

**IN THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR MANATEE COUNTY, FLORIDA**

MARY LOU SMITH  
an individual, and  
SHARON DENSON,  
an individual

Plaintiffs,

vs.

CASE NO.: 08 CA 11315  
Division: B

TRAILER ESTATES PARK AND  
RECREATION DISTRICT,  
an independent special taxing district,  
JANET JONES, an individual,  
JOHN VANDERMOLEN, an individual,  
JOSEPH SALERNO, an individual, and  
MARY LOU MCNULTY, an individual

Defendants.

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**PLAINTIFFS' SUPPLEMENT TO MOTION TO COMPEL**  
**(Production of Documents identified in Privilege Log)**

COME NOW, Plaintiffs, MARY LOU SMITH and SHARON DENSON, by and through their undersigned counsel and pursuant to Rule 1.380, Fla. R. Civ. P., and supplement their prior Motion to Compel in which they requested that this Court enter an Order compelling Defendant, Trailer Estates Park and Recreation District (hereinafter the "District"), to produce the documents identified in the District's privilege log provided in lieu of documents responsive to Plaintiffs' Amended Notice of Taking Deposition Duces Tecum of the District's Representative.

In support thereof, Plaintiffs state as follows:

1. On February 5, 2010, February 9, 2010, and February 11, 2010, this Court heard argument on that portion of the Motions to Compel and Motion for Ruling on Objections to Non-Party Subpoenas relating to the production of computer. The remainder of

Plaintiffs' Motion to Compel which sought the production of specific documents recently identified as privileged has not yet been heard.

2. As this Court is aware, this suit centers on alleged violations of Florida's Public Records Law and Florida's Sunshine Law. Plaintiffs, residents of the District, allege that the Board of Trustees in general, and the individuals named in particular, have committed numerous specific violations of the Public Records and Sunshine Laws and have engaged in a pattern and practice of ignoring these statutory and constitutional mandates requiring open government.
3. On August 28, 2009, Plaintiffs sought the production of documents supporting these allegations through their Amended Notice of Taking Deposition Duces Tecum of the District Representative. A copy of the Amended Notice is attached hereto as **Exhibit A**. At the District Representative's deposition, the District failed to provide all documents responsive to the Amended Notice, claimed two specific documents were privileged and generally asserted privilege for "some" other documents without identifying those documents. Brauer Deposition, Pages 196:21-199:5.
4. On January 27, 2010, more than five (5) months after receipt of the Amended Notice and after numerous requests by Plaintiffs, counsel for the District produced a document described as a "Privilege Log" which designated approximately 76 documents as privileged. A copy of the Privilege Log and the associated correspondence is attached hereto as **Exhibit B.1**
5. Under Rule 1.280(b)(5), when a party withholds information otherwise discoverable under the Rules by claiming such material is privileged, the party shall make the claim

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<sup>1</sup> Defendant's Privilege Log did not include numbering. For ease of reference, Exhibit B reflects hand-numbering by Plaintiffs' counsel of each of the items listed on the Privilege Log.

expressly and *shall describe the nature of the documents not produced in a manner that “will enable other parties to assess the applicability of the privilege.”* Rule 1.280(b)(5), Fla. R. Civ. P. (emphasis added). The purpose of the privilege log and corresponding disclosure is so that a court can rule on the applicability of the privilege or protection prior to trial. Kaye Scholer LLP v. Zalis, 878 So.2d 447, 449 (Fla. 3d DCA 2004) (citation omitted).

6. Although the Rule does not specify what information is required in order to comply with the requirements for a privilege log, the Fourth DCA looked to Federal Rule 26(b)(5) (upon which Rule 1.280(b)(5) is modeled) and the local rules in determining that a privilege log should include the following:

- a. The type of document;
- b. The general subject matter of the document;
- c. The date of the document; and
- d. Such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship between the author and the addressee.

TIG Ins. Corp. of America v. Johnson, 799 So.2d 339, 341 (Fla. 4<sup>th</sup> DCA 2001) (citation omitted). Without this information, neither a party nor the Court can “assess the applicability of the privilege” asserted. Rule 1.280(b)(5).

7. Defendant’s “Privilege Log” does not come close to meeting the disclosure requirements outlined in TIG, *supra*, nor does it satisfy the requirements of the Rule. The deficiencies in the Log include the following:

- a. Items 9, 10, 17-20, 23-32, 34-41, 67-71: Attorney-client and/or work product privileges claimed although Defendant’s counsel is not identified as being a party to the communication;
- b. Items 1-7, 37 & 65: No description of privilege asserted;

