

In the Matter of the Application of

SARATOGA COUNTY

for a permit pursuant to Section 809 of the Adirondack Park Agency Act to construct three emergency communications towers as part of the County's proposed new 800 MHz trunked radio system.

RULINGS ON
MOTIONS FOR
PROTECTIVE
ORDERS

(Project 2001-245)

BACKGROUND

Saratoga County has applied to the Adirondack Park Agency (APA) for a permit to construct three emergency communications towers - - on Mount Anthony in the Town of Hadley, Lakeview in the Town of Day, and Fraker Mountain in the Town of Edinburg - - as part of the County's proposed new 800 MHz trunked radio system. Agency members voted the application to hearing on August 12, 2005, with regard to the following issues:

1. Alternate technologies that would eliminate the need for one or more of the three proposed towers while providing for appropriate area coverage to meet public safety standards;
2. Alternate configurations using microwave links and the County's proposed technology and radio frequency limits that would not require one or more of the three proposed towers; and
3. Alternatives to the proposed road up Mount Anthony, including alternate routes, alternate means of access other than a paved road, alternate methods for construction and operation of the facility, and alternative locations for support facilities for the proposed tower sites.

Apart from the County and APA Staff, parties to the hearing include the state's Office for Technology (OFT), John Bergeron (a Mount Anthony property owner), the Adirondack Council, the Residents' Committee to Protect the Adirondacks, and the Association for the Protection of the Adirondacks.

According to directives I made as hearing officer, formal discovery demands were due on November 1, 2005, and motions for protective order were due on November 30, 2005. Timely discovery demands were made of the County by APA Staff, Mr. Bergeron and the Adirondack Council, and of OFT by Mr. Bergeron and the Adirondack Council. Additional discovery of the County was

demanded by APA Staff on November 15, 2005, in a request that was joined by Mr. Bergeron on November 16, 2005.

OFT submitted a motion for protective order dated November 29, 2005, and the County submitted a motion for protective order dated November 30, 2005. Timely responses to these motions were received from APA Staff, Mr. Bergeron and the Adirondack Council.

DISCUSSION

The following discussion addresses first the County's motion for protective order, and second the OFT's motion for protective order. Particular objections to disclosure are noted, along with the requesters' responses.

County's Motion for Protective Order

- - Blue Wing materials

The County objects to the requests made by APA Staff on November 15, 2005, and Mr. Bergeron on November 16, 2005, relating to materials prepared for the County by Blue Wing Communications Services (Blue Wing). According to the County, Blue Wing was engaged recently as a technical expert to review the design of the County's proposed new emergency communications system, which was designed by SSI Services (SSI), solely and specifically for the purposes of providing advice and testimony at the adjudicatory hearing.

When APA Staff became aware of Blue Wing's engagement through a newspaper article published on November 15, 2005, it promptly requested :

(1) Any and all correspondence between the County and SSI, between the County and Blue Wing, and between SSI and Blue Wing, relating to the County's proposed emergency communications project or the option proposed by Mr. Bergeron, including all supporting documents, data or memoranda; and

(2) Any and all reports, opinions or other document or mechanism for providing analysis of the County's project or the Bergeron options, made by either SSI or Blue Wing, or the two together, including any and all supporting documents.

On November 16, 2005, counsel for Mr. Bergeron said he was requesting the same information on behalf of his client.

In its motion for protective order, the County argues that the services of Blue Wing were engaged specifically in anticipation of litigation, and that materials relating to Blue Wing's review of the application are specifically exempt from discovery pursuant to Civil Practice Law and Rules (CPLR) 3101(d). The County asserts that the professional conclusions and opinions of the experts at Blue Wing will be provided in the County's pre-filed testimony, and that the experts will be available for cross-examination.

According to APA Staff, because this is an administrative proceeding the CPLR's disclosure exemption for material prepared in anticipation of litigation does not apply. APA Staff contends that no litigation has been initiated with regard to the County's proposal, and that material prepared for a public hearing does not warrant the same protection that applies to material prepared for litigation.

