UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	Docket No. V-W-003-93
Safety-Kleen Corporation,	)	Docket No. V-W-004-93
	)	Docket No. V-W-005-93
	)	
	)	(consolidated)
	)	
Respondent	)	

Resource Conservation and Recovery Act -- Discovery -- EPA documents sought by Respondent were discoverable under 40 C.F.R. § 22.19(f)(1); but in camera inspection revealed that they were protected by the attorney-client and the deliberative process privileges, and that these privileges had not been waived by Complainant's offhand reference to the contents of the documents.

ORDER DENYING RESPONDENT'S REQUEST FOR PRODUCTION OF DOCUMENTS

This Order addresses a request by Respondent--Safety Kleen Corporation--for the production of seven documents of the U.S. Environmental Protection Agency ("EPA") by Complainant--the Acting Associate Director, Office of RCRA, Waste Management Division, Region V, EPA. Complainant initiated this proceeding under Section 3008(a)(1) of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. § 6928(a)(1).

The November 24, 1992 complaint alleged that Respondent, a Wisconsin corporation that accepts, collects, and stores hazardous waste, failed to respond timely to EPA's August 4, 1992 RCRA Section 3007 information requests regarding each of three of Respondent's facilities in Minnesota. For these three allegedly untimely responses together, Complainant proposed a total civil penalty of $462,928.05.

To prepare its defense, Respondent requested from Complainant seven EPA inter-office memoranda.[1] Complainant declined Respondent's request, arguing that it failed to satisfy the

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[1] The memoranda are those seven documents listed in Complainant's Response to Respondent's Second Renewal of Pending Motions and Request for In Camera Inspection of Documents (April 11, 1994) at 6-10 that are identified therein as not having been released to Respondent. Photocopies of the seven memoranda constitute Exhibit B of Complainant's Response.

requirements for discovery under EPA's Consolidated Rules of Practice (40 C.F.R. Part 22), which govern the procedure of this case.

Complainant contended moreover that, even should the request satisfy these requirements, the documents are protected by the attorney-client and the deliberative process privileges. In reply, Respondent asserted that the relevant discovery requirements were met, and that Complainant had waived any privileges by making a reference to the contents of the documents. Complainant submitted the documents to the undersigned for an in camera inspection in the event that they were held to be discoverable under the Consolidated Rules.[2]

Discussion

I. Consolidated Rules

Section 22.19(f)(1) of the Consolidated Rules (40 C.F.R. § 22.19(f)(1)) permits discovery upon a determination by the Presiding Officer:

> (i) That such discovery will not in any way unreasonably delay the proceeding;
> (ii) That the information to be obtained is not otherwise obtainable; and
> (iii) That such information has significant probative value.

In this case, each of these requirements is satisfied. First, the production of the requested documents would not unduly delay this proceeding, a point that Complainant did not contest. Second, the information sought is not otherwise available. Complainant has declined Respondent's request for a voluntary production of the documents, and has withheld them from Respondent's Freedom of Information Act request. No other source of the documents has been suggested.

Determining whether each of the documents has "significant probative value" is less clearcut. The Consolidated Rules do not define "significant probative value." In this situation, guidance may be obtained from other statements of the law, such as the Federal Rules of Evidence.[3]

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[2] Complainant's Response, supra note 1, Exhibit B.

[3] See In the Matter of Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1, Order on Interlocutory Review (June 24, 1991), at 10 n.10 (employing Federal Rule of Evidence 401 to determine "significant probative value" of documents).

Rule 401 of these Federal Rules defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Advisory Committee's note adds that "[a]ny more stringent requirement is unworkable and unrealistic." Moreover, "the test of relevance for discovery purposes is less stringent than that applied to the admissibility of evidence at trial." Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964).

These quoted authorities regarding "relevant evidence" and "relevance" provide a reasonable guide to assessing "significant probative value" under Section 22.19(f)(1)(iii) of the Consolidated Rules. Clearly, especially in view of the Trans World Airlines statement, it is a requirement that is to be applied liberally.

