

ILLINOIS POLLUTION CONTROL BOARD
May 25, 2017

JOHNS MANVILLE,)
)
 Petitioner,)
)
 v.) PCB 14-3
) (Enforcement)
 ILLINOIS DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent.)

HEARING OFFICER ORDER

On April 25, 2017, the Illinois Department of Transportation (IDOT) filed a motion to compel. Also on April 25, 2017, IDOT filed a “Corrected First Motion To Compel”. (Corrected Mot.). On May 9, 2017, Johns Manville’s (JM) filed its response. (Resp.). On May 16, 2017, IDOT filed its reply. (Reply). On May 17, 2017, as directed by my order of May 17, 2017, JM filed its Rule 214 Affidavit of Completeness.

This order first summarizes each filing and then provides a ruling on the motion.

Summary of IDOT’s Corrected Motion to Compel

IDOT requests that JM produce all responsive documents requested “in the manner in which they have been kept by Johns Manville” and that JM “provide IDOT with an Illinois Supreme Court Rule 214 affidavit for all document productions to date”. Corrected Mot. at 1.

Specifically, IDOT states that between the dates of April 5 through April 17, 2017, JM sent IDOT flash drives consisting of over 30,644 pages of documents and photographs contained in over 12,000 separate files. *Id.* at 1-3.

On April 10 and April 21, 2017, IDOT sent JM 201(k) letters. In the April 21, 2017, 201(k) letter, IDOT states that “[i]t is difficult to understand how documents – most especially, documents pertaining to the costs which have been incurred by your client – could be maintained in a fashion which first requires substantial reorganization before those documents can be used in any meaningful fashion.” *Id.* at 4. IDOT also states that none of the document requests provided by JM were accompanied by a Rule 214 affidavit. *Id.* at 5.

IDOT argues that Rule 214 requires that the requested documents must be produced as they are kept in the usual course of business and that the production must be accompanied with an affidavit of completeness. *Id.* at 5.

IDOT argues that JM produced the documents in a “highly irregular fashion” and that it does not make sense that a “sophisticated corporate entity” would keep its documents in this manner. *Id.* at 6. IDOT argues that “it defies logic that Johns Manville would keep records in a haphazard fashion, where those records pertain to costs which are potentially tax deductible.” *Id.* Finally, IDOT states that JM has not provided IDOT with a Rule 214 affidavit of completion. *Id.* at 7.

Summary of JM’s Response

JM states that IDOT’s requests are not narrowly tailored and that for example, “IDOT has asked for all documents produced by all contractors or sub-contractors that performed site investigation or removal work for you at the Sites”. Resp. at 1. JM notes that “many of the documents responsive to IDOT’s requests are maintained by JM’s various consultants and contractors.” *Id.* at 4. JM states that [t]he Board’s Interim Opinion and Order identified boring areas for which IDOT is responsible”, and that “neither JM nor its consultants kept records based on boring locations. JM has gone to great lengths to cull voluminous documents to those related to the areas in the Board’s order”, and “produced [the] documents in the manner in which they were received.” *Id.* at 2-4.

JM has provided IDOT with a master index of the documents produced and lists arranging the invoices produced in chronological order. *Id.* at 4-5. On May 17, 2017, JM filed a Rule 214 affidavit of completeness.

Summary of IDOT’s Reply

IDOT reiterates that JM has produced the requested documents in an irregular fashion and that JM has not explained why it or its contractors and consultants produced the documents in a “disorderly and non-chronological manner.” Reply at 2. IDOT continues argue that it simply cannot comprehend why the requested documents were not kept in some sort of logical order. *Id.* at 3.

Finally, IDOT states that JM “could have easily put this matter to rest had it simply attached an affidavit/affidavits from the person or persons that provided the documents Johns Manville has produced to IDOT, stating that, although seemingly irregular, the documents had been produced in the manner in which they are ordinarily kept.” *Id.*

Discussion and Ruling

The Board’s procedural rules do not address the requirements for responses to requests for the production of documents. In such instances the Board may look for *guidance* to the Illinois Supreme Court Rules; but those rules do not expressly apply to the Board. *See* 35 Ill. Adm. Code 101.100(b). Rule 214, which applies to requests for production and responses to such requests in civil cases, requires that documents be produced as they are kept in the usual course of business or in a manner corresponding to categories in the request. The rule also

requires the producing party to provide an affidavit “stating whether the production is complete in accordance with the request.” Ill. Sup. Ct. R. 214(c).

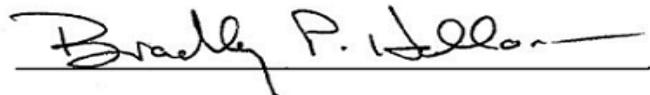
IDOT’s motion does not take issue with the timing or completeness of JM’s responses to IDOT’s production requests, other than JM’s prior omission of an affidavit of completeness (since supplied). Instead, IDOT insists JM must not have produced responsive documents as they are kept in the ordinary course of business. JM responds that it had to obtain responsive documents from third party consultants and contractors, who did not keep the responsive documents according to boring locations. JM states that it produced the documents to IDOT as JM received them from these third parties. JM further states that it has provided IDOT with a master index and lists of the requested invoices in chronological order.

Given JM’s representations, I find IDOT’s motion unfounded. Even if Rule 214 applied here, JM has met its requirements, including to provide an affidavit of completeness. I find JM’s response that it produced the documents as received from third parties sufficient to show compliance with the rule—which, to repeat, is not binding in Board proceedings. And, contrary to IDOT’s claim, Rule 214 does not expressly require that the affidavit state that the documents were produced as kept in the usual course. It follows that JM’s affidavit of completeness is not deficient because it does not address this requirement under Rule 214.

I am fully aware that the 30,644 documents and photographs produced by JM thus far will take an extensive amount of time by IDOT to review. To that end, I am also fully aware that the hearing date tentatively scheduled for the end of October 2017 may have to be postponed. Nonetheless, both parties are directed to make every effort to keep discovery on appropriate relief focused and orderly and to avoid undue delays in proceeding to the second hearing in this case.

IDOT’s motion is denied.

IT IS SO ORDERED.



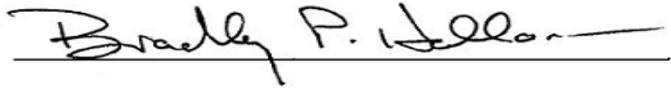
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on May 25, 2017, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on May 25, 2017:

Don Brown
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Chicago, Illinois 60601

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran
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@ Consents to electronic service

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