Mr. Bergeron concedes that the professional conclusions and opinions of Blue Wing experts made specifically in anticipation of litigation are exempt from discovery under CPLR 3101(d). However, he says that protection would not extend to the raw technical data amassed by the County's consultants.

The County also objects to the timeliness of the demands for Blue Wing material, noting that they were made after the November 1 deadline I had set. APA Staff responds that the County's retention of Blue Wing had not been disclosed to the other parties prior to the deadline, and that its discovery demand was made as soon as it became aware of Blue Wing's engagement.

Ruling: The County's motion for protective order, in relation to materials prepared for the County by Blue Wing, is granted.

Because Blue Wing's retention by the County was apparently unknown to the other parties on November 1, when discovery demands were due, the subsequent request for Blue Wing materials, made promptly once APA became aware of Blue Wing's involvement, is timely. Nonetheless, materials prepared for the County by Blue Wing would, at this point, be materials prepared in anticipation of litigation, and therefore exempt from disclosure pursuant to CPLR 3101(d)(2).

According to APA Staff, because this is an administrative proceeding the exception for material prepared in anticipation of litigation does not apply. That is incorrect. The exception applies in this hearing to the same extent as it would in a civil

action under the CPLR. In fact, Section 580.14(a)(4)(vii) of APA's own hearing procedures states that, upon good cause shown by any party, the hearing officer shall have the power to order the production of documents for inspection and copying consistent with the general principles of CPLR Article 31, which includes the exemption for materials prepared in anticipation of litigation.

APA Staff cite Fiedelman v. New York State Department of Health, 58 NY2d 80 (1983), for the principle that an administrative proceeding is not an action considered "litigation." In fact, that case confirms only that an administrative proceeding is not an "action" as that term is defined under CPLR 105(b); and, therefore, a statute governing actions - - one that prescribes extensions of time where service on a party is made by mail - - does not apply to administrative proceedings. Fiedelman does not address at all what is meant by the term "litigation" or the protection afforded to materials prepared in anticipation of litigation.

APA Staff contend that no litigation has been initiated by anyone with regard to the County's proposed emergency communications system. However, by voting this matter to hearing, APA itself has directed that certain issues be litigated before it decides whether or on what terms it may permit the placement of towers as part of that system.

In this case, the County has the burden of proving that its project would not have "an undue adverse impact" upon park resources [APA Act Section 809.10(e)]. If, in meeting that burden, the County avails itself of Blue Wing's evaluation, the testimony of the Blue Wing consultant shall be pre-filed before that of the other parties, allowing them to examine the County's case before they are obliged to present their own. The application materials are a matter of public record, and the other parties may, through their own consultants, evaluate these materials for themselves. Under Section 3101(d)(2), materials prepared in anticipation of litigation may be obtained "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." No such showing is made in this case, given the availability of the application materials and the ability of the other parties to evaluate them independently.

- - County's Request for Proposals

The County objected to the request of APA Staff (Item 1) and the Adirondack Council (Item B6) for a copy of the Request for Proposals (RFP) issued by the County to solicit vendors for the proposed emergency communications project. The objection was based on the County's belief that the RFP is not germane to any of the issues to be addressed at the hearing. However, the County agreed that the RFP is a matter of public record, and, for that reason, the County said it would make it available for review at its offices at a mutually agreeable time.

APA Staff replied that the RFP is relevant to the issues of project alternatives because it established criteria with which vendors had to comply in submitting their proposals, criteria which essentially dictated those proposals' content and design. According to APA Staff, a copy of the RFP was provided to its consultant in Florida over a year ago, but it was destroyed as a result of hurricanes there during the summer and fall of 2004.

On December 15, after the schedule for submissions had passed, the County provided a letter stating that it would be more efficient to provide both APA Staff and the Adirondack Council with their own copies of its RFP, rather than schedule appointments with their representatives to visit the county's offices and then have the County copy selected portions of the RFP for them. The County said it would provide a copy of the RFP to both parties, though it maintains that the RFP is not material to the hearing issues.

