STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law and Part 673 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

ROBERT BERGER, KAREN BERGER, DAVID COOK and JODY COOK,

Respondents.

RULING ON DISCLOSURE

DEC Case No. CO3-20070201-9

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Robert and Karen Berger ("Berger respondents"), and David and Jody Cook ("Cook respondents"), by service of a notice of hearing and complaint, both dated April 27, 2007. The complaint alleges that respondents are owners of the Honk Falls Dam (State Dam ID No. 177-0735) and that they failed to operate and maintain the dam in accordance with the provisions of section 15-0507 of the Environmental Conservation Law ("ECL").

This matter first came before the Office of Hearings and Mediation Services upon the filing of a Notice of Motion for Summary Judgment and Ancillary Relief, dated July 25, 2007, by the Berger respondents. By ruling ("2007 ruling") dated September 19, 2007, I denied the Berger respondents' motion for summary judgment in its entirety. The Berger respondents filed a motion for leave to appeal the 2007 ruling with the Commissioner and, by letter dated November 21, 2007, the Commissioner denied that motion. By motion dated July 7, 2008, the Berger respondents again moved for summary judgment and, by ruling dated February 17, 2009, I again denied the motion.

By ruling dated June 25, 2009, I directed the parties to conclude discovery expeditiously and further directed that "any motion under 6 NYCRR 622.7(c) [governing protective orders and motions to compel], and any motion for additional discovery, must be filed with this office within 30 days of the date of this ruling" (Ruling at 5). Subsequent to my July 25, 2009 ruling, however, the parties advised this office of ongoing efforts to resolve the discovery disputes without resort to motion practice and requested additional time.

On August 19, 2009, I convened a conference call with the parties to discuss discovery issues and other matters raised by the parties. By letter ruling dated August 28, 2009, I modified my previous ruling to reflect the agreements reached by the parties and, thereby, extended the deadline for motions to compel disclosure to September 30, 2009. I also reminded the parties that any motion to compel "must be made in conformance with 6 NYCRR 622.6(c)(1) and (2) [providing, inter alia, that a pre-hearing motion 'must clearly state its objective and the facts upon which it is based and may present legal argument in support of the motion']" (letter ruling at 3). Under cover letter dated August 31, 2009, Department staff filed a revised privilege log ("privilege log") with this office.[1]

Currently before me are motions by the Berger and Cook respondents relating to documents ("withheld documents") withheld from disclosure by Department staff. The Berger respondents request, by affirmation of Carl G. Dworkin, Esq., dated September 30, 2009 ("Berger motion"), a ruling directing Department staff to "deliver all non-disclosed documents for in camera review and grant[ing] that in camera review" (Berger motion at 8). The Cook respondents request, by affirmation of Alyse D. Terhune, Esq., dated September 30, 2009 ("Cook motion"), a ruling directing Department staff to either "release all documents" or "release and/or redact documents" determined to be discoverable pursuant to an in camera review of the withheld documents by this office (Cook motion at 9).

Department staff filed an affirmation of Robyn M. Adair, Esq., dated October 13, 2009 ("staff affirmation"), in partial opposition to the Berger motion. The Berger respondents filed a reply, dated October 26, 2009 ("Berger reply"),[2] to the staff affirmation. Staff also filed a cross-motion for a protective order,[3] dated October 16, 2009 ("staff reply"), in partial opposition to the Cook motion. Staff provided the last of the withheld documents to this office for in camera review under cover letter dated January 21, 2010.

SUMMARY OF THE PARTIES' POSITIONS

The Berger respondents argue that Department staff has withheld documents that are "absolutely, completely and unequivocally exculpatory" (Berger motion ¶ 14) and, therefore, staff has "indisputably violated Mr. and Mrs. Berger's due process rights" (Berger motion ¶ 26). The Berger respondents also assert that staff has withheld documents "for which no privilege claim validly can be made" (Berger motion ¶ 23).

