

STATE OF NORTH CAROLINA

WAKE COUNTY

IN A MATTER  
BEFORE THE COMMISSIONER OF BANKS  
DOCKET NO. 05:008:CF

IN RE: )  
)  
ADVANCE AMERICA, CASH ADVANCE )  
CENTERS OF NORTH CAROLINA, INC. )  
)

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' JOINT MOTION TO  
QUASH AND FOR A PROTECTIVE ORDER**

Pursuant to Rule 26(c) of the North Carolina Rules of Civil Procedure, the Office of the Commissioner of Banks ("OCOB"), and the Attorney General (hereinafter referred to as "the Petitioners"), hereby submit the following memorandum of law in support of their Joint Motion to Quash and For a Protective Order, which was filed with the Commissioner on April 25, 2005, and is incorporated herein. Petitioners also incorporate herein their Memorandum of Law in Support of Petitioners' Motion for Protective Order and Order Limiting Discovery, filed with the Commissioner on April 22, 2005.

**INTRODUCTION**

On April 18, 2005, the Respondent served the Petitioners with Notices of Deposition for the following individuals: (1) Roy A. Cooper, III, Attorney General of the State of North Carolina; (2) Joshua N. Stein, Senior Deputy Attorney General; (3) L. McNeil Chestnut, Special Deputy Attorney General; (4) Philip A. Lehman, Assistant Attorney General; (5) M. Lynne Weaver, Assistant Attorney General, and (5) Reitzel Deaton, Director of the Consumer Finance

Division of the Office of the Commissioner of Banks. The Petitioners have moved to quash the depositions of all of the above individuals except for the deposition of Reitzel Deaton.

It should be noted that it is highly unusual and irregular for counsel in a case to attempt to depose opposing counsel. The Notice of Depositions is an extension of the Respondent's pattern of overbroad, irrelevant and burdensome discovery noted earlier by Petitioners in response to the Respondent's document production request. None of the undersigned have ever experienced any previous attempt by opposing counsel to depose them in a case brought by the State. In the collective memory of Messrs. Stein and Lehman and Ms. Weaver, no opposing counsel has ever sought to depose Attorney General's Office counsel in any consumer protection case brought by the State. The Respondent's tactics represent an abuse of the discovery process and should be curtailed by order of the Commissioner.

For the reasons set forth below, the taking of the depositions of the Attorney General and the Petitioners' counsel in this case is highly improper, unduly burdensome, and, in the words of one North Carolina federal district court, constitutes "an invitation to delay, disruption of the case, [and] harassment...." N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D. N.C. 1987).

I. **Depositions of High-Ranking Government Officials Are Rarely Allowed Because of the Undue Burden Imposed on High-Ranking Officials Who Are Entrusted With Significant and Substantial Governmental Responsibilities.**

Mr. Cooper, as the Attorney General of North Carolina, is a member of the Council of State, and is the head of the North Carolina Department of Justice, the chief law enforcement agency for the State of North Carolina. Courts have held that the depositions of high-ranking government officials are rarely permitted, and, when allowed, are only allowed when the requesting party demonstrates that the testimony is "essential" to the requesting party's case.

Respondent cannot begin to make such a showing here, and therefore, the Respondent's request to depose the Attorney General should be quashed in its entirety.

Numerous courts, including the United States Supreme Court, have held that the burden a deposition would place on a high ranking government official "must be given special scrutiny," and "[a]s a general proposition, high ranking government officials are not subject to depositions." Marisol A. v. Guiliani, 1998 U.S. Dist. LEXIS 3719, at \*7 (S.D. N.Y. March 23, 1998) (citing cases) (emphasis added).<sup>1</sup>

The Guiliani case illustrates this established principle well. In Guiliani, plaintiff citizens sued officials of the City of New York, including Mayor Rudolph Guiliani, alleging systemic deficiencies in the Child Welfare Administration ("CWA"). Shortly after the filing of the suit, Mayor Guiliani reorganized the CWA, making it a freestanding agency which reported directly to him. The plaintiffs subsequently served Mayor Guiliani with a notice of deposition, which city officials moved to quash.

In granting the city's motion to quash the deposition of Mayor Guiliani, the United States District Court for the Southern District of New York, citing numerous cases, observed that "[i]f the head of a government agency were subject to having his deposition taken concerning any litigation affecting his agency..., we would find that the heads of government departments... would be spending their time giving depositions and would have no opportunity to perform their functions." Id., 1998 U.S. Dist. LEXIS at \*10, quoting Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C. 1964). See also United States v. Morgan, 313 U.S. 409, 422 (1941) (Holding that the practice of calling high officials as witnesses should be discouraged, and that the U.S. Secretary of Agriculture should not have been asked to testify.); In Re United States of America,

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<sup>1</sup>A copy of this opinion is attached to this Memorandum at Exhibit 1.

