

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC)	
)	
Petitioner,)	
)	
v.)	PCB No. 07-146
)	(Pollution Control Facility Siting
)	Appeal)
UNITED CITY OF YORKVILLE, CITY)	
COUNCIL)	
)	
Respondent.)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on this 3rd day of December, 2007, Leo P. Dombrowski, one of the attorneys for Respondent, United City of Yorkville, filed via electronic filing the attached **United City of Yorkville's Reply in Support of Motion to Compel Return of Document Inadvertently Disclosed by Respondent**, with the Clerk of the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

UNITED CITY OF YORKVILLE

By: /s/ Leo P. Dombrowski
One of their Attorneys

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**REPLY IN SUPPORT OF MOTION TO COMPEL RETURN
OF DOCUMENT INADVERTENTLY DISCLOSED BY RESPONDENT**

Yorkville, by its undersigned attorneys, submits this Reply in support of its Motion to Compel.

I. BY NOT REBUTTING RELEVANT CASE LAW AND THE OLSON AFFIDAVIT, FOX MORAINE CONCEDES THAT THE INVOICE IS PRIVILEGED AND MUST BE RETURNED.

Fox Moraine does not contest the Appellate Court's holding in *Murry* that a party "must knowingly waive" the attorney-client privilege. *People v. Murry*, 305 Ill. App. 3d 311, 316 (2nd Dist. 1999). Nor does Fox Moraine contend that Yorkville has failed to meet the balancing test set forth in *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18 (2nd Dist. 1992).

Rather, Fox Moraine tries to bypass the cases' significance simply by asserting that they are "so fact specific" as to have no relevance here. Resp. ¶ 5. The facts of any case will necessarily be different from the facts of any other, and, by not rebutting the cases, Fox Moraine effectively concedes that the Invoice is covered by the attorney-client privilege and must be returned.¹

¹ Fox Moraine's contention (Resp. ¶ 2) that the Board or the Hearing Officer lacks the authority to order return or destruction of the Invoice is likewise unavailing, as Board rules provide that, "All discovery disputes will be handled by the assigned hearing officer." 35 Ill. Admin. Code § 101.616.

Fox Moraine also does not rebut the facts contained in the Olson affidavit establishing that Mr. Olson had no authority to send the Invoice to Fox Moraine and that he did not intend to waive any privilege or protection that may attach to the Invoice. Olson Affidavit ¶¶ 6-7. Facts contained in an affidavit in support of a motion "which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion." *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986); *see also Milynarski v. Rush-Presbyterian St. Luke's Medical Ctr.*, 213 Ill. App. 3d 427, 431-32 (1st Dist. 1991) (where, in discovery dispute, court took as true facts contained in un rebutted affidavit).² By acknowledging that Mr. Olson may not have understood any possible consequences (Resp. ¶ 4), Fox Moraine concedes that Yorkville could not have knowingly waive any privilege.

Fox Moraine further contends that Yorkville did not point to specific parts of the Invoice to show why it is privileged. While not wanting to be accused of waiving privilege by quoting specific entries in the Invoice, Yorkville noted that a review of the five-page Invoice would "reveal the substance and nature of work conducted in preparing legal advice for Yorkville." Motion ¶ 14. As a few examples of legal advice provided and matters discussed between attorney and client, Yorkville directs the Hearing Officer to the time entries of April 30, May 9, May 14, May 17 and May 21. These entries show the substance of confidential attorney-client discussions and are subject to the attorney client privilege. *See People ex rel. Ulrich v. Stuckel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997) (bills containing explanations for legal fees that reveal the substance of confidential attorney-client communications are protected by the attorney-client privilege); *In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982) (attorney-client privilege)

² Fox Moraine is correct that it is entitled to review some proof of Yorkville's fees and expenses before paying them (Resp. ¶ 3), but nowhere does Fox Moraine contend, nor could it, that it is entitled to receive an unredacted invoice for legal services.

protects attorney's bills, ledgers, statements, time records and the like which reveal the nature of services provided).

