

and procedural policy." *Id*. (emphasis added). The court went on to state that where a state holds out an expectation of privilege, that state's citizen should not be disappointed by an application of a federal rule. *Id*.

As such, *Schadur*, instructs federal courts look to **expand** privileges in federal court based upon a state citizen's reliance on that state privilege. This is entirely different than what Plaintiffs are asking this Honorable Court to do, which is **restrict** a recognized federal privilege based upon state court rulings.

CONCLUSION

The lack or presence of deliberate indifference on the part of Defendant City has no bearing on the *Monell* issues at bar. Even so, the deliberative process privilege as a civil discovery privilege is a privilege recognized by Rule 501 in civil litigation. Further, federal courts look to expand privileges based upon a state citizen's reliance on that state privilege where it would not result in substantial cost to federal substantive and procedural policy. As many courts in this District have established that the deliberative process privilege applies, 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 an order in favor of Defendant or, in the alternative, conduct an *in camera* review of the withheld material.

Respectfully submitted,

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BY: */s/ Bret A. Kabacinski*

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CERTIFICATE OF SERVICE

I hereby certify that I have served this notice and the attached document **Defendant City's Supplemental Response to Plaintiff's Motion to Compel** by causing it to be delivered by the Court's electronic filing system to the following on July 22, 2021.

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