- c. Items 37, 46-50, 65 & 77: No identification of author, recipient or date;
  - d. Items 8-12, 22, 29, 42-51: No identification of type of document.
8. As shown by information contained in the Privilege Log, the District has claimed as privileged at least 29 documents where there is no indication or evidence of any involvement by District counsel. As to those documents identified in ¶8a. above, Defendant has identified nothing which supports their protection as privileged.
9. The burden of establishing the attorney-client privilege rests upon the party claiming it. Southern Bell Telephone & Telegraph Co. v. Deason, 632 So.2d 1377, 1383 (Fla. 1994) (citing Fisher v. U.S., 425 U.S. 391 (1976)). Similarly, the party claiming the protection of the work product doctrine must present evidence to the Court to support its claim. Wal-Mart Stores, Inc. v. Weeks, 696 So.2d 855, 856 (Fla. 2d DCA 1997). Assuming for purposes of argument only that the District has not waived the privilege by failing to comply with the requirements of Rule 1.280(b)(5), then the District must prove its entitlement to that protection.
10. Additionally, because the District is a government agency whose records are public records in accordance with Chapter 119, Fla. Stat., the attorney-client privilege and work product doctrine exceptions are further narrowed. More specifically, only those documents which are “prepared by an agency attorney . . . or prepared at the attorney’s express direction, that reflect a mental impression, conclusion, litigation, strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil litigation” are protected from disclosure. Section 119.071(1)(d)1, Fla. Stat.

[T]he exemption only extends to those records that contain the attorney’s mental impressions, litigation strategy, or legal theory *and* are prepared exclusively for litigation . . . .

Lightbourne v. McCollum, 969 So.2d 326, 332 (Fla. 2002) (emphasis in original).

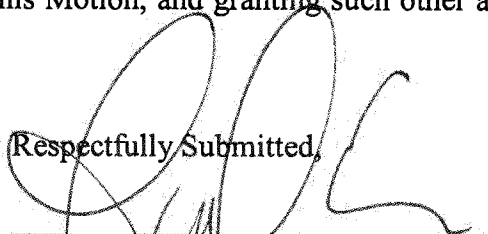
11. As with the claim of privilege under Rule 1.280(b)(5), the burden of proof that the documents sought fall within this narrow exception to the Public Records Law rests solely on the District. Lightbourne at 333.
12. “The trial court possesses broad discretion in determining the scope of allowable discovery. . . . Pursuant to Florida Rule of Civil Procedure 1.280(b)(5), trial courts have the discretion to find waiver of privilege claims for failure to produce a privilege log.” Metabolife Intern., Inc. v. Holster, 888 So.2d 140, 141 (Fla. 1<sup>st</sup> DCA 2004) (citations omitted). Where, as here, the privilege log is incomplete and fails to comport with the requirements under Rule 1.280(b)(5), it is as if no log was produced at all. Omega Consulting Group, Inc. v. Templeton, 805 So.2d 1058, 1060 (Fla. 4<sup>th</sup> DCA 2002).
13. Accordingly, where a party submits an insufficient or incomplete privilege log under Rule 1.280(b)(5), the Court has the discretion to deem the attorney-client and work product privileges waived. Id. (citing TIG supra). See also Kaye Scholer at 449 (“[f]ailure to comply with the requirements of Rule 1.280(b)(5) results in the waiver of any attorney-client and work-product privileges.”); General Motors Corp. v. McGee, 837 So.2d 1010, 1032 (Fla. 4<sup>th</sup> DCA 2002). Because of the inadequacy of the District’s Privilege Log, the Court should find that the District has waived any privilege and order the production of these documents.
14. Should the Court determine that the District has not waived the privilege in light of insufficiency of the Privilege Log and assuming that the District carries its burden of proof, then the Court must conduct an *in camera* review of the documents identified to determine whether they are protected by the attorney-client privilege or work product

doctrine. Jacob v. Barton, 877 So.2d 935, 937 (Fla. 2d DCA 2004). The Court must also find that these documents fall within the narrow exception under §119.071(1)(d)1. Should the Court determine that any of the documents sought are in fact privileged and are within the confines of §119. 071(1)(d)1, then an evidentiary hearing may be required so that the Court can determine whether any exceptions to the lawyer-client privilege exist or whether Plaintiffs can overcome the protection of the work product doctrine. Jacob at 937-38 (citations omitted).

15. Pursuant to §119.07(6)(1)(2), Fla. Stat., if the Court finds that a document has been improperly withheld from production or disclosure, the party seeking access to the record shall be awarded her reasonable attorneys' fees and costs in addition to any other remedy.
16. On February 16, 2010, prior to filing this Motion, Plaintiffs' counsel conferred with counsel for the District in a good faith attempt to resolve this discovery dispute, but such efforts were unsuccessful.

WHEREFORE, the Plaintiffs move this Court for entry of an Order requiring the District to produce the documents identified in the Privilege Log, awarding of Plaintiffs' attorneys fees and costs associated with bringing this Motion, and granting such other and further relief as the Court deems just.

Respectfully Submitted,



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Counsel for Plaintiffs

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to **Hunter Carroll, Esquire**, Matthews, Eastmoore, Hardy, Crauwels & Garcia, P.A., 1777 Main Street, Suite 500, Sarasota, FL 34236, **James D. Dye, Esquire**, Dye, Deitrich, Petruff, & St. Paul, 1111 Third Ave. West, Suite 300, Bradenton, FL 34205, **Robert E. Turffs, Esquire**, 1444 First Street, Suite B, Sarasota, FL 34236, **Daniel E. Scott, Esquire**, Daniel E. Scott, P.A., 2033 Main Street, Suite 408, Sarasota, FL 34237, **Thomas D. Shults, Esquire**, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, by *U.S. Mail and Facsimile*, this 19<sup>th</sup> day of February, 2010.

  
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JENNIFER R. COWAN, ESQUIRE