

ORDER RE MOTION TO QUASH

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IN THE MATTER OF THE APPEAL OF:

**EDWARD KELLER**, Appellant,

vs.

**DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,**  
and the City and County of Denver, a municipal corporation, Agency.

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Following Appellant's motion, nearly identical *subpoenas duces tecum* were issued and served on the City Attorney's Office and the Office of the Independent Monitor seeking "any and all notes, memorandums, e-mails, investigative reports, or statements exchanged between July 31, 2011 and November 8, 2013 by or on behalf of the Office of the City Attorney and the Office of the Independent Monitor relating in any way to the investigation of the July 31, 2011 incident involving Jamal Hunter and Deputy Edward Keller."

On January 8, 2015, the Agency filed a motion asking to reconsider the order granting *subpoenas duces tecum*. In support of its motion, the Agency stated it had previously objected to prior discovery requests by Appellant seeking similar documents on the grounds that it is privileged by the deliberative process privilege, attorney client privilege, or the work product privilege.

On January 9, 2015, the City Attorney and Office of the Independent Monitor filed a motion to quash the subpoenas. They argued: the *subpoenas duces tecum* are unreasonable and oppressive because they seek records that are confidential and protected from disclosure by the attorney-client, work product, and deliberative process privileges; the subpoenas seek records that are irrelevant; the subpoenas themselves are vague, overbroad, and burdensome; the subpoenas were untimely issued and complying would pose an unreasonable burden; and the subpoenas conflict with a contemporaneous order allowing the parties to file a privilege log.

On January 15, 2015, Appellant filed a reply to the Agency's motion to quash. In that reply, Appellant modified his request to "all correspondence, notes, memorandums, e-mails, investigative reports, or statements sent or received by (Assistant City Attorney) Stuart Shapiro, Independent Monitor Mitchell, and Independent Monitor Rosenthal between July 31, 2011 and November 8, 2013 relating in any way to the investigation into the July 31, 2011 incident involving Jamal Hunter and Deputy Edward Keller." Appellant also claimed the attorney-client privilege and work-product doctrine do not apply to the modified subpoenas, the deliberative process privilege does not apply, and if the deliberative process privilege applies the Agency must file a Vaughn Index.

On January 20, 2015, the Agency submitted a responsive pleading, claiming broadly that the attorney-client, work product, and deliberative process privileges apply to the materials sought; that it should not have to produce a Vaughn index; that the material sought is not relevant; and that the subpoenas are vague, overly broad and burdensome, and untimely.

## Analysis

In the January 6, 2015 Order Re: Appellant's Request for *subpoenas duces tecum*, the recipients were required to comply with the subpoenas unless they claimed privilege over the material sought. In the event the Agency, City Attorney, or Office of the Independent Monitor claimed privilege of any kind over the documents, they were to create a privilege log identifying those documents, a brief description of the contents, and the privilege being claimed.

The Agency and the moving parties' arguments for privilege may have some merit. However, as was previously ordered, the substance of a privilege claim must be presented in the form of a privilege log. The parties who claimed privilege cited the City of Colorado Springs v. White to support the deliberative process privilege; however, White holds that a party asserting privilege must submit either a Vaughn Index or the underlying documents for an *in camera* review. City of Colorado Springs v. White, 967 P.2d 1042 (Colo. 1998).

In White, the Colorado Supreme Court recognized the deliberative process privilege in Colorado. The case explained the procedure that must be followed by a party claiming the privilege. The Court stated the initial burden of proof falls upon the entity asserting the deliberative process privilege, and adopted the Vaughn index as "an aid to reviewing courts" allowing them to "effectively and efficiently evaluate the nature of the disputed documents," so they may make a ruling on the applicability of the privilege claimed. The White court further stated "the government cannot meet (the procedural) requirements (required to claim the deliberative process privilege) by conclusory and generalized allegations of privilege."

The Agency's motion calls for conclusory and generalized allegations of privilege. It has not complied with the procedural requirements required by White, and thus has not met the initial burden of proof for the assertion of the privileges claimed. Indeed, it is not feasible to determine the merits of the movants' claims without knowing how the privilege might apply to the documents requested. In other cases the City Attorney's Office has recognized, and complied with the requirement to produce a privilege log. (In re Fuller, CSA 39-14 (12/15/14); In re Denovellis, CSA 44-14; In re Ford, CSA 48-14; In re Lewis, CSA 51-14).

Notwithstanding the foregoing, as Appellant has agreed to limit the scope of the *subpoenas duces tecum*, the original *subpoenas duces tecum*, issued January 6, 2015, which the moving Agency argued were vague, overly broad, and burdensome, are void.

## ORDER

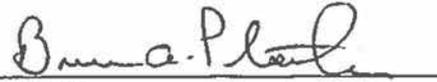
For reasons stated above, the Agency's motion to quash is GRANTED as to the original *subpoenas duces tecum* issued in the January 6, 2015 order but DENIED as to those issuing hereunder.

The movants are ORDERED to produce, by February 5, 2015, the documents requested in the *subpoenas duces tecum* that accompany this order, or to file a Vaughn Index/privilege log according to the procedural requirements adopted by the Colorado Supreme Court in White, *supra*.

Those requirements include: a specific and detailed assertion of the privilege claimed; the document's author, recipient, and subject matter; an explanation of why the document qualifies for the privilege including descriptions of the deliberative process to which the document is related and the role played by the document in that process; and an affidavit why disclosure of each document would be harmful.

No further Agency or Moving Party privilege argument will be considered without either the documents at issue or a Vaughn-type index or privilege log.

DONE January 22, 2015.

A handwritten signature in black ink, appearing to read "Bruce Plotkin", written over a horizontal line.

Bruce Plotkin  
Career Service Hearing Officer