COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C. 140 Allens Creek Road Rochester, NY 14618 Complainant, v. TOWN OF SHREWSBURY ELECTRIC LIGHT PLANT 100 Maple Avenue Shrewsbury, MA 01545-5398 Respondents.	)	D.T.E. 01-70

APPEAL OF FIBER TECHNOLOGIES NETWORKS, L.L.C.
TO HEARING OFFICER'S RULING ON FIBER TECHNOLOGIES NETWORKS, L.L.C. MOTION TO COMPEL DISCOVERY RESPONSES BY SHREWSBURY ELECTRIC LIGHT PLANT

Pursuant to 220 C.M.R. § 1.06(6)(d)(3), Fiber Technologies Networks, L.L.C. ("Fibertech") appeals the Hearing Officer's ruling entered on February 14, 2002 (the "ruling") on Fibertech's motion to compel discovery responses by Shrewsbury's Electric Light Plant ("SELP").[1] Although SELP is subject to the Public Records Act, the Hearing Officer upheld SELP's withholding of an opinion furnished to SELP by outside counsel. A copy of this ruling is attached as Exhibit 1. Fibertech is appealing this ruling because it is contrary to the Public Records Act and the bases of attorney-client privilege. Therefore there can be no expectation on SELP's part that the information is confidential, and any privilege has been waived by prior disclosures involving this opinion.

[1] The discovery responses are those to Fibertech 2-1, 2-2, 3-4, and 3-9.

Background

The ruling arises from information requests by Fibertech concerning a legal opinion furnished to SELP by its outside legal counsel. On October 21, 2001, Fibertech submitted its first set of information requests to SELP seeking documents concerning SELP's communications with any parties regarding Fibertech. Two of the documents SELP produced in response specifically disclose information as to which SELP claims privilege. A memorandum from T.R. Josie to the Light Commission dated October 16, 2000, refers to a "legal opinion …that stated since Fiber Systems is not a telecommunications provider or CATV company, SELP has no legal obligation to rent space to them." Another memorandum from T.R. Josie to D. Morgado and J. LeBeaux dated May 15, 2001 also refers to "an opinion from counsel stating that this fiber company, Fibertech, does not meet the DTE's criteria to mandate attachments from SELP." Copies of these documents are attached as Exhibits 2 and 3.

In light of these disclosures, on November 13, 2001, Fibertech filed a second set of information requests specifically seeking the legal opinion(s), the substance of which was described in these documents. On November 21, 2001, SELP responded by asserting the attorney-client privilege, the work product doctrine, and exemptions under the Public Records Act. A copy of SELP's responses is attached as Exhibit 4. Then, on November 16, 2001, Fibertech received from SELP the Prepared Direct Testimony of Thomas R. Josie. Mr. Josie's testimony referred to action he took after "obtaining the opinion of SELP's counsel" and a letter to Fibertech rejecting its request for pole attachments prepared "on the advice of counsel." Based on Mr. Josie's testimony, Fibertech prepared a third set of information requests seeking Mr. Barna's opinion and any documents reflecting or referring to the advice of counsel referred to in the Josie testimony, and the identity of any other parties to whom the opinion was

transmitted. SELP responded to this request by again asserting the attorney-client privilege, the work product doctrine, and exemptions under the Public Records Act. In a supplemental response, SELP did acknowledge that a copy of the actual opinion was disclosed to town officials of the Town of Shrewsbury (the D. Morgado and J. LeBeaux who received Exhibit 3). A copy of SELP's responses is attached as Exhibit 5. On November 28, 2001, Fibertech filed a Motion to Compel Discovery regarding SELP's responses to Fibertech 2-1, 2-2, 3-4 and 3-9. On January 25, 2002, SELP filed its opposition to Fibertech's motion. These filings are attached as Exhibits 6 and 7.

Argument

Under controlling authority, the opinion of counsel is a public record, and therefore not privileged. The Supreme Judicial Court has stated unequivocally that "the [public records] statute's clear and unambiguous language mandates disclosure of requested public records limited only by the definition of public record found in G.L. c. 4, §7, Twenty-sixth." and that the Public Records Act is "subject only to limited exceptions" that "must be strictly and narrowly construed." *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798, 801-02. Neither the attorney-client privilege nor the work product doctrine are among the enumerated exemptions to the Public Records Act. Hence, the documents cannot be shielded from production under SELP's two privilege theories, nor can there be an expectation of confidentiality unless the documents squarely fall within one of the enumerated exceptions. SELP's claim of privilege therefore is incompatible with law and public policy. Just as the Department is careful to conform protective treatment to the requirements of the Public Records

Act[2] even if the Department itself does not oversee the Public Records Act, it cannot enforce a claim of privilege that has no basis in law.