985 F.2d 510 (11<sup>th</sup> Cir. 1993) (Quashing defendants' -- who had been indicted for introducing unapproved drugs -- notice of deposition of Secretary Kessler, head of the Food and Drug Administration, where defendants could not demonstrate exigent circumstances justifying their request); Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (Holding that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions."); United States v. Merhige, 487 F.2d 25, 29 (4<sup>th</sup> Cir.), cert. denied, 417 U.S. 918 (1974) (Holding, in prisoner litigation, that members of the Parole Board should be subject to deposition only under "exceptional circumstances.").

As observed by the federal court in Guiliani, depositions of high ranking officials will be countenanced *only* where the requesting party can demonstrate that the official's testimony will "likely lead to the discovery of admissible evidence and is *essential* to that party's case." Guiliani, 1998 U.S. Dist. LEXIS at \*8 (citing cases) (emphasis added). Thus, courts only permit the deposition of a high ranking government official if "he has unique personal knowledge that cannot be obtained elsewhere." Id.

It is manifest that, if the Attorney General were subject to deposition in every case in which the State of North Carolina was a litigant, the Attorney General would be utterly unable to perform any of his duties. As set forth in the Commissioner's Pre-Hearing Order of April 21, 2005, the "issue in contest" in this case is "whether AANC's current operations violate the Consumer Finance Act and the action to be taken by the Commissioner should a violation be found to issuance of an order to cease and desist." Pre-Hearing Order, ¶10. Clearly, the facts surrounding AANC's "current operations" in North Carolina are facts specifically within the

knowledge of the Respondent, and the Attorney General can provide no testimony on the central issue in this case.

To the extent that the Respondent seeks to raise an estoppel defense against the Petitioners' prosecution of this case, as previously set forth in detail in Petitioners' Memorandum of Law in Support of Petitioners' Motion for a Protective Order and Order Limiting Discovery, this defense is meritless. Accordingly, the Respondent should not be allowed to depose the Attorney General under the pretense of raising a vacuous estoppel defense. Finally, even if the Respondent were allowed to raise an estoppel defense – which the Petitioners strongly contest – the Respondent can make absolutely no showing that the Attorney General has unique personal knowledge pertaining to this case that the Respondent cannot obtain elsewhere, or in any other way, and that the Respondent has an “essential” need for such testimony. Accordingly, the Respondent's deposition of Attorney General Roy Cooper should be quashed in its entirety.

**II. Courts Have Rarely Allowed the Depositions of Opposing Counsel Because Such Depositions Are Abusive of the Litigation Process; and, Therefore, the Depositions of Opposing Counsel Messrs. Stein, Chestnut and Lehman, and Ms. Weaver, As Well as Mr. Cooper, Should Be Quashed in Their Entirety.**

Requests to depose opposing counsel have met with strong disapproval by the courts because such requests are viewed as abusive of the litigation process. As a result, absent extenuating circumstances, courts routinely grant protective orders to prohibit depositions of opposing counsel.

In a case where the defendant noticed the deposition of the plaintiff's attorney, the United States District Court for the Middle District of North Carolina upheld the plaintiff's motion for a protective order under Rule 26(c) of the Federal Rules of Civil Procedure. N.F.A. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83 (M.D. N.C. 1987). In doing so, the court ruled: “Because deposition of a party's attorney is usually both burdensome and disruptive, the mere request to

depose a party's attorney constitutes good cause for obtaining a Rule 26(d) protective order...."

Id., 117 F.R.D. at 85, (emphasis added). The North Carolina federal district court went on to hold:

[E]xperience teaches that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disruption of the case, harassment, and perhaps disqualification of the attorney. In addition to disrupting the adversarial system, such depositions have a tendency to lower the standards of the profession, unduly add to the costs and time spent in litigation, personally burden the attorney in question, and create a chilling effect between the attorney and client.

...

[D]eposition of the attorney merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine – that involving an attorney's mental impressions or opinions.

Id., 117 F.R.D. at 85 (emphasis added).

See also, State v. Simpson, 314 N.C. 359, 373, 334 S.E.2d 53, 62 (1985) (Observing that there is "a natural reluctance to allow attorneys to appear in a case as both advocate and witness," and ruling that the trial court properly refused to permit a defendant to call a prosecuting attorney as a witness.); Hickman v. Taylor, 329 U.S. 495, 513 (1947) (Calling opposing counsel to testify causes "the standards of the profession [to] suffer" and disrupts the adversarial nature of our judicial system), see id. at 516 (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary."); Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8<sup>th</sup> Cir. 1986) (citing cases) (Observing that "[t]he practice of forcing trial counsel to testify as a witness, however, has long been discouraged," and "the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent.").

