ILLINOIS POLLUTION CONTROL BOARD
May 12, 2014

TIMBER CREEK HOMES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 14-99
VILLAGE OF ROUND LAKE PARK,	)	(Pollution Control Facility
ROUND LAKE PARK VILLAGE BOARD	)	Siting Appeal)
and GROOT INDUSTRIES, INC.,	)	
	)	
Respondents.	)	
	)	

ORIGINAL

HEARING OFFICER ORDER

On May 4, 2014, respondent Village of Round Lake Park (Village) e-mailed the hearing officer a link to download the Village's Privilege Log and the relevant documents for an in camera inspection.[1] On May 5, 2014, respondent Round Lake Village Board (Village Board) filed "Respondent Round Lake Park Village Board's Presentation of Attorney-Client Privilege Log in Response to Petitioner Timber Creek Homes' Request to Produce and Interrogatories." (Resp.) The Village Board has listed sixty e-mails in its Privilege Log that it argues are privileged and confidential. *Id.* at 3-6. By e-mail on May 6, 2014, the Village informed the hearing officer that it is adopting the Village Board's privilege and confidentiality argument. The Village has listed fifteen e-mails on its Privilege Log that it argues are privileged. On May 7, 2014, the hearing officer received *via* U.S. Mail the Village Board's e-mails relative to its Privilege Log.

Village Board's Response to TimberCreek Homes' Request to Produce

In the Village Board's response, it argues that "Timber Creek Homes, Inc. (TCH) seeks discovery, which includes communications between the Round Lake Park Village Board and its Attorney. Such communications are confidential and subject to attorney client privilege, and as such, are not discoverable." *Id.* at 1. The Village Board lists sixty e-mails in its Privilege Log and asserts that they "reflect secrets and confidences" between the Village Board and the attorney for the Village, Glenn Sechen. *Id.* at 3-6. In support of its position, the Village Board cites to the Illinois Supreme Court Rules of Professional Conduct, Rule 1.6, entitled "Confidentiality of Information". The Village Board highlights in bold a portion of Ill. Sup. Ct. Rule of Prof.

[1] The Village did not file its Privilege Log with the Clerk.

Conduct 1.6(a) where it states that "**A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...**" *Id.* at 2.

The Village Board further argues that:

> There exists the attorney's rule of confidentiality, which encompasses the attorney-client evidentiary privilege as well as the attorney's fiduciary duty to his client. (See Annotated Model Rules of Professional Conduct R. 1.6, at 88 (2d ed. 1992).) The rule of confidentiality sets forth what an attorney may, may not, or must ethically reveal about his client...**the rule of confidentiality applies not only during judicial proceedings, but at all times, and to client's secrets, as well as confidences.**" In re Marriage of Decker, 153 Ill.2d 298, 314, 606 N.E.2d 1094, 1102 (1992) (emphasis in original). Rule 1.6 of the RPC, provides that an attorney shall not reveal confidential information from a client, unless the client consents. RLPVB does not consent to the revelation of the confidential information. *Id.*at 2-3.

On May 6, 2014, the Village's attorney, Glenn Sechen, informed the hearing officer via e-mail that the Village adopts the Village Board's argument regarding its own Privilege Log and relevant documents.

Discussion And Ruling

The purpose of the attorney-client privilege is "to encourage and promote full and frank consultation between a client legal advisor by removing the fear of compelled disclosure of the information." Consolidation Coal Co. v. Bucyrus-Erie, 89 Ill. 2d 103, 117-18, 432 N.E. 2d 250, 256 (1991). Since the privilege is an exception to the general duty to disclose, the party asserting the privilege carries the burden of proving that it applies, and "bears the burden of presenting factual evidence which establishes the privilege." Rounds v. Jackson Park Hospital and Medical Center, 319 Ill. App. 3d 280, 745 N.E. 2d 561, 566 (2001). That privilege is interpreted narrowly and Illinois has a "strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit." Waste Management, Inc. v. International Surplus Lines Insurance Company, 144 Ill. 2d 178, 190, 579 N.E. 2d 322, 327 (1991). The Board has found that the party claiming the attorney-client privilege must prove the following:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor 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 exception be waived.

IEPA v. Celotex Corp., PCB 79-145, slip op. at 3 (Dec. 6, 1984).

Additionally, the "mere assertion that a matter is protected by the attorney-client privilege is insufficient to prove the existence of that privilege." Lake County Forest Preserve Dist. V. Neil Ostro, et al., PCB 92-80, slip op. at 4-5 (Apr. 22, 1993).

Finally, I note that where, as here, the client is an organization, the attorney-client privilege does not attach to every communication between employees of the organization and the organization's attorney even if all the standard elements of the privilege are met. Rather, the communications must be between members of the organization's control and the attorney for privilege to apply. The court in Rounds, citing Consolidation Coal Co., held that:

> An employee's communications receive the protection of the attorney-client privilege when the claimant demonstrates that: (1) the employee is in an advisory role to top management, such that the top management would normally not make a decision in the employee's particular area of expertise without the employee's advice; and (2) that opinion does in fact form the basis of the final decision by those with actual authority. (citation omitted).

