UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL (Emergency Planning) September 21, 1982

MEMORANDUM AND ORDER RULING ON LILCO'S MOTION TO COMPEL DISCOVERY OF SUFFOLK COUNTY EMERGENCY PLANNING DOCUMENTS

I. Background

On August 23, 1982, the Applicant, Long Island Lighting Company (LILCO), moved this Board, pursuant to 10 CFR § 2.740(f), for an order compelling intervenor Suffolk County (County) to produce those documents sought in "LILCO's First Request to Suffolk County for Production of Emergency Planning Documents", dated June 2, 1982, and in "LILCO's Second Request to Suffolk County for Production of Emergency Planning Documents", dated June 22, 1982. This motion asserts that the County has failed to produce in a timely fashion all documents requested by LILCO and that the County has neither identified those documents which

it alleges to be privileged from discovery nor the dimensions of the privileges which are being claimed.

Annexed to LILCO's motion was certain correspondence between LILCO and the County, including an August 11, 1982 letter in which the County had listed 44 items which it asserted to be privileged from disclosure by virtue of either the attorney-client privilege, the work product doctrine, the intra-agency communications branch of the executive privilege, or by virtue of some combination of these privileges.

Two days later, on August 25, 1982, LILCO filed a supplement to its August 23 motion to compel. Attached to the LILCO supplement was an August 24, 1982 letter from counsel for the County, listing an additional 18 documents which the County stated it was withholding under claims of privilege. LILCO's supplemental motion sought to compel the production of these documents for the same reasons stated in its August 23 motion.

As a result of discussions between counsel for LILCO and the County held pursuant to the Board's directions, the parties resolved their disputes with regard to 28 of the 62 documents listed in Suffolk County's August 11 and 24 letters. The County filed a response to LILCO's motion to compel on August 31, 1982, objecting to producing the remaining documents on the grounds of the privileges previously alleged. The response also asserted that LILCO's objections to the timeliness of

the County's production of documents in response to LILCO's requests were without merit and "essentially moot", in view of the County's imminent completion of its production of documents for which privileges were not claimed. Copies of the 34 documents which the County asserts to be privileged were provided for the Board's in camera inspection with this response.[1/]

By letter dated September 2, 1982, the County transmitted to LILCO the last of those emergency planning documents which it believes to be responsive to LILCO's requests. This letter lists 13 additional

---

1/ In a conference call held on September 3, 1982, the Board requested that the County review once again the documents submitted in camera on August 31 and determine whether it wished to continue to pursue its claim of privilege with respect to all of these items. The Board noted that disclosure of certain of these items, such as transmittal letters, would appear to be of lesser significance than would the disclosure of other items, and asked whether the public interest might not be better served if the County's claims of privilege were more narrowly focused.

In a letter to the Board dated September 7, 1982, the County acknowledged that the content of certain of the documents which it is claiming to be privileged may not be so significant as that of others, but stated that it continues to believe the privileges asserted for each document to be supportable. It asserts that the significance of these documents is irrelevant to their discoverability and states that "Suffolk County considers the principles underlying the privileges it has asserted to be important to effective litigation and effective decision making." It also states, incorrectly, that the Board suggested in the September 3 conference call that the County might have in some way waived its privileges by participating in the Shoreham licensing proceeding and denies that there is any basis for finding such a waiver based on its participation.

documents which the County claims to be privileged from discovery. The letter suggests, however, that LILCO await the Board's anticipated rulings on those items previously withheld, prior to contesting these claims of privilege, noting that the County would be prepared to reconsider its positions based upon the Board's rulings on those matters.

Copies of those additional documents for which privilege was claimed in the County's September 2, 1982 letter were provided for the Board's in camera inspection on September 8, 1982. Thereafter, on September 10, 1982, the County provided the Board with a consolidated in camera submission of all 46 emergency planning documents which it is claiming to be privileged from disclosure in response to LILCO's document requests.[2/] The documents in this submission were color-coded to

---

2/ One item claimed in the County's September 2, 1982 letter to be privileged, and which was included in its September 8, 1982 in camera submission to the Board, was deleted from this group of documents after discussions held with LILCO pursuant to this Board's directions during a September 7, 1982 conference call. Also deleted from those items which had been included in the County's September 8 in camera submission were two documents not appearing on the County's lists of documents being withheld. Their presence was brought to the County's attention by a September 9 telephone call from Counsel for the Licensing Board, Daniel F. Brown. The County's September 10 letter to the Board described these documents as relating to security matters and stated that they were inadvertently included in this submission. We agree with the County that these documents are not responsive to LILCO's emergency planning requests.

show which privileges the County is claiming for various portions of each document.