Only in very limited circumstances, where the requesting party can demonstrate a “compelling reason” for the testimony, will such depositions be allowed. Simpson, 314 N.C. at 373. Generally, in seeking to depose a party’s attorney, the movant must demonstrate that “(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.” Shelton, 805 F.2d at 1327. In the instant case, the Respondent cannot begin to meet its burden.

Messrs. Stein, Chestnut, and Lehman and Ms. Weaver are all attorneys employed by the Attorney General’s Office, and each of them has entered an appearance in this case on behalf of the Petitioners. Although Attorney General Cooper is not actively involved in the litigation of this case, he is the chief attorney in the Department, is the ultimate decision-maker in policy and litigation matters, and appears in name on all submissions through the undersigned counsel, and therefore should be protected from deposition to the same extent as Messrs. Stein, Chestnut, Lehman and Ms. Weaver.

The Respondent has absolutely no need, much less a “compelling” need to depose Petitioners’ counsel on the central issue in this case, namely, whether the *Respondent* AANC’s current operations in North Carolina are in violation of the Consumer Finance Act. Petitioners’ counsel have no competent or relevant evidence to provide, and have no independent factual information on the principal issue in the case. Again, the facts surrounding the Respondent’s operations in North Carolina are well-known to the Respondent, and the Respondent has no need whatsoever to obtain testimony from opposing counsel on this issue.

Further, as set forth above, and in Petitioners’ Memorandum of Law in Support of Petitioners’ Motion for Protective Order and Order Limiting Discovery, to the extent the

Respondent seeks to obtain discovery to assert an estoppel defense, the Respondent's attempts should be rejected. It is well established under North Carolina law that Respondent cannot maintain an estoppel defense against a law enforcement agency seeking to enforce the State's police powers. Raleigh v. Fisher, 232 N.C. 629, 61 S.E.2d 897 (1950); Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953); Kings Mountain Bd. of Education v. North Carolina State Bd. of Education, 159 N.C. App. 568, 583 S.E.2d 629 (2003). Moreover, to the extent that such an estoppel defense exists – which it does not – the Respondent still cannot demonstrate a “compelling” need for opposing counsel's testimony. To the extent that the Respondent contends it detrimentally relied on any statements of the Petitioners – which the Petitioners strongly contest – in carrying on its operations in North Carolina, by definition, the Respondent has that information in its possession and has no need, much less a “compelling” or “crucial” need for Petitioners' counsel's testimony. As the Respondent has advanced no other theories or rationale supporting its requests for depositions of opposing counsel, the depositions should be quashed.

#### CONCLUSION

WHEREFORE, for the foregoing reasons, pursuant to Rule 26(c) the Petitioners respectfully request that their Joint Motion to Quash and for a Protective Order be granted.

Respectfully submitted, this the 25<sup>th</sup> day of April, 2005.



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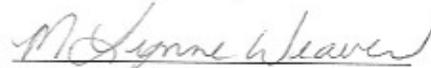
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**CERTIFICATE OF SERVICE**

THE UNDERSIGNED hereby certifies that he has this day served a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' JOINT MOTION TO QUASH AND FOR A PROTECTIVE ORDER via electronic mail and by placing a copy of the same in the United States Post Office at Raleigh, North Carolina, postage prepaid and addressed to:

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This the 25<sup>th</sup> day of April, 2005.

  
Philip A. Lehman  
Assistant Attorney General

LEXSEE 1998 U.S. DIST. LEXIS 3719

MARISOL A., by her next friend, Rev. Dr. James Alexander Forbes, Jr., et al.,  
Plaintiffs, -against- RUDOLPH W. GIULIANI, Mayor of the City of New York, et  
al., Defendants.

95 Civ. 10533 (RJW)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

1998 U.S. Dist. LEXIS 3719

March 23, 1998, Decided  
March 23, 1998, Filed

**DISPOSITION:** [\*1] City defendants' motion to quash notice of deposition and for protective order precluding deposition of Mayor Giuliani granted.

**LexisNexis(R) Headnotes**

**COUNSEL:** For MARISOL A., LAWRENCE B., THOMAS C., SHAUNA D., OZZIE E., DARREN F., DAVID F., BILL G., VICTORIA G., BRANDON H., STEPHEN I., plaintiffs: David M. Brodsky, Schulte Roth & Zabel, New York, NY.

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For MARISOL A., LAWRENCE B., THOMAS C., SHAUNA D., OZZIE E., DAVID F., BILL G., VICTORIA G., BRANDON H., STEPHEN I., plaintiffs: Marcia Robinson Lowry, Rose E. Firestein, Children's Rights, Inc., New York, NY.

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For RUDOLPH W. GIULIANI, MARVA LIVINGSTON HAMMONS, NICHOLAS SCOPPETTA, defendants:

Grace Goodman, Paul A. Crotty, Corporation Counsel of the City of NY, New York, NY.

