

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JONATHAN NNEBE, ALEXANDER KARMANSKY,
EDUARDO AVENAUT, KHAIRUL AMIN and the NEW
YORK TAXI WORKERS ALLIANCE, individually and
on behalf of all others similarly situated,

Plaintiffs, 06-CV-4991 (KMK)(AJP)

-Against-

MATTHEW DAUS, CHARLES FRASER, JOSEPH
ECKSTEIN, ELIZABETH BONINA, THE NEW
YORK CITY TAXI AND LIMOUSINE
COMMISSION, AND THE CITY OF NEW YORK,

Defendants.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

In their answering papers, defendants concede their initial violation and request a do-over. But the Tortorici Declaration—among its many failings—comes too late. Even with a mulligan, they are distant from the fairway.

Beyond their continued failure to comply with discovery rules, defendants’ papers contain damning admissions, not just about their privilege claims, but also about their liability in this action. Even Item 1, e-mails between Marc Hardekopf and Thomas Coyne, which defendants produced not right away but with their answering papers, amounts to a confession. With defendants’ bad faith now on display, and the prejudice to plaintiffs evident, the motion to compel should be granted and sanctions should be imposed.

Defendants’ False Privilege Claims
Indicate a Cover-Up at the Heart of this Case

Defendants seem to believe that anytime one governmental official communicates with another, it’s privileged. But as the Supreme Court has stated, “The point is not to

protect Government secrecy pure and simple.” *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9 (U.S. 2001). The deliberative process privilege shields only those communications designed to assist an agency decisionmaker in arriving at a decision and which are actually related to the policy formulation process. *Hopkins v. U.S. Department of Housing and Urban Development*, 929 F.2d 81, 84 (2d Cir. 1991).

This Court has already ruled that the very first item on defendants’ privilege log, listed as an e-mail from Joseph Eckstein to Elizabeth Bonina, is, in fact, not privileged at all. Defendants claimed, without any basis, that the document was protected by both the attorney client and deliberative process privileges. Defendants finally produced it not at the conference with Judge Peck (February 16) or the next day, but at 9:05 on a Friday night a week later. Exh. J.¹ It is no wonder they tried to hide it.

First, the e-mail from Eckstein, the TLC’s director of adjudications, actually covers an exchange between Marc Hardekopf, the TLC’s chief prosecutor in summary suspension cases and Thomas Coyne, the deputy chief ALJ in charge of summary suspension hearings.² The exchange essentially admits the allegation at the core of this action: The post-arrest summary suspension hearings are a charade.

On 3/22/06 at 10:00 AM, Coyne tells Hardekopf: “I think you fail to realize that Gottlieb did not abide by our current summary suspension rules concerning arrests.” (emphasis in original). Gottlieb is Eric Gottlieb, the only TLC judge who ruled in favor of a cab driver on summary suspension. Coyne continues: “If the ALJs now have the authority to lift summary suspensions then this change should be in writing since it conflicts with the ALJ manual and my understanding of current policy.” In other words, Coyne confesses that ALJs had no authority to lift suspensions—the hearings were rigged.

Coyne mentions the ALJ Manual and current policy. The ALJ Manual is delivered to all ALJs, but it is not available to taxi drivers, their lawyers or the public. Daus

¹ Exhibits J -R are to the Reply Declaration of Daniel Ackman dated February 26, 2006.

² In the Appendix to the “amended” privilege log, served on February 23, Coyne’s description reads: “TC – Thomas Coyne, Administrative Law Judge (ask Charles).”

103-04. It is an *ex parte* communication. This manual establishes what Coyne and Bonina call “the standard” in summary suspension cases: “whether the acts alleged, if established and substantiated, form a rational basis for the licensee’s continued suspension.” This “standard” appears only in the ALJ Manual; it is nowhere in the NYC Administrative Code or the TLC’s (published) Rules. Coyne 34-35; Bonina 97, 128-29. It is a “standard” that the TLC has never failed to meet, even if Ms. Bonina could not quite bring herself to admit it. Bonina 101-02.

Of course, Gottlieb’s decision is only a recommendation to the chairman. That Matthew Daus accepted virtually every such recommendation is also admitted. Responding to Coyne, Hardekopf writes: “I think today will be the very first time a summary suspension case has been decided in favor of a driver by the Chairperson.” This was big news at the TLC, and Hardekopf promised: “I will keep you updated.” Apparently, it never happened.

