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Dear Mrs. Murphy and members of the Erie County Water Authority Board:

I want to thank you for the opportunity to provide my rebuttal to Mrs. Murphy's request to not disclose some or all the records I requested in my June 18 Freedom of Information law request.

Some on the ECWA Board may be unfamiliar with the FOI law and rely on their attorney to decide if documents are releasable, without context of why the law was established and what it means. I think this context is important for not just the ECWA, but all government bodies and authorities in New York State.

First, law was passed to maintain a free society where "government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government."

That's the legislative declaration. This declaration goes on to say that, "The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article."

The records I am requesting were all obtained by the ECWA under the cloak of secrecy. That's an important fact to remember, as well.

As a result, it is held that FOIL is to be **liberally construed and that any exemptions ought to be narrowly interpreted so that the public is granted maximum access to records** of its governments, including water authorities. (see, Matter of Washington Post Co. v. New York State Ins. Dept., 61 NY2d 557,564, citing Matter of Fink v. Lefkowitz, supra, at p 571). It is evident that the narrow construction respondents urge is contrary to these decisions and antagonistic to the important public policy underlying FOIL"[69 NY2d246, 252 (1987)].

Now, allow me to rebut Mrs. Murphy's argument to not disclose records that I requested. To start, the exemptions in FOI are discretionary to begin with. An attorney can tell you not to disclose something, but that is not law-binding – it is still an opinion that you can disagree with and lean toward transparency and full disclose. Keep that in mind as you read the rest of this rebuttal.

Mrs. Murphy is arguing that the five-binders' worth of material prepared by Phillips Lytle are privileged material under the "intra-agency" exemption. To use this exemption, it would mean that every page in the five binders does not contain any facts, but all opinions. That cannot be the case. For example, if Phillips Lytle provided ECWA with a list of best practices for lead in water testing, with comparisons and information on what might work best for ECWA, that would all be factual material. None of it would be

opinion. It is very likely that most of the documents in the five binders contains all facts. By law, this is releasable and should be made public.

Keep in mind, that to use the “attorney-client privilege” the courts have ruled that it must be a product that only an attorney could have prepared. If you could have gotten the same information from a consultant, then it would be releasable under the law. The same holds true if this information was prepared by an attorney: it is releasable unless only an attorney could prepare it. Drafts and preliminary work are still facts, and are public records.

If the “thoughts and ideas prior to any formal decision” are still facts, the courts have held this material is releasable and public under FOI.

Note that in Ingram v. Axelrod, the Appellate Division held that: ***"Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].***

Mrs. Murphy says that the exemptions are there to assure that agency subordinates can feel free to provide decisionmakers with their uninhibited opinions and recommendations without fear of criticism. However, these recommendations, developed with the use of ratepayer funds, cannot be made inside a vacuum in the best interest of ratepayers who have no insight or opportunity to comment on whatever uninhibited recommendations staff might make. When would the public be involved? Wouldn’t public disclosure of these documents benefit the public? Of course, they would. How would transparency of the decision-making process create fear, unless such practice included some level of wrongdoing? Keep in mind, that these recommendations did not come from any agency subordinate; they came from a law firm that the ECWA hired under the cloak of secrecy and in exchange they received documents – five binders’ worth – of material that could not possibly only be opinion.

Finally, the Erie County Water Authority recently announced a new “gold-standard” for transparency. Any exemption in the FOI law is discretionary. One could easily argue that the gold-standard of transparency is not to find ways to keep information hidden from public view, but to narrowly interpret any potential exemption so that the public is granted maximum access to records.

Sincerely,

Daniel M. Telvock