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

Derrell Fulton, AKA Darryl Fulton,	)	
	)	Case No. 17 CV 8696
Plaintiff,	)	
	)	Hon. Judge Pacold
v.	)	
	)	Magistrate Judge Harjani
City of Chicago, et al.,	)	
Defendants.	)	

Nevest Coleman,	)	
	)	Case No. 18 CV 998
Plaintiff,	)	
	)	Hon. Judge Pacold
v.	)	
	)	Magistrate Judge Harjani
City of Chicago, et al.	)	
	)	
Defendants.	)	

THE CITY DEFENDANTS' JOINT RESPONSE TO THE MOTION TO QUASH THE DEPOSITION SUBPOENA OF ERIC SUSSMAN

Defendants City of Chicago and former Chicago Police Officers John Halloran, Kenneth Boudreau, James O'Brien, Gerald Carroll, William Moser, Albert Graf, Michael Clancy, Thomas Benoit, and Geri Lynn Yanow, as Independent Administrator of the Estate of William Foley (collectively the "City Defendants"), through their respective undersigned attorneys, submit this Response to Cook County State's Attorney's Office ("CCSAO") Motion to Quash the Subpoena for the Deposition of Eric Sussman, and state[1]:

[1] In addition to Sussman's deposition, the CCSAO has indicated it will move to quash Fulton's subpoena for the deposition of Mark Rotert, the former Chief of the CCSAO's Conviction Integrity Unit ("CIU"), for the same reasons it is moving to quash Sussman's deposition subpoena. Rotert's deposition is currently scheduled for October 23, 2020 and the City Defendants anticipate questioning Rotert. Fulton has indicated a willingness to accept the offer of a Rule 30(b)(6) deponent in place of Rotert, The City Defendants would have subpoenaed Rotert's deposition if Fulton had not. Therefore, City Defendants address Rotert's deposition in this response as if the motion to quash had been filed as to both subpoenas. If the Court agrees with the City Defendants, they will subpoena and take the lead on Rotert's deposition.

INTRODUCTION

Eric Sussman is the former First Assistant to the Cook County State's Attorney's Office ("CCSAO"). Mark Rotert is the former Chief of the CCSAO's Conviction Integrity Unit ("CIU"). Both played a pivotal role in the CIU's re-investigation of the cases against Plaintiffs and the decisions by the CCSAO to vacate Plaintiffs' convictions for the brutal rape and murder of Antwinica Bridgeman and dismiss the charges. Following a thorough re-investigation by the CIU of the 1994 homicide investigation, Rotert recommended that Plaintiffs' convictions be vacated and that Plaintiffs be *retried* for the same crimes. Sussman appears to have initially agreed with this recommendation. The CCSAO suddenly reversed course and dropped the charges in the midst of intense media pressure, primarily from the Chicago Tribune.[2] After the convictions were vacated, Plaintiffs each filed petitions for a certificate of innocence ("COI"). Sussman, as First Assistant, was involved in the decisions related to those petitions. Instead of opposing the COI petitions, however, and forcing Plaintiffs to prove their innocence by a preponderance of the evidence (as required by Illinois law), the CCSAO appears to have used the COIs as bargaining chip to negotiate favorable language in the eventual agreed order granting the COI. That favorable language states that the COIs do not count as evidence of wrongdoing by any Assistant State's Attorneys ("ASAs") involved in Plaintiffs' convictions. Not surprisingly, Plaintiffs now argue the COIs constitute "legal" proof of their innocence and have sued ASA Hal Garfinkle along with the City Defendants.[3]

[2] *See* Chicago Tribune, https://www.chicagotribune.com/columns/eric-zorn/ct-perspec-zorn-foxx-coleman-fulton-dna-1110-20171109-story.html, this article is in .pdf format and attached as Ex. N.

[3] Defendants Cook County and former ASA Hal Garfinkle have declined to join this Response and stated: "The depositions of Sussman and Rotert do not impact Mr. Garfinkel's defense one way or the other. Consequently, Defendant Hal Garfinkel has no interest in how the Motion to Quash is resolved and respectfully takes no position."