Ruling: As the County, on its own, has now agreed to provide APA Staff and the Adirondack Council with copies of the RFP, a ruling on its motion is no longer necessary. Without viewing the RFP, its relevance to the hearing issues cannot be determined conclusively, though, at the least, it would likely be reflective of the County's objectives in pursuing this project, which is relevant to considering the reasonableness of project alternatives. The County shall also provide a copy of the RFP to Mr. Bergeron, who made substantially the same request as APA Staff and the Adirondack Council, though the County did not make an objection to it specifically. [See Item 3 of Bergeron discovery request, dated October 31, 2005.]

- - Documents "Relied Upon" by OFT

The County objects to a request by the Adirondack Council (Item A2) for any and all documents provided by the County "and relied upon by OFT" in its September 30, 2004, report which

reviewed the County's selection of radio tower sites inside the Adirondack Park.

The County says it has no knowledge of what materials OFT relied upon. The report itself states that it relies upon information derived from meetings with Saratoga County personnel, SSI and APA, as well as reports and documentation provided by those entities.

The Adirondack Council made an identical request of OFT, which located four documents prepared by SSI which OFT said appeared to be responsive. Because the documents, described in OFT's letter of November 29, 2005, did not contain a cover letter, OFT said it was unsure if they were duplicative of documents already marked as exhibits in this hearing or if the County viewed the documents as information for which it would be seeking a protective order. In papers dated December 13, 2005, the County said the documents identified by OFT were incorporated into the County's various submissions to APA and are thus already are exhibits for the upcoming hearing. This drew a response from APA Staff on December 15, 2005, which indicated that it could not find three of the four documents within the particular exhibits referenced by the County.

Ruling: The motion for protective order, as requested by Saratoga County, is granted. While the County can identify which documents it provided to OFT, it is not in a position to know which documents OFT relied upon in preparing its report. Only OFT can speak to that, and it has, through its letter of November 29, 2005. The County is not asserting any privilege with regard to these documents; in fact, it claims that the documents, or at least the information they contain, are already part of APA's public record. It appears what happened is that, in certain instances, information that was provided to the County by SSI was repackaged for presentation to the APA, which is why APA cannot locate all of the documents referenced by OFT. Whatever the case, OFT shall produce for the other parties copies of the four documents cited in its letter. To the extent they were relied upon by OFT, they are relevant to consideration of that agency's report, about which OFT is expected to produce testimony.

- - Other Documents "Relied Upon" by OFT

The County objects to a request by the Adirondack Council (Item A3) for any and all documents that led to its conclusions/assumptions "upon which the OFT accepted and relied in their 9/30/04 report."

Ruling: The motion for protective order is granted. Again, the County is not in a position to know what documents OFT relied upon its report.

- - Need-Related Documents

The County objects to a request by the Adirondack Council for documents related to its need for a new emergency communications system. (See, in particular, Item D18, requesting need-related documents including but not limited to those concerning the number of emergency calls made and the response times for such calls by location for the past five years.)

According to the County, a needs verification study has been provided to APA as part of the project application process and is included among the hearing exhibits. The County adds, however, that need was not among the issues that APA identified for adjudication, and, for that reason, documents related to need are irrelevant and immaterial.

The Adirondack Council replies that while need is not explicitly identified among the three issues to be litigated, need is one of the primary reasons for looking at the issues, since without identifying and quantifying the need for the new system APA cannot determine whether any proposed alternative is reasonable. The Adirondack Council argues that the needs verification study that was provided as part of the application is insufficient because it broke down emergency calls by frequency and not location, showing calls within the entire county rather than the specific areas that would be served by the proposed towers.