On September 17, 1982, as permitted by the Board, LILCO filed its Reply to Suffolk County's August 31 answer to the LILCO motion to compel (as supplemented). This last filing by LILCO replies to those claims of privilege for the 34 documents asserted in the County's August 31 response, but does not address those additional 12 documents withheld by the County's September 2 letter.

II. Suffolk County's Response And The Timeliness Of The County's Production Of Documents

The two LILCO requests to the County for the production of emergency planning documents, which are the subject of the instant motion, each state that they are being made pursuant to 10 CFR § 2.741. Subsection (d) of this regulation provides:

> (d) Response. The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

Suffolk County's response to LILCO's June 2, 1982 document request was served on July 1, 1982, and its response to LILCO's June 22, 1982 request was served on August 4, 1982.

LILCO states, at page 2, n. 1 of its August 23 motion, that the County's second response was filed out of time (a fact acknowledged by the County in that document). Furthermore, LILCO's motion asserts, at 4-5, that the County has not produced documents within the dates specified by the Board at its July 20, 1982 prehearing conference as a result of LILCO's July 9, 1982 motion to compel, has not provided adequate detail as to those documents which it claims to be privileged from discovery, and has not applied for a protective order pursuant to 10 CFR § 2.740(f).

In its August 31 Response, the County states that it informed LILCO in late July that due to the dimensions of LILCO's requests, the County could not produce all documents by early August and asserts that "...LILCO refused to narrow its requests to facilitate more prompt production." Response at 2. The County disputes LILCO's allegation that it has provided no basis for its assertions of privilege, stating that specific descriptions of those documents claimed to be privileged and the nature(s) of any privilege(s) being asserted were provided in its August 11 and 24 letters. Response at 4-5. It further states that under 10 CFR § 2.740(f), a party is not required to seek a protective order when, as in the case of the County, the party responds to a

discovery request. Response at 4. It also alleges that, pursuant to 10 CFR § 2.740(f)(1), LILCO's motion to compel is itself untimely. Response at 3. The County does not address the timeliness of its own objections. We address each of these matters below.

A. Responses, Objections, and Applications For Protective Orders

As noted above, pursuant to 10 CFR § 2.741(d), a party upon whom a request for the production of documents is served is required to serve, within 30 days, a written response stating either that the requested inspection will be permitted or stating its reasons for objecting to the request. We agree with LILCO that the County's August 4, 1982 response to LILCO's June 22 document request was not timely filed; however, in the interest of ruling on the important privileges asserted, we will not deny the County's objections due to their untimeliness in the circumstances of this particular instance.

LILCO's August 23 motion to compel asserts, at 4-5, that the County has not properly raised its claims of privilege in response to LILCO's requests in that the County has not moved for a protective order pursuant to 10 CFR § 2.740(c). In support of its claim, LILCO cites 10 CFR § 2.740(f)(1), which states, in pertinent part:

> Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

The County states, in our view, correctly, that a party is not required to seek a protective order when it has, in fact, responded by objecting. Pursuant to 10 CFR § 2.740(f)(2), we are empowered to make such a protective order as we would make upon a motion made pursuant to section 2.740(c), in ruling upon a motion to compel made in accordance with section 2.740(f). We believe, however, that in embracing this idea, the County has encountered a double-edged sword.

The sentence immediately preceding the above-quoted language of Section 2.740(f)(1), referring to "failure to answer or respond", states that "[f]or purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond." We believe the County's July 1 and August 4 responses to LILCO's document requests to be, at the very least, incomplete.

Section 2.741(d) requires that a response state, with respect to each item or category, either that inspection will be permitted or that the request is objectionable for specific reasons. In addition to certain other objections which we overruled at the July 20 prehearing conference and in our July 27 order, at 23-24, the County's July 1 response to LILCO's June 2 request objects to producing documents

responsive to eight categories of items sought, alleging that they seek privileged matters pertaining to Suffolk County policymaking. This response does not in any way describe those documents claimed to be privileged from production, nor does it attempt to assert that any other privilege applies to those documents sought by LILCO. Similarly, the County's August 4 response to LILCO's June 22 request does not attempt to claim that any privilege applies to the matters sought by LILCO.

