

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 7, 2014)

RHODE ISLAND ECONOMIC :  
DEVELOPMENT CORPORATION, :  
Plaintiff, :

v. :

C.A. No. PB 12-5616

WELLS FARGO SECURITIES, LLC; :  
BARCLAYS CAPITAL, INC.; FIRST :  
SOUTHWEST COMPANY; STARR :  
INDEMNITY AND LIABILITY :  
COMPANY; CURT SCHILLING; :  
THOMAS ZACCAGNINO; RICHARD :  
WESTER; JENNIFER MACLEAN; :  
ROBERT I. STOLZMAN; ADLER :  
POLLOCK & SHEEHAN, P.C.; MOSES :  
AFONSO RYAN LTD.; ANTONIO :  
AFONSO, JR.; KEITH STOKES; and J. :  
MICHAEL SAUL, :  
Defendants. :

DECISION

SILVERSTEIN, J. Before the Court for decision is First Southwest Company’s Motion to Compel Production of Documents (Motion). First Southwest Company’s Motion was joined by Wells Fargo Securities, LLC, Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Antonio Afonso, Jr., Moses Afonso Ryan Ltd., J. Michael Saul, Curt Schilling, Jennifer MacLean, Starr Indemnity and Liability Company, Keith Stokes, Thomas Zaccagnino, and Richard Wester (collectively, Defendants). Defendants assert that the Rhode Island Economic Development Corporation (EDC), the Office of the Governor (OOG), the Department of Administration (DOA), the Department of Revenue (DOR), and the General Treasurer’s Office (GTO) are

compelled to produce documents that have been classified as privileged by the various offices under the deliberative process privilege.

## I

### Facts & Travel

As this Court previously stated in its Decision on the Motion to Dismiss: “[t]he basic plot is well-known: 38 Studios, LLC (38 Studios) was induced to move its business to the Ocean State in exchange for a massive financial accommodation; less than two years later, 38 Studios went bankrupt. Much has been written about that plot in the media. Much has been discussed and debated—and continues to be discussed and debated—in the other two branches of government.” Rhode Island Econ. Dev. Corp. v. Wells Fargo Sec., LLC, PB-12-5616, 2013 WL 4711306, at \*2 (R.I. Super. Aug. 28, 2013). However, what is pertinent to the present Motion before the Court is that Defendants have made various discovery requests, and, in response to those requests, parties have created privilege logs that identify documents that are purportedly privileged for reasons indicated on such logs.<sup>1</sup> One such justification used for classifying documents as privileged is the deliberative process privilege. First Southwest Company filed the Motion on May 2, 2014, seeking production of documents classified as privileged on the privilege logs. All other Defendants later joined First Southwest Company’s Motion. Objections to the Motion were made by the EDC, Taft & McShay LLP, the OOG, the DOA, the DOR, the Rhode Island Budget Office, the GTO, and Shivan Subramaniam.

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<sup>1</sup> Privileges asserted are Attorney Client, Work Product, Deliberative Process, and Executive among others.

One argument advanced by the Motion is that the deliberative process privilege is inapplicable as asserted. However, it is worth noting that not all of the objecting parties<sup>2</sup> asserted the deliberative process privilege. For example, the privilege log of Shivan Subramaniam dated October 31, 2013, identifies eleven documents and asserts either “Attorney/Client” and/or “Work Product” for all eleven documents. Accordingly, this Decision only pertains to the parties that have asserted the deliberative process privilege. However, the Court will once again take this opportunity to remind all parties, as it did at the hearing on this issue, that: “with respect to the purpose of [] a privilege log, that, among other things, it is necessary in reviewing a privilege log for the party from whom materials are being withheld to be able to make a determination as to whether the privilege properly has been asserted, at least a threshold determination; and also, for the Court to be able to do the same.” (Hr’g Tr. 48).

## II

### Standard of Review

The discovery process affords Rhode Island litigants the ability to obtain information “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]” Super. R. Civ. P. 26(b)(1). To help ensure that a discovering parties’ proper Super. R. Civ. P. 26 request is complied with, Super R. Civ. P. 37(a)(2) provides that:

“[i]f a deponent fails to answer a question propounded or submitted under Rules 30 and 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for production or inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an

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<sup>2</sup> The Court recognizes that some of the objecting parties are actually non-parties to the suit. However, for ease of reference, the Court will not distinguish between objecting parties and objecting non-parties.

answer, or a designation, or an order compelling production or inspection in accordance with the request.”

### III

#### Discussion

Defendants argue that the deliberative process privilege is inapplicable because:

“the EDC cannot advance claims that Defendants concealed information from the EDC’s Board of Directors (the “Board”) while the EDC, its agents, and the State simultaneously withhold documents revealing the information disclosed to the EDC regarding the 38 Studios transaction, and [] the Privilege Logs fail to provide information sufficient to justify the privilege and often contain information that undermines the claim of privilege.” First Southwest Company Mem. 3.

Defendants also assert that the EDC waived the deliberative process privilege by placing any deliberations that may have taken place at issue.

The parties seeking to utilize the deliberative process privilege argue that the privilege is applicable because of its very purpose, which is to “protect[] the internal deliberations of an agency in order to safeguard the quality of agency decisions.” In re Comm’n on Judicial Tenure & Discipline, 670 A.2d 1232, 1235 n.1 (R.I. 1996). Additionally, some of the parties counter Defendants’ argument that the privilege was waived by the EDC; arguing that the EDC lacked the ability to waive any governmental offices’ deliberative process privilege. Still, other parties (such as the GTO) assert that they had no role in the decision-making process and, accordingly, their conduct has not been placed at issue in the case.

