

ILLINOIS POLLUTION CONTROL BOARD
June 18, 2020

RELIABLE STORES, INC.,)	
)	
Complainant,)	
)	
v.)	PCB 19-02
)	(UST Appeal)
OFFICE OF THE STATE FIRE)	
MARSHAL,)	
)	
Respondent.)	
)	
)	

ORDER OF THE BOARD (by B.F. Currie):

On July 3, 2018, Reliable Stores, Inc. (Reliable) filed a petition requesting a hearing to review a June 12, 2018, determination of the Office of the State Fire Marshal (OSFM). The OSFM's determination concerns Reliable's leaking underground storage tank (UST) site located at 905 W. Roosevelt in Maywood, Cook County. On March 16, 2020, the OSFM filed a motion to supplement the record (Mot.). Reliable filed a response opposing the motion on March 30, 2020 (Response). For the reasons below, the Board grants the OSFM's motion to supplement the record.

In this order, the Board first provides a brief procedural history relevant to the motion to supplement the record and rules on the OSFM's request to reply. Next, the Board summarizes the filings regarding the motion to supplement, after which the Board analyzes and provides the reasons for granting the motion.

PROCEDURAL HISTORY

Under the Environmental Protection Act (Act) (415 ILCS 5/et seq (2018)), the OSFM decides whether persons are eligible to have their cleanup costs reimbursed from the UST Fund, which consists of UST fees and motor fuel taxes. If the person is eligible for reimbursement, the OSFM also decides what deductible applies. The UST owner or operator may appeal these OSFM decisions to the Board. *See* 415 ILCS 5/57.9(c)(2) (2018); 35 Ill. Adm. Code 105.Subpart E. In this case, the OSFM denied Reliable Stores' application for eligibility and deductibility, finding that the application indicates a release from above-ground equipment, and not a UST. Reliable' amended petition, filed on August 27, 2018, and accepted by the Board on September 6, 2018, argues that the leaking equipment is a component of the UST system and is therefore eligible for reimbursement. Amended Petition at 3.

As required under the Board's procedural rules and the Board order of September 6, 2018, the OSFM timely filed the record of its determination on September 21, 2018. 35 Ill. Adm. Code 105.508(b)(4). Included in the electronically filed administrative record, the OSFM filed a Privilege Log of Documents Withheld from Record (Privilege Log). With its present motion, the OSFM seeks to have entered into the record a portion of an email that had been logged previously as withheld for attorney-client privilege. Mot. at 2.

On April 3, 2020, the OSFM filed, *instanter*, a motion for leave to file a reply (Reply). In its reply, the OSFM argues that it would be "materially prejudiced if unable to respond to Petitioner's allegations." Reply at 3. The Board's procedural rules provide that the moving party "will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The Board grants the OSFM's motion for leave and accepts its reply.

Motion to Supplement

The OSFM seeks to supplement the record with a portion of an email from Deanne Lock, Division of Petroleum and Safety, OSFM, to Tom Andryk, attorney, OSFM. Mot. at 2. The document at issue is an email dated May 11, 2018, and purports to memorialize a telephone conversation between Ms. Lock and Brian Morin, Eagle Environmental, Reliable's consultant. OSFM states that this email is the only documentation of the May 11, 2018, telephone conversation and it is found within a document that otherwise contains attorney-client privilege. Reply at 5. OSFM argues that the four sentences it seeks to un-redact are not subject to attorney-client privilege, but "is intended only for the purposes of providing an complete factual record on appeal, pursuant to 35 Ill. Adm. Code 105.508(b)(4), and is in no way to be construed as a waiver of the attorney-client privilege as it applies to the remainder of the May 11, 2018 e-mail, or any other documents currently withheld as attorney-client privilege." Motion at 2. The portion of the previously redacted email has been included in an attachment to the OSFM's motion as Exhibit A (Mot. Exh. A) and is as follows:

After review of the file, I made a phone call to Inspector Carben to discuss what he found at the facility. He stated there was a leak which found inside dispensers which were located above the shear valve. I then made a call to Brian Morin of Eagle Environmental to discuss the information he provided on the E & D Application regarding the type of release as well as Inspector's Carben's remarks as to where the leak was located. Brian Morin stated to me that the leak was above the shear valve.

Mot. Exh. A.

The OSFM argues that "[d]uring discussions between Respondent and its counsel on potential stipulated facts, it was discovered that a telephone conversation between the OSFM and Petitioner's consultant had been relied upon by the OSFM in making its determination. It was also discovered that the telephone conversation was memorialized only in internal legal correspondence at the OSFM." Reply at 5.