We believe Suffolk County's responses to be incomplete as a basis for the claims of privilege which the County now attempts to assert. While we agree with the County that it was under no obligation to move formalistically for a protective order with respect to those documents which it now claims to be privileged, a party objecting to the production of documents on grounds of privilege does have the obligation to specify in its response to a document request those same matters which it would be required to set forth in attempting to establish "good cause" for the issuance of a protective order, i.e., there must be a specific designation and description of (1) the documents claimed to be privileged, (2) the privilege being asserted and (3) the precise reasons why the party believes the privilege to apply to such documents.[3/]

3/ We recognize that the standards for showing "good cause" for a protective order enumerated above differ from those adopted by the Appeal Board in Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 416-417 (1976). In the context of an application for a protective order to prevent the disclosure of certain

(continued)

It will not suffice for a party to object that all matters which could fit a particular category in a document request are privileged, as the County did in raising its claims of executive privilege in its July 1 response. Claims of privilege must be specifically asserted with respect to particular documents. See United States v. El Paso Company, No. 81-2484 (5th Cir. August 13, 1982); United States v. Davis, 636 F.2d, 1028, 1044, n. 20 (5th Cir. 1981). As is discussed, infra, privileges are not absolute and may or may not apply to a particular document, depending upon a variety of circumstances.[4/] The claimant

---

commercial information, pursuant to 10 CFR § 2.740 (c)(6), that case required that it be demonstrated that (1) the information in question is of a type customarily held in confidence by its originator; (2) there is a rational basis for having customarily held it in confidence; (3) it has, in fact, been kept in confidence; and (4) it is not found in public sources. Id.

However, what constitutes "good cause" for the issuance of a protective order depends upon the kind of protective order that is being sought. See 4 J. Moore's Federal Practice (2d ed. 1982), ¶ 26.68. We believe the standards enumerated above more accurately reflect the showing necessary to establish "good cause" for issuance of a protective order in the context of an assertion of evidentiary privilege.

4/ While privileges exist to provide categorical protection to certain individual interests which society has an interest in protecting at the expense of the public interest and the search for truth, the existence of a privilege must be determined on a fact-specific basis. Cf. In re Sealed Case, 676 F.2d 793, at 806-807, n. 43 and accompanying text (D.C. Cir. 1982) (addressing privileges in the context of a grand jury subpoena).

of a privilege must bear the burden of providing that it is entitled to such protection, see In re Fischel, 557 F.2d 209 (9th Cir. 1977), and this includes pleading it adequately in its response.

Nor is it sufficient for a party asserting certain documents to be privileged from discovery to await a motion to compel from the party seeking discovery prior to setting forth its assertions of privilege and specifying those matters which it claims to be privileged.[5/] Such a practice both wrongfully places an unnecessary burden on the party seeking discovery to obtain that which is its right under the Commission's discovery rules and occasions unnecessary delays in the

---

5/ While we recognize that Suffolk County did eventually list those documents for which it claims privilege in letters to LILCO dated August 11, August 24 and September 2, these letters are untimely as responses to LILCO's document requests. Only the August 11 and 24 letters, which were attached to LILCO's August 23 motion and its August 25 supplement, have been formally served and docketed in the record of this proceeding.

production of these items.[6/] This is well illustrated here, where the properly detailed objections in the County's August 31 answer to the motion to compel should have been made about two months and one month earlier, at the times at which the responses to LILCO's June 2 and June 22 document requests were due. Indeed, had there been particular claims of privilege in response to LILCO's June 2 request, they would have been ruled on in connection with LILCO's July 9 motion to compel at our July 20 prehearing conference.

While we therefore conclude that it would be within our power to deny the County's claims of privilege outrignt as being both improperly and untimely raised, we do not believe this to be the appropriate course of action or in the public interest based on the record before us and the dearth of previous Commission precedent interpreting the applicable NRC discovery rules. [7/] We therefore address the County's claims of privilege, infra.

6/ Cf. Cincinnati Gas and Electric Company, et al. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 16 NRC ____, (slip op. at 11-12) (June 21, 1982) (holding that a party objecting to a deposition question may not simply instruct his witness not to answer a question, but must either seek a ruling from the licensing board or move for a protective order).