Courts do order high-ranking governmental officials to be deposed in these reversed-conviction cases. (*See* Ex. A, Memo Order, Case No. 13-cv-1970, Dkt. #247 (N.D. Ill March 19, 2019) (requiring Gov. Quinn to testify about his decision to commute plaintiff's sentence). Indeed, Chief Judge Pallmeyer ordered both Sussman and Rotert to sit for a deposition in another reversed-conviction case, rejecting most of the same arguments the CCSAO is now raising before this Court. (*See Brown v. Chicago*, 18-cv-7064, Report of Proceedings, Jul. 28, 2020, attached hereto as Ex. I; *See also* Minute Order (C.J. Pallmeyer), attached hereto as Ex. J). Despite this precedent, the CCSAO again moves to block transparency and prevent Sussman and Rotert from testifying. But the motion comes nowhere close to meeting its burden and does not even include the required affidavit by Sussman in support of the deliberative process privilege. Instead, the CCSAO merely assumes that because Sussman was the First Assistant, his testimony is automatically irrelevant and privileged. Not only does this undeveloped argument fail as a matter of law, it ignores a host of reasons that Sussman's testimony is both relevant and not privileged. The motion should be denied.

BACKGROUND

On May 12, 1997 and May 13, 1997, respectively, Plaintiffs Nevest Coleman and Derrell Fulton were convicted for the brutal rape and murder Antwinica Bridgeman. Bridgeman's badly decomposing body was found in the basement of the Coleman family's home on April 28, 1994 with a large piece of brick or concrete shoved down her throat and a metal pipe shoved into her vagina. The evidence to convict Plaintiffs was compelling. Coleman was the last person to have been seen with Bridgman around midnight after a party on April 11, 1994, the date Bridgeman disappeared. On April 28, 1994, Coleman "found" Bridgeman's decomposing body in the basement of his family's home. Coleman was initially questioned at Area 1, where he lied to

police about his knowledge of Bridgeman and whether he was with her the night she disappeared. Later that night, witnesses who had been at the same party the night Bridgeman disappeared reported to police that Coleman had left the party with Bridgeman. Police brought Coleman back to Area 1 at midnight on April 27-28, 1994, and at 9:30 a.m. the following morning, he gave a court-reported confession to the crime, in which he described in detail, in response to open-ended questions, what he, Fulton and another person, Eddie Taylor, did to Bridgeman. After Coleman was charged, Fulton gave a handwritten confession, which likewise provided a detailed description of what he, Coleman and Taylor did to Bridgeman, albeit with the roles reversed. Plaintiffs now claim their confessions were coerced, although Coleman primarily blames Detectives Foley and Clancy, while Fulton primarily blames ASA Garfinkle.

In 2016, the CIU began re-investigating the case and ordered new DNA testing of semen on the victim's underwear. The semen was found to be a close match to another individual with a history of sexual assaults that post-date the Bridgeman homicide. Despite the match, the CIU conducted a thorough investigation over a period of 18 months, interviewing numerous witnesses, as well as Plaintiffs. As First Assistant, Sussman oversaw the investigation and communicated regularly with Plaintiffs' counsel and the investigative team during the investigation.

On November 17, 2017, Sussman announced that the CCSAO would move to vacate Plaintiffs' criminal convictions and sentences due to the DNA evidence and re-try Plaintiffs for the same crime. Ex. B, Report of Proceedings, Nov. 17, 2017. At the next hearing on December 1, 2017, however, the CCSAO had a change of heart. Sussman stated that although "previously the Conviction Integrity Unit had recommended a new trial based on new DNA evidence as opposed to a finding of innocence…after reviewing the DNA evidence, the State's Attorney's Office concluded that we would be unable to meet our burden of proof on a retrial." Ex. C, Report of

Proceedings, Dec. 1, 2017. It is unclear what changed in two weeks that led to the CCSAO's change of heart.