Fox Moraine also appears to contend that, for a communication to be privileged, it must reveal "the client's (City's)" thoughts or communications, and not the attorney's. Resp. ¶ 6. Fox Moraine cites no authority in support of this novel idea, as there is none. *See, e.g., Midwesco-Paschen Joint Venture v. IMO Indus., Inc.*, 265 Ill. App. 3d 654, 660 (1st Dist. 1994) ("we reject Midwesco's argument that only communications from a client to an attorney are covered by the attorney-client privilege and not communications from the attorney to the client."); *see also* S. Ct. Rule 201(b)(2) (privileged matters, "including communications **between** a party or his agent and the attorney for the party" are not discoverable (emphasis added)).

Finally, Fox Moraine argues that no attorney-client relationship existed between Yorkville and the firm of Wildman Harrold. Resp. ¶ 8. It relies on minutes of a City Council meeting showing that Wildman lawyer Michael Roth was appointed as Interim City Attorney. *Id.* Roth's individual retention and appointment as City Attorney does not somehow negate Yorkville's additional retention of the firm of Wildman Harrold as counsel in the landfill matter, and Fox Moraine does not point to any authority that special approval was needed before an attorney-client relationship could be formed between Yorkville and Wildman Harrold. The Invoice and its entries demonstrate that an attorney-client relationship was created.³

II. THE INVOICE REFLECTS YORKVILLE'S ATTORNEYS' THEORIES AND MENTAL IMPRESSIONS AND IS THEREFORE ALSO PROTECTED BY THE WORK PRODUCT DOCTRINE.

There is likewise no merit to Fox Moraine's suggestion that the Invoice does not constitute attorney work product. Resp. ¶ 7. In its Motion to Compel, Yorkville pointed out

³ The first page of the Invoice notes that it is for legal services rendered to Yorkville "In the Matter of: Local Siting Engagement." This is separate from Mr. Roth's retention and appointment as Interim City Attorney.

that, prior to Yorkville's resolution of Fox Moraine's landfill application, it was unknown whether an appeal would be filed. Motion ¶ 16. As Fox Moraine and its attorneys know, appeals are common in landfill siting matters either by the applicant or by third-party objectors, no matter what the decision of the local siting authority. *See* 107.200(a & b) (siting applicants may appeal denial of application; third-party objectors may appeal approval of application).

Attorneys need not be able to predict the future to advise their clients in landfill siting cases as to legal principles and doctrines—such as various standards of review, scope of discovery, and compilation and use of the record—that may apply if an appeal is indeed filed. As a few examples of matters regarding work product issues, Yorkville directs the Hearing Officer to the time entries of May 11, May 13-16, and May 20. The Invoice touches on the theories and mental impressions of Yorkville's attorneys should an appeal be filed. It is therefore also protected under the work product doctrine.⁴

Fox Moraine intimates that the Invoice may reflect "evidence of prejudgment" by Yorkville and therefore should not be returned. Resp. ¶ 7. If the Invoice did, Fox Moraine would certainly have specifically raised the issue in its Response. After all, Fox Moraine has had the Invoice for several weeks and has had ample time to review it. The fact that Fox Moraine did not provide any support for its claim of prejudgment shows that the claim is an empty one.⁵

⁴ The work-product doctrine provides broader protection than the attorney-client privilege, so that a document may be protected under the work-product doctrine, while not being protected by the attorney-client privilege. *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 196 (Ill. 1991). Additionally, "they are separate and distinct protections and waiver of one does not serve as waiver of the other." *Id.* at 189.

⁵ The "at issue" exception does not apply here, and *Waste Management* shows why it does not. There, an insurer and its insured were involved in a coverage dispute, and the court held that where "an attorney represents the common interests of two or more clients whose relationship subsequently becomes adverse, and, in a subsequent action the work product of the attorney is at issue, Rule 201(b)(2) is not available to bar discovery by one of the original parties." *Id.* at 200. There is no common representation here, nor does this case involve any coverage or similar type of litigation where the exception might apply.

III. CONCLUSION

The Hearing Officer should grant Yorkville's motion and order the return or destruction of all physical and electronic copies of the Invoice in the possession of the Fox Moraine and all recipients.

Respectfully submitted,

UNITED CITY OF YORKVILLE, CITY
COUNCIL

By: _____/s/ Leo P. Dombrowski
One of their Attorneys

Dated: December 3, 2007

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