Ruling: The motion for protective order is granted. Need for the County's proposed system is not an issue identified by APA for adjudication in this matter. The Adirondack Council points out that one of the issues certified for hearing is "alternative technologies that would eliminate the need for one or more of the three proposed towers while providing for appropriate area coverage to meet public safety standards." However, as the County notes, this refers to the need for one or more of the towers to create the emergency communications system proposed by the County, and not the County's need for the system itself. The need for the system is not at issue; what's at issue is how best to meet that need so that there is no "undue adverse impact" upon park resources [APA Act Section 809.10(e)].

- - Contracts, Memoranda and Supporting Documentation

The County objects to a request by the Adirondack Council (Item B10) for any and all contracts, memoranda, and supporting documentation executed or drafted in connection with the County's proposed emergency communications system.

The County says the request is overbroad and implicitly covers not only all of the Adirondack Council's other requests but issues well beyond the scope of the hearing, making them irrelevant and immaterial.

Ruling: The County's motion for a protective order is granted. The County did not object to a request by the Adirondack Council (Item B11) for all documents related to the design of its proposed emergency communications system, presumably because such documents would be relevant to the hearing issues. On the other hand, as the County argues, Item B10 is considerably broader than that, and no explanation has been offered as to the relevance of the materials being sought.

- - Documents Exchanged Between the County and Impacted Towns

The County also objects to requests by the Adirondack Council (Item B14) and Mr. Bergeron (Item 18) for any and all documents, including any correspondence, memoranda and supporting papers exchanged between the Towns of Day, Edinburg or Hadley and Saratoga County regarding the proposed emergency communication services system, including potential towers or transmitter locations.

The County claims that the requested material is likely to include issues not among those to be addressed at the hearing and, therefore, not appropriate in a discovery request. On the other hand, the County says it does not object to providing materials to the extent they relate to issues properly included in the hearing, such as potential towers or transmitter locations.

Ruling: The motion for protective order is granted.

The requests of the Adirondack Council and Mr. Bergeron are overbroad, and the County's proposal - - to limit disclosure to those documents that are relevant to the hearing issues - - is reasonable.

- - Information on Environmental and Visual Impacts

The County objects to requests by the Adirondack Council (Items D20 and D21) for any and all documents relating to the environmental evaluation, and to the visual impact assessment and analysis, that it undertook.

The County argues that such documents are irrelevant to the hearing issues, and that, at any rate, substantial material on these topics has already been provided to APA as part of the application process, and is now included in the hearing exhibits.

Ruling: The motion for protective order is granted.

As the County maintains, none of the requested information would reasonably relate to whether the communications parameters it identified could be accomplished through alternative technologies or tower locations, resulting in fewer proposed towers, or whether there is any viable alternative to the road proposed on Mount Anthony. The hearing is not designed to supplement the record as to the environmental impacts of the County's proposal. It is meant to investigate alternatives to the County's proposal that may have diminished environmental impacts, particularly as they relate to tower visibility.

- - Eminent Domain Documentation

The County objects to requests by the Adirondack Council (Item D22) and Mr. Bergeron (Item 8) for any and all communications or documents regarding the need for and initiation of eminent domain proceedings with respect to Mount Anthony, and a request by Mr. Bergeron (Item 15) for all written communications or documents regarding Nickolas D. Kotsakis, another Mount Anthony property owner.

The County argues these documents are irrelevant to the hearing issues, though the Adirondack Council says they are necessary to analyze and submit alternative technologies and configurations. Mr. Bergeron says the decision to proceed to eminent domain relates to all three of APA's identified issues. Mr. Bergeron would like to explore whether the County approached Mr. Bergeron and Mr. Kotsakis about purchasing their property as a potential site, when the County first asserted the possibility of eminent domain to these landowners, the extent to which the proposed location of Mount Anthony was predetermined, whether the County sought guidance from the landowners as to possible desirable routes for the road up Mount Anthony, whether the route was changed at the request of either landowner, and whether

alternatives to the current proposal for the service of the equipment or the design of the proposed towers were discussed.

