

**Matter of Protect the Adirondacks! Inc. v New York
State Dept. of Env'tl. Conservation**

2016 NY Slip Op 33212(U)

March 18, 2016

Supreme Court, Albany County

Docket Number: Index No. 2137-13

Judge: Gerald W. Connolly

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of PROTECT
THE ADIRONDACKS! INC.,

DECISION AND ORDER
Index No.: 2137-13

Plaintiff-Petitioner,

For a Judgment Pursuant to Section 5 of Article 14
of the New York State Constitution, and CPLR
Article 78,

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION and
ADIRONDACK PARK AGENCY,

Defendants-Respondents.

(Supreme Court, Albany County)

APPEARANCES: John W. Caffry, Esq.
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Glens Falls, New York 12801

Loretta Simon, Esq.
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Connolly, J:

The Court, via Decision and Order dated October 20, 2015, made determinations regarding the motion of the plaintiff for various discovery¹, in this (remaining) plenary action brought by the

¹ The relevant facts and allegations of the underlying plenary matter herein are fully set forth in the extensive Decision/Order of the Court (Ceresia, J.) of October 15, 2014 ("Ceresia Decision"), which decision is herewith incorporated by reference in its entirety into the within decision, and will accordingly not be repeated.

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plaintiffs seeking a declaratory judgment and permanent injunction to prevent alleged damage to, and illegal use of, the Adirondack Forest Preserve. As part of such determination the Court ordered that with respect to the portion of plaintiff's motion seeking an order requiring defendants to produce all discoverable documents that were allegedly incorrectly withheld, to the extent such documents at issue constitute non-final versions (drafts) of plans, policies and approvals, they are not discoverable; and, it was further ordered that with respect to the remainder of the documents identified in defendants' privilege log, defendants provide: (i) an updated privilege log, on notice, and, (ii) all such asserted privileged documents, *in camera*, with appropriate affidavits/affirmations demonstrating the specific basis for each asserted privilege with respect to each document.

Defendants have accordingly submitted, *inter alia*, certain asserted privileged documents that were specifically challenged by plaintiff for *in camera* review by the Court. Defendants have asserted various privileges including, *inter alia*, (i) attorney work product, (ii) trial preparation and (iii) deliberative process.

"Attorney work product under CPLR 3101(c), which is subject to an absolute privilege, is limited to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy. Documents generated for litigation are generally classified as trial preparation materials (CPLR 3101[d][2]) unless they contain otherwise privileged communications, such as memoranda or private consultations between attorney and client. Trial preparation materials are subject to a conditional privilege and may be disclosed only upon a

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showing that the party seeking discovery has [a] 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.” (*In the Matter of New York City Asbestos Litig.*, 109 AD3d 7 [1st Dept 2013]). While, in the opinion of the Court, such “deliberative process privilege” has not been well defined outside the scope of the Freedom of Information Law (“FOIL”), the exemption for inter- or intra-agency documents (POL §87(2)(g)), which, in the FOIL context has been used interchangeably with the phrase “deliberative process”, has been held to apply to “deliberative materials or communications exchanged for discussion purposes not constituting final policy decisions” (*Matter of Bass Pro, Inc. v. Megna*, 69 AD3d 1040, 1041-1042 [3d Dept 2010]), and the Court will apply such standard upon the instant privilege assertions in the discovery context. As to the deliberative process privilege, even absent a FOIL request, communications may be protected from disclosure in order to protect respondents’ interest in “allowing the candid exchange of opinions, advice and criticism” (*Entergy Nuclear Indian Point 2, LLC v NYS Dept. of State*, 130 AD3d 1190 [3d Dept 2015]; *see also New York Tel. Co. v Nassau County*, 54 AD3d 368, 369-370 [2nd Dept 2008]).

With respect to the challenged documents identified by Bates Nos.: 6553, 6443, 6555, 6556-6687, 6688-6689, 6690-6693, 6694-6707, 6708, 6709-6754, 6755-6760, 6761, 6762-6767, 6768-6775, 7009-7010, 7016-7018, 7019, 7020, 7021, such documents need not be produced for discovery as they are trial preparation materials. Mr. Wolckenhauer has averred that he was asked to prepare various documents at various stages of the litigation to assist counsel in assessing the allegations in the complaint and preparing a defense. Further, much of the documentation consists of extracted pages from publicly available final unit management plans and plaintiff has accordingly failed to

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adequately demonstrate that it has a substantial need of the above documents in the preparation of the case and are unable without undue hardship to obtain the substantial equivalent of the materials by other means, particularly as it appears that the bulk of such documents consist of publicly available Unit Management Plans.²

With respect to the challenged document identified by Bates No. 2506-2507, as such chart is merely a compilation of factual data, such document is not subject to the deliberative process privilege and should be produced.