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[1] Over the course of this proceeding Department staff has filed several iterations of its privilege log. The privilege log filed by staff under cover letter dated August 31, 2009 is the last log filed by staff and is the subject of this ruling.

[2] The Berger respondents filed errata, under cover letter dated October 29, 2009, correcting two pages of the Berger reply.

[3] Department staff denominated its reply as a "Cross-Motion for a Protective Order" and stated that "Respondents' reply to this motion must be served within ten (10) days of service of this Notice of Cross-Motion" (notice of cross-motion ¶ 6). Although no further responsive pleadings were filed by the Berger or Cook respondents, their respective positions with regard to disclosure are set forth in their motions.

Therefore, the Berger respondents argue, "[i]t is imperative that there be an *in camera* review of all documents which Staff continues to withhold" (Berger motion ¶ 25).

The Cook respondents argue that Department staff has improperly invoked the deliberative process and inter/intra-agency privileges and that, therefore, a significant number of the withheld documents must be disclosed (Cook motion ¶ 20). Moreover, the Cook respondents assert, "[f]actual documents are not privileged" and should be released in their entirety or with non-factual material redacted (Cook motion ¶ 19.B). Additionally, the Cook respondents argue that they should be afforded the opportunity to review documents that staff previously listed on, but has now removed from, the privilege log as "non-responsive," because these "documents may nevertheless be beneficial to their defense" (Cook motion ¶ 19.A).

Department staff does not oppose the respondents' request for in camera review of the withheld documents, but does oppose disclosure of any of the withheld documents (see Department staff affirmation, dated October 13, 2009, ¶ 4; Department staff affirmation, dated October 16, 2009, ¶ 5).

DISCUSSION

The scope of discovery in this administrative enforcement proceeding is as broad as that provided for under article 31 of the CPLR (see 6 NYCRR 622.7[a]). Accordingly, unless it is protected from disclosure pursuant to New York law, any matter that is material and necessary in the prosecution or defense of this proceeding must be disclosed (see CPLR 3101; 6 NYCRR 622.11[a][3]). The words "material and necessary" are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial . . . The test is one of usefulness and reason" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]). Where a party fails to comply with a demand for discovery, the proponent of the discovery demand may apply to the ALJ to compel disclosure (see 6 NYCRR 622.7[c][2]).

Because Department staff seeks protection against disclosure, the burden is on staff to establish that the protection asserted applies (see e.g. Spectrum Sys. Intl. Corp. v Chem. Bank, 78 NY2d 371, 377 [1991] [stating that "the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity"]).

Department staff's privilege log consists of nine pages and lists all of the withheld documents, together with some descriptive information and the protection asserter for each document. The predominant basis asserted by staff for immunity from disclosure is "interagency," however, staff also asserts "deliberative process," "prepared in anticipation of litigation," "attorney-client," "attorney work-product," or some combination of the foregoing, as providing the basis for withholding documents.

Berger Respondents' Motion

Much of the Berger motion is dedicated to expressing their counsel's opinion regarding the manner with which Department staff has prosecuted this matter. As to disclosure, the Berger respondents do not cite to any authority to challenge the various bases asserted by Department staff for withholding documents. Rather, the Berger respondents assert a broad "due process" claim in support of their demand for an in camera review of all the withheld documents. This claim is premised on staff's alleged improper withholding of exculpatory documents.