The County responds that the manner in which the County acquires any property needed for tower locations is not relevant to the issues in the hearing. The County says it would certainly prefer to obtain property by voluntary sale and that it has made efforts in that regard. But, the County says, this has no bearing on whether there are alternative technologies or tower locations which might enable the County to meet its emergency communications criteria with fewer proposed towers. Also, the County maintains that the manner in which it acquires property has no bearing as to whether there are viable alternatives to the proposed road up Mount Anthony.

Ruling: The motion for protective order is granted. The issues that would be heard in an eminent domain proceeding are different from those being entertained by the APA. As the County argues, the requested material is not relevant to the APA's issues, or necessary to the development of alternatives, including alternatives to the proposed road up Mount Anthony.

- - Lakeview Mountain Deeds and Sales Contract

The County objects to the request of the Adirondack Council (Item D23) for copies of the deeds and sales contract for Lakeview Mountain made between Saratoga County and Judge Nolan.

Ruling: The motion for protective order is granted. As the County argues, this material is not germane to the hearing issues, which concern potential alternatives to a tower on Lakeview.

- - Radio Committee Records

The County objects to the request of Mr. Bergeron (Item 20) that it provide the minutes and documents prepared for the radio committee for the Saratoga County Board of Supervisors. The County contends that the request is overbroad and would involve the disclosure of material not relevant to the hearing issues.

According to Mr. Bergeron, the radio committee was and remains the main advisory body within County government on the emergency communications system, so documents prepared for its discussions likely helped shape its recommendations on matters related to the RFP (which determined the number of high elevation sites), the availability of potential sites (which influenced project design, including the selection of Mount Anthony), and

project design (which determined potential visual and environmental impacts, such as those associated with the proposed road up Mount Anthony).

The County initially responded that the minutes of the radio committee, as a matter of public record, could be made available for inspection at its offices. Then, responding to Mr. Bergeron's arguments, the County said it would provide documents prepared for the committee's discussion on the matters cited specifically by him - - the RFP, the availability of potential sites, and project design - - but not as to visual and environmental impacts of its project proposal, on the ground that these latter documents are not relevant.

Ruling: The County's request to limit the scope of disclosure for documents prepared for the radio committee is reasonable, and, for that reason, it is granted. The document demand, as submitted by Mr. Bergeron, was overbroad and, for that reason, objectionable. The County shall make the radio committee minutes and the relevant documents prepared for the committee available for Mr. Bergeron's inspection.

- - Responses to RFP

The County objects to requests by the Adirondack Council (Items B8 and B9) for any and all responses to any RFP for an 800 MHz trunked radio system, including any inquiries in response to any RFP; and for any and all correspondence with potential bidders and engineers in conjunction with the County's proposed emergency communications system. [Mr. Bergeron has also requested a copy of all the submittals in response to the RFP (Item 4) as well as any and all written correspondence between the candidate firms and Saratoga County (Item 5), though the County did not object to these requests.]

The County maintains that the materials requested by the Adirondack Council are confidential communications from responders to the County's RFP made as part of an RFP process for which award decisions have not yet been made. According to the County, these communications have not been made public because doing so would violate the RFP process by providing unfair competitive advantage to responders by virtue of knowing the information submitted by their competitors. In addition, the County maintains, these communications are likely to contain proprietary information and/or trade secrets protected from disclosure.

Ruling: A ruling on the County's motion is deferred, pending its provision of additional information.

Initially, it appears that the requested materials would provide relevant information as to potential project alternatives, so to withhold the materials would require some countervailing argument as to their confidentiality. The County maintains that their release would "violate" the RFP process, without explaining exactly how this would happen.

I appreciate that the disclosure of the responses to the RFP would open the door for responders to know the information submitted by their competitors. However, that would not necessarily impair the process under which they were developed, as noted in an advisory opinion of the state's Committee on Open Government discussing the provision of the Freedom of Information Law under which an agency may deny access to records that if disclosed "would impair present or imminent contract awards" [Public Officers Law Section 87(2)(c)]. In that opinion dated October 29, 1996 (a copy of which is attached), Robert Freeman, committee executive director, distinguishes the solicitation of bids and RFPs, noting that in the case of RFPs, "even though the deadline for submission of proposals may have passed, an agency may engage in negotiations or evaluations with several of the submitters resulting in alterations in proposals or costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally."