In the instant case, on the basis of the descriptions of the seven documents set forth in Complainant's Response Brief,[4] it is held that this standard is satisfied with respect to each of the documents. Each of them appears, based on these descriptions, to have a "significant probative value" with regard to one or another of Respondent's asserted defenses, such as that it acted in good faith, that Complainant already had the information it was requesting, and that the alleged violations constitute only one offense, not three as charged.

II. Privileges

Since the seven documents were found to be discoverable under Section 22.19(f)(1), they were inspected in camera to evaluate Complainant's claims of privilege. This inspection determined that each of the seven documents is privileged and therefore shielded from discovery. Two documents come within the attorney-client privilege, and the remaining five documents fall within the deliberative process privilege.

A. Attorney-Client Privilege

A document is protected from disclosure by the attorney-client privilege if it contains "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . . ." Proposed Fed. R. Evid. 503(b).[5]

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[4] See Complainant's Response, supra note 1, at 7-9.

[5] "Although not enacted by Congress, 'courts have relied upon [Proposed Federal Rule of Evidence 503] as an accurate definition of the federal common law of attorney privilege. . . .'" In re: Bieter Company, 16 F.3d 929, 935 (8th Cir. 1994) (quoting United States v. Spector, 793 F.2d 932, 938 (8th Cir. 1986), cert. denied,

The purpose of the privilege is to encourage clients to make full disclosure to their attorneys: "[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." Fisher v. United States, 425 U.S. 391, 403 (1976).

In the instant case, Complainant has properly alleged that the following two of the seven documents come within the attorney-client privilege.

(1) Document #38, (also numbered 44)[6] inter-office memorandum, dated November 3, 1992, from Matthew Ohl, Environmental Scientist, to Barbara Wester, Assistant Regional Counsel. This document contains "confidential communications"[7] from an EPA employee (client) to an EPA attorney, "made for the purpose of facilitating the rendition of professional legal services to the client."[8]

(2) Document #45, inter-office memorandum, dated November 3, 1992 from Eric Glatstein, Environmental Engineer, to Barbara Wester, Assistant Regional Counsel. Again, this document contains "confidential communications"[9] from client to attorney, made to facilitate the rendition of legal services.

B. Deliberative Process Privilege

The deliberative process privilege protects from discovery documents "reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." In the Matter of Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1, Order on Interlocutory Review (June 24, 1991), at 13 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). It was Chautauqua

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479 U.S. 1031 (1987); see also United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979).

[6] The document numbers listed in this Order are those that appear in Complainant's Response, supra note 1, at 7-9.

[7] Under Proposed Federal Rule 503, the parties must intend that the communication be confidential. Proposed Fed. R. Evid. 503 advisory committee's note. Here, the document was stamped "ENFORCEMENT CONFIDENTIAL."

[8] Proposed Fed. R. Evid. 503(b).

[9] Document #45 was stamped "ENFORCEMENT CONFIDENTIAL."

Hardware (at 14-15) that established that the deliberative process privilege is available in EPA administrative adjudications.

> This privilege serves several purposes:
>
> it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's actions.

Chautauqua Hardware, EPCRA Appeal No. 91-1, Order on Interlocutory Review (June 24, 1991), at 14 (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

To qualify for the privilege, information must be both "predecisional" and "deliberative." Chautauqua Hardware, EPCRA Appeal No. 91-1 at 14 (citing Jordan v. United States Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978)); Petroleum Information Corporation v. United States Department of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992). To be "predecisional," a document must involve "only those communications that occur before the adoption of the final rule or policy." Chautauqua Hardware, EPCRA Appeal No. 91-1 at 14. However, the government need not:

> identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process . . . . [T]he line between predecisional documents and postdecisional documents may not always be a bright one.

