IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

RYAN WILLIAMSON,
Plaintiff,

v.

CITY OF PEKIN and THE BOARD OF FIRE AND POLICE COMMISSIONERS FOR THE CITY OF PEKIN,
Defendants.

Case No. 1:13-cv-01436-JES-JEH

Order

Now before the Court is the Defendants' Motion for Protective Order Re: Executive Session Transcripts (Doc. 77). The Plaintiff Ryan Williamson filed his Response to the Motion for Protective Order (Doc. 82) and for the reasons set forth below, the Defendants' Motion is GRANTED IN PART AND DENIED IN PART.

I

On April 25, 2014, the Plaintiff filed his Second Amended Complaint naming the Board of Fire and Police Commissioners for the City of Pekin (the Board) as an additional Defendant and claiming that both the Board and the City of Pekin took employment actions against him that violated the Americans with Disabilities Act (ADA), 42 USC § 12111, *et seq*. On July 1, 2015, the Defendants filed a Motion requesting an order finding the transcripts of executive sessions held by the Board of Police and Fire Commissioners on March 22, 2013 and April 10, 2013 privileged from production pursuant to the attorney/client privilege and/or the deliberative process privilege. The Defendants alternatively request

that the Court enter an order finding portions of the transcripts privileged and that the Defendants may not be compelled to produce the minutes of those meetings.

II

A

The deliberative process privilege originated in federal courts to protect the "decision making processes of government agencies." *NLRB v Sears, Roebuck & Co*, 421 US 132, 150 (1975) (collecting cases). It covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Id. The privilege recognizes that frank discussion of legal or policy matters may otherwise be inhibited if such discussion were made public which would result in poorer decisions and the policies formulated. Id; *Department of Interior v Klamath Water Users Protective Association*, 532 US 1, 8-9 (2001) (explaining that the deliberative process 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" so that its object is to enhance the quality of agency decisions).

The Seventh Circuit has accordingly applied it where federal agencies are involved. See *United States v Farley*, 11 F3d 1385, 1389-90 (7th Cir 1993) (Federal Trade Commission); *Enviro Tech International, Inc v United States EPA*, 371 F3d 370, 374-76 (7th Cir 2004) (United States Environmental Protection Agency); *King v IRS*, 684 F2d 517, 521 (7th Cir 1982) (Internal Revenue Service).

At the District Court level, the privilege has migrated to cases involving state and municipal entities. See *Bobkoski v Board of Education of Cary Consolidate School District 26*, 141 FRD 88, 92 (ND Ill 1992) (local board of education); *Moorhead v Lane*, 125 FRD 680, 681-86 (CD Ill 1989) (providing exhaustive

discussion on why the deliberative process privilege was not categorically inapplicable to Illinois Department of Corrections materials); *Evans v City of Chicago*, 231 FRD 302, 315-19 (ND Ill 2005) (applying deliberative process privilege to Illinois Governor's office materials and Illinois Prisoner Review Board's materials); *Guzman v City of Chicago*, 2011 WL 55979, *2-3 (ND Ill) (applying deliberative process privilege to materials of Independent Police Review Authority, a City of Chicago Agency). However, not all district courts within the Seventh Circuit have found that the deliberative process privilege applies to state and municipal entities. See *Allen v Chicago Transit Authority*, 198 FRD 495, 501-02 (ND Ill 2001) (rejecting that the deliberative process privilege existed for municipal agencies where the case law relied upon by the defendant in seeking protection of the privilege was called into question in an Illinois Supreme Court case refusing to recognize a deliberative process privilege); *Jones v City of Indianapolis*, 216 FRD 440, 450 (SD Ind 2003) (stating that "no court in the district has expressly held that the deliberative process privilege applies to municipal governmental entity").

In light of the migration of the privilege to state and municipal entities and given that the Plaintiff does not argue otherwise, the Court assumes for purposes of this case that the privilege can be asserted by a municipal agency.

B

Two distinct lines of cases have emerged on the question of when the deliberative process privilege should apply. The first line makes clear that the deliberative process privilege is only applicable "in the context of communications designed to directly contribute to the formulation of important public policy." *Anderson v Marion County Sheriff's Department*, 220 FRD 555, 560-61 (SD Ind 2004); *Fares Pawn, LLC v Indiana*, 2012 WL 3580068, *3 (SD Ind) (noting that the privilege protects communications of a government entity that is part of

the entity's decision-making process in adopting policies), citing *Enviro Tech International, Inc, 371 F3d at 374*; *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F3d 1422 (DC Cir 1998) ("The privilege was fashioned in cases where the governmental decisionmaking process is *collateral* to the plaintiff's suit") (emphasis added).

The second line of cases that has emerged provides that if the plaintiff's cause of action is directed at the government's intent, the privilege shall not apply. *Fares Pawn*, 2012 WL 3580068, *4 (explaining that because the plaintiffs' cause of action for the denial of their Due Process and Equal Protection rights under the Fourteenth Amendment was directed at the defendants' intent, the defendants could not use the privilege as a shield against claims of governmental intent); *Anderson*, 220 FRD at 561 (concluding that the privilege was unavailable where the plaintiff alleged employment discrimination under Title VII against the county sheriff's department and under violations of the Equal Protection Clause pursuant to 42 USC § 1983 against the colonel and deputy chief); *United States v Lake County Board of Commissioners*, 233 FRD 523, 526 (ND Ind 2005) (deciding in case brought under the Fair Housing Act against county board of commissioners and redevelopment commission that the privilege did not apply in civil rights cases in which the defendant's intent to discriminate was at issue, in other words, when the government's intent was at issue); *Scott v Board of Education of City of East Orange*, 219 FRD 333, 337 (DNJ 2004) (finding in plaintiff's Section 1983 action for employment termination that the privilege was not available to the defendant school board because the privilege was not available to bar disclosure of government agency deliberations that were at issue).

