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United States District Court, S.D. New York.

MARISOL A., by her next friend, Rev. Dr. James Alexander Forbes, Jr., et al., Plaintiffs,
v.
Rudolph W. GIULIANI, Mayor of the City of New York, et al., Defendants.

No. 95 CIV. 10533(RJW). | May 8, 1997.

Opinion

MEMORANDUM DECISION

WARD, J.

***1** Plaintiffs move for an order directing defendants to provide documentary discovery withheld and to permit deposition inquiries objected to on the basis of the deliberative privilege and to provide the parties with guidance regarding the scope of the privilege in this litigation.

After having briefed the matter, the parties appeared before the Court on April 16, 1997. It was agreed that plaintiffs would specify a representative number of documents which the Court would review *in camera.* By letter dated April 18, 1997, plaintiffs presented a list of representative documents for which individual *in camera* review was sought. The Court has reviewed the documents and rules upon the objections as follows:

1. Document # 1—Child Fatality Review Report 94–02 (including document numbers C906, C907, C908).

RULING: C906, pages 8–10, appears to consist of self-critical analysis. Objection sustained.

> C907, pages 21–28, appears to consist of self-critical analysis and falls within the rule of *Flynn v. Goldman, Sachs & Co.,* No. 91 Civ. 0035, 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. Sept. 15, 1993). Objection sustained.

C908, the City argues that the "FINAL REPORT of the NEW YORK CITY CHILD FATALITY REVIEW PANEL" is preliminary to the Panel's Annual Public Report. While the Annual Report includes summary information regarding the year's child fatalities, it does not appear to contain any details concerning individual child fatalities. Therefore, the Panel's "Final Report" is final as to each individual child fatality and is not pre-decisional. Objection overruled.

2. Document # 5—Child Fatality Review Report 94–08 (C943, C944, C946, C947).

RULING: C943, pages 8–13, appears to consist of self-critical analysis. Objection sustained.

C944, pages 31–45, appears to consist of self-critical analysis and falls within the rule of *Flynn v. Goldman, Sachs & Co.,* No. 91 Civ. 0035, 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. Sept. 15, 1993). Objection sustained.

C946, page 1, CWA's responses to the HRA Fatality Panel's recommendations does not come within either the deliberative privilege or self-critical analysis. Objection overruled.

C947, the City argues that the "FINAL REPORT of the NEW YORK CITY CHILD FATALITY REVIEW PANEL" is preliminary to the Panel's Annual Public Report. While the Annual Report includes summary information regarding the year's child fatalities, it does not appear to contain any details concerning individual child fatalities. Therefore, the Panel's "Final Report" is final as to each individual child fatality and is not pre-decisional. Objection overruled.

3. Document # 7—Child Fatality Review Report 94–27 (C9075, C9076, C9077, C9078, C9079, C9080, C9081, C9083, C9084, C9086).

RULING: Inasmuch as all of the above documents with the exception of C9080, C9081, and C9083, appear to have been furnished to plaintiffs unredacted, the Court will rule only with respect to C9080, C9081, C9083.

***2** C9080, pages 7–10, appears to consist of self-critical analysis. Objection sustained.

C9081, pages 28–30, appears to consist of self-critical analysis and falls within the rule of *Flynn v. Goldman, Sachs & Co.,* No. 91 Civ. 0035, 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. Sept. 15, 1993). Objection sustained.

C9083, page 1, CWA's responses to the HRA Fatality Panel's recommendations does not come within either the deliberative privilege or self-critical analysis. Objection overruled.

4. Document # 8—January 1997 Report to commissioner on the Stat. of the James Satterwhite Academy, from Paula Y. Fendall, Director, presenting her view on conditions, issues and recommendations.

RULING: Although this forty-three page document includes facts, they are intertwined with opinion and self-criticism. The document falls within the rule of *Lead Indus. Ass'n, Inc. V. Occupational Safety and Health Administration. et al.,* 610 F.2d 70, 83 (2d Cir.1979). Objection sustained.

5. Document # 13—August 12, 1996 Memo from K. Scurria to Scoppetta on background (pp. 1–3 unprivileged) including analysis of ACS independent living programs with proposals (pp. 4–10 privileged).

RULING: Appears to contain self-critical analysis and recommendations and falls within the rule of *Lead Indus. Ass'n, Inc. v. Occupational Safety and Health Administration, et al.,* 610 F.2d 70, 83 (2d Cir.1979). Objection sustained.

6. Document # 16—March 13, 1996 Memo to Linder from J. Lilien regarding observations and comments, Manhattan Field office; outlines key issues and observations from staff interviews. sustained with the exception of the last page as to which the sustained with the exception of the last page as to which the sustained with the exception of the last page as to which the objection is overruled.

7. Document # 20—June 25, 1996 Memo from re-engineering team to W. Bell regarding issues and recommendations raised at the Brooklyn SupCons. RULING: This document appears to contain self-critical analysis. Additionally, it is pre-decisional and falls within the rule of *Hopkins v. United States Dep't of Housing & Urban Dev.,* 929 F.2d 81, 84 (2d Cir.1991). Objection sustained.

8. Document # 23—June 10, 1996 Memo from Lilien to W. Bell on interview with Manhattan OCACM office.

RULING: This one-page document appears to be primarily factual. Objection overruled.

9. Document # 25—July 9, 1991 Draft of HRA Baseline Analysis Project, CWA, containing critical observations and recommendations for change, with handwritten notes.

RULING: This fifty-seven page document is labeled "Draft–Baseline Analysis Project." The City asserts that the draft, dated July 9, 1991 and prepared during the administration of an earlier Commissioner of the Human Resources Administration, was circulated only within the Agency and that no Final Report was issued. The City argues that the document is pre-decisional. Since the draft was never made into a Final Report, however, the document cannot be pre-decisional and shall be furnished with the handwritten comments redacted. Objection overruled except with respect to the handwritten comments.

***3** 10. Document # 32—The "DeMarco Report" dated February 1996, produced as document number C536.

RULING: This report appears to be pre-decisional. Objection sustained.

11. Document C1550 a, b—Office of Field Services, Contract Agency Case Management "briefing books" (2 volumes). Book I redacted as to "Conditions" (4 pages); "Issues and Recommendations" (3 pages). In the Appendix to Book I, the following portions of the Office of Field Services and Case Management section in "Transition Issues," dated January 12, 1994, are redacted: "Litigation Issues" (3 pages); "Impending/Critical Issues" (1 page); "Long Term Issues" (2 pages); the

following portions are redacted from the CWA Executive Summary section: "Impending/Critical Issues" (6 pages); "Long Term Issues" (4 pages); and in the document "Homemaking Overview," three "proposals currently being considered" are redacted (1 page).

RULING: C1550a appears to contain self-critical analysis on the pages which have been marked by the City. As to those pages, the objection is sustained.

C1550b appears to have been furnished in its entirety.

12. Document C1554—Office of Direct Foster Care Services Briefing Report, Janice Hassan, Assistant Deputy Commissioner, Feb. 8, 1996, redacted as to "Alerts and Recommendations" (2 pages).

RULING: On the two pages in question, the objection is overruled with respect to the "Alerts." The objection is sustained with respect to the "Recommendations." *See Hopkins v. United States Dep't of Housing & Urban Dev.,* 929 F.2d 81, 84 (2d Cir.1991).

The Court is hopeful that the foregoing rulings with respect to the representative documents will enable the parties to resolve their differences with regard to the remaining documents and will provide guidance during the depositions regarding the scope of the privilege in this litigation.

It is so ordered.