

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RELIABLE STORES, INC.,)
)
 Petitioner,)
)
 v.) PCB 19-2
) (UST Appeal)
 OFFICE OF THE STATE FIRE MARSHAL,)
)
 Respondent.)

NOTICE OF ELECTRONIC FILING

To: Patrick D. Shaw Carol Webb
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Don Brown
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PLEASE TAKE NOTICE that on the 3rd day of April, 2020, I caused to be served with the Clerk of the Illinois Pollution Control Board, Respondent's Motion for Leave to File Reply and Reply in Support of Respondent's Motion to Supplement the Record *Instantly*, a true and correct copy of which is attached hereto and is hereby served upon you.

OFFICE OF THE STATE FIRE MARSHAL

By: /s/ Daniel Robertson
Daniel Robertson
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Floor
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CERTIFICATE OF SERVICE

I, DANIEL ROBERTSON, an Assistant Attorney General, do certify that I caused to be served this 3rd day of April, 2020, the attached Notice of Electronic Filing and Respondent's Motion for Leave to File Reply and Reply in Support of Respondent's Motion to Supplement the Record *Instantly*, upon the persons listed on the Notice of Electronic Filing *via email*.

/s/ Daniel Robertson
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OFFICE OF THE STATE FIRE MARSHAL,)	
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Respondent.)	

RESPONDENT’S MOTION FOR LEAVE TO FILE REPLY AND REPLY IN SUPPORT OF RESPONDENT’S MOTION TO SUPPLEMENT THE RECORD *INSTANTER*

The Office of the State Fire Marshal (“OSFM”), by Kwame Raoul, the Attorney General of the State of Illinois, moves the Illinois Pollution Control Board, pursuant to 35 Ill. Adm. Code 101.500(e), for leave to file its Reply in support of its Motion to Supplement the Record, and to accept Respondent’s Reply *instanter*. In support thereof, Respondent states as follows:

I. MOTION FOR LEAVE TO FILE REPLY

1. Section 101.500(e) of the Board’s procedural rules provides that a person may reply “as permitted by the Board or the hearing officer to prevent material prejudice.” 35 Ill. Admin. Code 101.500(e).
2. On March 16, 2020, Respondent filed its Motion to supplement the record with information the OSFM relied upon in making its determination. On March 30, 2020, Petitioner filed its Response, requesting that the Board deny the Motion.
3. Petitioner mischaracterizes the timing and intention of Respondent’s Motion, and presents an incomplete review of relevant case law.
4. Respondent would be materially prejudiced if unable to respond to Petitioner’s allegations. Respondent therefore respectfully requests that the Hearing Officer enter an Order

granting this Motion for Leave to File Reply, and permit Respondent to enter the below Reply in Support of Respondent's Motion to Supplement the Record *instanter*.

**II. REPLY IN SUPPORT OF RESPONDENT'S MOTION
TO SUPPLEMENT THE RECORD**

5. On September 21, 2018, the OSFM timely filed the Record on Appeal. The OSFM also filed a Privilege Log of Documents Withheld From Record.

6. Following the filing of the Record on Appeal, Petitioner sought from Respondent a video filmed by the OSFM's inspector of the gasoline leak that was not relied upon by the OSFM in making its determination. *Hearing Officer Order* (Nov. 7, 2018). Regardless, Respondent turned over the requested video.¹

7. In March 2019, Petitioner proposed entering a stipulation of facts. *Hearing Officer Order* (March 12, 2019). In August 2019, Petitioner submitted its proposed stipulation of facts to Respondent. *Hearing Officer Order* (Aug. 6, 2019).

8. Immediately upon the parties not reaching agreement on the proposed stipulation of facts, Respondent informed Petitioner and the Hearing Officer that it would be filing a motion to supplement the record. *Hearing Officer Order* (Jan. 7, 2020). At the same time, Petitioner stated that it may file a similar motion to supplement the record. *Id.* Petitioner made no indication that it considered either motion to be untimely. Indeed, the last official action in this matter was the filing of the Record on Appeal. Petitioner does not allege any sort of prejudice were the supplement to be filed, nor does it allege any surprise to the existence of the telephone conversation referenced in paragraph 9 below.

¹ The video was previously thought deleted by the OSFM, but was turned over in January 2020, following successful electronic recovery.

