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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV **MOTION TO COMPEL RESPONSES FROM DEFENDANT DAVIS**

INTRODUCTION

Soon after the Court issued its Order Denying Motions to Dismiss (Docket 69), Plaintiffs served three sets of written discovery on Defendant Hon. Jeff Davis ("Judge Davis"): interrogatories, requests for production, and requests for admission. Defendant Davis objected to many of Plaintiffs' requests. Most of those objections have since been

resolved informally between counsel. However, several disputes remain unresolved, and Plaintiffs feel obligated to present four of them to the Court for resolution. In Plaintiffs' opinion, these four objections by Judge Davis go to the heart of Plaintiffs' case. If Judge Davis is allowed to avoid responding to this discovery, Plaintiffs will likely be deprived of significant evidence. Plaintiffs therefore have no realistic option but to seek the Court's intervention.

One principle should dispose of all four of Judge Davis's objections: *this lawsuit is about judicial and administrative procedures, not judges' decisions in individual cases*. As the Court repeatedly stated in rejecting Defendants' various motions to dismiss, Plaintiffs' lawsuit challenges policies, practices, and customs, not any specific child custody decisions on the merits. There is nothing about this litigation that requires Defendants to discuss (or for this Court to consider) the results reached in–or the deliberations undertaken regarding the merits of–any child custody case or group of cases. Only prospective relief is sought, directed at a policies, practices, and custom. *See Oglala Sioux Tribe v. Van Hunnik*, 2014 WL 317657, at *3 (D.S.D. January 28, 2014) ("Mot. to Dismiss Op.") ("[P]laintiffs in this case are not challenging any pending state court action. Neither are plaintiffs challenging any ruling by the state court. Rather, plaintiffs are only seeking prospective relief [regarding the application of policies, practices, and customs]."); *id*. at *3-4 ("Plaintiffs reiterate they are challenging the policies and practices employed by state officials in connection with judicial proceedings and are not challenging prior state court judgments or orders. . . . Plaintiffs' complaint seeks prospective relief. Nothing in the complaint seeks to interfere with any ongoing state judicial function or challenges any previous state court ruling."); *id.* at *6 ("In this

case, plaintiffs are not seeking review of the state court judgments in their cases or asking this court to review the merits of those cases. Rather, plaintiffs are requesting the court review the alleged inadequacies of the procedures employed during 48–hour hearings."). *See also Oglala Sioux Tribe v. Van Hunnik*, 2014 WL 940718 at *3 (D.S.D. Jan. 28, 2104) ("Disc. Op.") ("Plaintiffs' complaint alleges defendants employ policies, practices and customs in their 48–hour ICWA hearings that cause plaintiffs to suffer irreparable injury. (Docket 1).").

As the Court has noted, the procedures that Plaintiffs accuse Defendant Judge Davis of pursuing in violation of Plaintiffs' federal rights include the following:

> [P]laintiffs claim Judge Davis has instituted six of his own policies, practices and customs for 48–hour hearings which violate the Due Process Clause and ICWA. (Docket 43 at pp. 3–4). These include: not allowing Indian parents to see the ICWA petition filed against them; not allowing the parents to see the affidavit supporting the petition; not allowing the parents to crossexamine the person who signed the affidavit; not permitting the parents to present evidence; placing Indian children in foster care for a minimum of 60 days without receiving any testimony from qualified experts related to "active efforts" being made to prevent the break-up of the family; and failing to take expert testimony that continued custody of the child by the Indian parent or custodian is likely to result in serious emotional or physical damage to the child. *Id.* at pp. 2–4.

Mot. to Dismiss Op. at *9.

Plaintiffs' burden of proof is consistent with the relief they seek: in order to prevail, Plaintiffs must prove the existence of a policy, practice, or custom that violates Plaintiffs' federal statutory or constitutional rights. Disc. Op. at *6 ("In this case, in order to be successful, plaintiffs must prove the defendants engaged in policies, practices and customs which violate the plaintiffs' constitutional rights.").

The four discovery requests at issue here seek the very type of information upon which Plaintiffs' case will succeed or fail. Yet, Judge Davis believes that he can prevent Plaintiffs from discovering that information.