7/ Cf. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC ___ (Slip. op. at 34-35) (September 9, 1982) (holding censure of counsel inappropriate when advancing justifiable legal theory).

"[F]uture litigants who make only blanket assertions of privilege...should not expect such grace." United States v. Davis, 636 F.2d, at 1044, n. 20

B. Timeliness Of Suffolk County's Production Of Documents and LILCO's Motion To Compel

In our July 27, 1982 order, which confirmed the rulings made at our July 20 prehearing conference, we directed:

> Suffolk County shall produce those documents requested by LILCO which are in its direct custody and control by July 26, 1982. Those requested documents in the possession of consultants, witnesses, etc., should be produced by August 3, 1982. Tr. 7416-7417. The County is expected to make good faith efforts to produce such documents in a timely fashion and should promptly communicate to LILCO any difficulties which might arise in meeting this schedule such that a mutually agreeable resolution might be reached. (Order at 25.)

While Suffolk County began producing documents on July 26, it did not complete its document production until September 2, 1982, almost one full month after the date by which we had ordered the County to comply with LILCO's requests. It did not until its August 11, August 24 and September 2, 1982 letters identify to LILCO those specific documents which it was withholding under claims of privilege, even though it had asserted such privileges as early as its July 1 response to LILCO's first document request. Nor did the County, to this Board's knowledge, set a date certain for the completion of its document production until it filed its August 31, 1982 response to LILCO's August 23 motion to compel. Response at 2.

In our opinion, the County has failed to comply with our order requiring that it make good faith efforts to produce documents pursuant to LILCO's requests in a timely fashion or that it promptly communicate to LILCO any difficulties encountered such that a mutually agreeable resolution might be reached. Suffolk County's August 31 response asserts that the County was at that time continuing to produce documents "as speedily as it is able to do so", but does not attribute its one month delay to anything other than the size of the LILCO requests and LILCO's refusal to narrow their scope.

In view of our July 27, 1982 prehearing conference order directing that the County produce those emergency planning documents requested by LILCO (Order at 25), we find no basis for the County to claim that LILCO was under any obligation to limit the scope of its document requests solely to decrease the time period within which the County could respond. Indeed, we held in that order that in light of the efforts made by all parties, particularly LILCO, to comply in a timely fashion with previous voluminous discovery requests, "the Board does not believe that a request for documents should be deemed objectionable solely because there might be some burden attendendant to its production." Order at 24.

We further note, as LILCO points out in its August 23 motion, at 3, that a major consideration behind the Board's ordering the County to produce those documents responsive to LILCO's requests within the time frames described at the July 20 prehearing conference, Tr. 7416-7417, and confirmed in our July 27 order, at 25, was to ensure that LILCO would have these documents prior to the commencement of depositions on August 5, 1982. Tr. 7414-7415. We recognized that in view of the dimensions of LILCO's document requests it was possible that certain logistical problems might arise in their production. In fact, the County noted at the July 20 prehearing conference the possibility that certain of its consultants might have some difficulty producing their materials in a timely fashion. Tr. 7413-7415. It was for these reasons that we directed the County to "promptly communicate to LILCO" any such difficulties, "such that a mutually agreeable resolution might be reached." July 27 order at 25.

Other than complaining about the breadth of LILCO's requests, it does not appear from the record before us that the County made good faith efforts to communicate its difficulties to LILCO, or to work out any sort of mutually agreeable resolution. Indeed, the County's failure to produce documents in a timely fashion appears particularly egregious when it is noted that although the County produced all responsive documents in the possession of its consultants, who are located as far away as California, by August 16, what the County describes as "only a small number of documents from the County Executive's office", Response

at 2, n. 1, were not produced until September 2, 1981. Even if we assume, based solely on the described location of these documents, that these matters presented certain closer questions of privilege than had other items at other locations, the County offers no explanation why it should have taken 17 more days, in addition to the almost four weeks from our prehearing conference until August 16, for it to review this admittedly small number of documents. We therefore conclude that the County has failed to produce documents in a timely fashion, in unilateral violation of the due dates which were particularly discussed and established by the Board.[8/]

In light of the County's failure to produce documents in accordance with this Board's order, its untimely response to LILCO's second document request, as well as its untimely assertions of privilege with respect to particular items, we do not look with great favor on its

---

8/ In the absence of agreement among the parties or a request for extension to the Board, the County, represented by experienced counsel, cannot march to the beat of its own drum. This is particularly true in the circumstances of this complex and lengthy proceeding. Since we are now in the evidentiary hearing phase on many issues, an unexpected change in the scheduling for one item often has cascading repercussions for the scheduling of many other items. We trust this is the last lecture which we need deliver to any party in the proceeding on the importance of adhering to required time periods, in the absence of the grant of a timely request for an extension.

objection to the timeliness of LILCO's motion to compel. Indeed, in view of the continuing nature of the County's failure to comply with time requirements, it does not appear that LILCO's motion is untimely. In any event, we believe that fundamental fairness requires that we consider LILCO's motion.

