

ILLINOIS POLLUTION CONTROL BOARD
July 13, 1989

CITIZENS UTILITIES COMPANY)	
OF ILLINOIS,)	
)	
Petitioner,)	
)	
v.)	PCB 88-151
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by B. Forcade):

This matter is before the Board on Citizens Utilities Company of Illinois' ("Citizens") July 6, 1989 Motion for Reconsideration of the June 22, 1989 Order of the Board. It is also before the Board on the June 29, 1989 Second Supplement to Citizens' Application for Non-disclosure and for Protective Order, filed in response to the June 22, 1989 Order, and Citizens' Application for Non-disclosure and for Protective Order, attached to supplemental responses to the Illinois Environmental Protection Agency's ("Agency") Interrogatories Nos. 1 and 2.

The Agency filed a supplement to its objection to the motion for non-disclosure on July 10, 1989. On July 11, 1989, Citizens filed a motion to file its response to the supplement to the Agency's objection (filed July 10, 1989) instantaneously, together with a copy of Citizens' response. The Board hereby grants that motion to file.

The June 22, 1989 Order of the Board focused on various discovery disputes between the Agency and Citizens. It primarily dealt with an Agency motion for sanctions and Citizens' claims for privilege against public disclosure of various answers to Agency interrogatories. At issue were answers to Agency interrogatories numbered 1, 2, 3, 12, 16, 19 and 20. The Board ordered sanctions as to certain of Citizens answers to the Agency's interrogatories. With regard to the answers to interrogatories 2 and 19, the Board gave Citizens a final opportunity to respond not later than June 29, 1989, or the Board would dismiss Citizens' petition. The Board denied sanctions as to interrogatories 1 and 16, but granted the Agency leave to refile for sanctions at some future date if further discovery discloses that citizens was less than forthright in its answers. The Board imposed a sanction for Citizens' failure to

respond more fully to Agency Interrogatory 12: the Board barred Citizens from presenting certain, specified evidence at hearing. The Board ordered that certain answers to interrogatories 1, 3, 12, and 20 were temporarily subject to non-disclosure and gave Citizens until June 29, 1989 to provide a detailed explanation of its theory for non-disclosure.

With regard to Citizens motion for reconsideration, the Board notes that Citizens cites nothing that was not before the Board when it entered its June 22, 1989 Order. Further, Citizens cites no authority which indicates that the Board abused its discretion in imposing sanctions by that Order. Therefore, the Board hereby denies reconsideration of its June 22, 1989 Order.

The situation is similar with regard to Citizens' applications for non-disclosure of the answers to Agency interrogatories 1, 3, 12, and 20. The June 22 Board Order stated, in significant part, as follows:

The Board will first address the application for non-disclosure. Citizens claims that the supplemental answers filed June 1, 1989, should not be disclosed to the public because the answers contain "information privileged against introduction in judicial proceedings", as provided in Section 101.107 of the Board's procedural rules. (These answers were previously not subject to disclosure by Interim Hearing Officer Order which expired May 11, 1989.) The court proceeding involved is Village of Glenview v. Northfield Woods Water & Utility Co., Inc., case No. 87 CH 02577, Circuit Court of Cook County, Illinois. Citizens states that although on April 24, 1989, the court granted Glenview's motion for summary judgment, "Northfield Woods purportedly has filed a petition for rehearing and reconsideration which now is pending before the court." Citizens further states:

[t]he attached supplemental responses relate to subject matter involved in these court proceedings and to the subject matter of discovery which the court has denied. If these materials are not treated as confidential, Citizens believes that the court proceedings may be adversely affected, and the court's rulings circumvented.

Citizens' further elaborates:

As Citizens' application states, it seeks protection, from disclosure by IEPA or from public disclosure, of confidential materials contained in Citizens' supplemental responses to IEPA's interrogatories. These materials relate to the subject matter of the court proceedings involving the Village of Glenview and Northfield Woods Water & Utility Co., Inc. ("Northfield Woods"). They also relate to the subject matter of discovery which the court has denied. If these materials are not treated as confidential, Citizens will be disadvantaged and the court's rulings will be circumvented. For example, the court has denied Northfield Woods' discovery attempts to obtain material of the type which Citizens has produced to IEPA herein.