With respect to the challenged documents identified by Bates Nos.: 6993-6995, 7032, 7033, 7167-7168, 7606-7607, 14821, 14847-14850, 14851-14855, 15165, 15268, 15528-15530, 15531-15534, such documents need not be produced for discovery as they are subject to the deliberative process privilege as they constitute, *inter alia*, internal unsigned or draft memorandums, notes, internal advisory memorandums, draft letters, internal briefing materials to the Commissioner, and maps with proposed (but non-final) plans. As such communications consist of the internal opinions and advice and of non-final proposed plans they are protected from disclosure in order to protect respondents' interest in allowing the candid exchange of opinions, advice and criticism.

With respect to the challenged document identified by Bates No. 9826, the Court need not address such item as defendants have represented it was produced to plaintiff.

With respect to the challenged documents identified by Bates Nos.: 7004-7008, 7011, 7012, 7013-7015, 7023, such documents, which consist of internal charts concerning the status of certain

² To the extent such documents were prepared or compiled by a non-attorney, they are not subject to the attorney work product privilege and, accordingly the Court has not considered such contention.

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snowmobile trails, should be produced with the column for "next steps" redacted. Such charts consist of factual data (as opposed to opinions, advice or criticism), and, though defendants assert they consist of "trial preparation materials", Mr. Wolckenhauer has averred that they were prepared not for counsel but at the request of a "Special Assistant, Forest Preserve Coordinator" to ascertain the status of the construction of certain trails.

With respect to the documents identified by Bates Nos.: 0001-0003, 0004-0009, 0010-0013, 0014-0018, 15565-15570, 15571-15578, 15579-15584, 15585-15589, 15590-15598, 15599-15604, 15605-15609, 15643-15646, 15647-15652, 15653-15658, 15659-15665, 15666-15670, 15671-15674, 15675-15681, 15682-15687, such documents need not be produced for discovery as they are subject to the deliberative process privilege as internal reports which set forth, *inter alia*, internal issues for discussion and reporting, internal assessments and status reports on ongoing matters and projects and advice and opinions on future activities. Accordingly, as such discovery materials constitute internal reports which represent the exchange of opinions and advice on ongoing projects, they are subject to the deliberative process privilege and need not be disclosed.

With respect to the documents identified by Bates Nos.: 7043-7129, such documents need not be produced for discovery as they constitute trial preparation materials. Mr. Wolckenhauer has averred that such documents consist of a spreadsheet he prepared listing plaintiff's discovery demands and spreadsheets he created to organize potentially responsive documents. Accordingly, such information need not be provided.

With respect to the documents identified by Bates Nos.: 7381-7390, 7391-7398, 7399-7407, 7408-7416, 7417-7425, 7426-7435, 7441-7449, 7450-7457, 7458-7466, 7467-7475, 7476-7485,

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7486-7495, constituting “internal notes related to scenic rivers, Vanderwhacker UMP, alternative analysis of trails”, upon review such documents need not be produced for discovery as they are subject to the deliberative process privilege as they constitute, *inter alia*, internal notes, opinion, analysis and advice.

With respect to the documents identified by Bates Nos.: 4627-4629 and 4649-4651 which consist of the Taylor Pond Wild Forest UMP draft executive briefs, upon review such documents need not be produced for discovery as they are subject to the deliberative process privilege as they constitute, *inter alia*, internal notes, opinions, analysis and/or advice.

With respect to the document identified by Bates No. 6791, which consists of a meeting agenda, such document should be released as it does not constitute deliberative process material as it does not itself consist of opinions, advice or criticism.

With respect to the document identified by Bates No. 6841 which consists of an internal report, such document need not be released as it is subject to the deliberative process privilege.

With respect to the documents identified by Bates Nos.: 6957-6958 and 6959-6961 and as memorandum from the general counsel of DEC to the DEC Commissioner concerning litigation, such documents need not be released, as they are subject to the attorney-client privilege (*see generally, Spectrum Systems Int'l Corp. v Chemical Bank*, 78 NY2d 371 [1991]).

With respect to the document identified by Bates No. 6962-6969, as such document is an internal memorandum consisting of opinions and advice for internal discussion, such document need not be released as it is subject to the deliberative process privilege. The Court notes that defendants have represented that the photographs in the document were produced to plaintiff.

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With respect to the document identified by Bates Nos.: 6996-7002, as such document is a letter that is marked-up with internal notes of opinion and advice such document need not be released as it is subject to the deliberative process privilege.

With respect to the documents identified by Bates Nos.: 7003 and 7024-7027 as such document (identified as 7003) is simply a list prepared by DEC counsel and such document (identified as 7024-7027) consists of a list of entities which have agreements to assist in the maintenance of trails, though it is asserted such documents are subject to privilege as attorney trial preparation, as such assertion is not supported by any affidavit and such documents consist of factual lists, such documents should be released.