NLRB v. Sears, Roebuck & Co., 421 U.S. at 131-32; accord Access Reports v. Department of Justice, 926 F.2d 1192, 1194 (D.C. Cir. 1991).

To be "deliberative," a document must "somehow reflect or reveal the deliberative process by which a final policy was formulated." Chautauqua Hardware, EPCRA Appeal No. 91-1 at 14 (quoting Jordan, 591 F.2d at 774). Material is deliberative if it "reflects the give-and-take of the consultative process." Coastal States, 617 F.2d at 866.

As a general rule, "factual information generally must be disclosed, [while] materials embodying officials' opinions are ordinarily exempt." Petroleum, 976 F.2d at 1434. "The fact/opinion distinction, however, is not always dispositive; in some instances, 'the disclosure of even purely factual material may so expose the deliberative process within an agency' that the material is appropriately held privileged." Id. (quoting Mead Data Central, Inc. v. Department of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977)).

In the instant case, Complainant has properly claimed that the deliberative process privilege applies to the five remaining documents. In terms of the above discussion, each of these documents is predecisional and deliberative.

(1) Document #39, inter-office memorandum, dated October 6, 1992, from Karl E. Bremer, Chief, RCRA Permitting Branch, to Joseph Boyle, Chief, RCRA Enforcement Branch. This document is predecisional because it discusses possible Safety-Kleen violations prior to an EPA enforcement action. The document is deliberative because it contains the opinions of EPA employees.

(2) Document #40 (also numbered 47), inter-office memorandum, dated December 17, 1991, from Karl E. Bremer, Chief, RCRA Permitting Branch, to Joseph Boyle, Chief, RCRA Enforcement Branch. This document is predecisional because it discusses possible Safety-Kleen violations prior to an EPA enforcement action. The document is deliberative because it contains the opinions of EPA employees.

(3) Document #41 (also numbered 46), inter-office memorandum, dated November 15, 1991, from Karl E. Bremer, Chief, RCRA Permitting Branch, to Joseph Boyle, Chief, RCRA Enforcement Branch. This document is predecisional because it discusses possible Safety-Kleen violations prior to an EPA enforcement action. The document is deliberative because it contains the opinions of EPA employees.

(4) Document #42, inter-office memorandum, dated August 4, 1992, from Diane Sharrow, Environmental Scientist, through Gale Hruska, Safety-Kleen Permit Coordinator--Illinois Section, to Permit Section Chiefs. This document is predecisional because it discusses possible Safety-Kleen violations prior to an EPA enforcement action. The document is deliberative because it contains the opinions of EPA employees.

(5) Document #48, inter-office memorandum, dated February 25, 1992, from Eric Glatstein, Environmental Engineer, to Laura Lodisio, Chief, MI/WI Technical Enforcement Section. This document is predecisional because it discusses possible Safety-Kleen violations prior to an EPA enforcement action. The document is deliberative because it contains the opinions of an EPA employee.

C. Waiver

The final issue is Respondent's argument that, even if Complainant properly asserted its privileges initially, it subsequently lost them through a waiver. As stated by Respondent, Complainant waived any claim of privilege by "referr[ing] the Presiding Officer to the substantive contents of the withheld documents to support its position in this case on the merits. . . ."[10]

The reference that Respondent proposed as the waiver evidently appeared in the following statement in one of Complainant's submissions.

> The first "area" that Respondent discusses is that the withheld documents are likely to show that the "agency has always considered these three enforcement cases to be a single matter." However, even assuming that U.S. EPA treated the above captioned matters as a single matter in its internal memoranda (the withheld documents show otherwise), a reference to these matters as a single matter would not have the "exculpatory" effect of merging the three causes of action into one.[11]

The emphasis has been added to this quotation, and the emphasized portion is presumably the alleged waiver.[12]

As contended by Respondent, it is indeed possible to waive a privilege "if the privileged communication is injected as an issue in the case by the party which enjoys its protection." Garfinkle v. Arcata National Corporation, 64 F.R.D. 688, 689 (S.D.N.Y. 1974) (citing Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.2d 195 (2d Cir.), cert. denied, 280 U.S. 579 (1929)). "Waiver may occur by pleading the privileged material as a defense." Id. (citing Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964)); e.g., Todd v. South Jersey Hospital System, 152 F.R.D. 676 (D.N.J. 1993); James W. Moore et al., Moore's Federal Practice, ¶ 26.60[6] (4th ed. 1994).

