

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

RELIABLE STORES, INC.,            )  
    Petitioner,                    )  
    v.                                )  
                                      )  
OFFICE OF THE STATE FIRE        )  
MARSHAL                            )  
    Respondent.                    )

PCB 2019-002  
(OSFM Appeal)

**NOTICE OF FILING AND PROOF OF SERVICE**

To: Don Brown, Clerk  
Illinois Pollution Control Board  
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Chicago, IL 60601

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302, Petitioner's Response in Opposition to Motion to Supplement the Record, a copy of which is herewith served upon the above parties of record in this cause. The undersigned hereby certifies that I served the aforementioned document by e-mail to each of the persons listed above at the above e-mail address on the 30<sup>th</sup> day of March 2020, and the number of pages in the e-mail transmission are 6.

RELIABLE STORES, INC., Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RELIABLE STORES, INC.,	)	
Petitioner,	)	
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v.	)	PCB 2019-002
	)	(OSFM Appeal)
OFFICE OF THE STATE FIRE MARSHAL,	)	
Respondent.	)	

**RESPONSE IN OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD**

NOW COMES Petitioner, RELIABLE STORES, INC. (hereinafter “RELIABLE”), pursuant to Section 100.500(d), in response to the Motion to Supplement the Record, stating as follows:

1. On September 21, 2018, the Office of the State Fire Marshal (hereinafter “OSFM”) timely filed the administrative record, including a certification of the OSFM that this is the record and a privilege log of documents being withheld.

2. The document that OSFM now wishes to include in the administrative record is identified in the privilege log as a May 5, 2011 e-mail written by Deanne Locke to “Tom Andryk, Legal” that is withheld on the basis of attorney-client privilege. Deanne Locke is the author of the June 12, 2018 decision being appealed. (R.2)

3. According to the privilege log, there are three such e-mails written by Deanne Locke to Tom Andryk, and a fourth written by Tom Andryk to Deanne Lock on June 11, 2018, the day before the decision.

4. OSFM does not claim that this is newly discovered material, and of course, it cannot be newly discovered because it was identified when the administrative record was filed.

While Petitioner cannot be certain given lack of access to the documents withheld, the participants to the e-mails and their timing suggest that Locke sought advise of legal counsel, which she then relied upon in rejecting the underlying application.

5. Relying on the Board's procedural rules that state that the administrative record must include any information OSFM relied upon in making its determination, OSFM claims that it relied upon one or more telephone conversations and therefore a portion of the correspondence with in-house counsel must be admitted for a complete record. (Mot., at ¶ 4 - ¶ 7)

6. Implicitly, OSFM is arguing that the information should have been disclosed at the outset and it violated the Board's procedural rules in not disclosing it. In OSFM's framing of the rules, OSFM (or similar agencies) must disclose evidence it relied upon, even if it is privileged. This would seem to completely undermine the notion of privilege, which by its nature is always asserted to protect information that would otherwise be subject to disclosure. The privilege log here is entitled "PRIVILEGE LOG OF DOCUMENTS WITHHELD FROM RECORD," which underscores the point that all of these communications were relied upon by Locke in making the decision and should be included in the record, but for the privilege asserted. OSFM is seeking to characterize its actions as seeking to comply with the rules, when it is only doing so belatedly and selectively.

7. OSFM incorrectly assumes that everything it relied upon must be in the administrative record, but verbal communications are not required to be reduced to writing and then filed. It would presumably make OSFM's job easier had Locke made a contemporaneous written record of her telephone conversations or e-mailed the exchanges, or even identified the telephone conversations as a basis for the final determination.

8. It is also not entirely accurate to claim that OSFM relied upon the excerpts. The sequence here appears to be (1) telephone conversations were conducted between Locke and two people at an unknown date and time; (2) said telephone conversations were not memorialized in any contemporaneous writing; (3) Locke mentioned the telephone conversations in one or more communications with OSFM's attorney; (4) OSFM's attorney gave his opinions to Locke; (5) Locke executed the final decision without entering any detailed finding referencing any telephone conversation. Locke appears to have relied at least in part upon Andryk's opinions, which OSFM does not wish to disclose.

9. What OSFM wants to do here is selectively waive the privilege on its own terms without any time limit. This violates the subject matter waiver doctrine in Illinois, which the Illinois Supreme Court expressed as follows: "According to Wigmore, '[t]he client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter.' Further, a client's offer of his own or his 'attorney's testimony as to a part of any communication to the attorney is a waiver as to the whole of that communication, on the analogy of the principle of completeness.'" Center Partners v. Growth Head GP, 2012 IL 113107, ¶ 37. "Courts have characterized this reasoning as the 'sword' and the 'shield' approach, in 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 the privilege when the opposing party attempts to discover the undisclosed portion of the communication or communications relating to the same subject matter." Id. ¶ 39.

10. Board procedural rules governing disclosure follow those in judicial proceedings, 35 Ill. Adm. Code § 101.202 ("non-disclosable information"). The rules of fundamental fairness

and the principle of completeness in judicial proceedings should control here as well. A year-and-a-half after filing a complete administrative record, OSFM improperly seeks to selectively waive its prior claim of privilege. 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.

11. It is also of some relevance that the telephone conversations are with people whose statements are in the administrative record. Inspector Carben's inspection report is in the record, describing his observations of the release, (R.4), and Brian Morin wrote and signed the eligibility and deductible application at issue herein (R.25). The sword here is more of a distraction device.

12. The Hearing Officer is asked to deny the motion outright, by reason of lack of timeliness, lack of justification for the delay, lack of necessity for all verbal communications to be reduced to writing and filed in the administrative record, lack of diligence in making contemporaneous record of the telephone conversation or detailed written findings in the OSFM decision, and for seeking to violate the subject matter waiver doctrine in Illinois.

WHEREFORE, Petitioner, RELIABLE, prays that the motion be denied and that RELIABLE be granted such other and further relief as the Hearing Officer deems meet and just.

Respectfully submitted,

RELIABLE STORES, INC., Petitioner

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BY: /s/ Patrick D. Shaw

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