Matthew Daus’s Testimony

At his deposition, Daus (“the Chairperson”) claimed to recall a ruling in favor of at least one driver “in recent memory.” I asked Ms. O’Sullivan why the document had not been produced. She replied: “If you want to put in a document demand...” But the document demand had been served months earlier. I then tried to refresh Daus’s recollection—perhaps he had misspoke. Ms. O’Sullivan asked to take a break. But a question was pending, and Daus continued to insist he had—at least once—ruled in a driver’s favor. Daus 70-72. But there is no evidence he ever did so and other witnesses could not recall such an event.³ Mazer 41-42; Fraser 109-110.

Thomas Coyne’s Testimony

The e-mails also cast doubt on Coyne’s testimony. At his deposition, he was asked if TLC judges have any discretion at summary suspension hearings. After trying to avoid the question, assisted by Ms. O’Sullivan’s objections, Coyne said the judges do have

³ Of course, if Matthew Daus ruled for a cab driver once (or even twice) would hardly alter the fact that at the summary suspension hearings the drivers had no chance. The hearings, either way, are a sham.

discretion: “If the standard is met [sic], the judge can say I don’t think the suspension should remain in effect.” Coyne 33. Of course, in his e-mails he admitted just the opposite.

These are just two examples—based on a single log item—of testimony that could have been challenged or proven completely false had defendants produced documents without false privilege claims. The testimony of Fraser, Bonina, Hardekopf and others would also be impacted. Even after taking over four months to produce documents, defendants still failed to produce non-privileged documents or any privilege log until after depositions were under way and the most important witnesses were just about to testify. If Item 1 on the privilege log is any indication, they are continuing to hide highly relevant, non-privileged documents. This cover-up has been extremely prejudicial to the plaintiffs’ ability to conduct discovery. Moreover, they still can provide no coherent justification for their actions.

The Tortorici Declaration is Late and Deficient

Defendants concede, as they must, that their initial privilege log was not merely late, but an utter failure. As discussed in our initial motion, the February 10 log contained far too cursory descriptions, failed to identify the authors and recipients of the documents, failed to articulate the bases for the privileges asserted, and failed to establish that a policymaker had reviewed the documents and properly asserted a privilege. *See* Pl. Mem at 19-21. These failings made it impossible for plaintiffs or the Court to assess the applicability of the privilege claimed.

Now defendants purport to cure their initial wrong by propounding a declaration by Charles Tortorici, a TLC attorney of unspecified duties, along with an “amended” log that is still, they say, a work in progress. Mr. Tortorici claims that Matthew Daus “authorized” his review “and provided instructions concerning such review and the need for confidential protection of TLC’s decision-making process.” In other words, Daus told Tortorici to keep the “confidential” stamp in gear.⁴

⁴ Claims of Matthew Daus’s authorizations should not be accepted at face value. Mr. Hardekopf signed a declaration in this action saying that the TLC Chairman had delegated authority to suspend licenses to the legal department. He later admitted at a deposition he did not know if that was true. Hardekopf 17-18.

Conspicuous by their absence are Charles Fraser, Tortorici's boss, and First Commissioner Andrew Salkin, Fraser's boss. Salkin's boss, Daus, plays a non-speaking role, and flees the scene. It is strange enough that defendants would assume they could cure their lateness with a document that is later still. Worse, the amended privilege log and the Tortorici declaration come after all but one of the depositions in the case have been conducted.

But stranger still is their reliance on Tortorici. He is not a decisionmaker, which is what the cases require. *See, e.g., Bowne, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 473-74 (S.D.N.Y. 1993); *Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 603-04 (S.D.N.Y. 1991) (collecting cases). Tortorici's declaration refers to "the understanding" that communications would remain confidential. ¶ 13. But he does not even claim it was his understanding, let alone Daus's or Fraser's. The question, moreover, is not whether Tortorici reviewed the documents—a clerk could do that. It is whether a decisionmaker reviewed the documents and determined them to be confidential. *Resolution Trust Corp.*, 773 F. Supp. at 602-604. The decisionmakers at the TLC either would not or could not do so.

Defendants Persist in Their Failure to Prove
the Existence of a Deliberative Process Privilege

Defendants now admit that many of the allegedly "deliberative" communications—they also admit they were not all e-mails—post-date the October policy vote on the new rules that took effect on December 2, 2006. The Tortorici declaration is there to back and fill. The post-October 2006 documents concern "proposed changes in operating procedure" that followed the new rule, possible future rule changes or legislation, and even proposed changes in a form letter. (Tortorici ¶¶ 9, 26, 28, 20). These claims must be rejected for various reasons.