The County also claims that the materials requested by the Adirondack Council are "likely" to contain proprietary information or trade secrets, though this apparently has not been determined by the County with certainty. It is unknown whether the responders identified so-called proprietary information or trade secrets in their responses, on their own or at the County's request in the RFP.

The County has indicated that it would be willing to provide me with the material responsive to these requests for my in camera review, to determine whether it should be withheld. I am willing to take this path, but the County must accompany the material with a more detailed motion for protective order, answering the points in this ruling and the attached committee opinion. Portions of the RFP itself would also be helpful, to the extent they might address the identification and treatment of

proprietary information and trade secrets in the responses submitted. The County's submittal (except for the documents themselves, which shall be provided to me in camera) shall be copied to the service list, so they may have the opportunity to respond before I rule on the motion.

OFT Motion for Protective Order

- - OFT's Request for Proposals

OFT objects to a request by Mr. Bergeron (Item 1) for the RFP for the Statewide Wireless Network (SWN).

OFT says that volumes 1 and 3 of the SWN RFP are available at its website, but that disclosure of volume 2 would be "contrary to the public interest," for various reasons discussed below.

According to OFT, volume 2 of the RFP contains "critical infrastructure" information for New York State, "critical infrastructure" being defined by Public Officers Law Section 86(5) as "systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy." OFT represents that this information was specifically compiled and aggregated by OFT into volume 2 for purposes of the SWN project and is not otherwise publicly available in compendium form. OFT adds that this information includes but is not limited to "aggregated information concerning the state's existing physical infrastructure and critical public safety information and resources" which was deemed by OFT to be "pertinent and necessary" to allow qualified bidders to prepare a responsive proposal. According to OFT, strict controls have been placed on this information, both within and outside the agency.

OFT also argues that due to volume 2's level of detail concerning the state's existing information technology assets and the proposed structure of the information technology assets that will constitute the SWN, disclosure of that volume would "interfere with law enforcement and pose a danger to life and safety."

On November 29, 2005, responding to a Freedom of Information Law request by the Adirondack Council, OFT denied access to volume 2 of the RFP, contending that it "includes detailed information concerning the statewide public safety and law

enforcement operations, and location of physical public and private infrastructure." According to OFT, volume 2 was compiled for law enforcement purposes and its release would interfere with law enforcement [Public Officers Law Section 87(2)(e)(I)], its disclosure could endanger personal life or safety [Public Officers Law Section 87(2)(f)], and its disclosure would jeopardize OFT's capacity to guarantee the security of its information assets [Public Officers Law Section 87(2)(I)].

Responding to OFT, Mr. Bergeron contends that the RFP and the completed SWN contract are relevant to the extent that they reflect the standards that will guide the establishment of the SWN and its planned implementation in Saratoga County. Mr. Bergeron admits he is not in a position to know whether release of these documents would put public security in jeopardy, but suggests as a reasonable solution that I perform an in camera review of the material that OFT proposes to exempt from discovery. As to the internal controls placed on volume 2 of the RFP, Mr. Bergeron suggests that much of this security could be attributed to a desire and obligation to maintain the integrity of the bidding process for such an enormous state contract.

Ruling: OFT shall provide me access to volume 2 of the RFP, so I can determine whether it is relevant to this hearing and whether its disclosure would be contrary to the public interest, as asserted by OFT. OFT's motion cannot be granted in its present form because it is not adequately specific about the types of information included in volume 2. As a result, neither I nor the other parties can verify OFT's descriptions of the document, or its conclusions about potential impacts of the document's release.