For [\*2] GEORGE E. PATAKI, BRIAN J. WING, defendants: Michael S. Popkin, Dennis C. Vacco, Attorney General of the State of NY, New York, NY.

**JUDGES:** Robert J. Ward, U.S.D.J.

**OPINIONBY:** Robert J. Ward

**OPINION:****MEMORANDUM DECISION AND ORDER**

Defendants Rudolph W. Giuliani ("Mayor Giuliani" or "Mayor"), Marva Hammons, and Nicholas Scoppetta ("Commissioner Scoppetta" or "Scoppetta") (collectively referred to as "City defendants") move this Court for an order quashing the notice of deposition of Mayor Giuliani and for a protective order precluding the deposition of the Mayor pursuant to *Fed. R. Civ. P. 26(c)*. For the following reasons, City defendants' motion is granted.

**BACKGROUND**

In December 1995, plaintiffs filed this action, alleging that systemic deficiencies in the Child Welfare Administration ("CWA") were endangering the well-being of thousands of children in the City of New York. Mayor Giuliani, on December 18, 1995, announced that CWA would be reorganized, and on January 10, 1996, "he created -- for the first time in the city's history -- a freestanding agency, reporting directly to him, that would be charged with, in his words, 'first, last, and always' protecting the children of this [\*3] city." Honorable Rudolph W. Giuliani and Nicholas Scoppetta, Protecting

the Children of New York: A Plan of Action for the Administration for Children's Services 6 (Dec. 19, 1996) (hereinafter "Protecting the Children of New York"). CWA was thereafter transformed into the New York City Administration for Children's Services ("ACS"), and Nicholas Scoppetta ("Commissioner Scoppetta" or "Scoppetta") became commissioner of this new agency on February 10, 1996. Although familiarity with the Court's earlier decisions in this action is assumed, the Court will summarize the facts relevant to the motion to quash the notice of deposition of Mayor Giuliani.

Discovery for this case has been ongoing. On January 16, 1998, City defendants represented that over 25,000 pages of documents have been produced. See King Decl. Supp. of City Defs.' Mot. to Quash and for a Protective Order Precluding the Deposition of Mayor Rudolph W. Giuliani P 11 ("King Decl."). Plaintiffs have also been provided access to an extensive list of knowledgeable persons for the purposes of depositions. Included among these are Commissioner Scoppetta, John Linder ("Linder") who was the consultant on ACS's reform plan, [\*4] and many Assistant and Deputy Commissioners of ACS. In addition, on December 19, 1997, this Court denied City defendants' motion to quash the deposition of Howard Wilson ("Wilson"), the City's former Commissioner of Investigation.

After the death of Eliza Izquierdo, in November 1995, Mayor Giuliani asked Wilson to chair an inter-agency task force designed to review the operations of CWA and to recommend to the Mayor potential improvements to CWA. Giuliani Decl. Supp. of City Defs.' Motion to Quash and for a Protective Order Precluding the Deposition of Mayor Rudolph W. Giuliani P 3 ("Giuliani Decl."). In an oral ruling the Court denied defendants' motion to quash the deposition of Wilson, holding that Wilson's deposition "may include questions concerning the facts ascertained during his investigation of the former Child Welfare Administration, which led to public statements by Mayor Giuliani." Hearing Transcript of 12/19/97 at 40, line 7-10. Since Mayor Giuliani had made public comments regarding advice received from Wilson, which were reported in the press, this Court ordered that Wilson's deposition could include the factual underpinnings of these publicized recommendations and [\*5] conclusions. *Id.* at 40.

Pursuant to *Rule 30 of the Federal Rules of Civil Procedure*, plaintiffs served Mayor Giuliani with a notice to appear for a deposition on December 23, 1997. In submissions to the Court and correspondence between the parties, plaintiffs claim that there are a variety of issues on which only Mayor Giuliani is qualified to present testimony. Among these are Mayor Giuliani's: (1) reasons for requesting Wilson to investigate CWA and the findings which Wilson presented to Mayor Giuliani;

(2) reasons for ordering the creation of ACS; (3) retention of Linder to draft a reform plan for CWA; (4) involvement in the setting of policy for ACS; and (5) reasons for appointing Scoppetta as the first commissioner of ACS. Plaintiffs also wish to question Mayor Giuliani regarding an alleged discrepancy between Commissioner Scoppetta's testimony concerning the deficiencies existing in ACS when he became commissioner of the agency and Mayor Giuliani's public statements regarding the shortcomings of the agency. See Pls.' Mem. Opp. Mot. to Quash the Notice of Deposition of Mayor Rudolph W. Giuliani ("Pls.' Mem."); Letter from Marcia Robinson Lowry to the Court of 1/19/98 [\*6] at 5-10 ("Pls.' Letter to Court"); King Decl. Ex. B: Letter from Marcia Robinson Lowry to Gail Rubin of 12/18/97 at 3-4 ("Pls.' Letter to Rubin").

