STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 701 and 703 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

U.S. ENERGY DEVELOPMENT CORPORATION,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON RENEWED MOTION TO COMPEL DISCLOSURE

DEC File No. R9-20111104-150

December 23, 2015

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Maureen A. Brady, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Hodgson Russ LLP (Daniel A. Spitzer and Charles W. Malcomb of counsel), for respondent U.S. Energy Development Corporation

-- Theresa B. Marangas, Associate Counsel, for the New York State Office of Parks, Recreation and Historic Preservation (no appearance)

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON RENEWED MOTION TO COMPEL DISCLOSURE

Respondent U.S. Energy Development Corporation renews its motion to compel disclosure of several documents staff of the Department of Environmental Conservation (Department or DEC) has withheld. The privileges claimed by staff are the attorney work product privilege and the public interest privilege. For the reasons that follow, the privileges are properly asserted, and respondent's motion is denied.

I. Proceedings

On August 28, 2015, respondent filed a motion, pursuant to 6 NYCRR 622.7(c), to compel Department staff and staff of the Office of Parks, Recreation and Historic Preservation (Parks) to produce documents they withheld from discovery. After several adjournments to allow the parties to resolve the dispute, respondent withdrew its motion to compel, without prejudice, while the parties continued to seek resolution of the dispute.

On October 7, 2015, Parks staff released all documents it had listed on its privilege log (see Letter from Theresa B. Marangas, Associate Counsel, to Hodgson Russ LLP [Oct. 7, 2015], Affirmation in Support of U.S. Energy's Renewed Motion, Exh D). On October 8, 2015, Department staff also produced some documents previously withheld. However, staff continued to withhold other documents on various grounds, and produced a revised privilege log (see Letter from Maureen A. Brady, Regional Attorney, to Daniel A. Spitzer, Esq., and Charles Malcomb, Esq. [Oct. 9, 2015], id., Exh E).

On October 28, 2015, respondent filed a cover letter, a notice of motion, and an affirmation of Daniel A. Spitzer with exhibits, all dated October 28, 2015. In its motion, respondent renews its motion to compel disclosure. Respondent seeks a ruling ordering Department staff to produce all documents for which it has improperly claimed a privilege, and to produce un-redacted versions of certain partially-redacted emails. In the alternative, respondent requests in camera review of documents in the event it is unclear whether the claimed privileges apply.

Department staff filed a cover letter and an affirmation of Maureen A. Brady in opposition to respondent's motion to compel, all dated November 3, 2015. Parks staff has made no appearance on this motion.

II. Discussion

As previously held, the scope of discovery under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]) is as broad as that provided under CPLR article 31 (see 6 NYCRR 622.7[a]; Matter of U.S. Energy Develop. Corp., Ruling of the Chief Administrative Law Judge [ALJ] on

Motion for Leave to Conduct Depositions, May 9, 2014, at 4). Thus, unless it is protected from disclosure under New York law, any matter that is "material and necessary" in the prosecution or defense of an administrative enforcement proceeding must be disclosed (see CPLR 3101[a]). Upon objection by a person entitled to assert the privilege, however, privileged matter is not subject to disclosure (see CPLR 3101[b]; 6 NYCRR 622.11[a][3]; see also State Administrative Procedure Act [SAPA] § 306[1]). Privileges expressly recognized under the CPLR, and therefore applicable to proceedings under Part 622, include the attorney-client privilege and the attorney work product privilege (see CPLR 4503; CPLR 3101[c]).

A. Attorney-Client and Attorney Work Product Privileges

Respondent challenges Department staff's assertion of the attorney work product privilege for a June 12, 2012 email and draft document sent from Maureen Brady, DEC Regional Attorney, to Nicole Rodrigues, an attorney with Pennsylvania's Department of Environmental Protection (PA DEP) (see Department Privilege Log, Affirmation in Support of U.S. Energy's Renewed Motion, Exh E [DEC Privilege Log], at 1).[1] Respondent argues that because PA DEP is a third party not in an agency relationship with the Department, the communication with PA DEP waived the attorney-client and attorney work product privileges. In addition, respondent argues that the Department waived its privileges by sharing draft documents with PA DEP. In support of its argument, respondent cites Matter of Town of Waterford v New York State Dept. of Envtl. Conservation (18 NY3d 652 [2012]).