Plaintiffs then filed petitions for COIs, which, under Illinois law, requires the petitioner to prove "by a preponderance of evidence that…the petitioner is innocent of the charge in the indictment." 735 ILCS 5/2-702(g)(3). On March 9, 2018, the CCSAO entered into a negotiated Agreed Order with Plaintiffs, which include the following language that the COIs:: "are not intended to provide evidentiary support for any claim that the Cook County State's Attorney's Office engaged in misconduct with respect to Petitioner's conviction." Ex. D, Plaintiff Emails from James Hanlon; Ex. E, Agreed Orders for Plaintiffs' Certificates of Innocence.

The Comments to the Media

Plaintiffs' cases remained a topic of discussion for Rotert and State's Attorney Kim Foxx. On July 1, 2018, Foxx was interviewed by the ABA Journal regarding the outcome of Plaintiffs' cases. *See* Kevin Davis, *The Chicago Police Legacy of Extracting Confessions is Costing the City Millions*, ABA Journal (July 1, 2018, 12:15 a.m.), https://www.abajournal.com/ magazine/article/ chicago_police_false_confessions. That article reported: "Foxx says her office struggled with the cases of Coleman and Fulton. 'The unit itself concluded [Fulton/Coleman] was not a case of actual innocence,' Foxx says. 'But would we be able to meet the burden of proof at trial of guilt? The answer we had was no.' Still, because of the questionable interrogations and lack of evidence, Foxx concluded the charges had to be dropped. 'It troubled us,' she says. 'It pained us to try to characterize the right way to say what we were doing. These cases are really complicated.'" *Id.*

Following that article, Rotert, Sussman and Foxx were interviewed by reporter Steven Bogira for his article *The Hustle of Kim Foxx*, The Marshall Project (October 29, 2018, 6:00 a.m.).[4] In his recorded interview, Rotert explained why the DNA evidence does not exclude or exonerate Plaintiffs and why Coleman's confession withstands the test of scrutiny:

> There's DNA in the crotch of this woman's panties. When you look at the photos of the crime scene, even if you don't look at the confessions, but when you look at the photos of that crime scene, what happened there was a terrible and violent event. Let's hypothesize that the person whose DNA is in the crotch of those panties, as I understand the theory, it would have to be that the person had intercourse with her, that she pulled her panties back up around her waist so that the deposit could be made, and that then she was stripped down a second time, and the brutality erupted from that. That doesn't seem very likely to me. Now, there are other factors in that case that I would also discuss in terms of if we were having a debate about whether or not -- and I want to emphasize we agreed, and I'm comfortable with the recommendation I made, that Coleman and Fulton deserved a new trial. That's all I've ever said about Coleman and Fulton. And I will tell you that the proposition that that DNA came about because she put her panties back up and then was stripped down and then was murdered, on the physical and other evidence in the case, strikes me as implausible. * * * The Coleman confession is -- is not one that on its face appears to me incredible. I've seen confessions where I look at it and think, gee, that's a hard one to believe. The Coleman confession does not present those issues for me . . . And Coleman was using very vivid and descriptive language that he maintains he was trained. He's got a fabulous memory for scripts if he was trained to say all those things.

Ex. F, Recorded Interview Tr. at 40-41, 44.

Plaintiffs have each brought claims placing their innocence at issue, especially claims for malicious prosecution. The City Defendants anticipate Plaintiffs will rely on the CCSAO's dismissal of their convictions and agreed order on their COIs as proof of their factual innocence.

