

STATE OF MINNESOTA  
COUNTY OF RAMSEY

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DISTRICT COURT  
SECOND JUDICIAL DISTRICT

Case Type: Civil Other  
File No.: 62-CV-19-4626  
Judge: John H. Guthmann

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System, Permit No. MN0071013 for the Proposed NorthMet Project, St. Louis County, Hoyt Lakes, Babbitt, Minnesota.

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**PART TWO OF ORDER  
GRANTING IN PART AND  
DENYING IN PART RELATORS'  
MOTION TO COMPEL  
DOCUMENTS IDENTIFIED IN  
MPCA'S PRIVILEGE LOGS**

On December 18, 2019, the court conducted an informal motion conference pursuant to Minn. R. Gen. Prac. 115.04(d). As a result of the conference, the court issued an order on December 19, 2019. The order included a briefing schedule in connection with the parties' dispute over MPCA's assertion of privilege in connection with certain documents listed on its original and supplemental privilege logs. The final brief was filed on December 30, 2019, after which time relators' motion to compel was taken under advisement. Thereafter, on January 8, 2020, the court ordered the MPCA to furnish certain documents to the court for its *in-camera* review. Having completed its review of forty-nine documents numbering hundreds of pages, and based upon all of the files, records, submissions, and arguments of counsel herein, the court issues the following:

**ORDER**

1. Attorney-client or work product privilege was properly asserted and not waived in connection with the following documents: 597, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 1114, 1115, 1162, 1163, 1165, 1166, 1168, 1169, 1170, 1171, 1172, 1247, 1249, 1250, Supp 222, Supp 245, Supp 246,

Supp 247, and Supp 248. Consequently, relators' motion to compel the production of these documents is **DENIED** in all respects.

2. With regard to the documents 301 and 597, relators' motion for an order requiring production is **GRANTED in part**, subject to the redaction of the mental impressions, conclusions or opinions of counsel.

3. The court defers a ruling on Documents 39, 1117, and 1118.

4. The following memorandum shall be a part of this order.

Dated: January 17, 2020

BY THE COURT:

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John H. Guthmann  
Judge of District Court

#### MEMORANDUM

As stated in its previous order, each of the parties rely on the same basic legal principles governing the attorney-client and work product privileges. Once again, the court considers the document dispute in the context of categories used by relators.

##### 1. Attorney-Client Privilege

In *Kobluk v. University of Minnesota*, cited by relators, the Minnesota Supreme Court held that attorney-client privilege may attach to preliminary drafts of a document exchanged between a client and a lawyer even if the final version is later published to a third party. 574 N.W.2d 436, 441-44 (Minn. 1998). In so holding, the *Kobluk* court also summarized the law of attorney-client privilege in Minnesota. Thus, attorney-client privilege exists:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7)

from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*Id.* at 440 (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961)); *Brown v. Saint Paul City Ry. Co.*, 241 Minn. 15, 33, 62 N.W.2d 688, 700 (1954) (same quotation) (case cited by the MPCA). *Kobluk* also emphasized the important purpose of the privilege, which is “to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client.” *Id.* (quoting *National Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979)).

Equally important are the limits courts place on attorney-client privilege. “The privilege may not be used to shield communications regarding a future crime or fraud.” *Id.* (citations omitted). In addition, there is no privilege if the lawyer acted as a “mere scrivener” when drafting a legal document, as distinguished from a request for the lawyer’s advice regarding a “document’s legal terms and effect.” *Id.* (citations omitted). Because “the privilege tends to suppress relevant facts [it] must be strictly construed.” *Id.* (quoting *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395, 399 (Minn. 1979)). As such, “the party resisting disclosure bears the burden of presenting facts to establish the privilege’s existence.” *Id.* (citations omitted). A document is not protected by the privilege “merely because it bears the label ‘privileged’ or ‘confidential.’” *Id.* at 441 (citation omitted).

If a document comes into existence as a communication to the attorney, it is subject to protection. *Id.* (citation omitted). If the document already existed and its contents were brought to the attorney’s attention, the document may be discoverable. *Id.* (citation omitted).

This court is not convinced by relators’ argument that the MPCA’s alleged failure to completely describe a withheld document in its privilege log automatically requires the sanction of waiver. (Relators’ Mem. in Supp. of Produc. of Doc.’s Identified MPCA’s Privilege Logs at 3-

4 (citations omitted).) Instead, the court considers the privilege-log dispute as an opportunity for an *in-camera* review of the disputed documents to fully inform the court’s decision regarding the documents’ true status. A client should not suffer unnecessarily if an otherwise privileged communication is revealed simply because of counsel’s less than artful drafting of a chart. With the preceding legal foundation in mind, the court addresses the disputed documents, once again referencing the categories used by relators.<sup>1</sup>

**a. Documents for which MPCA disclosure is sought because the privilege log lists no author or the recipient is an attorney:**

Per the court’s previous order, only documents 1114<sup>2</sup>, 1118<sup>3</sup>, and 1162<sup>4</sup> remain in dispute.

