

ILLINOIS POLLUTION CONTROL BOARD

March 27, 2008

FOX MORaine, LLC,)	
)	
Petitioner,)	
)	
v.)	
)	PCB 07-146
UNITED CITY OF YORKVILLE, CITY)	(Pollution Control Facility
COUNCIL,)	Siting Appeal)
)	
Respondent)	
)	
KENDALL COUNTY,)	
)	
Intervenor.)	

HEARING OFFICER ORDER

On November 8, 2007, respondent United City of Yorkville (Yorkville) filed a motion (Mot.) to compel return of a document inadvertently disclosed by respondent. The document at issue is dated June 15, 2007 and is an invoice or “interim statement for professional services rendered [from April 27, 2007] through May 31, 2007” (invoice) issued to Yorkville by its attorney Wildman, Harrold, Allen, and Dixon LLP (Wildman, Harrold). Yorkville sent the invoice to Fox Moraine, LLC, (Fox Moraine), and Fox Moraine included it with other documents produced in response to Yorkville’s discovery requests on October 29, 2007. Fox Moraine likewise served the Hearing Officer with its responses to Yorkville’s discovery request, but same was not filed with the Board.

On November 27, 2007, the petitioner Fox Moraine, filed its response (Resp.) in opposition. On December 3, 2007, Yorkville filed its reply (Rep.). For the reasons set forth below, Yorkville’s motion is denied.

Yorkville’s Motion To Compel Return of Document

The facts underlying this motion are best related in Yorkville’s own words. In its motion, Yorkville represents that:

Yorkville hired the law firm of Wildman, Harrold, Allen & Dixon to provide legal advice regarding the proposed siting of a landfill and to represent it if an appeal were filed. Under Yorkville’s Landfill Siting Ordinance, Fox Moraine is required to reimburse Yorkville’s costs associated with the landfill siting process, including attorney’s fees. From time to time, Yorkville has sent Fox Moraine copies of invoices or other material reflecting siting costs incurred by Yorkville. On or about

August 15, 2007, Mr. Bart Olson, Yorkville's Assistant City Administrator, sent several landfill-related invoices to Mr. Don Hamman at Fox Moraine. One of the invoices was a bill from Wildman Harrold, dated June 15, 2007, detailing tasks undertaken on behalf of Yorkville during Wildman's first month of representation (the "invoice"). This is the only Wildman Harrold invoice Yorkville has sent to Fox Moraine. Olson had not been told to send any Wildman invoices to Fox Moraine, nor did he appreciate the possible significance of sharing a law firm invoice. He had no intention of waiving any privilege or protection that may attach to the invoice. On September 21, 2007, Wildman Harrold learned that the invoice had been included in the mailing to Mr. Hamman. By letter dated September 28, 2007, Wildman Harrold informed Mr. George Mueller, attorney for Fox Moraine, that the invoice had been inadvertently sent and demanded the return and the destruction of any copies. Mot. at 1-2(paragraph indicators in original omitted).

The facts asserted in Yorkville's motion are attested to by the affidavit of Bart Olsen, Yorkville's Assistant City Administrator. Mot. Exh. A.

Citing case law, Yorkville argues that the invoice is subject to the attorney-client privilege and because its disclosure was inadvertent and unintentional, Yorkville did not waive the attorney-client privilege. Motion at 3. Yorkville also argues that the invoice constitutes work-product because the invoice reveals theories, mental impressions and litigation plans in the event of an appeal and is therefore protected. Mot. at 4.

In conclusion, Yorkville requests the hearing officer to order the return or destruction of all physical and electronic copies of the invoice in possession of the petitioner and all recipients, and including:

- 1) Mr. Don Hamman and any other recipients at Fox Moraine;
- 2) Mr. George Mueller and any other recipients at his law firm;
- 3) Mr. Charles Helsten and any other recipients at his law firm;
- 4) Mr. Michael Blazer and any other recipients at his law firm;
- 5) Mr. Eric Weis and any other recipients at the office of the Kendall County State's Attorney;
- 6) The Hearing Officer and any other recipients at the Board; (collectively, the "Recipients") and furthering ordering the Recipients to retrieve the Invoice from all persons who have been provided with the Invoice or a copy thereof, if any additional such persons exist, and for further relief as the Hearing Officer deems just and fair. Mot. at 7.