ARGUMENT

I. The Witnesses Have Information Highly Probative to the Cases' Defense.

Federal Rule of Civil Procedure 26(b)(1) provides that parties may obtain discovery regarding any non-privileged matter that is relevant to a party's defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in

[4] https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx.

controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The fundamental premise of Plaintiffs' lawsuit is that they are innocent of the crimes for which they were convicted. To prevail on the malicious prosecution claims, they will have to prove the convictions were vacated and charges dismissed in a manner "indicative of innocence." *See Swick v. Liautaud*, 169 Ill.2d 504, 512 (1996) ("[A] malicious prosecution action cannot be predicated on underlying criminal proceedings which were terminated in a manner not indicative of the innocence of the accused."). Plaintiffs have made no secret of their belief that the CCSAO's actions – vacating the convictions, dropping the charges and not opposing the COIs – are indicative of innocence. For instance, Coleman has stated "'I've been telling people I was innocent from day one,' as Plaintiff held up his certificate of innocence. 'This here is the proof.'" Andy Grimm, *Judge Grants Nevest Plaintiff Certificate of Innocence*, Chicago Sun Times, (March 9, 2018, 5:14 p.m.), https://chicago.suntimes.com/2018/3/9/18367838/judge-grants-nevest-coleman-certificate-of-innocence.

Plaintiffs have never denied that they will rely on the CCSAO's actions that led to their COIs, or their COIs themselves, as proof of innocence in this lawsuit. In *Hood v. City of Chicago*, under similar circumstances as here, Magistrate Judge Valdez denied former Governor Patrick Quinn's motion to quash his deposition subpoena and noted, "In the absence of Plaintiff disavowing any reliance on Quinn's commutation, the information sought by Defendants is relevant to the subject matter of the action, and thus within the scope of discovery. Plaintiff alleges, *inter alia*, that he was wrongfully charged, prosecuted, and convicted. He asserts that he is

innocent, thus, such discovery pertaining to Quinn's decision to commute Plaintiff on a basis other than innocence goes directly to Defendants' defenses." Ex. A, Memo Order.

The CCSAO does not deny that Sussman and Rotert were personally involved in the CIU investigation and the decisions to vacate Plaintiffs' convictions and dismiss the charges. Nor does the CCSAO deny that Sussman and was involved in the decision to enter into an Agreed Order regarding Plaintiffs' COIs. In another case involving Defendant City of Chicago, defense counsel recently received two spreadsheets produced by the CCSAO in response to an IFOIA requests for a list of certain CCSAO emails. (Ex. G, FOIA Response.). Subject lines of several emails listed in the spreadsheets (the actual emails were not produced) confirm that Sussman and Rotert were deeply involved in the CIU investigation in this case, spoke regularly with Plaintiffs' counsel, spoke with the media about Plaintiffs' cases, drafted public statements regarding the cases, drafted public statements regarding the outcome of the CIU investigation, and regularly appeared in court on behalf of the CCSAO in these matters. *Id.* The roles Sussman and Rotert played in the investigation and disposition of Plaintiffs' criminal convictions are also illustrated in email communications recently produced by Plaintiffs (Ex. H) and the recorded media interview of Rotert (Ex. F).

The CCSAO's offer to produce a Rule 30(b)(6) witness comes nowhere close to an adequate substitute. (*See* CCSAO Mtn., Dkt. 236, pp. 3-4). There is no description in the motion as to who this witness is or what information he or she can provide. Nor is there even a vague description of subjects or topics this person will discuss. And a Rule 30(b)(6) witness will only be able to say what he or she has been coached to say by the very entity now seeking to slam the door shut on this discovery. This would lead to either a series of formulaic and nonresponsive answers or objections, leading to more motion practice as to the appropriateness of the answers or

objections. Thus, in addition to being completely undeveloped and unfair, the vague offer of a Rule 30(b)(6) witness would only waste the parties' and Court's resources.

II. The CCSAO Fails to Make a Case that Deliberative Process Privilege Applies.

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), *citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–52 (1975). The privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." *Dept. of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 9 (2001). For the privilege to apply, the document or communication must be "pre-decisional" and "deliberative." *Evans v. City of Chicago*, 231 F.R.D. 302, 316 (N.D. Ill. 2005). The theory behind the privilege is that "[s]ince frank discussion of legal and policy matters is essential to the decision-making process of a governmental agency, communications made prior to and as a part of an agency determination are protected from disclosure." *Id.* (citation omitted). Communications made subsequent to an agency decision, however, are not protected. *Id.*

