

ILLINOIS POLLUTION CONTROL BOARD
December 6, 1984

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) PCB 79-145
)
CELOTEX CORPORATION and)
PHILIP CAREY COMPANY,)
)
Respondents.)

ORDER OF THE BOARD (by B. Forcade):

On November 15, 1984, Respondents, the Celotex Corporation and Philip Carey Company ("Celotex") filed a motion for reconsideration of a November 8, 1984 Board Order denying Celotex's application for non-disclosure. On November 21, 1984, the Illinois Environmental Protection Agency ("Agency") filed an objection to the Celotex motion for reconsideration and a petition to the Board for a special Board meeting to decide Celotex's motion for reconsideration. Celotex filed a response to the petition, and a reply to the Agency objection on December 4, 1984.

Celotex's motion for reconsideration provides an inadequate basis for Board reconsideration of its November 8, 1984 order. Celotex's assertion that the issue of whether the material in question is subject to discovery was not properly before the Board is clearly erroneous. Celotex, itself, raised the discovery issue when it denied discovery requested by the Agency based on the attorney-client privilege and the work-product doctrine. The hearing officer's Orders of October 5 and 15 referred the discovery issue to the Board. After examining the document in question, the Board determined that the information was discoverable under Illinois case law and statute. The Board reaffirms that holding here.

The issue of whether a document is discoverable and whether a document in the Board's files is subject to public scrutiny are clearly separate issues; both were properly before the Board. The hearing officer has all necessary authority to rule on discovery issues, including in camera inspections and protective orders to prevent public disclosure of discovery material secured by parties, Section 103.200(c). However, only the Board may rule on whether information in the Board's files may be withheld from public scrutiny.

Since Celotex's claim for non-disclosure was premised on

attorney-client and attorney work product privileges, disposition of the discovery issue necessarily disposes of the non-disclosure issue. As pointed out in the November 8, Order, Section 7(d) of the Act also requires disclosure. Celotex responded to Complainant's statement No. 7 regarding "materials disposed of at the landfill at issue," not by denying the existence of such information, but by claiming confidentiality. Celotex's current argument is that the Board had no basis for concluding the confidential documents pertained to material "being placed or to be placed in landfills." The connection between "materials disposed of" and "substances being placed" seems clear to the Board. The Board's November 8 Order was a Final Order on the issue of non-disclosure under Section 7 of the Act and the 35-day time clock runs from that date. However, under Section 103.240, Celotex's 35 day clock starts anew as of today's Order.

The Agency has stated, in its petition requesting a special Board meeting, that Celotex has withheld the information found to be discoverable subsequent to the Board's November 8, 1984 Order. Since a Board Order compelling production of information is not stayed by a motion for reconsideration 35 Ill. Adm. Code 103.140(h), any failure to timely produce such information would be a violation of the Board's Order. The Board is unable to see any purpose that will be achieved by holding a special Board meeting and the Agency's petition is denied.

On November 15, 1984, in an unrelated filing, the Agency submitted an application for non-disclosure, motion to file instant, and the subject material in an envelope labelled "Not Subject to Disclosure." In accordance with 35 Ill. Adm. Code 101.107(c)(3), the subject material has been afforded confidential status pending a prompt ruling by the Board. Celotex filed an opposition to the application and motion on November 26, 1984 and the Agency filed a response on December 4, 1984.

This issue arose from a discovery request by Celotex for production of the "brochure" prepared by the Agency and submitted to the Attorney General which describes in detail certain evidentiary material, legal theories and strategies. The Board has reviewed the subject document in camera. The brochure, dated September 15, 1978, is the documentary mechanism by which the Agency referred the case material that became PCB 79-145 to the Attorney General. The cover letter of the brochure requests that the Attorney General review the material contained within and decide whether an enforcement action should be filed before the Board. The brochure outlines general background information about the Celotex facility, Agency regulatory history concerning the facility, a listing of alleged violations of the Act and regulations, a table listing specific pieces of evidence that prove specific alleged violations, a list of potential witness that could be utilized in an enforcement action, and a proposed remedy for such violations.

The Agency attorney states by affidavit that the material in question is privileged against production in a judicial proceeding

under the attorney-client privilege. The attorney also describes the general nature of the material, who prepared the material and in what context, and lists eight people who are familiar with the subject material; each of whom are either Agency technical or legal staff or assistant attorneys general. Celotex argues that the Agency has not sufficiently alleged the elements of the attorney-client privilege. The Board is presented with two issues, whether the referral brochure is discoverable material and whether the material may be disclosed to the public under Section 7 of the Act and 35 Ill. Adm. code 101.107.

The Board finds that the referral brochure is not subject to discovery as it conforms with the elements of the attorney-client privilege as outlined by the Illinois Supreme Court in People v. Adam, 51 Ill. 2d 46, 280 N.E.2d 205 (1972). There the court outlined the "essentials of its creation and continued existence" as follows:

"(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived." 8 Wigmore, Evidence, Sec. 2292 (McNaughton Rev. 1961)" 280 N.E.2d at 207.

While the attorney-client relationship between two agencies of government such as the Illinois Environmental Protection Agency and the Attorney General has some unique aspects, it is generally analagous to more typical attorney-client relationships. The Agency submitted the brochure to the Attorney General in anticipation of legal advice regarding a potential enforcement suit. The Attorney General was consulted in his capacity as constitutionally designated legal representative of the Agency. The communication, in the form of the referral brochure, related to the purpose of legal advice regarding that potential enforcement suit. The brochure was kept confidential. Only a limited number of Agency and Attorney General staff were allowed to view the document. The communication was made by the Agency in its capacity as a legal client to the Attorney General and the Agency has endeavored to keep the document from being disclosed by the Attorney General and has not waived the privilege. The brochure is therefore not subject to discovery. The decision regarding application of the privilege disposes of the statutory disclosure issue. Because the brochure is privileged against introduction in a judicial proceeding under the attorney-client privilege, the brochure is also protected from public disclosure under Section 7(a)(2) of the Act.

The Celotex "Motion for Reconsideration of Board Order Denying Celotex Discovery," dated November 15, 1984, is denied.

The Celotex "Motion to Strike Hearing Officer Order Regarding

Site Inspection," dated November 27, 1984, is denied. Any possible prejudice to Celotex was cured by the hearing officer's Order dated December 3, 1984, which the Board has reviewed in light of Celotex's December 5 motion and declines to strike.

The Celotex "Motion to Board to Bar Certain Witnesses' Testimony at the Hearing," dated November 30, 1984 is denied to the extent that it requests the Board to rule on the issues. The conduct of the hearing is primarily the province of the hearing officer, 35 Ill. Adm. Code Part 103, Subpart F. All motions, except dismissal, must be directed to the hearing officer, Section 103.140(e). Only in the most unusual of circumstances will the Board entertain a motion within the scope of the hearing officer, absent a referral pursuant to Section 103.140(f). No such circumstances are presented here. The parties are encouraged to clearly delineate whether a motion is directed to the Board or to the hearing officer to aid in proper docketing of motions.

The Agency on December 3, 1984, filed "An Emergency Motion for Continuance of Hearing." Paragraph 2 of that request clearly presents unusual circumstances; the motion is granted.

Hearing must be held in this matter not later than January 28, 1985. The hearing officer can make such adjustments to any pre-hearing schedules as justice requires.

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 6th day of December, 1984 by a vote of 6-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board