Apart from providing me access to RFP volume 2, OFT shall provide me and the other parties a more definite statement of the document's contents, to which the requesters can then respond. It should be possible for OFT to prepare such a statement without actually revealing the information for which it seeks protection. The statement shall also address the relevance of volume 2 to this hearing, and indicate the extent to which volume 2 contains information that is already in the public domain, given OFT's qualifier that the information is not otherwise publicly available "in compendium form." If volume 2 contains information that is otherwise publicly available, it would seem that the case for withholding volume 2 is at the very least diminished.

In lieu of providing me access to RFP volume 2 and providing me and the other parties a more definite statement of the document's contents, OFT may be able to negotiate an agreement

for the document's release to Mr. Bergeron and the Adirondack Council, which also proposes to discuss the SWN as an alternative to the County's proposal. Such a release could be subject to restrictions like those that accompanied the release to prospective bidders so that they could prepare a responsive proposal. Short of releasing the entire document, OFT may be able to negotiate an agreement for the release of only those portions of volume 2 that address the parties' legitimate discovery interests.

I appreciate OFT's position that RFP volume 2 is not a document it would release to members of the general public under the state's Freedom of Information Law. However, to determine whether it should be subject to a protective order in this hearing, its relevance to the hearing issues and the parties' need for information must be considered against any public interest in withholding access.

- - SWN Contract

OFT also objects to the requests by Mr. Bergeron (Item 3) for the completed contract with M/A-COM as successful bidder on the SWN RFP, and by the Adirondack Council (Item 7) for any and all documents, including any memoranda and supporting papers regarding that contract.

According to OFT, release of the entire contract would involve release of volume 2 of the RFP (discussed above) as well as "certain portions of M/A-COM's proposal and proposal supplemental submissions" and other documents incorporated into the SWN contract. OFT says such a release would be "contrary to the public interest" (given that critical public safety information is involved) and would involve disclosure of trade secrets that are not relevant to this case, the protection of which is invoked by both M/A-COM and OFT. For those reasons, OFT has restricted access to this information, even with the agency itself.

OFT also points out that the entire SWN contract is thousands of pages long, to which Mr. Bergeron responds that he would consent to OFT not reproducing those portions that are boilerplate text for state government contracts, which he anticipates would eliminate a substantial portion of the document.

OFT has provided a CD-ROM containing the publicly available portions of the SWN contract, having redacted those portions which are covered by its motion for protective order.

However, it contends that the Adirondack Council's request for any and all documents regarding the contract is overbroad and unduly burdensome, and that it seeks documents which are immaterial, irrelevant, and may be the subject of a privilege or otherwise exempt from disclosure.

Ruling: As with volume 2 of the RFP, OFT shall provide me access to the unredacted SWN contract, to allow for my in camera inspection of the material that has been withheld. OFT's motion cannot be granted without a better understanding of the relevant material whose release is deemed contrary to the public interest. According to OFT, portions of M/A-COM's bid proposal which are part of the contract contain "the proposed public safety architecture for the state's communications network," and the release of these portions, as well as the release of other documents incorporated into the contract, would jeopardize OFT's capacity to guarantee the security of the state's information technology assets. This needs to be explained in more detail in a submission to which the other parties can respond, and I need to see the portions of the contract to which this claim applies.

OFT does not state that the portions of the SWN contract to which it has restricted access are entirely irrelevant to the issues in this hearing; it states only that they are "in large part" irrelevant. Whatever the relevance of the withheld material, the County's voluntary participation in the SWN is being proposed as a possible alternative to the County's project, which suggests that the contract itself, or at least large portions of it, would be relevant. To the extent that portions of the contract are withheld, the relevance of those portions to the issues at hand, and the parties' alleged need for the withheld information, must be balanced against the public interest in non-disclosure. Relevance must be considered for each portion of the withheld information, which means, in the first instance, that OFT must explain which portions of the withheld information are irrelevant, and why.