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[10] Respondent's Reply in Support of Second Renewal of Pending Motions and Request for In Camera Inspection of Documents (April 25, 1994), at 13 (discussing Complainant's Response, supra note 1, at 3).

[11] Complainant's Response, supra note 1, at 3 (citations omitted).

[12] Respondent did not specify the language constituting the alleged waiver.

These cases, however, involved a distinctly more assertive reference to privileged information than the offhand, parenthetical reference in the instant case. In Trans World Airlines, for example, the party claiming the attorney-client privilege pleaded advice of counsel as a defense, and submitted to the court an affidavit prepared by one of its attorneys (which was based on information obtained as part of the attorney-client relationship). Trans World Airlines, Inc. v. Hughes, 332 F.2d at 615. The court held that, under these circumstances, the privilege had been waived. Id.

Similarly, in Garfinkle, the party claiming the privilege asserted advice of counsel as a defense, specifically citing an opinion letter as reason for its inaction. Garfinkle, 64. F.R.D. at 689. The court granted plaintiff's request for production of documents related to the opinion letter, holding that defendant had "clearly injected the opinion letter into the case as a relevant matter and plaintiff [was] entitled to probe into the circumstances surrounding the issuance of the letter." Garfinkle, 64 F.R.D. at 689.

In addition, a critical consideration in determining the existence of waiver is whether the party attacking the privilege has been prejudiced. Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994); 8 Wigmore, Evidence § 2327 at 635-636 ("[i]n deciding [whether there has been a waiver by implication], regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency."); see also Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989). As a result, "courts generally have not found a waiver where the party attacking the privilege has not been prejudiced. . . ." Cox, 17 F.3d at 1417.

In the instant case, Respondent has demonstrated no significant prejudice to it from Complainant's offhand reference. The alleged waiver involved only a reference to the documents, rather than a meaningful disclosure of information therefrom. This reference will not affect any rulings in this case.

Moreover, actions that have been found in past cases to constitute a waiver have been far more substantive than this offhand reference. To rule that this reference deprived these EPA documents of their otherwise privileged protection would be to ascribe to the offhand reference a consequence hugely and unfairly out of proportion to its significance. In sum, Respondent's argument for a waiver of privilege by Complainant is unpersuasive.

III. Settlement Negotiations

The parties will be directed to explore again the possibilities for a negotiated settlement of this case. At this

point, such negotiations have the advantage of some disclosure of their positions by the parties through their written submissions, and the procedural situation is further clarified by this Order. Complainant will be directed to report on the status of the negotiations.

ORDER

Respondent's request for the production of seven EPA inter-office memoranda[13] is denied.

The parties are directed to continue their settlement negotiations, and Complainant is directed to report by August 15, 1994 on the status of these negotiations.

Thomas W. Hoya
Administrative Law Judge

Dated: July 1, 1994

[13] The memoranda are the seven listed in Complainant's Response, supra note 1, at 6-10 that were identified therein as not having been released to Respondent. Photocopies of these seven memoranda constitute Exhibit B of Complainant's Response.

In the Matter of Safety-Kleen Corporation, Respondent
Docket No. V-W-003-93

Certificate of Service

I certify that the foregoing **Order Denying Respondent's Request For Production of Documents**, dated July 1, 1994, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Marie Hook
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by Regular Mail to:

Attorney for Complainant:

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Maria Whiting
Legal Staff Assistant

Dated: July 1, 1994