

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 17s and 71 of the
New York State Environmental Conservation Law (ECL),

**RULING ON
MOTION TO
COMPEL
DISCLOSURE**

-by-

VILLAGE OF KENMORE,

DEC Case No.
R9-20160923

Respondent.

Appearances

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Teresa J. Mucha, Associate Attorney, of counsel), for staff of the Department of Environmental Conservation
- Hodgson Russ LLP (Daniel A. Spitzer of counsel) for respondent Village of Kenmore

Procedural Background

This matter involves allegations by staff of the New York State Department of Environmental Conservation (Department) that respondent Village of Kenmore (Village or respondent) violated the New York State Environmental Conservation Law. The allegations arise out of a consent order respondent executed with the Department, with an effective date of April 28, 2011, and a revised schedule of compliance executed in 2016, to abate sanitary sewer overflows in the Village. Currently before me is Department staff's motion to compel respondent to respond to Department staff's Set of Demands for Documents and Other Materials dated April 27, 2018.

Department staff served a notice for production of documents by electronic and regular mail on respondent's attorney Daniel A. Spitzer, Esq and respondent's Village Clerk-Treasurer Kathleen Johnson, Esq. on April 27, 2018 (*see* affirmation of Teresa J. Mucha dated August 6, 2018 [Mucha Aff], at ¶ 4 and Exhibit C). Pursuant to a scheduling order issued by Administrative Law Judge (ALJ) D. Scott Bassinson, the parties had until (1) June 15, 2018 to serve responses and objections to the discovery demands and submit privilege logs, (2) July 6, 2018 to make discovery related motions, and (3) July 23, 2018 to reply to any motions (*see id.*, Exhibit D). By letter dated June 14, 2018, Mr. Spitzer, with the concurrence of Department staff,

requested a 30-day extension of these deadlines to July 16, 2018, August 6, 2018, and August 23, 2018, respectively, “as the parties continue to discuss settlement” (*see* Letter from Daniel Spitzer dated June 14, 2018 [copied to all parties], *id.*, Exhibit F). I granted Mr. Spitzer’s request by email dated June 14, 2018 (*see id.*, Exhibit G).

Respondent failed to serve its responses to Department staff’s discovery demands by July 16, 2018. Department staff moved to compel disclosure on July 17, 2018 (Mucha Aff, Exhibit D). Following receipt of the Village’s response on July 20, 2018, staff withdrew its motion (*see* Letter from Terry Mucha, Esq. to ALJ Lisa Wilkinson, dated July 20, 2018 [copied to all parties], *id.*, Exhibit K). Respondent served its privilege log on Department staff on August 6, 2018 (*see* Email from Daniel Spitzer to Teresa Mucha dated August 6, 2018, *id.*, Exhibit O).

Department staff moves again to compel disclosure, contending that respondent’s responses are inadequate, and that respondent has not made documents available for inspection as respondent represented in its discovery responses. Staff’s motion papers consist of a notice of motion, a motion in the form of an affirmation of Teresa Mucha dated August 6, 2018, and fifteen exhibits. On August 23, 2018, counsel for respondent submitted an attorney affirmation (affirmation of Daniel Spitzer, Esq., dated August 23, 2018 [Spitzer Aff]), and memorandum of law in opposition to Department staff’s motion to compel. A complete list of the parties’ submissions is attached to this ruling.

For the reasons that follow, I grant Department staff’s motion to compel.

Discussion

The scope of discovery in administrative enforcement proceedings is as broad as that provided under article 31 of the CPLR (6 NYCRR 622.7[a]; *Matter of U.S. Energy Develop. Corp.*, Ruling of the Chief ALJ on Motion for Leave to Conduct Depositions, May 9, 2014, at 4; *Matter of U.S. Energy Develop. Corp.*, Ruling of the Chief ALJ on Renewed Motion to Compel Disclosure, December 23, 2015, at 2-3). “All matter material and necessary” to prosecute or defend an administrative enforcement proceeding must be disclosed unless it is protected from disclosure (*see* CPLR 3101[a]). The New York Court of Appeals has held that “the words ‘material and necessary’ are . . . to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 [1968]). The issues identified in the pleadings determine the scope of discovery (*Kem v City of Rochester*, 261 AD2d 904, 905 [4th Dept 1999]).