Contrary to the Berger respondents' argument that Department staff has "indisputably" violated their due process rights, there is no general due process right to exculpatory materials in administrative enforcement proceedings. The right of a criminal defendant to discovery of exculpatory materials in the possession of the prosecution does not extend to a respondent in an administrative proceeding (see Milburn v New York State Div. of Parole, 173 AD2d 1016, 1017 [3d Dept 1991]; Hachamovitch v Office of Professional Med. Conduct, 227 AD2d 686, 687 [3d Dept 1996], lv denied, 88 NY2d 814 [1996]). Moreover, State agencies have broad discretion to establish the scope of disclosure appropriate to their adjudicatory proceedings (see Miller v Schwartz, 72 NY2d 869, 870 [1988] ["It is settled, however, that there is no general constitutional right to discovery in . . . administrative proceedings"] [internal citation omitted]; State Administrative Procedures Act § 305 [stating that administrative agencies with the "power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings"]). The Department's enforcement hearing procedures provide that the scope of discovery in this proceeding must be as broad as that provided for under the CPLR. Accordingly, Department staff, like the other parties to this proceeding, may avail itself to the immunities from disclosure recognized under the CPLR (see CPLR § 3101 [enumerating various materials protected from disclosure]; 6 NYCRR 622.11[a][3] [providing, without limitation, that the ALJ "must give effect to the rules of privilege recognized by New York State law"]).

The Berger respondents also argue that withholding exculpatory documents "is a violation of Staff's legal obligation and Staff counsel's legal and ethical obligations" (Berger Motion ¶ 20). However, the Berger respondents again cite to no statute, regulation, case law or administrative decision that establishes a legal obligation on the part of either staff or staff counsel to disclose exculpatory documents in this administrative enforcement proceeding. Instead, the Berger respondents cite to the Ethical Considerations set forth under the former New York Lawyer's Code of Professional Responsibility.[4] However, even when the Ethical Considerations were in effect, they were not applicable to program staff who are non-attorneys (see Code of Professional Responsibility Preliminary Statement ["The Code is designed to be . . . a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules (emphasis supplied)"]), nor were

[4] Effective April 1, 2009, the New York Rules of Professional Conduct replaced the Code of Professional Responsibility.

they mandatory with respect to staff counsel (see id. ["The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character"]).

Notably, the Disciplinary Rules established under the former Code of Professional Responsibility, which are "mandatory in character," do not require disclosure of exculpatory materials in an administrative proceeding. Rather, the Disciplinary Rules state that "[a] public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment" (Code of Professional Responsibility DR 7-103[b] [emphasis supplied]).[5] There is no corollary requiring a government lawyer in a non-criminal proceeding to disclose such evidence.

Irrespective of the merits of the arguments advanced by the Berger Respondents, Department staff does not oppose an in camera review of the withheld documents and, as detailed in the sections below, I conducted an in camera review.

The Berger respondents also request dismissal of the complaint against them and reimbursement of the costs that they have incurred defending this action. Both of these requests are premised on Department staff's alleged violations of the Berger respondents' due process rights.[6] On review of the record before me, I reject the Berger respondents' characterizations of staff counsel's prosecution of this matter. Accordingly, I deny the Berger Respondents' requests for dismissal and reimbursement.

Cook Respondents' Motion

The Cook respondents request "disclosure of all documents or, in the alternative, [an] *in camera* review by the ALJ of documents withheld by the Department and a ruling ordering disclosure of such documents, in all or in part, ruled not to be privileged" (Cook motion ¶ 8). Although the Cook respondents' principal challenge is to staff's assertion of the inter/intra-agency and deliberative process privileges, they also challenge other protections asserted by staff.

As previously noted, Department staff did not oppose the Berger and Cook respondents' requests for an in camera review of all withheld documents. Accordingly, I reviewed all of the withheld documents and make the following determinations.[7]

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[5] This provision is largely unchanged under the Rules of Professional Conduct, except that the Rules expressly state that a government lawyer may be "relieved of this responsibility by a protective order of a tribunal" (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.8[b]).

[6] In addition to alleging that staff improperly withheld exculpatory documents, the Berger respondents also allege that staff commenced this action under "a knowingly false premise" (Berger motion ¶ 27).

[7] The section headings below correspond to each of the claimed exemptions from disclosure as designated by Department staff on its privilege log, seriatim.