In response, Department staff invokes the common-interest doctrine, an exception to the third-party disclosure waiver under the attorney client and attorney work product privileges (citing Ambac Assur. Corp. v Countrywide Home Loans, Inc., 124 AD3d 129 [1st Dept 2014]). Department staff asserts that at the time of the email, DEC and PA DEP legal staff were

[1] Both respondent and Department staff state that the subject email and draft document are dated June 12, 2012 (see Affirmation in Support, at 5; Affirmation in Opposition, at 3). The privilege log indicates that the subject email and draft document are dated June 25, 2012. I presume the date on the privilege log is a typographical error, and that the June 12 and June 25 documents are the same.

exploring the possibility of joint enforcement proceedings against respondent and, thus, were communicating in furtherance of a common interest. Accordingly, staff argues that the email and draft document are privileged under the common-interest doctrine. Moreover, staff notes that a June 29, 2012 final version of the June 12, 2012 draft document was released to respondent last month.

Department staff has properly invoked the common-interest privilege. The common-interest privilege is an exception to the rule that the disclosure to a third party of a confidential communication between counsel and client will render the communication non-confidential (see Ambac Assur. Corp., 124 AD3d at 132; see also People v Osorio, 75 NY2d 80, 85 [1989]). This limited exception to waiver of the attorney-client privilege requires that (1) the communication qualify for protection under the attorney-client privilege, and (2) the communication be made for the purpose of furthering a legal interest or strategy common to the parties (see 124 AD3d at 132-133). Pending or reasonably anticipated litigation is not a necessary element of the privilege (see id. at 130).

Here, the email and draft document qualify for protection under the attorney-client and attorney work product privileges. Moreover, the communication between DEC and PA DEP staff were made for purposes of furthering a common legal interest or strategy, namely, possible joint enforcement proceedings against respondent by the two agencies. In addition, although the privilege does not require that litigation be pending or anticipated, in this case it was (see id. at 135). Thus, the email and draft document were properly withheld under the common-interest privilege.

Respondent's reliance on Matter of Town of Waterford is unavailing. In that case, the Court held that communications between the Department and the United States Environmental Protection Agency (EPA) were not privileged and subject to disclosure under the Freedom of Information Law (Public Officers Law art 6 [FOIL]). Town of Waterford is inapposite. In that case, which involved the FOIL exemption for pre-decisional inter-agency or intra-agency materials (see Public Officers Law § 87[2][g]), the Court concluded that the federal EPA was not an "agency" based upon FOIL's specific statutory definition of "agency," which includes only State and municipal agencies (see 18 NY3d at 657).

This case does not involve the inter-agency materials privilege under FOIL. Rather, this case involves the common-interest doctrine protected by the attorney-client and attorney work product privileges, which are privileges applicable not only to Part 622 proceedings, but also in the FOIL context (see Public Officer Law § 87[2][a]; Matter of Morgan v New York State Dept. of Envtl. Conservation, 9 AD3d 585, 587 [3d Dept 2004]).[2] Thus, Town of Waterford does not provide a basis for requiring disclosure of the email or draft document.

B. Governmental Public Interest Privilege

Respondent also challenges the Department's reliance on a "deliberative process" privilege for 15 documents listed on the revised privilege log. Respondent argues that the deliberative process privilege is not applicable to discovery but, rather, only in the FOIL context. Even assuming the privilege is available in the discovery context, respondent argues the Department has failed to carry its burden of establishing its entitlement to the privilege. Citing federal cases, respondent argues that the Department's privilege log does not establish that the withheld documents apply to policy formation and, thus, the privilege does not apply.

In response, Department staff argues that the deliberative process privilege is recognized under New York law as a part of the public interest privilege (citing Matter of Berger, ALJ Ruling on Disclosure, Feb. 10, 2010, at 7). Staff argues that the privilege protects not only the formation of public policy, but also communications and documents that reflect the pre-decisional, deliberative processes of the agency, including pre-decisional, intra-governmental evaluations, expressions of opinion, and recommendations on policy and decision-making matters. Staff asserts that review of the privilege log reveals that it invoked the deliberative process privilege for documents containing communications regarding pollution and potential enforcement, and all pre-date any final decisions whether to either issue consent orders or

[2] In addition, although not argued by Department staff, the communications between DEC and PA DEP are also arguably exempt from disclosure under FOIL pursuant to FOIL's law enforcement exception (see Public Officer Law § 87[2][e]).

complaints, or to settle a case. Thus, staff claims the documents are all pre-decisional and fall within the privilege.