9. During discussions between Respondent and its counsel on potential stipulated facts, it was discovered that a telephone conversation between the OSFM and Petitioner's consultant had been relied upon by the OSFM in making its determination. It was also discovered that the telephone conversation was memorialized only in internal legal correspondence at the OSFM. Contrary to Petitioner's Response, the substance of that telephone conversation does not appear anywhere in the currently filed administrative record. Response at ¶11.

10. Petitioner states that "[i]t would presumably make OSFM's job easier had Locke made a contemporaneous written record of her telephone conversations or e-mailed the exchanges." Response at ¶7. In either of those scenarios, it is unlikely a petitioner would object to its inclusion in a record on appeal. While Respondent remains sensitive to the very real concern of revealing documents that are withheld as privileged, Respondent does not believe that the relevant information's location within a privileged document allows Respondent to withhold "information the OSFM relied upon in making its determination." 35 Ill. Adm. Code 105.508(b)(4). Just as Respondent turned over immaterial information to Petitioner at Petitioner's request, Respondent will not now withhold material information.

11. The Board has previously granted motions to supplement where information has been inadvertently left out of the filed record. *TNT Holland Motor Express, Inc. v. OSFM*, PCB 94-133 (June 23, 1994). Petitioner has indicated that its next action in this matter may be filing a motion for summary judgment. *Hearing Officer Order* (Jan. 7, 2020). Denying Respondent's Motion to supplement means the Board will review Petitioner's dispositive motion without all of the information that the OSFM relied upon in making its determination.

12. The subject-matter waiver doctrine only applies where a party attempts to selectively waive its attorney-client privilege as to a particular matter. That is not the case here. Respondent seeks only to file a factual memorialization of information relied upon by the OSFM in making its decision, as required by 35 Ill. Adm. Code 105.508(b)(4). The OSFM is not seeking to selectively waive any portion of its privilege as to its legal deliberations. *See Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶ 63 (The attorney-client privilege can only be waived by the client).

13. Petitioner offers no support that Respondent is selectively introducing privileged legal advice into this proceeding. *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 74, 981 N.E.2d 345, 368 (2012) (“[P]laintiffs’ have not pointed this court to any legal filings by defendants where defendants utilize legal advice as a defense.”). Such showing is not possible, as the factual summary was drafted by the OSFM reviewer in her original email to legal counsel and does not allude to any legal advice. Similarly, the OSFM has not, and Petitioner makes no claim that the OSFM has, “voluntarily inject[ed] into the case either a factual or legal issue, the truthful resolution of which requires examination of confidential communications, such as legal malpractice actions.” *Id.* at 356. Petitioner of course could simply speak to its own consultant if it wanted to determine the truthfulness of the statement. In *Center Partners*, relied upon by Petitioner in its Response, the Supreme Court reversed and remanded an appellate court decision, holding instead that a party did not waive its attorney-client privilege where that party did not testify to the actual content and basis of the legal advice. *Id.* at 368.

14. Assuming *arguendo* that Respondent has inadvertently waived any portion of its privilege, such inadvertent waiver would not require, and the Response does not seek, revealing

the entirety of the internal legal communications of the OSFM. Voluntary disclosure of confidential information does not effectively waive the privilege as to all conversations or the whole breadth of the discussion which may have taken place. Newton v. Meissner, 76 Ill. App. 3d 479, 498–99, 394 N.E.2d 1241, 1255 (1979), citing Goldman, Sachs & Co. v. Blondis, 412 F.Supp. 286, 288 (N.D.Ill.1976) (where client testified at his deposition about a telephone call he placed to counsel, waiver of attorney-client privilege was limited to that specific subject during that particular conversation).

15. Finally, Petitioner contends that it is not necessary for all verbal communications to be reduced to writing and filed in the administrative record. Response at 4. All Respondent attempts to do here, is supplement the filed Record on Appeal, before any notable activity has occurred in this case, with a written summary of a communication relied upon by the OSFM in making its determination, which already existed at the time the OSFM determination was issued, as required by 35 Ill. Adm. Code 105.508(b)(4).

WHEREFORE, Respondent respectfully requests that the Hearing Officer grant its Motion to Supplement the Record.

OFFICE OF THE STATE
FIRE MARSHAL

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