Fox Moraine's Response

Fox Moraine first asserts that the Board (and presumably the hearing officer) has no authority to order the return or the destruction of the invoice in question, having authority only to determine whether the invoice can be included into the record. Resp. par. 2. Next, petitioner notes that Yorkville's Landfill Siting Ordinance requires siting applicants to reimburse Yorkville for "certain costs and expenses including attorney fees related to the pollution control facility application review hearing and siting process". Noting that Section 13(a) limits those costs, Fox Moraine argues that it is axiomatic that Fox Moraine would be entitled to review invoices prior to payment of the same. Resp. par. 3. Next, Fox Moraine argues that the disclosure of the invoice was neither inadvertent nor negligent and that it was in fact intentional. Fox Moraine states the law is well settled that persons, governmental units and corporate entities are fully responsible for the consequences of their voluntary and intentional acts regardless of whether they consider those consequences at the time they commit the acts. Fox Moraine refers to the Olson affidavit as establishing that sending invoices, bills and requests for reimbursement was apparently part of Olsen's regular duties. Fox Moraine surmises that Olsen performed that duty without thinking of the consequences but that his actions were intentional. Resp. par. 4.

Distinguishing case law cited by Yorkville in its Motion, Fox Moraine argues that Yorkville points to no portion of the invoice that reveals privileged thoughts or communications that would be subject to the attorney-client privilege. Resp. par. 6. Fox Moraine also argues that Yorkville's work-product privilege claim fails as well where the privilege claim is dependent upon the material being prepared in anticipation of litigation. Again referring to the City's ordinance, Fox Moraine argues that litigation preparation is not subject to reimbursement and therefore "lends further support to the fact that the subject invoice cannot contain references to litigation preparation." Resp. par. 7. Fox Moraine further argues that, if in fact the invoice concerns litigation preparation, it would be evidence of prejudgment that would render the proceedings fundamentally unfair. Resp. par. 7.

Finally, Fox Moraine argues that no privilege existed as there was no attorney-client relationship between Wildman, Harrold and, Yorkville, as required before a privilege can attach. Resp. par. 8. Fox Moraine provided the May 8, 2007, minutes from the City Council meeting to support the position that a relationship did not exist. Resp. Exh. A. Fox Moraine states that the minutes reflect only that attorney Michael Roth from Wildman, Harrold, was appointed as Interim City Attorney, and not that the firm of Wildman, Harrold was retained by Yorkville.

Yorkville's Reply

Yorkville argues that the Olsen affidavit was not contradicted by Fox Moraine and, that contrary to Fox Moraine's assertions, portions of the invoice do "show the substance of confidential attorney-client discussions and are subject to the attorney-client privilege." Rep. at 2.

Yorkville also argues that "Roth's individual retention and appointment as City Attorney does not somehow negate Yorkville's additional retention and appointment of

the firm Wildman, Harrold as counsel in the landfill matter...” Rep. at 3. Yorkville alleges the invoice speaks for itself in demonstrating that an attorney-client relationship was created.

Finally, Yorkville responds to Fox Moraine’s argument that the City ordinance does not allow for anticipated litigation and therefore is not subject to the work product privilege. Yorkville argues that the “invoice touches on the theories and mental impressions of Yorkville’s attorneys should an appeal be filed” and “is therefore also protected under the work-product privilege.” Rep. at 4.