The complaint alleges that respondent failed to comply with an order on consent executed on April 28, 2011 (2011 Order) to address sanitary sewer overflows within the Village of

Kenmore and failed to comply with the compliance schedule that was part of the 2011 Order, Schedule A, and revised in 2016 (2016 Revised Schedule A). The complaint charges that respondent has failed to complete the projects and make required submittals set forth in the 2016 Revised Schedule A; respondent continues to discharge untreated wastewater to a waterbody as a result of sanitary sewer overflows in violation of ECL 17-0509(2) and 17-0511; dry weather overflows occur from respondent's sanitary sewer overflow outfalls into storm sewers which discharge into Two Mile Creek in violation of ECL 17-0501, 17-0509(2) and 17-0511; and respondents have failed to report discharges of untreated or partially treated sewage as required by the Sewage Pollution Right to Know Act in violation of ECL 17-0826-a. (*See Mucha Aff, Exhibit A.*) I consider Department staff's motion to compel in light of these charges.

Attorney Client Privileged Material

I first address respondent's claims that certain documents are exempt from disclosure as attorney-client privileged material. The attorney-client privilege is codified in CPLR 4503 and protects confidential communications between an attorney and client as part of an attorney's legal representation. For the privilege to apply, the communication must be made for the purpose of conveying legal advice or services, in the course of a professional relationship, and the "communication must be primarily or predominantly of a legal character" (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]). Communications that are subject to the attorney-client privilege are excepted from disclosure pursuant to CPLR 3101(b).

The attorney-client privilege does not encompass every communication between an attorney and a client, and cannot be used as a device to shield otherwise discoverable information. For example, an investigative report does not become privileged merely because it was sent to an attorney, nor is a report prepared by an attorney privileged if the scope of services falls outside the giving or receiving of legal advice. A lawyer's communication with a client that includes non-privileged information in its legal analysis and advice may be protected under certain circumstances. "The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." (*Spectrum Sys. Intl. Corp.*, 78 NY2d at 377-378.) The party asserting a privilege has the burden to establish that the claimed privileges applies (*see e.g. id.* at 377).

Here, respondent prepared a privilege log consisting of a table of two rows and five columns. The columns indicate documents with "various" dates, the author, the recipient, a generic document description, and an indication that the documents are protected by attorney-client privilege. Respondent describes the documents in general terms as follows: "Email communication forwarding legal advice from counsel regarding the Notice of Violations, draft submittals to the Agency, Complaint, Answer and Affirmative Defenses, Responses to Agency Discovery Requests, Expert Disclosure." The first row includes communications from Mr. Spitzer to Kathleen Johnson, the Town Clerk, and consultants Brook Hamberger and Bruce Shearer. The second row includes documents to Mr. Spitzer from Ms. Johnson, Ms. Hamberger,

and Mr. Shearer. (*See Mucha Aff, Exhibit O.*) The attorney-client privilege is the only privilege respondent asserts in the privilege log.

Department staff contends that respondent's privilege log is inadequate to assess whether the privilege applies, and that respondent did not timely assert the privilege (*see Mucha Aff at ¶¶ 8, 12, 23*). I concur with Department staff that it is not possible to determine from the privilege log itself whether individual documents contain privileged information, if the communication as a whole was made to render legal advice to a client, or whether some information is subject to disclosure. As respondent's counsel notes in his memorandum of law, "whether a particular document is protected [by the attorney-client privilege] is necessarily a fact-specific determination often requiring an in camera review. The party invoking the privilege bears the burden of demonstrating the information sought is 'immunized from disclosure'" (Respondent's Memorandum of Law at 5 [citing *Koump v Smith*, 25 NY2d 287, 294 (1969)]). Therefore, it will be necessary for me to examine the documents respondent seeks to withhold to determine whether, and to what extent, the attorney-client privilege applies.

I direct respondent to submit hardcopies of the documents referenced in its privilege log to me within 10 calendar days from the date of this ruling for an in camera review.

Documents Available for Inspection

Respondent stated in its response that it would make documents available for inspection in response to Department staff's document demand numbers 1, 2, 4, 5, 9, 10, 13, 14, and 17 (*see Mucha Aff, Exhibit J* [aforementioned responses]). The parties, however, were unable to arrange a date for inspection, and disagree whether respondent provided Department staff with a reasonable opportunity to inspect documents prior to the deadline for staff to make a discovery related motion. The record shows Department staff made several attempts to schedule an inspection of the documents from July 20 to July 31, and that Ms. Johnson asked staff to identify what documents Department staff wanted so she could retrieve them. Department staff responded that it wanted to inspect the documents responsive to its discovery request, which respondent stated it would make available. Ms. Johnson was out of the office the week of July 30, 2018. Due to the discovery schedule and lack of document disclosure, staff contends it was compelled to file discovery related motion by the deadline under the scheduling order. (*See Mucha Aff at ¶¶ 15-19.*) Respondent disputes the Department's claim of lack of cooperation, arguing that counsel invited Department staff to arrange a time to review records at the Village, and that Department staff made no appointment to inspect records or meet and confer about any discovery issues (*Spitzer Aff at ¶¶ 4-10*).