I. The Opinion Is Unequivocally a Public Record.

The well-settled principle of statutory construction that "where a statute provides a number of express exceptions, no other exceptions should be implied," compels the conclusion that the attorney-client privilege does not apply to the requested documents. *1010 Memorial Drive Tenants Corp. v. Fire Chief of Cambridge*, 424 Mass. 661, 667 (1997). "[S]ince the attorney-client privilege is not expressly incorporated into any of the enumerated exemptions to the [Public Records Law] it cannot be read in." *Kent v. Commonwealth*, No. 982693, 2000 WL 1473124, at *4 (Mass. Super. July 27, 2000)(Botsford, J.). *See District Attorney for the Plymouth Dist. v. Board of Selectmen of Middleborough*, 395 Mass. 629, 633 (1985) ("Exceptions are not to be implied. Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied.") (quoting 2A C. Sands, Sutherland Statutory Construction § 47.11 (4th ed. 1984)).

Neither does the work product doctrine shield the requested documents. In *General Electric*, the SJC held, "[m]aterials privileged as work product pursuant to the rule of civil procedure are not protected from disclosure under the public records statute, unless those materials fall within the scope of an express statutory exemption." *General Electric*, 429 Mass. at 799. Traditional common law privileges, such as the work product doctrine, do not apply to the Public Records Act because "the statute's clear and unambiguous language mandates disclosure of requested public records limited only by the definition of public records found in G.L. c. 4, §7, Twenty-sixth." *Id.* at 802 (emphasis added). Because the opinion(s) provided to

[2] *E.g., Hearing Officer's Ruling on Motion of CMRS Providers for Protective Agreement and Requests for Non-Disclosure Agreement*, D.P.U. 95-59B (1997); Ground Rules, Section 1(c) in this docket (a form used in numerous dockets).

SELP is a public record, no privilege attaches, and therefore no expectation of confidentiality exists. The only way for documents to be protected from disclosure is if the documents fall under one of the enumerated exceptions.

As a general matter, light plants such as SELP are subject to the Public Records Act. *See* G.L. ch. 164 § 47D. The Public Records Act establishes "a presumption that the record being sought is public," and places the burden on the custodian of the record "to prove with specificity the exemption which applies." G.L. c. 66, § 10(c). Therefore, it is presumed that the documents being sought by Fibertech are public records, unless SELP can demonstrate with specificity that one of the exemptions to the Public Records Act applies. SELP has failed to demonstrate with specificity that any one of the exemptions applies.

As illustrated by SELP in its opposition to Fibertech's Motion to Compel, the only exemption the documents even arguably fall under is the inter-agency/policy deliberation exemption while such deliberations are under way. For the inter-agency/policy deliberation exemption to apply, however, such information must be used to develop policy positions. As more fully discussed in Fibertech's Motion to Compel, SELP's function is to construct, maintain and operate the light plant. SELP is not delegated any decision-making authority in the public interest.

The memorandum falls outside this exemption for two additional reasons. First, the policy deliberation exemption does not shield the grounds for public policy once a policy decision has been made. *See* M.G.L. c. 4, §7, Twenty-sixth (d) (exemption applies "to policy positions ***being developed*** *by the agency*…") (emphasis added). Any policy deliberations by SELP have been completed. Second, since any policymaking on SELP's part was independent

of the Town of Shrewsbury, the disclosure of the opinion itself and its conclusions to town officials was not part of any policymaking deliberation.

II. The Opinion's Disclosure and Status As A Public Record Defeats Any Claim of Confidentiality on Which Privilege Rests.