First, as to possible future changes in operating procedure, Charles Fraser, Tortorici's boss, has already admitted quite candidly that the rule change did not alter the

TLC's way of doing business. "To the best of my recollection, [new rule] 816-C did not change our practice at all," Fraser testified. Fraser 23-24. Second, that there might someday be a new rule cannot be denied. But another imminent change seems far-fetched. The old rules had been in effect for at least six years—Matthew Daus could not recall if the summary suspension policy was installed on his watch or during the reign of Chairwoman Diane McGrath-McKechnie. If the communications concerned some other subject or rule altogether, they would be irrelevant, not privileged. More to the point, vague suggestions of possible future rules or legislation cannot pass muster. To meet their burden, defendants must pinpoint the specific decision to which the document correlates. *National Congress for Puerto Rican Rights v. City of New York*, 194 F.R.D. 88, 92-93 (S.D.N.Y. 2000). Tortorici muses about "proposed legislative agendas." But he doesn't say even what the legislation (or the rules) would be about.

Asserting deliberative process privilege regarding the communications about "proposed drafts of form letters" is government secrecy pure and simple. *See Klamath Waters*, 532 U.S. at 9. A draft form letter is obviously not intended to assist an agency decisionmaker in arriving at a decision. *See Hopkins v. U.S. Department of Housing and Urban Development*, 929 F.2d 81, 84 (2d Cir. 1991). There is nothing confidential here. The assertion of privilege as to these documents is like the proverbial 13th chime of the clock: Not only is the chime itself dubious, it calls into question all the chimes that came before it.

Summary Suspension of 'Particular Drivers'

The chimes continue. Tortorici claims as privileged, for example, seven items described as communications by lawyers about "pending summary suspension matters relating to particular drivers." Particular cases are not about policy. Moreover, the privilege log itself either belies this characterization of the seven items. Items 74 and 83 are e-mails

between Daus and Fraser on “summary suspension practice.” Item 84 is from Daus to two individuals (Indira Strouse and Carolyn Rinaldi) who are not identified—not even in the recent appendix. It is not clear what they do or why Daus would be discussing “particular drivers” with them. There is no indication individual drivers are being discussed in any of these items. Item 173 is from Fraser concerning “proposed legislation.” The descriptions appear simply wrong. In short, Tortorici’s claims make no sense and cannot be trusted.

There Can Be No Privilege For Illicit Communications

Certain aspects of Tortorici’s declaration essentially admit the persistence of *ex parte* contacts between the agency and its per diem judges. Others concede ongoing violations of CAPA. Item 265, among the “proposed changes to summary suspension policies and practices,” is listed as an e-mail from Bonina to the director of adjudications, Coyne and Robert Boland, another deputy chief ALJ. But Tortorici later admits the e-mail chain contains much more: “The initial e-mail contains Mr. Fraser’s legal opinion as to a particular summary suspension issue,” which was forwarded to the judges, Tortorici writes. If Fraser has legal arguments to make to judges, however, he should submit a brief or in appear in open court. He must not engage in *ex parte* communications with the at-will, per diem judges.

Communications with ALJs

In their memorandum of law, defendants mischaracterize plaintiffs’ position concerning privilege and the TLC judges. We do not say the judges “may not be consulted.” Def. Memo at 7. In fact, we concede that consultation “may even be a good idea.” Pl. Memo at 11. The question is whether the consultations are privileged as part of the agency’s policy deliberations. The answer is no for several reasons, including the fact, which defendants do not dispute, that they are not policymakers. Another reason is CAPA’s prohibition of *ex*

parte (i.e., private) contacts. Finally there is the general bar on *ex parte* contacts between litigants and judges. N.Y. Disciplinary Rule 7-110(B); *see* Pl. Memo at 11-13.⁵ It is not that the privilege has been waived: There was no privilege at all.⁶

The TLC ALJ Manual

In claiming the privilege as to drafts of the TLC ALJ Manual, Tortorici (§ 24) necessarily implies that the manual is a policy document. The problem here is that Tortorici is right. As noted above, the “standard” applied on summary suspension appears in the manual and nowhere else. That fact indicates a greater problem: No agency, the TLC included, is permitted to maintain policies about which the public has not been informed.⁷

The City Charter details the way that agencies enact rules. There must be public notice and an opportunity to comment. CAPA § 1043. Moreover, the TLC is not permitted to direct its judges by “*ex parte* communications ... including internal agency directives not published as rules.” CAPA § 1046(c)(1). The TLC may be reworking its manual. But if the plan is to keep the new manual internal, the CAPA violation would be ongoing. The TLC’s maintenance of this secret law is a cause of action, not a defense to a discovery demand.

