STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the New York State Environmental Conservation Law ("ECL") and Part 360 of Title 6 of the official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and of Department Order on Consent No. R1-20080514-150

DEC Case No.
CO 1-2014-0507-159

-by-

ECOLOGY SANITATION CORP., ECOLOGY TRANSPORTATION CORP., and ERNEST DEMATTEO, INDIVIDUALLY AND AS OWNER AND OPERATOR OF ECOLOGY SANITATION CORP. and ECOLOGY TRANSPORTATION CORP.,

Respondents.

SUPPLEMENTAL RULING ON
RESPONDENTS' MOTION TO COMPEL

In a ruling dated September 15, 2017, the undersigned directed staff of the Department of Environmental Conservation ("Department") to submit for in camera review twelve documents staff claims are protected from disclosure by the attorney-client or official information privilege.

The scope of discovery in this administrative enforcement proceeding "must be as broad as that provided under article 31 of the CPLR." 6 NYCRR § 622.7. The CPLR provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR 3101(a). The ALJ must, however, "give effect to the rules of privilege recognized by New York State law," 6 NYCRR § 622.11(a)(3), including the attorney-client privilege, see CPLR 4503, and common law privileges including the "official information," "public interest," and "deliberative process" privileges. See generally Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113 (1974); see also Matter of U.S. Energy Development Corp., Ruling of Chief Administrative Law Judge on Renewed Motion to Compel Disclosure, December 23, 2015, at 6-7.

Department staff has asserted the attorney-client privilege with respect to three documents submitted for in camera review. This privilege protects from disclosure confidential communications by the client to an attorney for the purpose of obtaining legal advice, and from the attorney to the client if made "'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.'" Spectrum Systems Int'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 377-78 (1991) (quoting Rossi v. Blue Cross & Blue Shield, 73 N.Y.2d 588, 593 (1989)).

Staff has satisfied its burden to demonstrate the applicability of the attorney-client privilege to the three documents, with the following exception. One of the documents is an email dated January 15, 2014, with an attachment. The email refers to the attachment as a "summary of … records" and states that "he stamped all of the documents confidential or trade secret." Because the email does not identify who "he" is, I requested that Department staff provide me the identity of the person to whom the pronoun "he" applied. By email dated October 16, 2017, counsel for Department staff stated that staff has indicated that the "he" refers to respondent Ernest DeMatteo.

Based upon staff's representation, the attachment to the January 15, 2014 email is a summary of facts gleaned from documents provided to the Department by one of respondents. The attorney-client privilege is "limited to communications – not underlying facts," Spectrum Systems Int'l Corp., 78 N.Y.2d at 377. Therefore, although the January 15, 2014 email is protected from disclosure by the attorney-client privilege, the factual summary list attached to the email is not privileged, and should be produced.[1]

With respect to the other documents withheld in whole or in part by Department staff, staff has asserted that these documents are protected from disclosure by the "official information," "public information" or "deliberative process" privilege.[2] The official information privilege "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, 35 N.Y.2d at 117. The privilege is a qualified one, and its applicability is determined on the facts of each case, requiring a balancing of harm to the government and public interest against the interests of the party seeking the information. See id. at 118; see also One Beekman Place, Inc. v. City of New York, 169 A.D.2d 492, 493-94 (1st Dep't 1991) ("a court must weigh 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").

Department staff described the documents at issue as:

> communications between Staff that contain recommendations, draft documents, suggestions, opinions, ideas or advice exchanged as part of the deliberative process of government decision making and reflecting the personal opinions of Staff.

[1] I note that the email refers to the attachment as a document with the file extension ".xlsx," thus indicating that the attachment is an excel spreadsheet. The copy produced for in camera inspection is one page, in "portrait" rather than "landscape" orientation, so that the entirety of the spreadsheet is not visible, and some words appear to be cut off.

[2] Respondents state that the official information privilege is "subsumed" by the public interest privilege. See Respondents' Motion for a Protective Order and to Compel, dated August 7, 2017 ("Respondents' Motion"), at 14-15, ¶ 42.

Affirmation of Jennifer Andaloro, Esq., in Opposition, dated August 14, 2017, at ¶ 34. Staff argues that disclosure of the documents "would likely inhibit the honest exchange of views between Staff," and that the "public interest in encouraging candor in communications between public employees" outweighs respondents' interests. Id.

Upon in camera review, it is clear that the documents at issue, and the redacted portions of documents that have been produced in redacted form, are deliberative, and contain pre-decisional communication, suggestions, recommendations, drafts, and so on, comprising a governmental decision-making process and reflecting the personal opinions of members of Department staff. Respondents have not described their interests in obtaining the withheld information, other than to say that the documents are "potentially significant" and relate to respondents. See Respondents' Motion at 15-16, ¶¶ 45, 46.

I am persuaded by Department staff's arguments and, upon review of the documents submitted by staff, hold that the balancing of interests favors non-disclosure.[3]

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: October 18, 2017
Albany, New York

[3] Staff has apparently made one small error in its redactions. The March 18, 2014 email chain (the top is from Mr. Wade to Mr. Conover, time 2:22pm), redacts the words "The attached permit is for Brussels-Liere" at the beginning of the March 14, 2014 email embedded within the email chain following ">>> John Conover 3/14/2014 1:31 PM >>> hi Jim." Three other documents contain that same email, and that text is not redacted in those documents. See March 14, 2014 email from J. Conover to J. Wade; March 17, 2014 email from J. Wade to J. Conover; March 18, 2014 email from J. Conover to J. Wade (noting the time as 12:40pm).

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