A. Interrogatory No. 11

Interrogatory No. 11 states in whole as follows: "With respect to *each* judge on the Seventh Judicial Circuit, describe in detail what conversation(s) you had with him or her regarding 48-hour hearings and the procedures that should or should not be included in them and approximately when you had each of those conversations." (emphasis in original). Judge Davis objected to this Interrogatory on the grounds that the Interrogatory seeks "privileged communications among judges and their staff in the performance of their official duties. *See Williams v. Mercer*, 783 F.2d 1488, 1518-19 (11th Cir. 1986); *Thomas v. Page*, 837 N.E.2d 483 (Ill. App. 2005)." *See* Defendant Davis' Answers and Responses to Plaintiffs' First Set of Interrogatories and Second Set of Requests for Production ("Davis' Responses") at No. 11 (attached hereto as Ex. 1).

In response to that objection and in an effort to resolve the impasse, Plaintiffs' counsel sent counsel for Judge Davis the following reply:

> Plaintiffs are seeking conversations that have nothing to do with the merits of any case or with deliberations related to any case. Rather, we seek information concerning *procedures and/or practices* that would apply to 48-hour hearings in general. Therefore, these conversations are not privileged, as you claim they are. For instance, [we seek to learn] what conversations occurred as to whether (a) oral testimony will be allowed at a 48-hour hearing, (2) whether a copy of the petition, ICWA affidavit, and/or police report will be provided to the parents at the 48-hour hearing; (3) whether Indian parents will be advised that their case could be transferred to tribal court; (4) whether parents will be advised that they can obtain a hearing within 10 days if requested and if they have counsel; (5) how soon should the advisory hearing be held after the 48-hour hearing; (6) how soon should the adjudicatory hearing be held after the advisory hearing; (7) how and when will it be

> determined whether to appoint counsel for the child(ren); and (8) whether Sec. 1922 is a statute of deferment, etc.

Ltr. from Stephen Pevar to Nathan Oviatt, June 1, 2014 (emphasis in original). Judge Davis, however, did not withdraw his objection. Plaintiffs therefore seek an order compelling a response from Judge Davis to Interrogatory No. 11.

The *only* information that Interrogatory No. 11 seeks to discover is whether Judge Davis discussed any 48-hour procedures with other judges on the Seventh Judicial Circuit. It is difficult to imagine an interrogatory more related to Plaintiffs' burden of proof than Interrogatory No. 11. *See* Disc. Op. at *6 ("In this case, in order to be successful, plaintiffs must prove the defendants engaged in policies, practices and customs which violate the plaintiffs' constitutional rights.").

The two cases cited by Judge Davis in support of his objection fully support Plaintiffs' position, not his position. Indeed, in *Williams v. Mercer*, the court rejected the same type of objection that Judge Davis makes here, after first admonishing that judges must normally respond to discovery on the same basis as everyone else. *See Williams*, 783 F.2d at 1521 ("Like any testimonial privilege, the judicial privilege must be harmonized with the principle that 'the public . . . has a right to every man's evidence.'" (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))). The reason that judges normally must respond to discovery regarding judicial policies and procedures is because such disclosure maintains "public confidence in the judiciary." *Id.* at 1523. Moreover (and more to the point here), the judicial privilege against disclosure applies to deliberations and communications regarding the decision-making process associated with a particular case, *not* to policies and procedures. *See Thomas*, 837 N.E.2d at 490 (explaining that the privilege protects communication between judges and "their

colleagues and staffs in resolving cases before them."). Indeed, so legitimate is the public's interest in judicial policies and procedures that any judge who seeks to keep such matters a secret bears the burden of justifying secrecy. *See Williams*, 783 F.2d at 1520 ("A party raising a claim of judicial privilege has the burden of demonstrating that the matters under inquiry fall within the confines of the privilege."); *see also United States v. Anderson*, 560 F.3d 275, 282 (5th Cir. 2009) ("'a judge enjoys no special privilege from being subpoenaed as a witness.'" (quoting *Gray v. Los Angeles*, 861 F.2d 1366, 1369 (5th Cir. 1988))).

Thus, the privilege against disclosure cited by Judge Davis is wholly inapplicable in this context. Interrogatory No. 11 does not seek information regarding the resolution of cases but, rather, the policies and procedures employed during the proceedings themselves.