A. The CCSAO has not adequately invoked the deliberative process privilege.

As an initial matter, the Court should reject the CCSAO's attempt to assert a blanket deliberative process privilege over everything Sussman and Rotert have said, done or reviewed in connection with Plaintiffs. To assert the deliberative process privilege, the CCSAO must first make a *prima facie* showing that the privilege applies. *Ferrell v. United States Dep't of Housing and Urban Dev.*, 177 F.R.D. 425, 428 (N.D. Ill. 1998). To satisfy this burden three things must happen: (1) the department head with control over the matter must make a formal claim of privilege, after personal consideration of the issues; (2) the responsible official must demonstrate, typically by

affidavit, precise and certain reasons for preserving the confidentiality of the information sought; and (3) the official must specifically identify and describe the protected information. *Id.* If the threshold showing is satisfied, the burden shifts to Defendants to demonstrate a "particularized need" for the documents. *Farley*, 11 F.3d at 1389.

In the instant case, the CCSAO has not bothered to identify anything specific it wants protected, apart from generic "logic and reasoning" communications. *See, e.g.*, *Evans*, 231 F.R.D. at 316 (the official must specifically identify and describe the documents subject to the privilege). Similarly, the CCSAO's motion to quash lacks an affidavit setting forth precise and certain reasons for preserving confidentiality and specifically identifying and describing the information over which it claims privilege. Instead, the CCSAO takes the untenable position that all of Sussman's (and presumably Rotert's) knowledge, actions, and comments should be protected because they can offer nothing more than "the logic and reasoning behind the CCSAO's decision." Dkt. 238 at 4. The CCSAO has utterly failed to satisfy the threshold showing necessary to make a *prima facie* showing of deliberative process. *See* Ex. M, Order Denying CCSAO Mtn. to Quash Dep. Sub., *Washington-Riley v. Chicago*, 19-cv-6160, Dkt. 90, (Oct. 15, 2020) (MJ. Weisman) (noting "The CCSAO has not, however, produced a privilege log or affidavit, or otherwise provided any explanation as to why the responsive documents are subject to privilege. Absent such information, the CCSAO has not shown the responsive documents are subject to privilege.")

B. Many topics are not protected by deliberative process privilege.

Even assuming that the CCSAO had satisfied the threshold showing of a *prima facie* case for applying the deliberate process privilege at all, the privilege does not apply to all matters on which Sussman's and Rotert's depositions are sought. *See* Ex. I, *Brown v. City of Chicago, et al.*, Transcript of Proceedings before Chief Judge Pallmeyer (July 28, 2020) (denying in part the

CCSAO's motion to quash Sussman's and Rotert's deposition subpoenas and identifying several discoverable topics defendants were allowed to explore). For instance, the deliberative process privilege would not apply to the type of analysis employed during the CIU investigation; the policies and procedures followed during the investigation; statements made by Sussman, Rotert or other members of CCSAO to the press and third parties; factors taken into account in making the final decisions about Plaintiffs' cases and granting the COIs; and representations made by Plaintiffs or their counsel to the CCSAO during the CIU's investigation and any post-decisional statements. *Id.*; *see also, Saunders v. City of Chicago*, 2015 WL 4765424, at *10 (N.D. Ill. Aug. 12, 2015) (discussion of objective facts, as opposed to opinions and recommendations, generally is not protected by the deliberative process privilege). Defendants here seek this discoverable information to establish that the CCSAO's final decisions regarding Plaintiffs' criminal convictions and COIs were based on factors other than innocence.

The deliberative process privilege extends only to communications that are pre-decisional, generated before the adoption of policy, and reflect the give-and-take of the consultative process. *United States v. Bd. of Educ. of City of Chi.*, 610 F. Supp. 695, 698 (N.D. Ill. 1985). Communications made subsequently—such as the media interviews or email communications from Sussman, Rotert and State's Attorney Foxx—are not protected. *Evans*¸ 231 F.R.D. at 316.