On the other hand, to the extent that M/A-COM has sought and received from OFT trade secret protection for portions of its submissions, OFT's trade secret determinations shall not be revisited in this hearing, nor is it necessary to do so, as the classification of material as trade secrets does not, by itself, exempt that material from discovery. On September 28, 2005, the Adirondack Council requested a copy of the entire SWN contract from OFT pursuant to the Freedom of Information Law. That request was denied by OFT General Counsel Susan Corbett Zeronda on November 29, 1995, in a 15-page letter a copy of which is attached to OFT's motion. In her letter, Ms. Zeronda explained

in detail why portions of the contract documents have been withheld as trade secrets, consistent with the protection sought for them by M/A-COM. Her letter afforded the Adirondack Council 30 days to appeal to OFT's acting director. I am unaware whether an appeal has been filed, but if one has, it remains possible that Ms. Zeronda's determination will be reversed by the agency itself or a court.

As OFT argues, trade secret information may be protected from discovery where the requester fails to show that the information is indispensable to support its case and cannot be obtained in any other way. OFT contends that the portions of the SWN contract for which trade secrets protection has been sought would not be relevant to the issues identified in this proceeding. If true, that by itself would justify a protective order, but I need to verify it for myself. If, on the other hand, disclosure of the trade secret information is warranted, it may be possible for the parties to enter a confidentiality agreement for this information, to control the information's release in a manner that avoids potential prejudice to M/A-COM.

OFT's motion for protective order as to the Adirondack Council's request for all documents regarding the SWN contract is granted. As OFT points out, the SWN procurement process was nine years long, during which the SWN office produced and received literally thousands of pages of documents, the gathering, reviewing and copying of which would put an undue burden on OFT, particularly as the final product, the contract itself, is available. As to post-contract documents, their relevance to this hearing is not established. OFT notes that SWN implementation activities are currently focused on the primary build-out area in Erie and Chautauqua counties as well as a simultaneous build-out related to the Metropolitan Transportation Authority (MTA). Saratoga County has not opted into the SWN, and, as OFT asserts, there is not a proposed SWN design, nor selected SWN sites, in the Saratoga County area.

SUMMARY

1. The County's motion for protective order is granted except as otherwise noted above with regard to particular requests. No later than January 17, 2006, the County shall complete the disclosure to which it has agreed and that additional disclosure which I have ordered. As to those documents "relied on" by OFT which were sought from the County, disclosure shall be by OFT as custodian of those documents, unless OFT arranges for the disclosure by the County itself.

2. No later than January 17, 2006, the County shall supplement its motion for protective order with regard to responses to its RFP and related correspondence, which at the same time shall be provided for my in camera inspection. This supplement to the motion shall address the questions I have raised as to how release of the information would "violate" or impair the RFP process, and the extent to which the information contains proprietary or trade secret information identified as such by the RFP responders or the County itself.

No later than January 27, 2006, the parties requesting this information shall respond to the County's submission.

3. No later than January 17, 2006, OFT shall supplement its motion for protective order, and provide for my in camera inspection of volume 2 of the SWN RFP and the complete, unredacted SWN contract between OFT and M/A-COM. Also no later than January 17, 2006, OFT shall supplement its motion for protective order, providing a more detailed explanation of the information that has been withheld and its relevance to the hearing issues.

No later than January 27, 2006, the parties requesting the material withheld by OFT shall respond to OFT's submission.

4. In lieu of providing additional submissions and arranging for my in camera inspection of withheld documents, the County and OFT are encouraged to make their own arrangements for any additional disclosure that they find will assure adequate protection for sensitive information, such as disclosure subject to confidentiality agreements with the requesting parties.

OTHER MATTERS

With my schedule for additional submissions on the motions for protective order, I anticipate that the motions can be fully decided in a time frame that allows for the hearing to proceed on the timetable currently proposed by the County, with April 20 and 21 as the first dates for testimony. If the County proposes an additional postponement of the hearing, based on Blue Wing's review of its project or for any other reason, it should notify me and the other parties by February 1, 2006. If the County does not propose an additional postponement, it should contact me by telephone on or about February 1 about arrangements for a conference call involving me and the other parties' counsel, the purpose of which will be to formalize the hearing schedule.