Interagency Privilege

The first exemption from disclosure asserted by Department staff on its privilege log is listed as the "interagency"[8] privilege. Staff argues that documents "prepared by and maintained by Staff involving deficiencies at the Honk Falls Dam are specifically exempt from release under the provisions of the Public Officers Law § 87 (Freedom of Information Law or FOIL), which are also deemed privileged documents and exempt from disclosure under CPLR § 3101(b)" (staff reply ¶ 53). This argument must be rejected.

Department staff states that the Cook respondents submitted a FOIL request to the Department and "received a notice of partial denial, pursuant to POL § 87.2(g)," which allows agencies to deny access to certain inter/intra-agency documents (staff reply ¶ 56). The Department's response to the Cook respondents' FOIL request is, however, of no consequence here. This is because the exemptions to FOIL under POL § 87(2)(g) are simply that, exemptions to FOIL. Nowhere in FOIL does it state that these exemptions are also exemptions from discovery demands made pursuant to the CPLR. Rather, FOIL expressly provides that "[n]othing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records" (POL § 89[6]). Accordingly, the right of a party in these proceedings to gain access to Department records is not diminished by FOIL.[9]

Although Department staff's reliance on FOIL is misplaced, staff also cites to case law interpreting the application and reach of the common law "public interest privilege" in support of its assertion of the "interagency" privilege (see staff reply ¶ 53 [citing Matter of World Trade Ctr. Bombing Litig., 93 NY2d 1 [1999] and Matter of Klein v Lake George Park Commn. 261 AD2d 774 [3d Dept 1999]). Because the public interest privilege is interrelated with the deliberative process privilege, which is also asserted by staff, these two privileges are discussed together below.

Deliberative Process/Public Interest Privilege[10]

Department staff argues that some of the withheld documents are protected from disclosure pursuant to the deliberative process privilege. Staff argues that disclosure of

[8] It is clear from Department staff's filings that its assertion of an "interagency" privilege is intended to reach both inter-agency and intra-agency documents (see e.g. staff reply ¶ 57 [requesting that this office "withhold all inter and intra-agency documents" identified on the privilege log]).

[9] Department staff notes that the Cook respondents filed a FOIL request in relation to this matter and received a partial denial from the Department. The fact that respondents received a partial denial of their FOIL request is of no consequence to my determination of the Cook respondents' motion to compel disclosure under the CPLR.

[10] As noted in the previous section, Department staff relies, in part, on the common law public interest privilege for withholding documents that staff identified on its privilege log as protected by the "interagency" privilege. This section sets forth my determination with regard to the disclosure of those documents identified on staff's privilege log as protected by either the interagency or the deliberative process privileges.

these documents would "be injurious to Staff's strategy and confidential communications in the instant ongoing enforcement case" (staff reply ¶¶ 52, 58). The Cook respondents do not argue that the deliberative process privilege is unavailable, but state that "all of the documents withheld by the Department as 'inter-agency communications' . . . must be held to the same standard as applied by the courts . . . to the deliberative process exemption" (Cook motion ¶ 20).

In support of its argument to withhold documents under the deliberative process privilege, Department staff cites to several federal, but no New York State, cases. Nevertheless, it is clear that the deliberative process privilege is a viable protection against disclosure under the CPLR (see e.g. New York Telephone Co. v Nassau County, 54 AD3d 368, 369-370 [2008] [stating that the court below "improvidently exercised its discretion in compelling the disclosure sought here. The communications at issue are protected from disclosure by the deliberative process privilege" (citations omitted)]; Matter of Gaul, Rulings of the Administrative Law Judge, January 12, 2009, at 16 n 6 [stating that "[t]he deliberative privilege is an established evidentiary privilege against disclosure. . . . The privilege covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency" (citations omitted)]).