As noted in footnotes, each document is discussed in another section.

**b. Documents for which MPCA disclosure is sought because they were shared with a third party:**

As noted in the court’s previous order, no documents in this category remain in dispute.

Further reference to this category is unnecessary.

**c. Documents for which MPCA disclosure is sought because MPCA provided no “indicia of privilege”:**

As indicated in the court’s previous order, only documents 1171, 1172, 1118<sup>5</sup>, Supp 247, and Supp 248 remain in dispute. Nevertheless, other documents must also be referenced due to duplication. Documents 1168, 1169, 1170, and 1172 are interrelated and duplicative of each other in whole or in part. They involve an email discussion that began with a request to an attorney for legal advice followed by responsive legal advice and attached references to illustrate that advice.

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<sup>1</sup> As noted in the court’s previous order, some documents appear in more than one category.

<sup>2</sup> Discussed in section 1(d), *infra*. Authorship and attorney involvement are clear from the document.

<sup>3</sup> Discussed in section 1(d), *infra*.

<sup>4</sup> Discussed in section 1(d), *infra*. Authorship and attorney involvement are clear from the document.

<sup>5</sup> Discussed in section 1(d), *infra*.

Thereafter, the legal advice was discussed in several exchanges with a small group of persons and counsel. If there was any doubt about the protected character of these documents, the doubt vanishes upon *in-camera* review. Although the two attachments, documents 1171 and 1172, are public documents, they are an inseparable part of the legal advice that was sought and communicated to persons on a need-to-know basis by counsel to the client. Accordingly, they are also protected by attorney-client privilege.

Document Supp 248 is a legal analysis prepared by legal counsel with the stated purpose of assisting a person on MPCA's staff prepare for a meeting that included a legal issue. Supp 247 transmits Supp 248. Both meet the definition of a protected attorney-client communication. The documents are clearly protected by attorney-client privilege.

**d. Documents where an attorney is merely included among other recipients:**

Only documents 1115, 1117, 1118, 1165, 1168, 1169, 1170, 1172, 1247, and 1249 remain in dispute.<sup>6</sup> Documents 1168, 1169, 1170, and 1172 are discussed in the previous section. Documents 1247 and 1249 are duplicates of documents 1168 and 1169.

The most recent amended privilege logs were requested by the court in its previous order. The log indicates that document 1165 was produced to relators on December 10, 2019.

Document 1115 is an attorney's legal analysis of litigation issues related to NorthMet permits unrelated to the permit at issue herein. Document 1163 (also requested in section 2(a)) is a duplicate of document 1115. Document 1162 transmits document 1115 to the limited number of individuals who requested the legal analysis from counsel. Document 1114 is a duplicate of

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<sup>6</sup> Some of the disputed documents are duplicated in another privilege log. The court addresses each document once regardless of how many other numbers were placed on it. Thus, the following documents are excluded from the courts discussion because an exact copy of the document is included in the discussion. *See* Supp 75 (duplicative of 1168), Supp 88 (duplicative of 1172), Supp 103 (duplicative of 1118), Supp 210 (duplicative of 1115), Supp 86 and Supp 192 (duplicative of 1170), Supp 195 (duplicative of 1165), Supp 212 (duplicative of 1117), and Supp 214 (duplicative of 1118).

document 1162. These documents are plainly protected by the principles stated in *Kobluk*. Moreover, they are not responsive to issues in this case.

At the time this order was filed, the court was not completed with its review of Documents 1117 and 1118. In fact, the court may have a question for counsel about the document at the hearing. Counsel for the MPCA should be prepared to answer questions about this document.

## **2. Attorney Work Product**

Relators argue that certain documents listed by the MPCA as attorney work product are either not work product at all or they are entitled to production based on the concepts of substantial need and undue hardship. (Relators' Mem. in Supp. of Produc. of Doc.'s Identified MPCA's Privilege Logs at 9-19.) They also argue that production of certain documents is warranted because work-product privilege was waived. (*Id.* at 19-23.) Finally, relators cite the "crime-fraud" exception as a basis for seeking *in-camera* review and possible production of other documents. (*Id.* at 23-28.)

