

Roth & Roth, LLP v City of Rochester

2023 NY Slip Op 31878(U)

June 2, 2023

Supreme Court, Monroe County

Docket Number: Index No. E2020007203

Judge: William K. Taylor

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

ROTH & ROTH, LLP,

Petitioner,

DECISION AND ORDER

Index #E2020007203

vs.

CITY OF ROCHESTER,

Respondent.

Submitted Special Term March 2, 2023

Appearances:

Elliot Shields, Esq., for Petitioner

John M. Campolieto, Esq., for Respondent

Taylor, J.,

Before the Court are several motions flowing from a December 23, 2021 order of the Appellate Division modifying a December 29, 2020 judgment of Supreme Court (Piampiano, JSC) in the underlying article 78 proceeding concerning Respondent's denial of access to records Petitioner requested under the Freedom of Information Law ("FOIL"). Specifically, it was held that "the judgment impermissibly expanded the relief granted to petitioner in the decision." Roth & Roth, LLP v City of Rochester, 200 AD3d 1728 (4th Dept 2021). Relevant to resolving the instant dispute, and left unmodified by the Appellate Division's order, was a decretal paragraph in the judgment ordering Respondent to produce "all communications by any RPD Officers and/or City employees related to the incident...and all...other records containing factual data

related to the incident...[and such] communications and records must be produced that were created between March 23, 2020 to the date of production in response to this Order." See Doc. No. 81.

Production of responsive material has not yet concluded. Indeed, while Respondent has produced voluminous responsive material in an ongoing manner pursuant to the underlying FOIL request and as a result of the modified judgment, it has objected to further disclosures as detailed in a privilege log¹ and the materials referenced therein were submitted to the Court for in camera review.

Thus, Petitioner now moves for several forms of relief. First, Petitioner asks that Respondent be held in civil contempt pursuant to Judiciary Law § 753 for allegedly failing to comply fully with the modified judgment by not producing all responsive material. Second, Petitioner challenges Respondent's privilege log and most notably argues that, even if the attorney-client privilege and various Public Officers Law exceptions applied as Respondent suggests, Respondent's conduct knowingly waived such privileges. In opposition Respondent argues that, after the Appellate Division decision, it produced all responsive material except for those items contained in its privilege log that it claims are subject to either the attorney-client privilege or other grounds for non-disclosure pursuant to various provisions of the Public Officers

¹ See Doc. No. 84, Privilege Log.

Law. For the reasons that follow Petitioner's motion to hold Respondent in civil contempt is DENIED, but Respondent is ordered to produce all items contained in the privilege log except for those items delineated as not related in said log.

The attorney-client privilege can be waived "by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice." See, Orco Bank, N.V. v Proteinas Del Pacifico, S.A., 179 AD2d 390 (1st Dept 1992). Such is the case here. Even assuming arguendo that Respondent met its burden of demonstrating that its assertions of attorney-client privilege and Public Officers Law provisions protected from disclosure those materials contained in the privilege log related to the underlying FOIL application, the Court agrees with Petitioner that Respondent waived those protections. Specifically, the waiver was accomplished by the representatives of Respondent affirmatively placing selective privileged materials into the public sphere through various public statements², memoranda³ and reports.⁴ See generally, Village Bd. of Vil. of Pleasantville v Rattner, 130 AD2d 654, 655 (2d Dept 1987) ("[S]elective disclosure is not permitted as a party may not rely on the protection of the privilege regarding

² See Doc. Nos. 70, WHAM article re Tim Curtin press conference on 9-4-2020; Doc. No. 71, Chodak interview with Mayor Warren discussing advice from Curtin.

³ See Doc. Nos. 68 and 69, Smith managerial report and exhibits.

⁴ See Doc. No. 72, Independent Investigator's report commissioned by the Council of the City of Rochester.

damaging communications while disclosing other self-serving communications."). Petitioner's additional challenges to the privilege log are thus rendered academic.

Accordingly, it is hereby

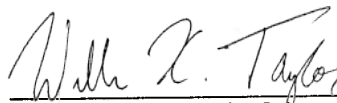
ORDERED that within 30 days of entry of this decision and order Respondent shall produce those materials contained in the privilege log except for those items delineated as "(Not related)" as said items are not responsive to the underlying FOIL request, and it is further

ORDERED that Petitioner's motion to hold Respondent in civil contempt pursuant to Judiciary Law § 753 is DENIED, and it is further

ORDERED that Petitioner shall file an application for attorneys' fees and costs no later than July 21, 2023; Respondent shall file any opposition papers no later than August 4, 2023; and reply papers, if any, shall be submitted no later than August 11, 2023.

Any additional prayers for relief sought but not specifically addressed herein are DENIED.

This constitutes the Decision and Order of the Court.



Honorable William K. Taylor
 Supreme Court Justice
 Dated: June 2, 2023