* * *

The Board agrees that there is no apparent doctor-patient, attorney-client or other privilege which would relate to the material involved. The Board also agrees that Citizens has not shown any judicial ruling that certain material is confidential or privileged. At most, Citizens has asserted that discovery was denied. Such a broad assertion will not support the requested protective order. The Board will, however, temporarily provide confidential treatment to these materials, and will allow Citizens until June 29, 1989 to provide the Board and Agency with a detailed explanation of its theory of non-disclosure. The Agency will have until July 7, 1989, to provide any needed supplement to its present position. The Board will determine the disclosure status at its July 13, 1989 Board meeting.

June 22, 1989 Order of the Board at 2-3.

That Order gave Citizens "until June 29, 1989 to provide the Board and Agency with a detailed explanation of its theory of non-disclosure." Id. at 3. Citizens' June 29 and July 11, 1989 filings purport to do just that, but the Board finds that those

filings do not enunciate any cognizable theory for non-disclosure. Further, Citizens' Application for Non-disclosure attached to its Supplemental Responses to interrogatories 1 and 2 broadens Citizens' claims of confidentiality to include its supplemental answer to interrogatory 1 on the same basis.

The basic thrust of Citizens' claims for protection against disclosure are that the Cook County Circuit Court denied discovery of the information disclosed in the answers to interrogatories. Citizens alleges that certain evidence indicates that the Agency is in close communication with one of the parties to that litigation and has obtained from that party documents produced during the course of discovery in that proceeding. Citizens voices its concern that the Agency will feed the instant answers back to that other party to that other proceeding, and that such an exchange might adversely affect the conduct of those court proceedings and circumvent the rulings of that court. Citizens asserts that the Board may grant the requested protective order on any of three distinct bases: (1) under Supreme Court rule 201(c)(1), "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression"; (2) under Board procedural rule 101.161(a)(2) (formerly rule 101.107(b)(2)), which would prevent the disclosure of "information privileged against introduction in judicial proceedings"; or under Board procedural rule 101.161(a)(3) (formerly rule 101.107(b)(3)), which would prevent the disclosure of "confidential data." See Citizens' Second Supplement to Application at 6-7. However, Citizens' assertions do not further elaborate to provide a basis for non-disclosure.

First, although Supreme Court Rule 201(c) enunciates a valid basis for ordering non-disclosure when disclosure would lead to "unreasonable annoyance, expense, embarrassment, disadvantage, or oppression," Citizens does not elaborate any basis for the Board to conclude that any of these would occur in this proceeding. Rather, Citizens' claims are restricted to what would occur before the Cook County Circuit Court. The Board believes that that tribunal is in a better position to protect its jurisdiction and orders than is the Board. Further, Citizens does not set forth with any particularity the type(s) of "annoyance, expense, embarrassment, disadvantage, or oppression" that might occur. The Board believes that such particularity is a prerequisite to relief where the type and magnitude of harm are not facially apparent. Therefore, even if the Board were to apply Supreme Court Rule 201 to its proceedings, Citizens has failed to state a basis for non-disclosure under this rule.

Second, Citizens has not proven that this information is of a type "privileged against introduction in judicial proceedings." In fact, all that Citizens has averred is that the Circuit Court denied discovery of this information. Although the basis on which the Circuit Court premised its order denying

discovery is potentially important to the Board's determination, Citizens fails to state the basis on which that court denied discovery, or whether the denial was total or partial. There are many bases upon which a tribunal may deny discovery, whether totally or in part, and just because a court has done so does not render a parallel denial appropriate before the Board. The basis for the court's denial (e.g., relevance, timing, etc.) is possibly irrelevant before the Board. For example, the Agency alleges that Judge Curry denied discovery because he rendered his final decision on the merits of Glenview's petition in that case. Agency July 10, 1989 Supplement to Objection at 1 & 3. Further, even if the Board were to adopt Citizens' apparent interpretation of Board procedural rule 101.161(a)(2), i.e., "information [that has been] privileged against introduction in judicial proceedings" (as opposed to "information [that is capable of being] privileged against introduction in judicial proceedings"), Citizens' failure to show that the Cook County Circuit Court disallowed discovery on the basis of some particular privilege is fatal to its assertion before the Board.