The City defendants now ask the Court to quash the notice of deposition of Mayor Giuliani.

## DISCUSSION

### I. Deposition of High Level Government Official

#### A. Legal Standard

*Rule 30 of the Federal Rules of Civil Procedure* provides for broad access to persons during the discovery process. *Fed. R. Civ. P. 30(a)*. Parties, however, may be limited in their pursuit of depositions under *Rule 26(c)*, which provides that courts can issue a protective order to prevent "undue burden" in the discovery process. *Fed. R. Civ. P. 26(c)*. While granting a protective order and quashing a deposition is the exception rather than the rule, the burden a deposition would place on a high ranking government official must be given special scrutiny.

While case law in the Second Circuit is scant on the issue of deposing high ranking government officials, the Court finds the two prong test applied by both plaintiffs and city defendants to be the standard when evaluating deposition notices of high ranking officials. Depositions of high level government [\*7] officials are permitted upon a showing that: (1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his governmental duties. See *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 314 (S.D.N.Y. 1991); see also *Sanstrom v. Rosa*, 1996 U.S. Dist. LEXIS 11923, \*11-13 (S.D.N.Y. Aug. 16, 1996) (permitting the deposition of Governor Cuomo, after his governorship ended, because he possessed particular information necessary to the case that could not reasonably be obtained by other discovery devices). As a general proposition, high ranking government officials are not subject to depositions. See *National Nutritional Foods Ass'n v. F.D.A.*, 491 F.2d 1141, 1144-46 (2d Cir.), cert.

denied, 419 U.S. 874, 42 L. Ed. 2d 113, 95 S. Ct. 135 (1974); *Simplex Time Recorder Co. v. Secretary of Labor*, 247 U.S. App. D.C. 85, 766 F.2d 575, 586-87 (D.C. Cir. 1985); *Church of Scientology v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990).

The first prong of this standard, which requires that the deposition be necessary to obtain relevant [\*8] information not available from other sources, is strictly imposed. Courts, before permitting the involuntary deposition of a high ranking government official, require that the party seeking the deposition demonstrate that the official's testimony will "likely lead to the discovery of admissible evidence and is essential to that party's case." *Warzon v. Drew*, 155 F.R.D. 183, 185 (E.D. Wis. 1994) (citing *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir.), cert. denied, 459 U.S. 878 (1982)). If the information is available through alternative sources, courts discourage the deposing of high officials. *Id.*

Further, when applying the first prong, courts only permit the deposition of a high ranking government official if he has unique personal knowledge that cannot be obtained elsewhere. For example, in *L.D. Leasing Corp., Inc. v. Crimaldi*, the court granted a protective order prohibiting the deposition of then Mayor David Dinkins ("Mayor Dinkins"). 1992 U.S. Dist. LEXIS 18683, \*3-4 (E.D.N.Y. Dec. 1, 1992). In quashing the notice of deposition of Mayor Dinkins, the court found that: (1) Mayor Dinkins had no first-hand knowledge of the information being sought; (2) several [\*9] key individuals had already been deposed; and (3) the examination with regard to a Local Law is the type of mental probing of officials that is prohibited. *Id.* The court held that, "in general, a party may only obtain the deposition of a high-level government official by showing that official has particularized first-hand knowledge that cannot be obtained from any other source." *Id.* at \*2-3 (citations omitted).

In a similar case, a court suppressed the deposition of the Mayor of Philadelphia. *Hankins v. City of Philadelphia*, 1996 U.S. Dist. LEXIS 13314 (E.D. Pa. 1996). The court placed the burden on those seeking the deposition to "demonstrate that [the official's] testimony is likely to lead to the discovery of admissible evidence, is essential to that party's case and that this evidence is not available through any alternative source or less burdensome means." *Id.* at \*3-4 (citations omitted). While the Mayor of Philadelphia was one of three members of the City's Administrative Board, which approved changes to job requirements, the court found that the he had no unique personal knowledge of the particular reasons for the proposed changes. *Id.* ("High ranking [\*10] government officials are generally entitled to limited immunity from being deposed concerning matters about which they have no unique personal knowledge.") (citations omitted).