Here, Plaintiff Williamson's claim that he was improperly terminated by the Defendants in violation of the ADA falls within the second line of cases which provide that the deliberative process privilege does not apply where the

plaintiff's cause of action is directed at the defendant's intent. Nonetheless, the Court assumes again for purposes of this case that the deliberative process privilege *can* be asserted in this case given that the Plaintiff has not argued as a matter of law that the privilege *cannot* be asserted in this context.

C

Assuming therefore that the deliberative process privilege can be asserted in the context of this case, the privilege will apply only if the matters the Plaintiff seeks to discover are "predecisional" and "deliberative." *Enviro Tech International*, 371 F3d at 375. The matters are predecisional if they are "actually antecedent to the adoption of an agency policy," and they are deliberative if they are "actually related to the process by which policies are formulated." Id, citing *Jordan v United States Department of Justice*, 591 F2d 753, 774 (DC Cir 1978).

Here, the Defendants have established that the executive session transcripts include communications between the Commissioners that were predecisional because the Commissioners had not yet made a determination on the question of whether to terminate the Plaintiff when they met in executive session on March 22, 2013 and April 10, 2013. Furthermore, the communications contained within the transcripts were deliberative because the Commissioners discussed the question of whether to terminate the Plaintiff.

Because the Defendants have met their burden in showing that the privilege applies, the burden shifts to the Plaintiff to show a particularized need for the executive session transcripts. *Farley*, 11 F3d at 1389. The Defendants must turn over the transcripts only if the Plaintiff makes a showing that his need for the documents outweighs the Defendants' interest in not disclosing them. Id.

The Plaintiff argues that a claim that requires a showing of intent constitutes a particularized need outweighing the reasons for confidentiality. In his opposition to the Defendants' Motion for Protective Order, the Plaintiff cites

to two cases. In *Sronkoski v Schaumburg School District No 54*, the district court determined that the plaintiff established a particularized need for the materials where they might reflect the defendant's true motive and basis for terminating the Plaintiff allegedly in violation of the ADA. 2009 WL 1940779, *3 (ND Ill). In *Lewis v Phillips*, the district court noted that other district cases recognized an exception to the deliberative process privilege where intent was central to proving a claim. 2012 WL 5499448, *1 (CD Ill). The *Lewis* court determined that the defendants' intent was central to the plaintiffs' retaliation claim, and thus the deliberative process privilege did not protect the relevant documents from disclosure. Id.

The Plaintiff has made the requisite showing of particularized need for the executive session transcripts in this case. The executive session transcripts go directly to the issue of the Defendants' intent in terminating the Plaintiff. While the Defendants argue that the Plaintiff has a "panoply of other discovery available to him," none of that other evidence is necessarily an adequate substitute for "contemporaneous evidence in a discrimination case." *Sronkoski*, 2009 WL 1940779, *3 (specifically rejecting the notion that deposition testimony was an adequate substitute for contemporaneous evidence of discrimination). The particularized need shown in this case is the very need which serves as the rationale underpinning those cases (discussed above) which exclude the privilege from this context entirely. That fact only bolsters the Court's conclusion in its analysis at this step of the analysis. The deliberative process privilege does not bar discovery of the executive session transcripts.

III

Finally, the Defendants argue that the Plaintiff is precluded from obtaining the executive session transcripts because they are protected by the attorney-client privilege. The attorney-client privilege applies: 1) where legal advice of any

kind is sought; 2) from a professional legal adviser in his capacity as such; 3) the communications relating to that purpose; 4) made in confidence; 5) by the client; 6) are at his instance permanently protected; 7) from disclosure by himself or by the legal advisor; 8) except the privilege be waived. *United States v Lawless*, 709 F2d 485, 487 (7th Cir 1983). The party invoking the privilege must establish all of the essential elements. Id.

After an *in camera* review of the transcripts, the Court finds that of all the statements identified by the Defendants as attorney-client privileged, those appearing on pages 4-5, 7, and 11-12 of the March 22, 2013 transcript (where the Board attorney was actually present) meet all of the essential elements of the privilege. However, it is also clear that the April 10, 2013 transcript contains nothing that could be considered protected by the attorney-client privilege. The Board's attorney was not even present at that executive session. While the Defendants argue that the Board members did discuss some of the advice and instruction given to them by the Board attorney, a review of their discussion on April 10th reveals that it was innocuous. The Defendants do not sufficiently articulate how the Board members' statements on April 10, 2013 met all of the essential elements necessary for the attorney-client privilege to apply.

The Defendants must therefore redact: a) pages 4-5 of the March 22, 2013 transcript beginning at "JG And he got like . . . " through and including "JG You know, you've been . . . "; b) page 7 of the March 22nd transcript beginning at "FM So what . . . " through and including "FM Okay . . . "; and c) the entirety of pages 11 and 12 of the March 22nd transcript. The Defendants must then turn over the redacted March 13, 2013 transcript and the entirety of the April 10, 2012 transcript to the Plaintiff within seven days of the date of this Order.

IV

For the reasons set forth above, the Defendants' Motion for Protective Order Re: Executive Session Transcripts (Doc. 77) is GRANTED IN PART AND DENIED IN PART. The Motion is granted only insofar as the March 22, 2013 executive session transcript must be redacted as set forth above. The Motion is denied in all other respects. The Defendants must provide the Plaintiff with copies of the redacted March 22, 2013 transcript and the entirety of the April 10, 2013 transcript within seven (7) days of this Order.

It is so ordered.

Entered on July 15, 2015.

s/Jonathan E. Hawley
U.S. MAGISTRATE JUDGE