



ERIE COUNTY WATER AUTHORITY
INTEROFFICE MEMORANDUM

Confidential Memorandum: Attorney-Client Privilege

June 26, 2018

To: Jerome D. Schad, Chair
Mark S. Carney, Vice Chair

Cc: Terrence D. McCracken, Secretary to the Authority

From: Margaret A. Murphy, Associate Attorney

Subject: FOIL Request from Investigative Post and Dan Telvock

A. Request for Confidential Communications

On June 14, 2018, Charlotte Keith, a reporter with Investigative Post, sent by email a Freedom of Information Law (“FOIL”) request to the Erie County Water Authority (the “Authority”). In her email, she requested, “all documents pertaining to work performed by Phillips Lytle LLP under the retainer agreement signed November 17, 2016, including but not limited to all [unredacted] invoices, memos, and any additional retainer agreement.” The Authority immediately sent a letter on the same day, acknowledging receipt of this FOIL request. A final response is due on or before 20 business days from the date of the request (i.e. July 13, 2018, excluding Saturdays, Sundays and legal holidays).

On June 18, 2018, Dan Telvock requested the following documents under FOIL:

- The complete research and any analysis and/or reports done by Phillips Lytle to review whether it was possible to sue the Investigative Post, a news organization.
- Any Phillips Lytle fact checking of Investigative Post stories, and all related advisory reports.
- The separate environmental review of water safety completed by Phillips Lytle, referenced in the June 16, 2018, Buffalo News story pasted here: <http://buffalonews.com/2018/06/16/case-study-of-how-the-water-authority-broke-transparency-laws/>

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- Emails to and from former Executive Director Earl Jann, current and former ECWA Board members and ECWA administrators that include the keywords or discuss matters related to “Investigative Post”, “WIVB” “Heaney” and “Dan Telvock.”

On June 19, 2018, Secretary McCracken signed a letter acknowledging the above-request, but wanted me to sign off on the letter before it was sent. As you will see from the attached email sent by me to Mr. Telvock the acknowledgement letter was never sent until June 26, 2018 – one day late. I take full responsibility for the delay. In any case, a final response to Mr. Telvock’s request will be due on or before July 17, 2018.

B. Public Policy Behind Nondisclosure of Privileged Communications

In both FOIL requests, confidential, privileged information is being requested, which fall within two categories authorizing the Authority to withhold this information from public disclosure. Pursuant to Public Officers Law § 87(2)(a) and (g), the Authority “may deny access to records or portions thereof that: (a) are specifically exempted from disclosure by state or federal statute; [and] (g) are inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; [or] (iv) external audits, including but not limited to audits performed by the comptroller and the federal government”

The information responsive to the FOIL request of Ms. Keith and Mr. Telvock would include confidential communications between the Authority and its attorneys, protected by attorney-client privilege and/or reveal the preliminary work and thought process of its attorneys, protected by the attorney work product privilege. *See, e.g., In re 91st Crane Collapse Litigation*, 930 N.Y.S.2d 175 (N.Y. Co. Sup. Ct. 2010). Additionally, these emails and other documents contain inter-agency or intra-agency materials used in the deliberative process to communicate thoughts and ideas prior to any formal decision or policy being made or adopted by the Authority’s Board of Commissioners. *See, e.g., Madrea v. Elmont Public Library*, 101 A.D.3d 726 (2d Dep’t. 2012).

The Secretary of the Authority does not have the power to waive these privileges; only the Board of Commissioners have the power to release such information. Before the Board can decide whether to release this information the information must be gathered and a privileged log should be made describing the document responsive to these requests. It has been a past practice of the Authority

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not to address the waiving of these privileges until the information was denied and an appeal was taken. Chairman Schad has requested the Board be immediately informed when such confidential information is being requested so the Board can consider the matter before a final response is due.

As to these particular requests, I have requested from Phillips Lytle all information responsive to these FOIL request. By the next board meeting I will be able to provide you with a privilege log and access to these confidential records.

That being said, I am familiar with the some of the confidential information that would be responsive to Ms. Keith's and Mr. Telvock's requests. It would be my recommendation to the Board not to waive these privileges for the very reasons the State Legislature allowed public bodies to exclude such information from public disclosure.

I do not need to explore with the Board the attorney-client or attorney work product privileges. However, I would like to review with the Board the public policy reasons for the privilege set forth in subdivision (g) of Public Officers Law § 87(2)(g), known as the "deliberative process" privilege.

The deliberative process privilege originated at common law to protect the consultative functions of governmental bodies by maintaining the confidentiality of advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated. *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 573 (D.C. Cir. 1990)(privilege "predicted on the recognition that the quality of administrative decisionmaking would be seriously undermined if agencies were forced to operate in a fish bowl"). The statutory privilege attached to inter- and intra-agency communications that are part of the deliberative process of adopting and implementing an agency policy.

The three primary purposes of the privilege are: (1) to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of criticism; (2) to protect against premature disclosure of proposed policies before they have been adopted; and (3) to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales of a course of action which were not in fact the ultimate reasons for the agency's action. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Before the next Board meeting, please take the opportunity to individually review these confidential, privileged materials. The Board can decide for itself

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whether to follow my recommendation or release the information.

In closing, I would recommend this confidential memorandum be released and posted on the Authority's website and that copies of this memorandum be given to Ms. Keith and Mr. Telvock. Ms. Keith and Mr. Telvock should be extended an opportunity to file with the Secretary a response to the recommendation I had made in this email by the filing deadline for the July 12, 2018 Board meeting. They should be told that failing to file a response does not waive their right to later file an appeal with the Board.

I will be available on or before June 28, 2018 to answer any questions, you may have regarding this matter.

FW: Message from "RNP002673CC502B"

 DELETE  REPLY  REPLY ALL  FORWARD ...



Margaret Murphy

Tue 6/26/2018 7:30 PM

Mark as unread

Show all 3 recipients

To: danielmtelvock@gmail.com;

Cc: Shari Zajdel;

 1 attachment 

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Dear Dan:

Attached is a copy of the letter that should have been sent by me on June 20, 2018. Terrence D. McCracken, the Authority's secretary, signed the letter on June 19, 2018 and asked me to review the letter before it was sent. I also spoke to Chairman Jerome Schad on the next day regarding the request because of the confidential information being requested. That conversation took place on June 20, 2018. Chairman Schad instructed to me to give you a call.

As you recall, I called you on June 20, 2018 to inform you that I would be recommending to the Board of Commissioners not to release these confidential matters, but the Board would take no action until its July 12, 2018 meeting to allow you an opportunity to respond. Unfortunately, after we spoke, I went into a 6:00 pm Governance Committee and forgot to instruct the staff to forward this letter to you. This is completely my fault and will inform both the Board and the Secretary on my mistake.

Today was the first day I have been back in the Authority's office. Unfortunately, I discovered my error when I was draft my memorandum to the Board. Please accept my apologizes for the delay in forwarding this letter to you. The Board has not denied your request.

If you have any questions, please give me a call. My next day I will be working at the Authority will be Thursday. However, as I indicated to you last Wednesday, please free feel to call me on my cell phone any time you cannot reach me at the Authority (716-867-1536).

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