

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.

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

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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. Based upon all of the files, records, submissions, and arguments of counsel herein, the court issues the following:

**ORDER**

1. The MPCA shall furnish the following documents listed on its privilege logs to the court for in camera review no later than Friday, January 10 at 4:30 p.m.: 39, 301, 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, 1117, 1118, 1162, 1163, 1165, 1166, 1168, 1169, 1170, 1171, 1172, 1247, 1249, 1250, Supp 222, Supp 245, Supp 246, Supp 247, and Supp 248.

2. The documents shall be stamped “confidential – for the court’s eyes only” and shall be delivered in a sealed envelope.
3. The MPCA shall also include in its delivery, the most current versions of its privilege logs.
4. Delivery shall be by messenger to Chambers 1470 in the Ramsey County Courthouse.
5. After completing its review of the documents, the court will issue an order advising the parties whether any of the documents may be withheld, in whole or in part, based upon attorney-client privilege or work product.
6. The following memorandum shall be a part of this order.

Dated: January 8, 2020

BY THE COURT:

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John H. Guthmann  
Judge of District Court

### **MEMORANDUM**

The party briefs demonstrate basic agreement on the law applicable to attorney-client privilege. The dispute centers on application of the law to certain documents listed in the MPCA privilege logs and the scope of certain of the legal principles.

In its December 19, 2010 order, the court instructed relators to be specific both with regard to their legal position and the documents in dispute. On pages 7-9 of their brief, relators complied with the court’s order—listing by document number the attorney-client documents they seek by way of outright production or production in whole or in part following an in-camera review. Similarly, on pages 14- 28 of their brief, relators listed by document number the documents they seek in whole or in part based on exceptions to the work-product doctrine.

The identity of the documents in dispute changes on a daily basis—and that is a good thing. To their credit, the parties continued to meet and confer during the briefing period and they narrowed the scope of documents in dispute. Accordingly, based on the MPCA’s representations, only the documents discussed below remain in dispute as of December 30, 2019. The documents are listed using the format of relators’ brief. There are four attorney-client privilege categories and three attorney work product categories. Relators’ frame their legal analysis around these categories. The subheadings paraphrase relators’ description of their legal basis for seeking disclosure. Some documents appear in more than one category:

**1. Attorney-Client Privilege**

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

With the exception of document Supp 120, which was removed from the privilege log as nonresponsive<sup>1</sup>, nearly all of the remaining documents listed in this category on page 7 of relators’ brief were produced. Only documents 1114, 1118, and 1162 remain in dispute.

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

With the exception of documents Supp 184 and Supp 186, which were removed from the privilege log as nonresponsive, the remaining documents listed in this category on page 7 of relators’ brief were produced. No documents in this category remain in dispute.

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<sup>1</sup> Relators make no argument that they are somehow entitled to production of nonresponsive documents. Due to the scope of the search terms, the court assumes that certain documents unrelated to the litigation will be identified. Such documents need not be produced and the court expects the parties to act ethically when culling nonresponsive documents.

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

With the exception of documents Supp 81, Supp 83, Supp 121, Supp 125, Supp 140, and Supp 224, which were removed from the privilege log as nonresponsive<sup>2</sup>, nearly all of the remaining documents listed in this category on pages 7 and 8 of relators’ brief were produced. In this category, only documents 1171, 1172, 1118, Supp 247, and Supp 248 remain in dispute.

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

With the exception of documents Supp 80, Supp 82, Supp 101, Supp 117, Supp 124, and Supp 190, which were removed from the privilege log as nonresponsive<sup>3</sup>, nearly all of the remaining documents listed in this category on page 8 of relators’ brief were produced. In this category, only documents 1115, 1117, 1118, 1165, 1168, 1169, 1170, 1172, 1247, and 1249 remain in dispute.

**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 Prod. of Documents Identified MPCA’s Priv. 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”

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<sup>2</sup> In addition, the MPCA identified the following documents in this category that are duplicative of previously identified documents separately: Supp 87 (duplicative of 1171), Supp 86 (duplicative of 1170), Supp 89 (duplicative of 1169), and Supp 102 (duplicative of 1117). These documents remain in dispute. They are listed by their original numbers.

<sup>3</sup> In addition, the MPCA identified the following documents in this category that are duplicative of previously identified documents: 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). These documents remain in dispute. They are listed by their original numbers.

exception as a basis for seeking in-camera review and possible production of other documents. (*Id.* at 23-28.)

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

Once again, many of the documents identified in relators' brief were already produced. In addition, Supp 223 and Supp 224 are nonresponsive and Supp 196 is duplicative of 1166. That leaves only documents 39, 301, 597, 953, 1115, 1163, 1166, 1171, 1172, 1250, Supp 222, Supp 245, Supp 246, Supp 247, and Supp 248 in dispute.

**b. Waiver of Privilege:**

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: 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.

**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. They identify the following responsive and non-produced documents as potentially subject to the crime-fraud exception: Supp 246, Supp 247, and Supp 248.<sup>4</sup>

**3. Conclusion**

The parties' legal positions are nuanced and complex. It simply is not possible to determine if the legal distinctions between protected and non-protected documents are applicable to a particular document without seeing the document. Due to the importance of the attorney-client

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<sup>4</sup> Supp 223 was listed as nonresponsive and the other documents listed on page 26 of relators' brief, Supp 84, Supp 85, Supp 224, Supp 249, and Supp 250, were produced after relators' brief was filed.

and work product privileges, the court is hesitant to act on relators' invitation to order outright production of certain documents based simply on the description of the document in MPCA's privilege log. Accordingly, the court orders the MPCA to produce the documents identified by the court's order for in-camera review by Friday, January 10. Thereafter, the court will issue another order addressing the extent to which disputed documents are privileged in whole or in part.

J H G