High ranking government officials are granted this limited immunity from being deposed when they have no personal knowledge to ensure that they have the time to dedicate to the performance of their governmental functions. See *Warzon*, 155 F.R.D. at 185; *In re U.S.*, 985 F.2d 510, 512 (11th Cir.), cert. denied, 510 U.S. 989 (1993); *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231-32 (9th Cir. 1979). "If the head of a government agency were subject to having his deposition taken concerning any litigation affecting his agency . . . , we would find that the heads of government departments and members of the President's Cabinet would be spending their time giving depositions and would have no opportunity to perform their functions." *Capitol Vending Co. v. Baker*, 36 F.R.D. 45, 46 (D.D.C. 1964); see also *Church of Scientology*, 138 F.R.D. at 12. In weighing the concerns of those seeking depositions of government officials, courts must place "reasonable limits" so as to conserve the time and energies [\*11] of public officials and prevent the disruption of the primary functions of the government. *Community Fed. Sav. and Loan Ass'n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983). *Wirtz v. Local 30, Int'l Union of Operating Eng'rs*, 34 F.R.D. 13, 14 (S.D.N.Y. 1963) ("Common sense suggests that a member of the Cabinet and the administrative head of a large executive department should not be called upon personally to give testimony by deposition, either in New York or elsewhere, unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it.").

#### B. The Standard as Applied to Plaintiffs' Request to Depose Mayor Giuliani

After reviewing plaintiffs' reasons for requesting the deposition of Mayor Giuliani, the Court finds that the legal standard applicable to high ranking government officials is not met. The information plaintiffs seek from the deposition of the Mayor can be obtained through other sources, and therefore the deposition would place an undue burden on an official who already has large demands on his time. n1

n1 Any information which plaintiffs could garner only from the Mayor involves executive privilege. These issues are addressed in Section II of this Discussion entitled "Executive Privilege."

[\*12]

The Court will briefly outline the issues plaintiffs would like to question the Mayor about and explain why they do not warrant his deposition. First, plaintiffs indicate that they wish to depose Mayor Giuliani about his reasons for asking Wilson to investigate CWA and the findings which Wilson presented to the Mayor. See

Pls.' Letter to Rubin at 3. Since this Court allowed Wilson's deposition to go forward, it appears obvious that such information can be gathered from him. Deposing the Mayor on this basis would be unduly burdensome as any relevant information regarding Wilson's investigation can be obtained from an alternative source, Wilson himself.

Second, plaintiffs indicate their desire to depose Mayor Giuliani regarding his retention of Linder to draft a reform plan for CWA. See Pls.' Letter to Rubin at 3. Plaintiffs have already been given the opportunity to depose Linder, and it is clear to the Court that any information regarding recommendations made to the Mayor by Linder could be obtained from Linder. It would be a burden to a high ranking official to require his deposition on subject matter that can be obtained from another source.

Third, plaintiffs attempt to [\*13] demonstrate a discrepancy between Commissioner Scoppetta's deposition testimony and Mayor Giuliani's public statements regarding the condition of the agency. Pls.' Mem. at 8-10; Pls.' Letter to Court at 5-6. This Court has reviewed the first two hundred pages of Commissioner Scoppetta's deposition transcript and the newspaper and television reports featuring the Mayor's comments on child welfare. See King Reply Decl. Supp. of City Defs.' Mot. to Quash and for a Protective Order Precluding the Deposition of Mayor Rudolph W. Giuliani Ex. A ("King Reply Decl."); Peters Decl. Supp. of Pls.' Mem. Opp. Mot. to Quash the Notice of Deposition of Mayor Rudolph W. Giuliani Ex. F ("Peters Decl."). The Court is in agreement with City defendants that Commissioner Scoppetta's statements do not contradict those of the Mayor, nor do they exhibit an incongruity between the positions of the Mayor and Scoppetta with regard to child welfare in New York City. When questioned regarding specific areas of CWA or ACS, Scoppetta did not always indicate that the area was below legal standards or requirements or that the functions within the agency area were inadequate. He did acknowledge, however, the "ills [\*14] of the agency" and that "Child Welfare needed a lot of attention." King Reply Decl. Ex. A: Scoppetta's Dep. at 13. Further, Scoppetta stated in the affirmative that there were unaddressed problems within ACS as of February 1996. King Reply Decl. Ex. A: Scoppetta's Dep. at 33. Scoppetta acknowledged that he was concerned with improving most areas within ACS's domain and that a global problem did exist.

As plaintiffs point out, Mayor Giuliani acknowledged "widespread problems" within the agency. See Pls.' Mem. at 9. But, plaintiffs also state that the "topics about which [they] seek to depose Mayor Giuliani do not involve the specific day-to-day-operation of ACS, but rather more global issues." Pls.' Mem. at 13. The Court does not find any inconsistencies between the

