

ILLINOIS POLLUTION CONTROL BOARD
April 22, 1993

LAKE COUNTY FOREST)	
PRESERVE DISTRICT,)	
)	
Complainant,)	
)	
v.)	PCB 92-80
)	(Enforcement)
NEIL OSTRO, JANET OSTRO,)	
and BIG FOOT ENTERPRISES,)	
)	
Respondents.)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a motion to quash subpoena, filed by American States Insurance Company. On January 20, 1993, the hearing officer conducted a hearing on the motion to quash. On January 21, 1993, the hearing officer referred the motion to quash to the Board for decision. The Board issued an order on February 25, 1993, asking complainant Lake County Forest Preserve District (Forest Preserve) whether it still seeks the information requested by the challenged subpoena. That February 25 order noted that Forest Preserve had filed its brief on February 16, 1993, and that the brief made no reference to the outstanding motion to quash. Thus, the Board was unclear whether Forest Preserve still seeks the information. On March 2, 1993, Forest Preserve filed a response to the motion to quash and a cross motion for rule to show cause. On March 8, 1993, American States filed a response to the Board's February 25, 1993 order, and a memorandum in support of its motion to quash.

Initially, the Board notes that Forest Preserve's March 2 filing does not refer to our February 25 order. We construe the filing to indicate that Forest Preserve still seeks the information requested by the subpoena. However, we will not consider either Forest Preserve's response to the motion to quash, or American States' memorandum in support of the motion to quash. Both filings were submitted long after the motion was filed on December 9, 1992. Pursuant to 35 Ill. Adm. Code 101.241 and 103.140, responses to motions are to be filed within 7 days after service of the motion. Forest Preserve's response did not meet that deadline. Additionally, American States should have filed any memorandum in support of its motion with the motion itself, or at least within a reasonable time thereafter. Thus, the Board will not consider either filing. Left before us are the motion to quash, Forest Preserve's cross motion for rule to show cause, and American States' response to the February 25 Board order.

0141-0205

The motion seeks to quash a subpoena served by Forest Preserve on an American States claims adjustor. That subpoena called for the claims adjustor to appear for deposition, and to bring all "correspondence, notes, memoranda, claims, tenders, insurance policies, certificates of insurance, and all other documents" related in any way to the respondents in this case. American States contends that the subpoena seeks irrelevant and privileged information, and has raised claims of attorney-client privilege and work product privilege.

At the January 20 hearing on this motion, American States produced the disputed file in two ways. The first group of documents ("group one" documents), which was provided only to the hearing officer for an in camera inspection, consists of documents which American States contends were compiled in defense of Mr. Ostro, and are thus privileged. (Tr. at 489-492.) Second, American States furnished a two-page "privilege log" listing documents for which American States claims attorney-client privilege and/or work product privilege. The documents themselves were not furnished to the hearing officer. (Tr. at 490; H.O. Exh. 3.) At the conclusion of the hearing, the hearing officer returned the "group one" documents to American States, because American States took the position that even if the hearing officer determined that some of those "group one" documents should be produced, American States would not produce them. (Tr. at 497-498, 503.) Thus, the hearing officer referred the motion to the Board.

Initially, the Board notes its frustration with the posture of this case. We are faced with deciding a complex motion to quash, involving several different claims of privilege, in a situation where all briefs have been filed. There has been no indication how the requested information might be used in this Board proceeding, if the motion to quash is denied. But for the outstanding subpoena and motion to quash, this case would be ready for decision. Absent a specific showing that information produced is material to the case, the Board will be extremely reluctant to allow any reopening of this case. We question whether the parties to this dispute have made legitimate efforts to resolve this issue.

The Board is also puzzled as to how we are expected to decide the motion to quash when none of the documents in dispute have been provided to the Board. A party asserting privilege has the burden of proving that privilege. (Cox v. Yellow Cab Co. (1975), 61 Ill.2d 416, 337 N.E.2d 15; Shere v. Marshall Field & Co. (1st Dist. 1974), 26 Ill.App.3d 728, 327 N.E.2d 92.) The mere assertion that a matter is protected by the attorney-client privilege is insufficient to prove the existence of that privilege. (Johnson v. Frontier Ford, Inc. (2d Dist. 1979), 68 Ill.App.3d 315, 386 N.E.2d 112.) We will not order the production of documents which are privileged, but American States

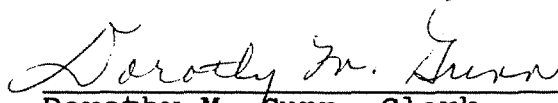
must prove the privilege.

The Board directs American States to produce all documents, including those for which it claims attorney-client or work product privilege, to the hearing officer for an in camera inspection. American States has not pointed to any authority which allows it to avoid such an inspection, and such inspections have been upheld by the courts. (Anderson v. St. Mary's Hospital (5th Dist. 1981), 101 Ill.App.3d 596, 428 N.E.2d 528; Johnson v. Frontier Ford, Inc. (2d Dist. 1979), 68 Ill.App.3d 315, 386 N.E.2d 112.) American States shall also provide a detailed explanation of the privilege asserted for each document, and an indication of who claims the privilege. Additionally, Forest Preserve shall make all efforts to narrow the scope of its request. For example, certain public documents (such as complaints filed in circuit court) are easily available elsewhere, and may indeed already be in Forest Preserve's possession.

The in camera inspection and hearing on this issue only shall be conducted in a manner similar to the January 20, 1993 hearing. It shall be transcribed, but no public notice need be given. The inspection shall be completed no later than June 1, 1993. The Board directs the hearing officer to make rulings upon each document which remains in dispute. If the parties wish to appeal any of those hearing officer rulings, they may file written appeals to the Board, with arguments in support, within 14 days of the conclusion of the in camera inspection. Such an appeal would require American States to transmit the challenged documents to the Board pursuant to our confidentiality rules. (35 Ill.Adm.Code 101.161.) We reserve ruling on Forest Preserve's motion for rule to show cause.

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 22nd day of April, 1993, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board