Finally, with regard to Citizens' assertion that the information which it now seeks to protect is "confidential data" within the meaning of Board procedural rule 101.161(a)(3), Citizens has similarly failed to show exactly how that information is confidential within the meaning of the rule, and how its disclosure would adversely affect Citizens' business interests. The full text of Section 101.161(a)(3), which derives from Section 7(a)(4) of the Environmental Protection Act, Ill. Rev. Stat. ch. 111-1/2, par. 1007(a)(4) (1989), states as follows:

Information concerning secret manufacturing processes or confidential data submitted by any person under the Act. ...

13 Ill. Reg. -- (July 21, 1989) (effective July 10, 1989, 35 Ill. Adm. Code 101.161(a)(3)); see Ill. Rev. Stat. ch. 111-1/2, par. 1007(a)(4) (1989).

In context, it is clear that the type of "confidential data" contemplated is not at issue here. Further, assuming, arguendo, that it was, Citizens fails to claim with any particularity that would justify non-disclosure, exactly how it has held this information as confidential and how its disclosure would adversely affect its business interests.

In its July 11, 1989 response, Citizens asserts that the Agency "has no standing to object to non-disclosure," asserting that because the Agency has gained copies of the answers, it "has no valid reason for objection to non-disclosure." Citizens' July 11, 1989 Response to Agency Objection at 2-3. Citizens then proceeds to assert as follows:

Nowhere does IEPA claim prejudice to it or any party to this case, if Citizens' request for non-disclosure is granted. Nowhere does IEPA cite case law which would support its assertion that non-disclosure could impair the validity of any PCB Order, and there is none.

Id. at 7 (emphasis in original).

The Board believes that this argument misses a vital point:

All files, records, and data of the Agency, the Board, and the Department shall be open to reasonable public inspection and may be copied upon payment of reasonable fees to be established where appropriate by the Agency, the Board, or the Department, except for the following:

1. Information which constitutes a trade secret;
2. Information privileged against introduction in judicial proceedings;
3. Internal communications of the several agencies;
4. Information concerning secret manufacturing processes or confidential data submitted by any person under this Act.

Ill. Rev. Stat. ch. 111 1/2, par. 1007(a) (1989); see also 40 CFR 2.304 (1988).

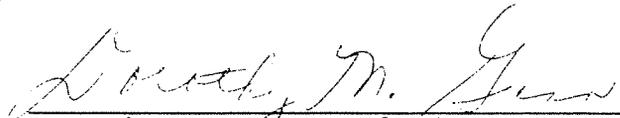
This provision expands the interest in the disclosure or non-disclosure of Citizens' answers beyond that of the parties involved, to include the interest of public at large. Further, this provision gives the Agency itself a vital interest in whether or not it must disclose those answers now resident in its files if it should receive a request by a member of that public.

For the foregoing reasons, the Board hereby denies Citizens' Applications for Non-disclosure of the answers to Agency Interrogatories 1, 2, 3, 12, and 20. The Board has given Citizens this third opportunity to state a cognizable basis for non-disclosure of this information. Citizens' three filings of June 1, 20, and 29, 1989 do not convince the Board that non-disclosure is warranted. The Board believes that the Circuit Court of Cook County is the proper forum to seek protection of that tribunal's jurisdiction and orders.

The Board will continue to protect the subject information against disclosure for ten days so that Citizens may have an opportunity to seek a restraining order from the Circuit Court. Absent an order of the court to the contrary, the Board will no longer hold the subject documents as confidential at the end of this ten-day period, and it will place those documents in those portions of its files that are open to public inspection and copying.

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 13th day of July, 1989, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board