Rounds, 319 Ill. App. 3d. at 288, 745 N.E. 2d at 568.

"Under the control group analysis, the only communications that are ordinarily held privileged under this test are those made by top managers who have the ability to make a final decision, rather than those employees whose positions are merely advisory." *Id.*

Here, neither the Village Board nor the Village attempted to show why the privilege attaches to the withheld documents. Neither makes any argument nor sets forth any facts that would prove the existence of an attorney-client privilege, despite settled authority requiring the party claiming privilege to meet the burden of establishing that privilege applies. In addition, neither advances any claim that the communications are limited to the control group of the Village Board and the Village, even though each is an organization rather than a natural person. Instead, both entities rest their privilege and confidentiality argument on Ill. Sup. Ct. Rule of Professional Conduct 1.6, also known as the attorney's rule of confidentiality. *See* In re Marriage of Decker, 153 Ill. 2d 298, 314, 606 N.E. 2d 1094, 1102 (1992). "The rule of confidentiality sets forth what an attorney may, may not, or must ethically reveal about his client." *Id.*

Invoking the rule of confidentiality and characterizing withheld information as "secrets and confidences" does nothing to support a claim of privilege. The attorney's rule of confidentiality is broader than the attorney-client privilege, and applies beyond judicial proceedings; it does not follow, then, that a lawyer-client communication is privileged just because the client seeks to keep it confidential. And the rule of confidentiality is not absolute; rather, as Decker, the case on which the Village Board relies, makes clear, there is a "required by law" exception to the rule. In that case, the court held that because of the crime-fraud exception to the attorney-client privilege, the "contemnor could not refuse to disclose, by asserting the attorney-client privilege, the non-privileged contents of the communication after being ordered to do so by the court." Decker, 153 Ill. 2d at 316, 606 N.E.2d at 1103. The court then addressed the issue of "whether the rule of confidentiality gives an attorney the discretion to refuse to

disclose such information after a court has properly determined that the information is not privileged and has ordered the attorney to disclose the information." *Id.* The court held that an attorney may not refuse and that [t]o hold otherwise, would place an attorney's discretion above judicial determination of the matter." *Id.* Indeed, in comment (3) of Rule 1.6 it states that "[t]he rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law." Ill. Sup. Ct. Rules of Prof. Conduct, Rule 1.6, comment (3).

Against this background, the Village Board and the Village have not demonstrated that any of the withheld documents is in fact subject to privilege—even if they are confidential. Neither respondent has made any attempt to show, by, for example, identifying by title and role in each organization all of the recipients to the communications, a factual basis for finding that any communication meets the elements of privilege. As noted above, in the organizational context, this includes the control group test, which neither party takes on.

With no showing that any of the documents is in fact privileged, I find that privilege—an exception to the duty to disclose in litigation—does not apply, and the withheld communications must be produced. In making this ruling, I do not address the interplay between this order and the attorney's rule of confidentiality, which is beyond the scope of the matter before me. I note only that, as Decker reflects, the rule does not constrain me from ordering production of the requested documents, having found that privilege has not been established. *See* Decker, 153 Ill. 2d at 316, 606 N.E. 2d at 1103.

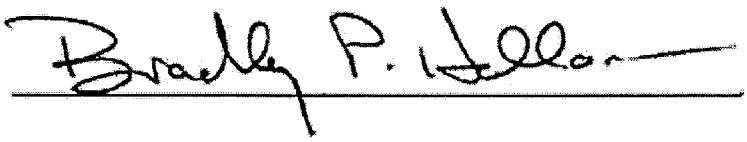
Conclusion

The Village Board and the Village have failed to argue, establish or set forth any reasons for such disclosures to be privileged and exempt from discovery pursuant to attorney–client privilege, including a control group scenario. I therefore find that the Village Board and the Village must disclose the requested information. By finding that the attorney-client privilege has not been established, the Village Board's and the Village's reliance on the rule of confidentiality necessarily falls.

As stated in the April 28, 2014 Hearing Officer Order, the e-mails that were submitted to the hearing officer will be treated pursuant to Section 130.400 of the Board's procedural rules.

Procedural rules provide that parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616 (e). The parties are reminded that the filing of any such appeal of a hearing officer order does not stay the proceeding. In statutory decision deadline cases, such as at bar, the hearing officer must manage the case to insure that discovery, hearing and briefing schedules allow for Board deliberation and a timely decision of the case as a whole.

IT IS SO ORDERED.



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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on May 12, 2014, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on May 12, 2014:

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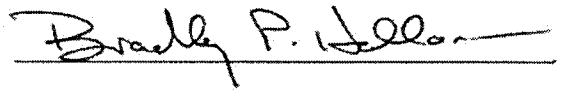

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