Respondent had an obligation to produce responsive documents by the July 16, 2018 deadline and failed to do so. Staff's document requests seek relevant information with respect to

the charges in the complaint, including respondent's affirmative defenses, the maintenance, operation and repair of respondent's sanitary sewer system, and respondent's compliance with State disclosure laws and meet the standards for disclosure pursuant to CPLR 3101(a) and New York judicial precedent. Therefore, I am directing respondent to provide Department staff all documents responsive to Department staff's document demand numbers 1, 2, 4, 5, 9, 10, 13, 14, and 17 within 10 calendar days from the date of this ruling. Respondent may make the documents available for inspection, copy the documents to a CD ROM or other electronic storage device acceptable to Department staff, or provide the documents in hardcopy form. If the parties mutually agree to another date for respondent to provide responsive documents, they can so advise me. Barring a mutual agreement, the 10-day deadline applies. If respondent asserts a claim of attorney-client privilege with respect to any of the responsive documents, respondent shall submit the document(s) to me for an in camera review within 10 calendar days of the date of this ruling as discussed above.

Document Demands Objected to by Respondent

Respondent objected to Department staff's document demand numbers 6, 7, and 8 as vague, ambiguous, overbroad and unduly burdensome, requiring the disclosure of confidential information, the creation of documents for production, but stated that responsive documents were available on-line (*see* Mucha Aff, Exhibit J, at 7-9). Department staff asserted that it could not locate documents on-line responsive to these document demands (*see* Mucha Aff at ¶ 35). Collectively, these document demands seek information regarding the Village's efforts to address the compliance issues associated with its sanitary sewer system. The demands meet the standard for disclosure pursuant to CPLR 3101(a) and New York judicial precedent. Directing Department staff to locate responsive documents on-line is not an adequate response. Respondent is obligated to identify and produce responsive documents for Department staff. I am, therefore, directing respondent to provide all documents responsive to Department staff for document demand numbers 6, 7, and 8 within 10 calendar days from the date of this ruling.

Respondent stated that it will not make documents responsive to document demand numbers 11, 12, 13 15, and 20 available for inspection. Document demand numbers 11 and 12 seek information related to the financing of sanitary sewer system repairs, evaluations, studies, and infrastructure improvements, matters relevant to the first, second and third causes of action. Documents responsive to these demands are pertinent to the allegations in the complaint and meet the standard for disclosure pursuant to CPLR 3101(a) and New York judicial precedent. Document demand number 13 seeks information related to the DEC/Capital improvements surcharge assessed to residents of the Village, how the figure was calculated and how the funds have been or will be used by respondent, information pertinent respondent's efforts to address the compliance issues with its sanitary sewer system. (*See* Mucha Aff, Exhibit J, at 10-12.) Document demand number 15 seeks information concerning respondent's compliance with the

Sewage Pollution Right to Know Act, the subject of the fourth cause of action (*see Mucha Aff* at ¶ 37). Document demand number 20 seeks documents concerning respondent's review and approval of all versions of plans required to be submitted pursuant to the 2011 Consent Order and 2016 Revised Schedule A, information relevant to the first, second and third causes of action (*see Mucha Aff*, Exhibit J, at 16).

Respondent asserts, without substantiation, that document demand numbers 11, 12, 13, 15, and 20 call for the "disclosure of confidential and/or proprietary documents and/or information," and would require the Village to "create documents for production" (*see Mucha Aff*, Exhibit J, at 10-13, 16-17). This response is not adequate. Document demand numbers 11, 13, 15, and 20 seek information pertinent to the Village's efforts to address the financing of projects associated with its sanitary sewer system, compliance with the public outreach requirements, and respondent's review and approval of plans and submissions required under the 2011 Order and 2016 Revised Schedule A. The documents demanded meet the standard for disclosure pursuant to CPLR 3101(a) and New York judicial precedent. To the extent that documents are covered by the attorney-client privilege, I have already established a protocol for in camera review. Whether the Department already possesses some of these documents, as respondent asserts, does not preclude Department staff from asking respondent what documents are in its possession and getting a response. Moreover, respondent can make the documents available for inspection, in the first instance. Respondent is, therefore, directed to provide Department staff with documents responsive to document demand numbers 11, 12, 13, 15 and 20 in accordance with this ruling.