Frankly, even if the judicial privilege of nondisclosure did apply in this instance (which it does not), that interest would be overcome by Plaintiffs' interests in vindicating their federal rights. *See Williams*, 783 F.2d at 1522 (holding that the public's interest in learning about communications between judges concerning the manner in which those judges addressed certain cases was "sufficiently great to overcome the [judicial] privilege."). This Court has already recognized in a related context that "individual and state privacy interests must yield to the federal interest in discovering whether public officials and public institutions are violating federal civil rights." Mot. to Dismiss Op. at *5. *See Grossman v. Schwarz*, 125 F.R.D. 376, 381 (S.D.N.Y. 1989) ("To justify withholding of evidence in a civil rights action, a claim of privilege must be so meritorious as to overcome the fundamental importance of a law meant to insure each

citizen from unconstitutional state action." (internal quotation marks omitted)); *see also Ginest v. Bd. of Commis. of Carbon County*, 306 F. Supp. 2d 1158, 1159 (D. Wyo. 2004).

In subsequent correspondence, counsel for Judge Davis has cited as authority for his client's refusal to answer Interrogatory No. 11 the case of *In re Enforcement of Subpoena*, 972 N.E.2d 1022, 1033 (Mass. 2012). However, reliance on that case is misguided. The court in *In re Enforcement* emphasized that the judicial privilege against disclosure applies only to a judge's communications regarding his or her decision-making process in a particular case. *See id*. at 1033 ("This absolute privilege covers a judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic materials. The privilege also protects confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases.").

Finally, we know that Judge Davis has had conversations with other judges on the Seventh Judicial Circuit about procedures in 48-hour hearings because Judge Davis recently admitted that fact. Attached hereto as Exhibit 2 is Judge Davis' Amended Answers and Responses to Plaintiffs' First Set of Interrogatories and Second Set of Requests for Production. In his amended response to Interrogatory No. 5, Judge Davis states that he obtained information regarding the procedures used by other judges in 48-hour hearings through "*conversations with various court staff.*" Judge Davis should not be permitted to invoke conversations that he has had with his colleagues about judicial procedures when it suits him but refuse to provide the same kind of information in response to Plaintiffs' legitimate discovery requests.

Interrogatory No. 11 does not ask Judge Davis to comment on the merits of any current or prior case. Nor does it seek the mental impressions of Judge Davis in any case he has decided or is currently pending before him. Rather, it asks only that he disclose conversations he has had with his fellow judges regarding the *procedures* to be generally applied in 48-hour hearings. Judge Davis should be ordered to respond to Interrogatory No. 11.

B. Request for Production No. 2

Plaintiffs' Request for Production ("RFP") No. 2 states in whole as follows: "Produce all documents of which you are aware issued by anyone other than you since you became the Presiding Judge of the Seventh Judicial Circuit that in any manner discusses, recommends, or prescribes procedures with respect to 48-hour hearings involving Indian children."

Judge Davis produced no documents in response to this RFP, but he logged a number of responsive documents in a Privilege Log. *See* Davis' Responses at Interrog. No. 11; Defendant Davis' First Supplemental Responses to Plaintiffs' Second Set of Requests for Production (attached hereto as Ex. 3).

RFP No. 2 goes hand-in-hand with Interrogatory No. 11. Whereas Interrogatory No. 11 seeks information about conversations concerning policies and procedures with respect to 48-hour hearings, RFP No. 2 seeks documents on the same subject. Therefore, Judge Davis's objections to producing responsive documents also lack merit.

C. Request for Production No. 3

RFP No. 3 states in whole as follows: "Please produce any documents you created, including letters, position papers and memoranda, regarding the interpretation of, the drafting of, or the amending of Section VII of the Guidelines."

The "Guidelines" referenced in RFP No. 3 are those cited by the Court in its Order Denying Motions to Dismiss:

> As pointed out by plaintiffs, an ICWA affidavit must be filed in each 48–hour hearing involving an Indian child unless an ICWA expert testifies at the hearing. (Docket 26 at pp. 6–7) (citing South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases, South Dakota Unified Judicial System ("Green Book"), at 46 ("An 'ICWA Affidavit' from a 'qualified expert' . . . must be filed in the 48 hour/advisory hearing unless a 'qualified ICWA expert' is available to personally testify."). The Green Book also requires each temporary custody order issued at the conclusion of a 48–hour hearing to indicate whether ICWA applied to that hearing. Green Book at 113–14; *see also* Docket 1–4.

These Guidelines are available at sdjudicial.com/courtinfo/childabuse.aspx. Section VII of the Guidelines sets forth recommendations regarding procedures to be followed in 48-hour hearings. It is Plaintiffs' understanding that Judge Davis played a role in drafting Section VII of the Guidelines and testified in the South Dakota Legislature regarding their adoption. Plaintiffs are therefore interested in obtaining documents responsive to this RFP.