The work-product doctrine protects from disclosure documents "prepared in anticipation of litigation or for trial." Minn. R. Civ. P. 26.02(d). Work product protection does not extend to "documents prepared in the regular course of business rather than for the purposes of litigation." *City Pages v. State*, 655 N.W.2d 839, 845 (Minn. Ct. App. 2003). Documents classified as work product may nevertheless be discoverable if relators make a showing of substantial need and that they are unable to obtain the substantial equivalent of the documents by other means absent undue hardship. *State ex rel. Humphrey v. Phillip Morris*, 606 N.W.2d 676, 690 (Minn. Ct. App.), *rev. denied* (Minn. 2000); *see* Minn. R. Civ. P. 26.02(d).

The parties agree that work product exists in one of two forms and each form is given a different level of protection. In *Baker v. General Motors Corp.*, a case cited and relied upon by

both the MPCA and relators, the Eighth Circuit concisely summarized the scope and operation of the work product doctrine:

There are two kinds of work product—ordinary work product and opinion work product. Ordinary work product includes raw factual information. Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories. Ordinary work product is not discoverable unless the party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means. In contrast, opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud. . . . Notes and memoranda of an attorney, or an attorney's agent, from a witness interview are opinion work product entitled to almost absolute immunity. Attorney notes reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant. In this way, attorney notes are akin to an attorney's determination as to which documents are important to a case—the latter being something we have also held to be protected work product.

209 F. 3d 1051, 1053-54 (8th Cir. 2000) (citations omitted). To a significant extent, the positions taken by the MPCA and relators represent a dispute over how the principles set forth in the above-cited cases, including *Baker*, should be applied to the documents at issue.<sup>7</sup>

The court's review of the party submissions also reveals potential confusion over the distinction between documents subject to attorney-client privilege and documents constituting work product. From the case law, the court finds a line of distinction between documents communicating a request for legal advice resulting in the communication of legal advice (subject to attorney-client privilege) and attorney materials prepared in anticipation of litigation that may or may not be communicated (documents potentially protected by the work-product doctrine).

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<sup>7</sup> The MPCA accurately notes the court's statement in a previous hearing that the MPCA could fairly anticipate litigation in connection with the NorthMet permits it issues from the beginning of the permit-preparation process. (Sept. 16, 2019 Disc. Conf. at 97-98.)

**a. Not Work Product or there is Substantial Need and Undue Hardship:**

As noted in the court's previous order, in this category, only documents 39, 301, 597, 953, 1115, 1163, 1166, 1171, 1172, 1250, Supp 222<sup>8</sup>, Supp 245, Supp 246, Supp 247, and Supp 248 remain in dispute. Documents 1115 and 1163 are discussed in section 1(d). They are protected by attorney-client privilege and they are non-responsive. Documents Supp 246, Supp 247, and Supp 248 are discussed in section 1(c). Similarly, document 1172 is discussed in sections 1(c)-(d). The documents are protected by attorney-client privilege. Consequently, there is no need to discuss the documents listed in this paragraph in the context of work product. There is no substantial need and undue hardship exception to attorney-client privilege.

Document 1166 is an attorney communication to a client in response to a request for legal advice and the interpretation of a contract. Document 1250 is a duplicate of document 1166. While attorney work product, the document is more fundamentally an attorney-client communication that is protected by attorney-client privilege.

Document 1171 is a contract with a third party that relates to a different project. Document 1172 is a copy of a statute. Both documents were attached to an email to illustrate and support legal advice that was requested from and provided by counsel at the request of MPCA staff.

Document Supp 246 is a revised version of Supp 248, which is discussed in section 1(c). Supp 245 is an attorney-drafted communication transmitting and explaining Supp 246. For the reasons discussed in section 1(c), both meet the definition of a protected attorney-client communication. While attorney work product, the documents are more fundamentally attorney-client creation/communications that are protected by attorney-client privilege.

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<sup>8</sup> This document is discussed in section 2(b).

Document 953 is pure opinion work product. The document consists of notes Mr. Schmidt made to himself to guide his own work and legal advice. Relators offer nothing that approaches the “rare and extraordinary circumstances” that would justify an order forcing disclosure of this document. *Baker*, 209 F. 3d 1051, 1053-54.

Documents 301 and 597 are notes taken by attorney Michael Schmidt during phone conferences between the MPCA and the EPA. Based on the format and content of the notes, the court concludes that Mr. Schmidt was basically a “mere scrivener” with rare exceptions. In other words, the document appears to have been prepared in the regular course of agency business rather than for the purpose of litigation, with only a few exceptions. *See City Pages v. State*, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003). Unlike *Baker*, Mr. Schmidt’s note-taking is not the same as the taking of notes during a witness interview. Here, no witness was being interviewed. Mr. Schmidt was simply one of many attending a business meeting where a project was being discussed.