Mayor's global statements, about the agency as a whole, in the press and those made by Scoppetta in his deposition. Both the Mayor's public statements and Scoppetta's deposition testimony highlight that general problems existed in the area of child welfare. There is no divergence since the Mayor did not comment on the specific areas within the agency. While Scoppetta was unable to comment as to the effectiveness of [\*15] every specific area within the purview of ACS, this provides no reason for deposing Giuliani. Further, the Mayor clearly states in his affidavit that he does not have first-hand knowledge of the factual affairs of ACS, so it is highly unlikely that the Mayor would be in a better position than Scoppetta to comment on the specific areas of ACS that plaintiffs refer to when attempting to show a schism between the Mayor and Scoppetta. n2 See Giuliani Decl. P 6-8. Plaintiffs have put forth no evidence showing contradictions, nor do they offer any evidence indicating the Mayor's testimony will add crucial information to that already received. As the plaintiffs have already been given access to government officials better able to provide the information plaintiffs seek, including Scoppetta and the Assistant and Deputy Commissioners, the Court finds no reason to allow the deposition of Mayor Giuliani to go forward.

n2 If the Court is to believe plaintiffs when they state that they do not wish to seek specific data from the Mayor, then the information on which plaintiffs rely to prove a disagreement between the Mayor and Scoppetta is wholly unfounded. Plaintiffs attempt to assert that Scoppetta's lack of knowledge on specific areas of ACS demonstrates a discrepancy in views. See Pls.' Mem. at 8-9. There is no discrepancy, on the contrary, Scoppetta has acknowledged the overall problems facing the agency but did not recall specifics with regard to such things as family preservation services and preventive services.

[\*16]

Fourth, plaintiffs claim that they need to depose the Mayor in order to learn his reasons for ordering the creation of ACS. Plaintiffs argue that the factors involved in initiating a reform plan are necessary for plaintiffs to determine the durability of the reform. See Pls.' Mem. at 7. As the Mayor has indicated, any facts on which he based the need for reform were facts garnered from others, specifically from Wilson or Scoppetta. See Giuliani Decl. P 6-7. In addition, as is discussed below, any new information that Mayor Giuliani could possibly supply to plaintiffs is subject to the executive privilege. n3

n3 Plaintiff's additional reasons for seeking

the deposition of Mayor Giuliani will be discussed in Section II of this Decision.

Plaintiffs have failed to establish that the deposition of Mayor Giuliani is necessary to obtain information that is not available from any other source. Further, deposing the Mayor on the bases that plaintiffs assert would unduly burden an official whose duty is not just [\*17] to set the policy of ACS, as plaintiffs point out, but to be the policy maker for the city as a whole. It would be improper to depose the Mayor regarding every topic that he at some point in time addressed in a public statement, and as he has no personal or unique knowledge regarding child welfare, this case should be no exception. Allowing for depositions where no personal knowledge existed would open up a floodgate of depositions, consuming much of the Mayor's time -- a clear interference with his ability to perform his governmental functions.

## II. Executive Privilege

### A. Legal Standard

City defendants claim that much of the information plaintiffs seek is subject to the executive privilege. The deliberative process privilege, or executive privilege, "protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins v. H.U.D.*, 929 F.2d 81, 84 (2d Cir. 1991); see also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975); *Local 3, Int'l Brotherhood of Electrical Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); *New York City Managerial Employee Ass'n v. Dinkins*, 807 F. Supp. 955, 956 (S.D.N.Y. 1992); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 128 U.S. App. D.C. 10, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952, 19 L. Ed. 2d 361, 88 S. Ct. 334 (1967). This privilege is premised on the notion that effective decisionmaking requires a free flow of information amongst government officials and that this free flow would be constrained if these communications had the potential to be revealed to outsiders. *New York City Managerial Employee Ass'n*, 807 F. Supp. at 956-57 (citing *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 580-81 (E.D.N.Y. 1979); *Archer v. Cirrincione*, 722 F. Supp. 1118, 1122 (S.D.N.Y. 1989)); see also *Carl Zeiss Stiftung*, 40 F.R.D. at 324-25.

The deliberative process privilege exists when communications are both (1) predecisional and (2) deliberative. *Hopkins*, 929 F.2d at 84; *New York City Managerial Employee Ass'n*, 807 F. Supp. at 957. Predecisional communications are those communications generated in order to assist the agency decisionmaker in making a decision. See *Hopkins*, 929 F.2d at 84; *New York City Managerial Employee Ass'n*, 807 F. Supp. at 957. Deliberative communications are those

relating to the process by which policies are formulated. See *Hopkins*, 929 F.2d at 84; *New York City Managerial Employee Ass'n*, 807 F. Supp. at 957. Such communications are used to aid a decisionmaker in arriving at a policy decision.