In addition, the decisions themselves are not protected, nor are the reasons for those decisions, or the facts discovered in the course of investigating and considering the decisions, because that information is either post-decisional or non-deliberative. *See Saunders*, 2015 WL 4765424, at *10. Likewise, the fact that the CCSAO did not consider certain evidence is not protected because the failure to do something cannot be considered deliberative, even if it does reveal something about the thought process. *Id.*,

C. Defendants have a particularized need to depose Sussman and Rotert about their pre-decision communications and mental deliberations.

Even if the CCSAO did make out a *prima facie* case that the privilege applies to certain topics (other than those delineated above), Defendants may still pierce the privilege by showing their particularized need for the information outweighs the CCSAO's interest in confidentiality. *Evans*, 231 F.R.D. at 316, *citing Farley*, 11 F.3d at 1388 (7th Cir. 1993); *Ferrell v. U.S. Dep't of Hous. & Urban Dev.*, 177 F.R.D. 425, 429 (N.D. Ill. 1998). Courts analyze the following factors in determining whether a particularized need exists: (1) the relevance of the information to the litigation; (2) the availability of other evidence that would serve the same purpose; (3) the government's role in the litigation; (4) the seriousness of the litigation and the issues involved; and (5) the degree to which the disclosure of the document would chill future deliberations with government agencies. *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1018 (N.D. Ill. 2016).

As discussed in Section I above, the information sought from these two witnesses is highly probative and goes to the heart of the malicious prosecution claims. *See Evans*, 231 F.R.D. at 317 (finding where plaintiff intended to use pardon to show innocence, defendants were entitled to obtain information and analysis on which the pardon was based to diminish the weight of the pardon). *See also Patrick v. City of Chicago*, 974 F.3d 824, --- (7th Cir. 2020) ("The district judge held—and we agree—that Patrick's certificate of innocence was directly relevant to an element on which he bore the burden of proof: that the prosecution against him was terminated in a manner indicative of innocence."). Furthermore, the seriousness of Plaintiffs' claims beyond question. "A claim that police officers violated their sworn duty by knowingly seeking the prosecution and conviction of a person whom they knew to be innocent (and did so through multiple constitutional violations) strikes at the heart of the integrity of our criminal justice system. It is among the most serious charges that can be leveled against law enforcement." *Evans*, 231 F.R.D. at 317.

Finally, testimony from Sussman and Rotert would not chill future deliberations by prosecutors. The CCSAO could have protected its deliberations by not disclosing its internal reasoning to the press or other third parties. Additionally, nearly four years have passed since the dismissal of Plaintiffs' cases, and Sussman and Rotert no longer work at CCSAO, so there would be no chilling effect on future prosecutorial decisions. *See Bahena v. City of Chicago*, 2018 WL 2905747 at *4 (N.D. Ill., June 11, 2018) (finding four years since dropping criminal case to be sufficient to not have a chilling effect "on future prosecutors willingness to objectively and candidly assess a case and recommend, when appropriate, that the charges be dismissed because the facts do not support a finding of guilt beyond a reasonable doubt); *see also*, Ex. I, *Brown* Transcript of Proceedings (finding the First Assistant State's Attorney's statements to the press resulted in no chilling effect).

III. The Deliberative Process Privilege Has Been Waived.

Even assuming the deliberative process privilege exists and applies here, it has been waived. *See Hobley v. Burge*, 445 F. Supp. 2d 990, 998-99 (N.D. Ill. 2006) (holding that "[w]here an authorized disclosure is voluntarily made to a non-federal party, whether or not that disclosure is denominated 'confidential,' the government waives any claim that the information is exempt from disclosure under the deliberative process privilege" (internal citations omitted)). As discussed above, the CCSAO, through Rotert and State's Attorney Foxx, used the media to shed light on its deliberations concerning Plaintiffs' criminal convictions. Those public statements effectively waived any protection over the deliberations and reasoning utilized by the CCSAO and the CIU when evaluating Plaintiffs' cases. *See In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997) (stating information voluntarily revealed to third parties waives the claim for the deliberative process privilege). Likewise, these public statements also waive any protections the CCSAO