Even in the realm of work product, relators have no other source of contemporaneous notes of these meetings. Only one of the meeting dates matches the EPA notes that were made available to the parties in December through relators’ FOIA filing. In addition, there is no real basis to distinguish the material in exhibit 301 that was voluntarily release to relators from the material that was withheld. Finally, because of the regulatory setting of the instant litigation, the court is loath to protect these transcript-like notes simply because they were taken by an attorney. Thus, relators made the required showing of substantial need and undue hardship even if the document is considered work product.

Nevertheless, it is plain from a few passages within the documents that Mr. Schmidt included reminders to himself and other legal and analytical statements that are clearly opinion

work product. Accordingly, documents 301 and 597 will be produced with court redaction of the mental impressions, conclusions or opinions of counsel.

At the time this order was filed, the court was not completed with its review of Document 39. In fact, the court may have a question for counsel about the document at the hearing. Counsel for the MPCA should be prepared to answer questions about this document.

**b. Waiver of Privilege:**

The protections afforded to both attorney-client protected documents and attorney work-product may be waived. *See Kobluk*, 574 N.W.2d 440 (attorney-client privilege may be waived). Relators contend that privilege was waived in connection with certain documents listed on the MPCA’s privilege logs. Of the documents that were not already produced or duplicative of other documents, the following documents remain in dispute: 301, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, and 1166<sup>9</sup>.

Relators offer an example of waiver in their brief. A client waives privilege by “conduct or affirmative consent” and “impliedly waives the privilege where . . . he himself discusses the content of the professional communication.” *State ex rel. Schuler v. Tahash*, 278 Minn. 302, 154 N.W.2d 200, 205 (1967). Waiver is also discussed by the Eighth Circuit *Baker*—a case that is relied upon by both relators and the MPCA. According to *Baker*, waiver occurs either when the disputed legal advice is used as an element of a defense or when a client’s testimony includes a reference to the otherwise privileged documents. *Baker*, 209 F.3d at 1055.

Relators’ waiver argument extends to two document categories. First is document 301, the Schmidt memorandum. The second involves documents 949-973 and Supp 222, which relate to

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<sup>9</sup> Document 1166 is unconnected to the category of documents discussed in relators’ waiver argument. Accordingly, the court holds that there was no waiver.

draft responses to third party comments made regarding the draft NPDES permit at issue in this case.

With regard to documents 949-973 and Supp 222<sup>10</sup>, relators claim entitlement to draft responses to Water Legacy's comments on the PolyMet draft permit based on statements made by Mr. Schmidt in his declaration to the Court of Appeals. (Relators' Mem. in Supp. of Produc. of Doc.'s Identified MPCA's Privilege Logs at 22.) However, the quoted passages from Mr. Schmidt's declaration relate to the MPCA's final response to Water Legacy's comments as well as the agency's response to all written comments. Mr. Schmidt's declaration simply takes the position that the agency's legal obligation responded extended only to written comments. If anything, relators' argument supports a conclusion that the MPCA waived its right to protect Mr. Schmidt's notes recording the EPA's verbal concerns during the April 5, 2018 meeting. *See* Document 301. However, the MPCA already withdrew its assertion of privilege regarding the notes of the April 5, 2018 meeting. Relators have those notes and there is no basis to claim that the MPCA waived any portion of Document 301 beyond what was voluntarily disclosed.

It should be noted that MPCA's response to Water Legacy's comments on the draft PolyMet permit are public. Relators have access to Mr. Schmidt and other MPCA authors of the subject permit and the response to Water Legacy's comments at the hearing. Relators simply failed to make a case that the MPCA used its response to the Water Legacy comments as a defense to the procedural irregularities claim. There was no waiver of privilege.

Similarly, there is no basis to claim substantial need and undue hardship in connection with the documents. As already mentioned, relators have access to Mr. Schmidt and other MPCA authors of the subject permit and the response to Water Legacy's comments at the hearing.

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<sup>10</sup> Many of these documents appear to be duplicates in whole or in part.

Relators are not entitled to materials related to attorney-prepared drafts of the MPCA response to Water Legacy's comments on the subject permit.

**c. Crime-Fraud Exception:**

Relators argue that the MPCA should be compelled to produce certain documents listed on their privilege logs pursuant to the crime-fraud exception to the work product doctrine. As noted in the court's most recent order, only the following documents are potentially subject to relators' crime-fraud exception argument: Supp 246, Supp 247, and Supp 248. The court found nothing in these documents that even hints at the potential applicability of the crime-fraud exception cases cited by relators. (Relators' Mem. in Supp. of Produc. of Doc.'s Identified MPCA's Privilege Logs at 23-28.)

J H G