The deliberative process privilege is a subset of the long established public interest privilege which "attaches to 'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged'" (Cirale v 80 Pine St. Corp., 35 NY2d 113, 117 [1974] [quoting People v Keating, 286 AD 150, 153 (1st Dept 1955)]). In 1999, the Court of Appeals noted that the public interest privilege requires a balancing of interests and that "[s]ince Cirale, this balancing of interests has been described in various ways and can include the weighing of the encouragement of candor in the development of policy against the degree to which the public interest may be served by disclosing information which elucidates the governmental action taken" (Matter of World Trade Ctr. Bombing Litig., 93 NY2d 1, 9 [1999] [internal quotation marks and citations omitted]). The Court further noted that "[t]he range of inquiry includes whether the [government] can show that the public interest might be harmed if the sought-after materials were to lose their confidentiality shield, such that, on balance, disclosure might produce results more harmful to the public good than beneficial to the private litigating parties seeking [disclosure]" (id. at 10). The Court has declined to delimit the scope of the term "public interest," instead holding that it is "a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case" (Cirale at 118-119).

As the case law makes clear, the mere showing that a document evinces communication between public officers is not sufficient to warrant shielding that document from the State's liberal disclosure rules. Rather, the government must demonstrate that a document implicates a discernible public interest that would be harmed if the document were to be released.

Applying the foregoing principles to the documents withheld by Department staff under either the deliberative process privilege or the inter/intra-agency privilege, I conclude that staff has failed to meet its burden to establish that the protection asserted applies to the following documents: 43, 44, 80, 81, 82, 526 (532[11]), 527, 528, 553 (566), 554 (567, 591), 555 (568, 590), 556 (569, 589), 557 (570, 588), 561 (573, 583), 582, 792-804, 810, 811, 813, 817, 818 and 833.

Materials Prepared in Anticipation of Litigation

The Cook respondents argue that "it is unlikely that documents from the 1980s were prepared for this enforcement action" and note that they are "not aware of any other Honk Falls Dam litigation" (Cook motion ¶ 19.D). Department staff maintains that each of the documents it identified as material prepared in anticipation of litigation, regardless of the document's date, was prepared for litigation and is immune from disclosure (staff reply ¶¶ 31-35). Staff asserts that the lone document it withheld on this basis that was created in the 1980s is a "legal referral package" that was prepared by program staff "in anticipation of commencing an enforcement case on the Honk Falls Dam in 1984" (staff reply ¶ 32). Staff argues that it has properly asserted immunity from disclosure under the materials prepared in anticipation of litigation protection and that the date of a document is irrelevant.

Generally, materials prepared in anticipation of litigation are protected from disclosure only within the confines of the proceeding for which the materials were prepared. However, the protection against disclosure may reach materials prepared for another proceeding if the other proceeding is sufficiently interconnected with the proceeding at bar to warrant extending the protection. As with other exemptions, the question is whether disclosure of a particular document would serve to defeat the purposes for which the protection was established. (See Milone v General Motors Corp., 84 AD2d 921, 922 [4th Dept 1981] ["Except where the pending litigation arose from the prior case . . . material prepared for related litigation is treated as if it is not prepared for the case at bar" (internal quotation marks and citations omitted)]; E. B. Metal Indus. v State, 138 Misc 2d 698, 700 [Ct Cl 1988] ["As a general rule, material prepared for litigation in a case other than the one in which disclosure is sought is not immunized. However, there is an exception to this general rule where the litigation for which the material was prepared arose from the same occurrence or transaction underlying the case in which disclosure is sought and where disclosure would be unfair" (citations omitted)]).

Although the legal referral package withheld by Department staff was created in 1984, it was generated in order to initiate an enforcement action against the owners of the Honk Falls Dam to correct deficiencies in the dam. Clearly, the commencement of an enforcement action was long delayed. Nevertheless, the legal referral package was created in anticipation of commencing an enforcement action much like that now before this office and, based upon my review of the document, I conclude that it is entitled to the

[11] Document numbers appearing in parentheses reference duplicates of the preceding document.

same protection against disclosure as materials more recently prepared by staff in anticipation of this litigation.