With respect to the documents identified by Bates Nos.: 7036-7038, 7039-7040, 7041-7042 which consist of directions to staff concerning the discovery process, and demand summaries with respect to the instant litigation, such documents need not be released as they constitute trial preparation.

With respect to the documents identified by Bates Nos.: 7130-7137, 7143-7144, 7154-7166, 7189, 7277 which consist, *inter alia*, of a spreadsheet detailing and advising as to resource needs, a produced document with a handwritten note, an internal memorandum discussing the East Stony Creek Bridge, an internal memorandum discussing the Taylor Pond mapping, and a proposed description of a project, as such documents consist of internal information consisting of internal opinions and advice, such documents are protected from disclosure under the deliberative process privilege.

With respect to the document identified by Bates No. 7138 which consists of a chart for

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internal discussion concerning snowmobile use, as such chart consists of factual data, although identified as being for internal discussion, such chart should be produced. The Court notes there is no affidavit of any person setting forth any information on why or by whom such document was created nor providing the reasoning behind the basis for assertion of a privilege.

With respect to the documents identified by Bates Nos.: 7364-7367, the Court need not address as defendants have represented that such document has been produced to plaintiff.

With respect to the documents identified by Bates Nos.: 7372 and 7376 which consist of a work plan aerial photograph and a topographical map, the documents need not be produced as such documents delineate proposed work plans and proposed trails and are subject to the deliberative process privilege.

With respect to the documents identified by Bates Nos.: 15306-15309, 15344-15389, and 15390-15395 which consist of unsigned draft affidavits which contain on the first page the caption of the instant litigation, such documents need not be produced as they are subject to the attorney-work product privilege (and although not raised trial preparation materials).

With respect to the documents identified by Bates Nos.: 15535-15543 and 15544 which consist of internal Unit Management Planning status reports setting forth, *inter alia*, advice and opinions on work to be performed, such documents need not be produced as they are subject to the deliberative process privilege.

With respect to the documents identified by Bates Nos.: 15688-15694 and 15695-15704

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which consist of action agendas for the Division of Lands and Forests for state fiscal years 2012-2013 and 2013-2014, such documents need not be produced as they consist of reports delineating proposed initiatives prepared by DEC staff for the Commissioner (*see* Frank Aff., ¶15) and are advisory in nature consisting of staff opinions concerning internal proposed actions and, accordingly need not be produced as they are subject to the deliberative process privilege.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED plaintiff's motion seeking an order requiring defendants to produce the documents identified in defendants' privilege log, such motion is granted, solely to the extent set forth herein and is in all other respects denied and defendants are directed to provide plaintiff with the records as discussed in the Court's Decision within twenty days of the date of this Decision and Order; and it is further

ORDERED that the parties appear for a conference on **Friday, April 22, 2016 at 11:00 AM** at the Albany County Courthouse, Room 219, Albany, New York 12207; and it is further

ORDERED that the confidential records submitted to the Court for *in camera* review are being returned to the defendants.

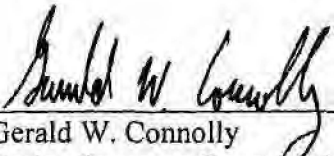
This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the defendants. The below referenced original papers are being mailed to the Albany County Clerk. **The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that**

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rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER.

Dated: March 18, 2016
Albany, New York


Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated March 5, 2015; Affidavit of John W. Caffry, Esq. dated March 5, 2014 with accompanying exhibits A-J; Memorandum of Law in Support of Plaintiff's Discovery Motion dated March 5, 2015; Examination Before Trial Testimony of Karyn Richards and Matthew McNamara;
2. Affirmation of Loretta Simon in Opposition to Plaintiff's Motion to Reopen Discovery dated April 23, 2014; accompanying exhibits A-P; affidavit of Kenn Hamm, Esq. dated April 1, 2015; Affidavit of Peter J. Frank dated April 2, 2015; Affidavit of M. Wolckenhauer dated April 7, 2015; Affidavit of K. Regan dated April 7, 2015; Affidavit of M. McNamara dated April 7, 2015; Affidavit of D. Luciano, Jr., dated April 22, 2015; Memorandum of Law in Opposition to Plaintiff's Motion to Reopen Discovery dated April 23, 2015;
3. Reply Affidavit of John W. Caffry, Esq. dated May 20, 2015; with accompanying exhibits A-C; Reply Memorandum of Law in Support of Plaintiff's Discovery Motion dated May 20, 2015;
4. Letter from Caffry & Flower dated September 18, 2015;
5. November 18, 2015 submission of defendants/respondents including the November 18, 2015 letter; supplemental affidavit of M. Wolckenhauer dated November 17, 2015; Verified Updated Privilege Log; Privileged Documents Challenged by Plaintiff and Privileged Documents Not Challenged by Plaintiff (Volumes 1 and 2).