DISCUSSION

To some extent, resolution of the issues presented is dependent on the time of events, and so a recapitulation of salient events is in order. Yorkville made its decision to deny siting approval on May 24, 2007, and Fox Moraine filed its appeal on June 27, 2007. The Wildman Harrold invoice dated June 15, 2007 covered services rendered between April 27 and May 31, 2007. On or about August 15, 2007 Mr. Olson sent Fox Moraine the invoice along with others from various sources as part of its collection of siting costs from the applicant. Wildman Harrold learned of the disclosure on September 21, 2007, and made its first demands for return September 28, 2007. Fox Moraine refused the demand by letter of October 10, 2007. On October 29, 2007, Fox Moraine included the invoice along with other documents produced in response to Yorkville’s first set of document requests. Wildman Harrold demanded return of the documents by e-mail on October 30, 2007. The instant motion was filed on November 8, 2007.

The invoice at issue here was originally provided by Yorkville to Fox Moraine outside the Board’s discovery process, in pursuit of monies due Yorkville under its Landfill Siting Ordinance. Had this document not been included in response to discovery requests in the Board’s action, the hearing officer would agree with Fox Moraine that the Board has no jurisdiction to entertain the motion at all. But, as Yorkville’s motion is in the nature of a motion for protective order as part of the Board’s discovery process, the hearing officer reluctantly concludes that the motion is properly before him and the Board. See, e.g. Saline County Landfill, Inc. v. IEPA, PCB 04-117 (May 6, 2004) (ruling on protective order concerning attorney-client privilege issues).

For the reasons expressed below, the hearing officer finds that the invoice is not properly within the scope of either the attorney-client or work product privileges. And, even if the privileges applied to the invoice, any such privilege would be considered waived under Illinois case law.

The Dalen Case

An instructive case is one cited by both parties is Dalen v. Ozite Corporation, 230 Ill. App. 3d. 18, 594 N.E. 2d 1365 (2d Dist.1992). Among other things, at issue was a four page memorandum authored by one of Ozite’s attorneys and discovered by one of Dalen’s attorneys.

The court's first inquiry was whether the memorandum was covered by either the attorney-client privilege, or by the work product privilege. The next was whether any privilege had been waived.

The memorandum discussed certain Maryland litigation based on notes similar to notes at issue in Dalen. In the memorandum, Oxite's attorney outlined for his client limitations of Ozites's defenses and the attorney's opinion as to the proper and likely determination of the notes. Dalen's attorney found the memorandum during the course of his review of Ozite's corporate files. After the trial court's entry of two document production orders, Ozite had made the files available for inspection in lieu of producing certain documents. After Ozite refused to provide Dalen's attorney of a copy of the memorandum he had inspected, the trial court held that Ozite had waived any attorney client privilege. Dalen, 594 N.E. 2d at 1367, 1369-70.

On review, the Dalen court stated that the:

Illinois and Federal courts recognize Wigmore's definition of the attorney-client privilege: "(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 protection be waived." *Id.*, 594 N.E. 2d at 1370.

Based on this definition, the court found that the attorney-client privilege did not by its terms apply to the memorandum. *Id.* The court did, however, find that a work product privilege analysis was appropriate:

The work product doctrine applies to documents prepared by either client or attorney in anticipation of litigation or trial. . . . Supreme Court Rule 201(b)(2)¹ [provides that] material prepared by or for a party in preparation for trial is not subject to discovery if it contains or discloses "the theories, mental impressions or litigation plans of that party's attorney". The memorandum was prepared by Ozite's attorney in anticipation of litigation, albeit different litigation than this case, and was therefore protected by work product doctrine. *Id.*

Finding that the privilege applied, the court then reviewed waiver arguments, after finding that the case applicable to attorney-client privilege applied to work product as well. The court noted that three general approaches had been used: a subjective analysis, an objective analysis, and a balancing test. In the subjective

¹ Section 101.616 of the Board's procedural rules states that all discovery disputes will be handled by the assigned hearing officer. For purposes of discovery, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent.

analysis, inadvertent disclosure cannot result in an intentional waiver. In the objective analysis, any disclosure of a document to opposing counsel results in waiver. *Id.*, 594 N.E. 2d at 1371.