With respect to document demand number 12, respondent claims not to know what Department staff is seeking. As I read this document demand, Department staff is seeking documents related to respondent's efforts to obtain alternative means of financing for its sanitary sewer system, in addition to municipal bonds and grants issued by the Department pursuant to the Water Quality Improvement Project Program and the Wastewater Infrastructure Engineering Planning Grant. If respondent has not sought or obtained any such funding, respondent can simply state that the Village has not sought or received additional funding. Otherwise, respondent shall provide responsive documents to Department staff in accordance with the protocols set forth in this ruling.

Respondent also objects to document demand numbers 18 and 19, reiterating that the Department already has this information, that it requires disclosure of confidential and/or proprietary documents and information, and that it requires the Village to create documents for production and asks for legal opinions. Respondent also "directs the NYSDEC to the Fourth amendment of the Constitution" in objection to document demand number 19 (*see Mucha Aff*, Exhibit J, at ¶ 16). Document demand number 18 asks for all documents and communications of respondent's code enforcement officers concerning property inspections that involve items

related to sanitary sewers. Document demand number 19 requests documents and communications of respondent concerning respondent's enforcement of its sewer use law regarding the authority of Village employees to enter and inspect properties. These document demands are pertinent to causes of action one, two, and three, in terms of assessing respondent's efforts to address sanitary sewer overflows and meet the standard for disclosure pursuant to CPLR 3101(a) and New York judicial precedent. Respondent has not asserted a privilege other than the attorney-client privilege, which I have already addressed in this ruling, and respondent's Fourth Amendment claim is unsubstantiated. Therefore, respondent is directed to provide Department staff with documents responsive to document demand numbers 18 and 19 pursuant to the protocols set forth in this ruling.

Other Document Demands

It is not clear from Department staff's motion papers whether staff is seeking specific relief with respect to document demands numbers 16, and 21-24. Department staff is directed to notify respondent within 10 calendar days of the date of this ruling whether staff is still seeking documents responsive to these requests. Respondent shall make documents available to Department staff in accordance with the protocols set forth in this Ruling within 10 calendar days after receiving notification from staff.

Department staff does not appear to seek relief with respect to document demand number 3, and I concur with respondent that document demand number 3 is in the nature of an interrogatory for which permission must be sought upon a finding that discovery is likely to expedite the proceeding (6 NYCRR 622.7[c]).

I note that the Department's regulations require parties to make good faith efforts to resolve discovery disputes before resorting to motion practice (6 NYCRR 622.7[c][1]). Department staff has demonstrated its good faith attempt to communicate with respondent regarding document inspection and its discovery demands before staff submitted the current motion (*see* Mucha Aff at ¶¶ 15-22 and Exhibits L and M). Moreover, Department staff had to file its motion by August 6 in order to comply with the scheduling order, at which point respondent had not timely responded to all of staff's discovery demands. Going forward, I encourage the parties to schedule a conference call with me to discuss any discovery disputes that they have been unable to resolve in good faith before resorting to motion practice.

Summary of Ruling

To summarize, I direct respondent to provide Department staff with all documents that are responsive to Department staff's document demand numbers 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19 and 20 within 10 calendar days after the date of this ruling. Respondent

may make the documents available for inspection, provide them on a CD ROM or other electronic storage device acceptable to Department staff, or provide the documents to Department staff in hardcopy form. If the parties mutually agree to another date for respondent to provide documents that is more than 10 calendar days after the date of this ruling, they can so advise me. Absent a mutual agreement between the parties, respondent must provide documents to Department staff within 10 calendar days of the date of this ruling. Finally, respondent shall submit any document(s) that respondent claims are protected from disclosure by the attorney-client privilege to me for an in camera review within 10 calendar days from the date of this ruling.