claims it is afforded under work-product privileges. *See Miller UK Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 736 (N.D. Ill. 2014), *quoting Appleton Papers, Inc. v. E.P.A.*, 702 F.2d 1018, 1025 (7th Cir. 2012) (work-product privilege is waived "when the protected communications are disclosed in a manner that substantially increases the opportunity for potential adversaries to obtain the information"). Furthermore, the CCSAO produced to all parties in this litigation, numerous reports documenting every witness interview conducted while re-investigating the Bridgeman homicide, thus waiving any work-product protections regarding the subject matter of those interviews. The voluntary disclosure of attorney work product to an adversary waives work-product protection because the protection is designed to protect an attorney's trial preparation and mental processes from discovery at the behest of an adversary. *See Caremark, Inc. v. Affiliated Computer Services, Inc.*, 195 F.R.D. 610, 612 (N.D.Ill.2000) (collecting cases). As such, voluntary disclosure to an adversary is seen as a total waiver. *Id.* at 613. See also Ex. A, Hood Memo Order, ("A public figure making strong public statements may not then skirt the questioning on the reason for the official action.")

The spreadsheet produced by the CCSAO in response to the IFOIA request also reveals that in addition to the media, the CCSAO – and in particular Sussman and Rotert – communicated with Plaintiffs' counsels during the CIU investigation and the CCSAO's decision-making process. For instance, there are 26 emails with titles "Coleman/Fulton Defense Meeting" between November 6 and November 14, 2017. (*See* Ex. K, IFOIA Email Search Results)[5]. During that same period, there are 4 Sussman emails titled "Coleman/Fulton Defense Meeting (Fulton with K. Zellner)" and 4 Sussman emails titled "Coleman/Fulton Defense Meeting (Coleman) w/R. Ainsworth." *See Id.* Between November 17 and November 21, 2017, Sussman and/or Rotert

[5] Due to the size of this exhibit, Defendants will submit it separately, via email, to the Court.

exchanged 8 more emails directly with Coleman's counsel regarding this matter. (*See* Ex. L, IFOIA Email Search Results).[6] Two of these emails between Coleman's counsel and Sussman and Rotert – both dated November 21, 2017 – are titled "Thank you on behalf of Nevest Coleman and family." *See Id.*; *see also* Ex. H. Not only do these discussions constitute a waiver, but it would also be patently unfair for the Plaintiffs' counsel, but not Defendants, to have unilateral knowledge of Sussman's and Rotert's communications about the case.[7] Finally, the CCSAO's claims of "mental process privilege" have also been waived, for the same reasons as the deliberative process privilege. *See* CCSAO Mtn., Dkt. #238 at 8 (citing *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 527 (N.D. Ind. 2005) for the proposition that the analysis for mental process privilege is the same as deliberative process privilege.).

CONCLUSION

For the reasons set forth above, the City Defendants respectfully request that the Court enter an order denying Cook County State's Attorney's Office's Motion to Quash the Deposition Subpoena of Eric Sussman, grant the Defendants' request to depose Mark Rotert, and grant any further and additional relief the Court deems just and appropriate.

October 16, 2020

Respectfully submitted by:

MARK A. FLESSNER
Corporation Counsel for the City of Chicago

/s/ Patrick R. Moran
Patrick R. Moran
Andrew J. Grill
Special Assistant Corporation Counsel
For the City of Chicago
Attorneys for Defendant Officers
Rock Fusco & Connelly
321 N. Clark Street, Suite 2200
Chicago, Illinois 60654

/s/ Jeffrey N. Given
Jeffrey N. Given
Sara J. Schroeder
Special Assistant Corporation Counsel
For the City of Chicago
Attorneys for Defendant City
The Sotos Law Firm
141 W. Jackson Blvd., 1240A
Chicago, Illinois 60143

[6] Due to the size of this exhibit, Defendants will submit it separately, via email, to the Court.
[7] Defendants requested these communications from Plaintiffs, but it appears not all of the emails were produced.

(312) 474-1000

(630) 735-3300