As an initial matter, the revised privilege log reveals that Department staff invoked the deliberative process privilege for 15 documents. For all but three documents, staff also invoked the attorney-client privilege, the attorney work project privilege, or both, as alternative grounds for withholding the documents. Respondent makes no argument that the attorney-client or attorney work product privileges were improperly invoked for these 12 documents. Accordingly, staff's determination to withhold the 12 documents is affirmed on the alternative grounds, and only the three documents withheld based solely on the deliberative process privilege are considered herein (see Privilege Log at 3, 4).

In referencing a "deliberative process" privilege, Department staff is invoking a New York common law privilege more correctly known as the governmental "official information" or "public interest" privilege applicable in the discovery context (see Cirale v 80 Pine St. Corp., 35 NY2d 113, 117 [1974]; see also Jerome Prince, Richardson on Evidence § 5-802 [Farrell 11th ed 1995]; 5 Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 5:53 [2d ed 2011]). The common law official information or public interest privilege applies to confidential communications between public officers, and to public officers in the performance of their duties, where the public interest requires that the confidential communications or their sources not be divulged (see Cirale, 35 NY2d at 117). The privilege is a qualified one, requiring the balancing of the harm to the overall public interest from disclosure against the interests of the party seeking the information (see id. at 118). "Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure" (id.).

The required balancing is a judicial determination and

> "requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. . . . [I]n some situations it may be difficult to determine if the assertion of the privilege is warranted without forcing a

> disclosure of the very thing sought to be withheld. In such situations, it would seem proper that the material requested be examined by the court in camera. . . . However, it will be the rare case that in camera determinations will be necessary. A description of the material sought, the purpose for which it was gathered and other similar considerations will usually provide a sufficient basis upon which the court may determine whether the assertions of governmental privilege is warranted"

(id. at 119 [citations omitted]).

Department staff has made a sufficient showing to warrant application of the governmental public interest privilege. Staff asserts that two of the documents withheld -- a September 21, 2010 email from Assistant Commissioner James Tierney to various DEC program and legal staff, and a December 20, 2010, from a Division of Water engineer to the Regional Engineer, Regional Enforcement Coordinator, and Assistant Regional Engineer -- contain pre-decisional opinions, questions, and recommendations regarding an alleged stream pollution incident and a pending consent order. Staff argues that the third document -- a December 7, 2011 email from Regional Director Abby Snyder to Regional Attorney Brady -- contains pre-decisional opinions and recommendations regarding the initiation of enforcement proceedings and the drafting of papers. Staff claims that the public disclosure of these documents would likely either inhibit the honest exchange of views or inaccurately reflect or prematurely disclose the views of the Department. This provides a sufficient basis to conclude that the disclosure of the three documents would be more harmful to the public interest than to the interests of respondent and, therefore, the documents should be withheld from disclosure under the public interest privilege. Respondent's request for in camera review of the documents is denied as unnecessary.

C. Redacted Emails

Finally, respondent argues that four emails disclosed by Department staff contain redaction (see Affirmation in Support, Exh F). Respondent claims that staff must either disclose un-redacted versions of the emails because staff did not provide a privilege log or other explanation for the

redactions, or demonstrate that the redacted portions are protected by an applicable privilege.

In response, Department staff notes that a redaction in one email -- an October 21, 2011 email from Parks Acting General Counsel Kathleen Martens to DEC Assistant Regional Attorney Karen Draves, which appears twice (see id., Exh F, unnumbered first and sixth pages) -- was redacted in error and appears un-redacted in Exhibit F, unnumbered eighth page. Thus, respondent's objection to this redaction is academic.

As to the remaining three redactions, two of which are the same, Department staff states that it mistakenly failed to explain its bases for the redactions. Staff asserts that the redaction on the October 21, 2011 email from Karen Draves consists of a non-work related post script that is unresponsive and irrelevant to respondent's document demands. The second redaction on the February 1, 2012 email from Maureen Brady contains information regarding internal procedures and is also non-responsive and irrelevant to respondent's document demands. Thus, staff has demonstrated that the redactions are proper, and respondent's request for disclosure of the two redactions should be denied.

III. Ruling

Accordingly, based on the foregoing, it is hereby ordered that respondent's renewed motion to compel disclosure is denied.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: December 23, 2015
Albany, New York