Judge Davis has refused to produce any documents in response to this RFP on the grounds that "it seeks information directly related to Judge Davis's own deliberative process." Davis' Responses at RFP 3. Judge Davis has cited five cases that he claims support his invocation of this privilege: *United States v. Morgan*, 313 U.S. 409 (1941); *Fayerweather v. Ritch*, 195 U.S. 276 (1904); *United States v. Anderson*, 560 F.3d 275

(5th Cir. 2009); *Grant v. Shalala*, 989 F.2d 1332 (3d Cir. 1993); and *Williams v. Mercer*, 783 F.2d 1488, 1518-19 (11th Cir. 1986). *Id.*

Judge Davis' reliance on the deliberative process privilege lacks merit. Indeed, all five cases he cites illustrate why Judge Davis cannot rely on the deliberative process privilege to avoid responding to RFP No. 3. As those cases make clear, the deliberative process privilege applies *only* to discovery that seeks to probe a judge's mental impressions and deliberations in particular cases. It prevents a judge from having to explain "what he had in mind at the time of the decision." *Fayerweather*, 195 U.S. at 307. *See also Morgan*, 313 U.S. at 422 (holding that the deliberative process exception prohibits discovery regarding "the process by which [a judge] reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates [about that case]."); *Grant*, 989 F.2d at 1345 (barring discovery "to probe the mind" of a judge concerning the "decision making and thought processes" involved in deciding a particular case).

For instance, in *Anderson*, the court agreed that a judge did not have to disclose whether he knew a girl was a juvenile when he accepted her guilty plea, given that such an inquiry sought to probe his "mental process" related to a particular case. *Anderson*, 560 F.3d at 282. Plaintiffs' RFP No. 3 seeks no such case-specific information from Judge Davis. It does not probe what Judge Davis had in mind when he deliberated over, and signed orders in, any particular 48-hour hearings. Thus, the deliberative process exception is simply inapplicable.

Judge Davis also seeks to benefit from fact that the deliberative process exception allows decision makers (including judges) to withhold certain "pre-decisional"

documents. This exception is explained, as Judge Davis notes, in *Bone Shirt v. Hazeltine*. Order Denying Plaintiffs' Third Motion to Compel at 3, Civ. No. 01-302-KES (D.S.D. Dec. 30, 2003).

Here again, the very case cited by Judge Davis eviscerates his argument. In *Hazelton*, the court allowed state officials to withhold the production of maps that had been created in response to specific litigation and which illustrated options that the state had for redistricting political subdivisions to resolve the pending litigation. In other words, the maps reflected "the prudence of accepting plaintiffs' settlement proposal." *Id.* at 5. Nothing remotely akin to that situation exists here. Indeed, "[t]he deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

Further, "the deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need." *Id.* The test is a balancing test, "taking into account factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees." *Id.* at 737-38. *See also Bone Shirt*, at 3. For the reasons discussed *supra* with respect to Interrogatory No. 11, the evidence here is highly relevant. In this very serious case centering on the role of the government, Judge Davis should be required to produce these documents even if the deliberative process privilege were found to apply. RFP No. 3 seeks documents related to "the interpretation of, the

drafting of, or the amending of" a public document. Judge Davis has no legitimate ground for refusing to produce responsive documents.

D. Requests for Production No. 4

RFP No. 4 states in whole as follows: "Please produce any documents that anyone other than you created, including letters, position papers and memoranda, regarding the interpretation of, the drafting of, or the amending of Section VII of the Guidelines."

Judge Davis refuses to respond to this RFP on the same grounds on which he has refused to respond to RFP No. 3. His objections therefore lack merit for the reasons explained above—the information being sought by Plaintiffs is not "pre-decisional" in the manner required to qualify for a privilege against producing otherwise legitimate discovery.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request an order from the Court compelling Judge Davis to respond to Plaintiffs' Interrogatory No. 11, and Requests for Production Nos. 2, 3, and 4.

Respectfully submitted this 18th day of June, 2014.

By: /s/ Stephen L. Pevar
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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2014, I electronically filed the foregoing Motion with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants, and that I sent by electronic mail a copy of this Motion to counsel for the five judges, Robert Anderson, listed below:

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