In addition to communications with others, the executive privilege extends to the mental processes by which an executive reaches a decision. The Supreme Court has clearly stated that the mental processes of executives should not be probed. See *United States v. Morgan*, 313 U.S. 409, 422, 85 L. Ed. 1429, 61 S. Ct. 999 (1941) (holding that "the integrity of the administrative process must be [] respected," and therefore discouraged the practice of calling high level officials as witnesses); *Morgan v. United States*, 304 U.S. 1, 18, 82 L. Ed. 1129, 58 S. Ct. 773, 58 S. Ct. 999 (1938) (recognizing that it is "not the function of the court to probe the mental processes of the Secretary [of Agriculture] in reaching his conclusions"); see also *Carl Zeiss Stiftung*, 40 F.R.D. at 325-26. "Top executive [] officials should not, absent extraordinary [\*20] circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co.*, 766 F.2d at 586.

Exceptions to the deliberative process privilege do exist. "Where the decision-making process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information." *Burka v. New York City Transit Authority*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986). The mental processes, which are normally privileged under the deliberative process privilege, may also be discoverable where there are allegations of misconduct or misbehavior. *United States v. American Telephone and Telegraph Co.*, 524 F. Supp. 1381, 1389 (D.D.C. 1981) (permitting staff members to be questioned regarding information normally considered deliberative privilege where the allegation involves inappropriate influence on the Commission in excess of the rules or customary practices of the Federal Communications Commission). In some instances, even when the court recognizes that an exception to the deliberative process privilege must be given as the allegation is personal to the defendant, the court still does not allow for [\*21] the probing of the mental processes of the deponent. See *Union Sav. Bank v. Saxon*, 209 F. Supp. 319, 319-20 (D.D.C. 1962) (permitting the deposition of the Comptroller of the Currency as he is accused of issuing a branch certificate to a bank on the basis of ex parte representations and a personal relationship between the Comptroller and the president of the bank).

This Court recognizes that a deposition cannot be barred simply because a deponent may be asked about privileged information. See *Sanstrom*, 1996 U.S. Dist. LEXIS 11923, \*14 ("the mere fact that a witness may be asked questions that seek to elicit privileged matter does

not provide a colorable basis for precluding the entire deposition"). But, when no other information is sought from a deposition, this privilege can bar the deposition.

#### B. The Executive Privilege of Mayor Giuliani

The Court now turns to the few assertions plaintiffs put forth as reasons for deposing the Mayor which this Court finds barred by the executive privilege.

Plaintiffs seek to depose the Mayor regarding both his reasons for creating ACS and for appointing Scoppetta as its first commissioner. Pls.' Mem. at 4; Pls.' Letter to Court [\*22] at 5-7. These decisions involve both factual underpinnings and the mental processes of the Mayor. This Court will take plaintiffs at their word that they "do not seek to probe the underlying mental processes that culminated in the Mayor's decisions regarding child welfare." See Pls.' Mem. at 12. That being the case, the Court finds no non-privileged information regarding the Mayor's decisions that cannot be obtained from alternative sources. As the Mayor has stated, any reasons for creating ACS are based on facts obtained from other individuals, primarily Wilson. Giuliani Decl. P 6-8. Therefore, the only additional information that plaintiffs could potentially garner from the Mayor involves the thought processes of the Mayor. Any examination by plaintiffs as to the Mayor's mental processes would be barred by the executive privilege.

This Court recognizes that the deliberative process privilege cannot be raised as a bar to all decisionmaking processes, especially when such processes are the subject of litigation. Plaintiffs in the instant case, however, are not challenging the process by which decisions were made. Therefore, the Court finds no reason to overrule the deliberative [\*23] privilege.

Further, the Mayor has not waived his executive privilege by issuing press releases or documents, including "Protecting the Children of New York: A Plan of Action for the Administration for Children's Services." Plaintiffs argue that "to the extent that executive privilege might have ever applied to these subjects, such privilege has been waived as a result of voluntary action

on the part of defendants in making this information public." Pls.' Mem. at 12. None of the authority on which plaintiffs base their claim persuades this Court that the Mayor waived his executive privilege. The court in *In re Sealed Case*, found that the "release of a document only waives [the deliberative process privilege] for the document or information specifically released, and not for related materials." 326 U.S. App. D.C. 276, 121 F.3d 729, 741 (D.C. Cir. 1997). Accordingly, the Mayor's statements only waived the privilege with respect to the information provided in them, and clearly any additional underlying information which is not privileged can be obtained from other sources. n4

n4 "Protecting the Children of New York: A Plan of Action for the Administration for Children's Services," was a policy statement and plan of action issued jointly by Mayor Giuliani and Commissioner Scoppetta. Therefore, any information which plaintiffs seek regarding this document can be obtained from Scoppetta. Plaintiffs will still have access to the material, but are not permitted to unduly burden an additional high ranking government official.

[\*24]

#### CONCLUSION

For the foregoing reasons, City defendants' motion to quash the notice of deposition and for a protective order precluding the deposition of Mayor Giuliani is granted.

It is so ordered.

Dated: New York, New York

March 23, 1998

Robert J. Ward

U.S.D.J.