With regard to the remainder of the documents identified by Department staff as materials prepared in anticipation of litigation, I conclude that they are all immune from disclosure, except for portions of documents numbered 734 and 735. These two documents consist of survey maps created by non-parties that contain annotations by staff. The annotations are protected from disclosure, the maps are not. Accordingly, staff is directed to disclose documents numbered 734 and 735 with staff's annotations redacted.[12]

Attorney-Client Privilege

The Cook respondents do not provide a specific factual basis or legal argument for requiring Department staff to disclose those materials that staff claims are protected by the attorney-client privilege. Staff identified nine[13] documents it withheld under the attorney-client privilege on the privilege log and subsequently reaffirmed that each of these documents involves confidential communications between staff attorneys and program staff concerning the Honk Falls dam enforcement action (see staff reply ¶ 16).

On the basis of the foregoing and my review of the documents, I conclude that the nine documents identified by staff as protected by attorney-client privilege need not be disclosed.

Attorney Work-product

The attorney work product exception protects "materials prepared by an attorney, acting as an attorney" from disclosure, but does not extend to "[m]aterials or documents that could have been prepared by a layperson" (Salzer v Farm Family Life Ins. Co., 280 AD2d 844, 846 [3d Dept 2001] [internal quotation marks and citations omitted]). Department staff identified 13 documents (some of which are partial duplicates of email strings) on the privilege log that staff withheld under this protection. Because I have already concluded that two of these 13 documents are entitled to protection from disclosure under the attorney-client privilege, I will consider only the remaining 11 documents here. Staff reaffirmed that each of the 11 documents was either prepared by an attorney or involves communications to, from, or between staff attorneys on matters relevant to this proceeding (staff reply ¶¶ 21-23).

On the basis of the foregoing and my review of the documents, I conclude that staff is entitled to withhold the 11 documents in their entirety, except for documents numbered 819 and 821. These two documents consist of maps created by non-parties

[12] In the event that staff has already disclosed non-annotated versions of the maps to the other parties, staff may comply with this directive by directing the parties' attention to the prior disclosure.

[13] Department staff's privilege log includes a number of duplicates. There are only nine discrete documents for which staff asserts attorney-client privilege.

that contain annotations by staff. The annotations are protected from disclosure, the maps are not. Accordingly, staff is directed to disclose documents numbered 819 and 821 with staff's annotations redacted.[14]

Non-responsive Documents

Department staff's letter dated August 31, 2009 transmitting the privilege log, states that staff removed a small number of documents from the privilege log because staff determined that the documents are non-responsive. Staff states that these documents are non-responsive because they relate to "summaries of other dams aside from the Honk Falls Dam." The Cook respondents argue that these documents should be disclosed to allow them to determine whether the information they contain may be beneficial to their defense.

I have reviewed the documents that Department staff removed from the privilege log as non-responsive and hold that those documents are not material and necessary in the defense of this enforcement action. Accordingly, staff need not disclose those documents.

CONCLUSION

For the reasons set forth herein, the Berger and Cook Respondents' respective motions for in camera review and other relief are granted in part and denied in part.

I direct Department staff to disclose the following withheld documents in their entirety (duplicates omitted): 43, 44, 80, 81, 82, 526, 527, 528, 553, 554, 555, 556, 557, 561, 582, 792-804, 810, 811, 813, 817, 818, and 833. I further direct staff to disclose the following withheld documents, redacted in accordance with this ruling: 734, 735, 819, and 821. Staff shall produce the foregoing documents, together with an updated document index and privilege log, within 30 days of the date of this ruling.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: February 10, 2010
Albany, New York

[14] In the event that staff has already disclosed non-annotated versions of the maps to the other parties, staff may comply with this directive by directing the parties' attention to the prior disclosure.