⁵ The *Klamath Water* case is not remotely to the contrary. In that case, the Supreme Court merely acknowledged that if an agency hires an outside, disinterested consultant to help make policy, the consultant’s advice may be privileged the same way as that of a government official. The privilege did not apply in the *Klamath* case itself. TLC judges, of course, are not hired to make policy; they are hired to act as hearing officers, and are barred from making policy. *See* Pl. Memo at 6-7. Defendants do not pretend otherwise.

⁶ Defendants also mischaracterize our point about the communications between Fraser and his ex-colleague Charles McFaul. McFaul is an OATH judge and OATH judges are in no conceivable way involved in TLC policymaking. The kind of inter-agency communication mentioned in *Nat’l Council of La Raza v. DOJ*, is simply not at issue. 411 F.3d 350 (2d Cir. 2005). There is no buddy-buddy privilege.

⁷ Asked whether the ALJ Manual is a public document, Chairman Daus and General Counsel Fraser played coy: “That is an interesting question,” Daus said. “I’m not sure what you mean by public document,” Fraser testified. Then Daus admitted it is “an internal manual.” It is not available to cab drivers or their lawyers and it is not published on the TLC website, though Daus volunteered, “[I]t could be on a blog somewhere.” Daus 105, Fraser 46.

Communications Regarding the Privately Maintained ‘List’ of Offenses

Tortorici notes that there had been some discussion at the TLC about what “types of arrests” would result in a cabbie’s automatic suspension. ¶ 12. Hardekopf exercises no discretion; he works off a list. Hardekopf 8-10. Around November 2006, the list was amended by Hardekopf and Fraser. Fraser testified he also consulted with Daus, but Daus testified he played no role. Fraser 117; Daus 151-52. Everyone concedes the list has never been made public. Even Chief TLC Judge Bonina and Deputy Chief Coyne have never seen the list, although Bonina has “heard about” it. Bonina 126; Coyne 141. This list, like the ALJ Manual, constitutes an aspect of TLC policy. It is not trivial, but an important aspect, which can result in the suspension or revocation of a hack license. Defendants did produce some of the memos (with redactions) in which the list changes were discussed, as Tortorici admits. ¶ 12. There is no legal basis for their refusal to produce the rest.

TLC Governance and the *Padberg* Case

Finally, something must be said about defendants’ dishonest reliance on *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 267-68 (E.D.N.Y. 2002), *aff’d* 2003 U.S. App. LEXIS 4618 (2d Cir. 2003), *cert. denied*, 540 U.S. 967 (2003).⁸ The Second Circuit most emphatically did not “[dismiss] the plaintiffs’ claim that the Chair lacked authority to implement policy without the approval of the Commission.” Def. Mem. at 9. Rather, the court simply agreed that the defendants had presented “a reasonable, *though arguably incorrect*, interpretation of the city regulations [that] support[ed] the Chairwoman’s actions” such that they did not “give rise to a *constitutional* violation.” 2003 U.S. App. LEXIS 4618

⁸ Never mind that defendants cite the Circuit Court decision, despite the fact that the decision is “unpublished” and Second Circuit rules bar its citation. The Second Circuit recently changed its rule and now allows citation of summary orders, but only those filed after January 1, 2007. *See* Notice of Rule Change, Exh. K; Ira Matetsky, “Ignoring Rule 0.23: Citing Summary Orders in the Second Circuit,” *New York Law Journal*, February 9, 2004. Exh. L.

(emphasis added). The Second Circuit's language is plain; defendants' portrayal of the ruling is not even close. As defendants and their counsel well know, the *Padberg* plaintiffs then amended their complaint to claim directly the same violation of the City Charter that is pleaded here. Judge Dearie blessed the amendments and the City agreed to pay plaintiffs millions of dollars on their claims. *Padberg v. McGrath-McKechnie*, 2006 U.S. Dist. LEXIS 95174 (E.D.N.Y. 2006); Declaration of Daniel Ackman, dated Nov. 21, 2006.

It remains undisputed, after *Padberg* as it was before, that under the City Charter the TLC is governed not by Daus alone, but by a majority vote of its commissioners. If not a single "deliberative" document found its way to the policymakers, something very strange is going on. That no such document has been produced demonstrates that defendants have treated their discovery obligations dismissively.

CONCLUSION

At this point, we submit defendants have forfeited their chance for another chance. The Court should forego *in camera* review of the allegedly privileged documents and simply order all documents on the privilege log be produced, together with sanctions. The Court should further order the re-opening on short notice of the depositions of Fraser, Hardekopf, Coyne and Matthew Daus. For the reasons stated, plaintiffs' motion to compel the production of documents should be granted.

Dated: New York, New York
February 26, 2007

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