In support of its request to add the additional document to the record, the OSFM cites TNT Holland Motor Express, Inc. v. OSFM, PCB 94-133, (June 23, 1994). In that matter, the OSFM sought to supplement the record and the petitioner did not oppose the motion. The OSFM further argues that subject-matter waiver doctrine does not apply in this case as it is not attempting to selectively waive any portion of its privilege. Reply at 6. Rather, it argues that it, “seeks only to file a factual memorialization of information relied upon by the OSFM in making its decision, as required by 35 Ill. Adm. Code 105.508(b)(4).” *Id.*

Opposition to Motion to Supplement

Reliable argues that the OSFM should not be allowed to supplement at this time for several reasons. To begin, it argues that the information contained within the May 11, 2018, email is not newly discovered as it had been made part of the administrative record on September 21, 2018. Response at 4. Reliable also argues that by allowing this evidence to be included in the record, the OSFM is attempting to “selectively waive the privilege on its own terms without any time limit.” *Id.* at 9. Reliable cites Center Partners, Ltd. v. Growth Head GP, LLC, which states that “a litigant should not be able to disclose portions of privileged communications with his attorney to gain a tactical advantage in litigation (the sword), and then claim privilege when the opposing party attempts to discover the undisclosed portion of the communication or communications relating to the same subject matter.” 981 N.E. 2d 345, 357 (Nov. 29, 2012)

Further, Reliable makes an argument for lack of fundamental fairness should this document allowed to be entered into the record. Resp. at 3, 4. Citing the Board’s procedural rules for the definition of “non-disclosable information,” Reliable states that OSFM is improperly attempting to maintain privilege over the redacted portions of the document. Resp. at 4. “The filing erroneously claims the right to maintain the privilege over the remainder of the document and the related exchange by strategic selection, improperly shielding from view the context and totality of the communications.” *Id.* However, Reliable does not request that the Board make the entire document in Exhibit A discoverable. Rather, it argues the document should not be entered into the record in any form. Resp. at 4.

DISCUSSION

In OSFM’s motion to supplement its record of decision, OSFM asks to add four consecutive sentences that appear in a two-page email. The email, dated May 11, 2018, is from Deanne Lock to Thomas Andryk, copying Shelly Bradley, Fred Schneller, and Scott Johnson. Mot., Exh. A at 1. When OSFM filed the record on September 21, 2018, it withheld the entire email, claiming “Attorney-Client Privilege.” Privilege Log at 1. In the privilege log accompanying the record, OSFM identified Ms. Lock as being with the Division of Petroleum and Chemical Safety (DPCS), Mr. Andryk as being with “Legal,” and Ms. Bradley, Mr. Schneller, and Mr. Johnson as being with DPCS.¹ *Id.* The four sentences now sought to be

¹ DPCS is within OSFM. The record on appeal (cited as “R[page number]”) contains the OSFM decision being contested, signed by Ms. Lock. R1-R2. As OSFM refers to the email as “internal legal correspondence at the OSFM,” Mr. Andryk must be an attorney with OSFM. Reply at 5.

added appear unredacted in Exhibit A to OSFM's motion. Mot., Exh. A at 1. The balance of the email's contents, as well as the email's subject line, are redacted. *Id.* at 1-2.

The first two of the four unredacted sentences purportedly document a telephone conversation—initiated by Ms. Lock with “Inspector Carben”—which included the latter describing the location of “a leak.”² Mot., Exh. A at 1. The last two of the four unredacted sentences purportedly document a telephone conversation—initiated by Ms. Lock with “Brian Morin of Eagle Environmental”—which included Ms. Lock sharing Inspector Carben's “remarks as to where the leak was located” and Mr. Morin describing the location of “the leak.”³ *Id.*

OSFM maintains that adding the four sentences is necessary to comply with the Board's procedural rule for filing the record of OSFM's decision. Mot. at 2; Reply at 6. The procedural rule requires that OSFM file “the entire record of its decision,” including not only the applicant's request to OSFM, correspondence with the applicant, and the denial letter, but also “[a]ny other information the OSFM relied upon in making its determination.” 35 Ill. Adm. Code 105.508(b). OSFM states that, in making the June 12, 2018 decision now on appeal (R1-R2), it relied on information memorialized by the unredacted sentences of Ms. Lock's May 11, 2018 email—specifically, information from her call with Mr. Morin, which references information from her call with Inspector Carben (Mot. at 1-2; Reply at 5-6). Reliable does not dispute that OSFM relied on this information in reaching its decision or counter OSFM's representation that “the substance of that telephone conversation does not appear anywhere in the currently filed administrative record.” Reply at 6. The Board grants OSFM's motion to supplement.

In granting the motion, the Board is not finding that a decisional record of “OSFM (or similar agencies) must disclose evidence it relied upon, *even if it is privileged.*” Resp. at 2 (emphasis added). That issue is not before the Board today. OSFM makes no claim of privilege over its email's four unredacted sentences.

Further, the Board need not and therefore does not decide the merits of Reliable's arguments—or OSFM's counter arguments—about attorney-client privilege and the subject-matter waiver doctrine. Reliable does not seek disclosure of any redacted portions of OSFM's email, and nothing in this order precludes Reliable from pursuing discovery to that end.

Finally, today's order does not prevent either party from providing facts concerning the subject or subjects of the supplemented information, whether at hearing or through affidavits supporting or opposing summary judgment.

² The record on appeal contains an OSFM “Emergency Response Investigation Report,” signed by Randy Carben, Storage Tank Safety Specialist. R3-R5.

³ The record on appeal contains Reliable's “Eligibility and Deductible Application,” with Brian Morin of Eagle Environmental Consultants, LLC listed as the contact. R25.

ORDER

The Board grants OSFM's motion to supplement the record of its decision with Exhibit A to that motion. Accordingly, the Clerk will add Exhibit A's two pages, as pages R91 and R92, to OSFM's record of decision filed on September 21, 2018.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 18, 2020, by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board