The deliberative process privilege “rests on a policy of affording reasonable security to the decision-making process within a government agency.” Texaco Puerto Rico, Inc. v. Dep’t of

Consumer Affairs, 60 F.3d 867, 884 (1st Cir. 1995).<sup>3</sup> The privilege precludes from disclosure “documents reflecting advisory opinions, recommendations, and deliberations compromising a process by which governmental decisions and policies are formulated.” Trentadue v. Integrity Comm., 501 F.3d 1215, 1226 (10th Cir. 2007).

For the deliberative process privilege to apply to a document, courts, including this Court, have looked to see whether the document was both “pre-decisional” and “deliberative.” See Heritage Healthcare Servs., Inc. v. Beacon Mut. Ins. Co., et al., PC-02-7016, 2007 WL 1234481, at \*14 (R.I. Super. Apr. 17, 2007). “A document is pre-decisional if it is ‘prepared in order to assist an agency decisionmaker in arriving at his decision.’” Id. (quoting Nadler v. U.S. Dep’t of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992)). Further, a document is “deliberative such that it ‘makes recommendations or expresses opinions on legal or policy matters.’” Id. at 15 (quoting Vaughn v. Rosen, 523 F.2d 1136, 173 U.S. App. D.C. 187 (D.C. Cir.1975)).

However, even if a document is both “pre-decisional” and “deliberative,” the privilege will not apply when an agency places its deliberations at issue. See In re Methyl Terriary Butyl Ether Prods. Liab. Litig., 898 F. Supp. 2d 603, 608 (S.D.N.Y. 2012) (finding that because the New Jersey Department of Environmental Protection (NJDEP) put at issue their deliberations regarding relative risks and benefits of using a gasoline additive, the NJDEP had waived its deliberative process privilege) (In re MTBE); see also Delphi Corp. v. United States, 276 F.R.D. 81, 85 (S.D.N.Y. 2011) (“Where the deliberative or decisionmaking process is the ‘central issue’ in the case, the need for the deliberative documents will outweigh the possibility that disclosure will inhibit future candid debate among agency decision-makers.”).

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<sup>3</sup> When Rhode Island caselaw provides “little guidance” on discovery issues, Rhode Island courts can “look to the federal courts for assistance.” See Fireman’s Fund. Ins. Co. v. McAlpine, 120 R.I. 744, 751, 391 A.2d 84, 88 (1978).

Two different approaches have been set forth when dealing with deliberative process documents when deliberations have been determined to be “at issue.” One such approach is that the privilege must automatically give way to production since the agency’s knowledge and deliberations are central to the claims made. See Dep’t of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295, 299 (S.D.N.Y. 1991). There, the court found that “[w]here the adjudication of fraud claims turns upon issues of knowledge, reliance, and causation, direct evidence of the deliberative process is irreplaceable. The governmental privilege must give way.” Id. A second approach has been to conduct a balancing test where relevant factors for the court to consider are “(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” In re MTBE, 898 F. Supp. 2d at 607. When conducting this balancing test, the “need for documents . . . will often outweigh the government’s interest in candid discussions.” Delphi Corp., 276 F.R.D. at 85-86.

Without a doubt, the deliberations of the EDC are a central issue to the case. The documents which the EDC or members of the EDC Board utilized in their deliberations are necessary for Defendants to defend against the EDC’s claims. See Arthur Andersen, 139 F.R.D. at 299. If the parties were able to baldly assert the deliberative process privilege, they may well indeed be able to withhold damaging documents while releasing only favorable documents. Such use of the privilege as a sword rather than a shield was exactly what was contemplated in In re MTBE when it found that:

“Similarly, by asserting a failure to warn cause of action—a claim which can only succeed if NJDEP demonstrates that it would have heeded adequate warnings—NJDEP has placed its own decision-making process “at issue,” and the deliberative process must give way. Were this not so, NJDEP could protect from discovery any deliberative process . . . materials that tend to demonstrate NJDEP

would not have heeded better warnings. At the same time, NJDEP could present to a jury any internal communications among NJDEP officials that tend to show the agency would have heeded stronger warnings. This is precisely the inequitable use of privilege “as a sword rather than a shield” that the “at issue” doctrine prevents.” In re MTBE, 898 F. Supp. 2d at 610.

Therefore, the Court finds that to the extent that any privilege log claims the deliberative process privilege with respect to matters that were communicated to the EDC, or any member of the EDC Board, including, without limitation, the Governor, or staff of the Governor to the extent that the document was communicated to the Governor, the claim of privilege is inappropriate because it was the decision-making of the EDC that has been placed at issue in this case. Thus, whatever information the EDC or any member of the EDC Board, including the Governor, or the Governor’s staff to the extent that the document was communicated to the Governor, had is at the center of this case and the Defendants have demonstrated a need to know what the EDC and the EDC Board members were told. The Court finds that Defendants are entitled to these documents whether it apply the strict rule enunciated in Arthur Andersen, or whether it apply a balancing test as set forth in In re MTBE.

#### IV

#### **Conclusion**

Predicated on the foregoing, all parties are ordered to produce documents that were communicated to the EDC or any members of the EDC Board, including the Governor, or the Governor’s staff to the extent that the document was communicated to the Governor, over which the deliberative process privilege had been previously asserted and to which no other privilege attaches.

Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

**TITLE OF CASE:** Rhode Island Economic Development Corporation v. Wells Fargo Securities, LLC, et al.

**CASE NO:** PB 12-5616

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** July 7, 2014

**JUSTICE/MAGISTRATE:** Silverstein, J.

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