Because the opinion(s) provided to SELP is a public record, SELP could have no reasonable expectation of confidential treatment, and therefore SELP could have no reasonable expectation of a privilege attaching. In fact, SELP's expectation should have been the exact opposite: that the opinion was a public record subject to public inspection. The fundamental purpose of the Public Records Act is to "ensure public access to government documents." *General Electric*, 429 Mass. at 801. The Public Records Act establishes "a presumption that the record being sought is public." G.L. c. 66, §10(c). *See Bougas v. Chief of Police of Lexington*, 371 Mass. 59 (1976) (documents presumed to be public records when possessed by a public entity). In addition, the Public Records Act provides that "every person having custody of any public record … shall, at reasonable times and without unreasonable delay, permit it … to be inspected and examined by any person." G.L. c. 66, §10. The plain language of the Public Records Act "manifests a legislative intent to provide broad public access to government documents subject only to limited exceptions." *General Electric Co.*, 429 Mass. at 802. As previously established above, SELP is subject to the Public Records Act. SELP therefore knew or should have known that its counsel's opinion(s) was a public record, subject to inspection by the public. SELP had no reasonable expectation of confidential treatment.

The attorney-client privilege and work product doctrine exist to protect a confidential relationship. *See Upjohn v. United States*, 449 U.S. 389 (1981) (acknowledging that sound legal advice or advocacy depends upon the lawyer being fully informed by the client). Accordingly, for the attorney-client and work product doctrines to apply, there must be an expectation of

confidentiality. Because SELP should have no reasonable expectation of confidentiality in light of the Public Records Act, neither the attorney-client nor work product doctrine apply to Mr. Barna's opinion. SELP furthermore surrendered any claim it might have had to confidentiality when it disclosed the requested information to a third party, Shrewsbury town officials. "The privilege applies only to matters discussed between the attorney and his client which are confidential in nature, and not to matters known to third persons or intended to be made public." *Commonwealth v. Michel*, 367 Mass. 454, 460 (1975) (citing *Ranocotti v. Boston Redevelopment Authority*, 341 Mass. 377, 380-81 (1960); Wigmore, *Evidence*, § 3211 (McNaughton rev. 1961); McCormick, *Evidence*, § 91 (2d ed. 1972), *new trial granted* 381 Mass. 447 (1980). "There is no privilege for … a public document." *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

Even if the attorney client privilege and the attorney work product doctrine arguments were taken out of the Public Records Act context, neither argument would shield the requested documents from being produced. *See In re Reorganization of Elec. Mut. Liab. Ins. Co., Ltd.*, 425 Mass. at 423 & n.4; *see Colonial Gas Co. & Aetna Cas. & Sur. Co.*, 144 F.R.D. 600, 604 (D.Mass 1992) ("Voluntary disclosure to an outside party generally waives the privilege."; *see also Drew v. Drew*, 250 Mass. 41, 45 (1924) (attorney-client privilege destroyed where wife showed letter written to her attorney to both husband and husband's attorney); *see also Adoption of Sherry*, 2001 WL 1402149 (Mass. November 13, 2001); *see also United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997) (holding disclosure of documents to an agency forfeited work product protection).

SELP waived any privilege claims it may have had once SELP disclosed the requested documents to the Town and its officials, and once SELP placed the subject matter of legal advice

"at issue" in this case.[3] SELP voluntarily disclosed the requested information to the Town. The Town is a third party, as it is a separate and distinct entity from SELP. *See Town of Middleborough v. Middleborough Gas & Electric Dept.*, 422 Mass. 583, 588 (1996). Although the Hearing Officer found that this disclosure was "to an associated interested party," there is no basis in the record for this finding. On the contrary, SELP made no argument – indeed, did not mention – that the Town was an associated interested party for the purpose of disclosure. And even if there were a basis for finding the Town to be an "interested party," that does not protect the privilege. Documents transferred to a third party who is not an agent for an attorney are not confidential and privileged. *United States v. Randall*, 194 F.R.D. 369, 372 (D. Mass. 1999)(documents transferred from attorney to accountant not privileged). The Town hardly stands in such a close confidential relationship with SELP. The ruling therefore is not supported.

CONCLUSION

For all of the reasons set forth above, the Hearing Officer's ruling of February 14, 2002 is contrary to law and Fibertech requests that it be reversed.

Respectfully submitted,

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Cameron F. Kerry, BBO# 269660
Kimberly C. Collins, BBO#643405
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

Attorneys for Fiber Technologies Networks, L.L.C.

[3] For a detailed discussion of the "at issue" argument, please refer to Fibertech's November 28, 2001 Motion to Compel.

OF COUNSEL:

Charles B. Stockdale
Robert T. Witthauer
Fibertech Networks, LLC
140 Allens Creek Road
Rochester, New York 14618
(716) 697-5100

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