The court adopted and applied the balancing test consisting of five factors in arriving at its decision that the privilege asserted had been waived. The five factors are: (1) the reasonableness of the precautions taken to prevent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of disclosure; (5) the overriding issue of fairness. *Id.* The court observed that Ozite had given Ozite free access to all files, after its counsel argued that he did not have time to purge all files before opposing counsel reviewed them. While disclosure was inadvertent, the court found that Ozite's conduct and that of its attorney was inconsistent with a confidentiality claim.

Conclusions and Rationale for Ruling

After review of the case law cited by the parties in their respective briefs and a review of the contents of the June 15, 2007 invoice, the hearing officer concludes that the invoice does not qualify under the definitions either of the attorney-client privilege or the work product privilege. At most, the invoice describes in general terms, that the firm reviewed case law concerning the various issues presented in nearly every siting appeal brought before the Board; the entries do not give research summaries or discuss conclusions. The firm also examined the City's Siting Ordinance, worked on evidence, reviewed transcripts for criterion issues, and scheduled and prepared for meetings. The invoice contains no legal advice or "theories, mental impressions, [or] litigation plans of Yorkville's attorneys should an appeal be filed" (Motion at 4) as required to qualify for the protection of either of the two privileges asserted.

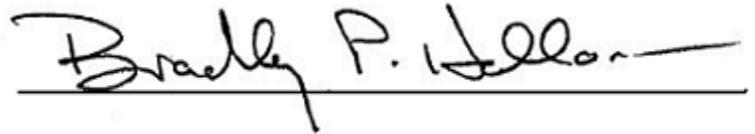
Additionally, absent exceptional circumstances, however, it "is well established that information regarding a client's fees is not protected by the attorney-client privilege because the payment of fees is not a confidential communication between the attorney and client." In The Matter Of : Witnesses Before the Special March 1980 Grand Jury, Appeal Of United States of America, 729 F. 2d 489 491 (1984), *citing* Matter of Walsh, 623 F. 2d 489, 494 (7th Cir.), *cert. denied*, 449 U.S. 994, 101 S. Ct. 531 (1980). Further, ordinary work product, which is any relevant material generated in preparation for trial which does not disclose 'conceptual data' is freely discoverable." Waste Management, Inc., v. International Surplus Lines Insurance Company, 144 Ill. 2d 178, 196, 579 N.E. 2d 322, 329-330 (1991). Work product is subject to discovery if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. *Id.*

Assuming *arguendo* that either privilege applies, the hearing officer would find that the privilege has been waived due to the disclosure of the invoice. Applying the Dalen balancing test here, it is unclear whether any measures were taken to segregate the invoice from others routinely forwarded to Fox Moraine in pursuit of reimbursement of

siting expenditures. Wildman, Harrold notified the attorney for Fox Moraine seven days after it became aware of the disclosure, after the invoice had been in Fox Moraine's hands for over a month. But, Wildman, Harrold did e-mail participants in the Board proceeding within 24 hours of Fox Moraine's inclusion of the invoice in discovery answers. The scope of discovery is not really relevant within the content of this case, since the initial disclosure occurred within the context of Yorkville's debt collection efforts. The extent of disclosure is small, as it involves only the general task listings described above. And finally, there do not appear to be any issues of fairness due to the extent and content of the invoice.

For all of these reasons, Yorkville's motion is denied in its entirety.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

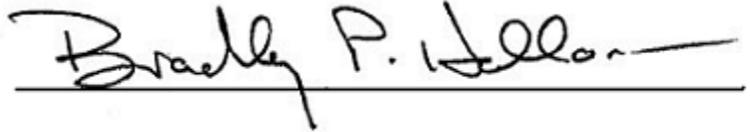
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Hearing Officer
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order was mailed, first class, on March 27, 2008 to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on March 27, 2008:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath it.

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