Ruling

Based on the foregoing, I grant Department staff's motion as follows:

- I. Respondent Village of Kenmore is directed to provide documents responsive to document demand numbers 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19 and 20 to Department staff for inspection within 10 calendar days of the date of this ruling or such other mutually agreeable timeframe on notice to the ALJ.
- II. Respondent Village of Kenmore may make the documents available to Department staff for inspection, provide them on a CD ROM or other electronic storage device acceptable to Department staff, or provide the documents in hardcopy form. If the parties mutually agree to another date for respondent to provide documents, they can so advise me. Barring a mutual agreement, respondent must provide documents to Department staff within 10 calendar days of the date of this ruling. Should any responsive documents be covered by attorney-client privilege, respondent shall submit the document(s) to me for an in camera review within 10 calendar days from the date of this ruling.
- III. Within 10 calendar days from the date of this ruling, Department staff will advise respondent Village of Kenmore whether it still seeks documents responsive to document demand numbers 16, 21-24. Respondent Village of Kenmore is directed to make documents responsive to document demand numbers 16, 21-24 available to Department staff within 10 calendar days of being notified by Department staff that staff is still seeking responsive documents.
- IV. Respondent Village of Kenmore shall submit all documents described in its privilege log in hardcopy form to the undersigned for an in camera review within 10 calendar days from the date of this ruling.
- V. Pursuant to 6 NYCRR 622.7(c)(3), if respondent Village of Kenmore fails to respond to Department staff's document requests in accordance with this ruling,

PARTIES' SUBMISSIONS

Department Staff

Notice of Motion and Affirmation of Teresa J. Mucha, Esq. in Support of New York State Department of Environmental Conservation's Motion to Compel Disclosure dated August 6, 2018 with:

- Exhibit A- Cover Letter from Teresa J. Mucha, Esq. to Mayor Patrick Mang dated December 8, 2016 and Notice of Hearing and Complaint dated December 8, 2016 with attached exhibit A (compliance schedule) and Table 1 Village of Kenmore SSO Outfalls
- Exhibit B- Village of Kenmore Answer dated January 13, 2017
- Exhibit C – Cover Letter from Teresa J. Mucha, Esq. to Daniel Spitzer and Kathleen Johnson dated April 27, 2018 with attached New York State Department of Environmental Conservation's set of demands for disclosure and other materials dated April 27, 2018
- Exhibit D – Letter from Teresa J. Mucha, Esq. to ALJ D. Scott Bassinson dated February 22, 2018 re: Scheduling Order
- Exhibit E – Letter from Chief ALJ James T. McClymonds to Daniel Spitzer, Esq. and Teresa Mucha, Esq. dated February 26, 2018 re: assignment of matter to ALJ Lisa Wilkinson
- Exhibit F – Letter from Daniel Spitzer, Esq. to ALJ Wilkinson dated June 14, 2018 re: Scheduling Order
- Exhibit G – Email ALJ Wilkinson to Teresa Mucha, Esq. and Daniel Spitzer, Esq. dated June 14, 2018 re: Scheduling Order
- Exhibit H - Letter from Teresa J. Mucha, Esq. to Daniel Spitzer, Esq. dated July 16, 2018 with attached NYSDEC's response to First Set of Demands for Documents and Other Materials and privilege log
- Exhibit I – Notice of Motion and Motion (Affirmation of Teresa J. Mucha, Esq.) to Compel Disclosure dated July 17, 2018
- Exhibit J – Respondent's Responses to the New York State Department of Environmental Conservation's Set of Demands for Documents dated July 17, 2018
- Exhibit K – Letter from Teresa Mucha, Esq. to ALJ Wilkinson dated July 20, 2018 re: Withdrawal of Motion to Compel
- Exhibit L – Email from Daniel Spitzer, Esq. to Teresa Mucha, Esq. dated July 20, 2018 re: Respondent's responses; Email from Teresa Mucha to Daniel Spitzer dated July 20 re: document inspection; Email from Teresa Mucha, Esq. to Kathleen Johnson dated July 20, 2018 re: document inspection; Email from Kathleen Johnson to Teresa Mucha, Esq. dated July 24, 2018 re: document inspection; Emails from Teresa Mucha, Esq. to Kathleen Johnson dated July 24, 2018 re: document inspection; Email from Kathleen Johnson to

Teresa Mucha, Esq. dated July 26, 2018 re: document inspection; Email from Teresa Mucha, Esq. to Kathleen Johnson dated July 26, 2018 re: document inspection

- Exhibit M - Email from Teresa Mucha, Esq. to Daniel Spitzer and Kathleen Johnson dated July 31, 2018 re: v expert disclosures and document inspection
- Exhibit N – Emails from Daniel Spitzer, Esq. to Teresa Mucha, Esq. dated August 3, 2018 re: document disclosures
- Exhibit O – Email from Daniel Spitzer, Esq. to Teresa Mucha, Esq. dated August 6, 2018 re: Village of Kenmore privilege log and document inspection

Respondent

- Affirmation of Daniel J. Spitzer, Esq. dated August 23, 2018
- Respondent's Memorandum of Law in Opposition to the Department of Environmental Conservation's Motion to Compel dated August 23, 2018

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