Furthermore, so as to avoid further delay in resolving this discovery dispute, we believe it appropriate to rule at this time on all of the County's claims of privilege. Tr. 10,278-10,279. Even though LILCO's September 13 reply does not address those matters described as privileged in the County's September 2 letter, we are unaware of any agreement by LILCO to defer consideration of these matters, as proposed by that letter. We therefore read LILCO's August 23 motion to compel to include these items, which the County admits to be responsive to LILCO's document requests.

III. Discovery Privileges Under NRC Regulations[9/]

Pursuant to 10 CFR § 2.740(b)(1), parties may generally obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter in the proceeding...." With exception of the work

---

9/ In the discussions of relevant case law which follow, no citations are provided to the pagination of the Federal case law slip opinions which are cited. Research of these matters was performed using the LEXIS (TM) legal research computer system, which, regrettably, does not provide this information.

product doctrine, which is codified as section 2.740(b)(2), those matters which are privileged from discovery are not expressly set out as a part of the NRC Rules of Practice.

We note, however, that section 2.740(b) is adapted from Rule 26(b) of the Federal Rules of Civil Procedure,[10/] the provisions of which are substantially the same as the Commission's rule. While the Federal Rules of Civil Procedure are not themselves directly applicable to practice before the Commission,[11/] judicial interpretations of a Federal Rule can serve as guidance for the interpretation of a similar or analogous NRC discovery rule.[12/] We thus believe that by choosing to model section 2.740(b) after Federal Rule 26(b), without incorporating any specific limitation, the Commission implicitly chose to adopt those privileges which have been recognized by the Federal Courts. Therefore, we address below each of the privileges claimed by the County.

10/ See Statement of Considerations, 37 Fed. Reg. 15127 (July 28, 1972).

11/ See Toledo Edison Company, et. al. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975)

12/ Id.; see also Cincinnati Gas & Electric Company, et. al. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 16 NRC ____ (Slip Op. at 5) (June 21, 1982).

A. Attorney-Client Privilege

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), citing 8 J. Wigmore, Evidence § 2290 (McNaughten rev. 1961). Its purpose is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn, supra; see also Fisher v. United States, 425 U.S. 391, 403 (1976).

The two formulations of the essential elements of this privilege most frequently cited are those which are found in 8 J. Wigmore, Evidence § 2992, at 554 (McNaughten rev. 1961)[13/] and in United States v. United Shoe Machinery Corporation, 89 F. Supp. 357, 358-359

13/ "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor (8) except the protection be waived (footnote omitted)."

(D. Mass. 1950).[14/] The Wigmore formulation of this privilege has been read to presuppose that communications for which the privilege is claimed will emanate directly from the client. See, e.g., Ohio-Sealy Mattress Manufacturing Company v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980); see also In re Fischel, 557 F.2d. 209, 211 (9th Cir. 1977); United Shoe Machinery Corporation, 89 F. Supp., at 358-359. Although there appears to be division among state courts as to whether communications from an attorney to his client, as opposed to the reverse, are protected by this privilege, the Federal courts have generally held that communications in both directions are covered. See United States v. Ramirez, 608 F.2d 1261, 1268 n. 12 (9th Cir. 1979) and cases therein cited.

Apparently premised, at least in part, on the assumption that any statement by a lawyer is likely to reveal, at least indirectly, a confidential communication by a client, one line of cases holds that once the attorney-client privilege is established, virtually all

---

14/ "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."

communications from a client are subject to the privilege, even if unsolicited. See e.g., Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974); Jack Winter, Inc. v. Koratron Company, Inc., 54 F.R.D. 44, 46 (N.D. Cal. 1971). The more widely held view, and in our opinion, the correct one, is that statements from an attorney to the client are privileged only if the statements reveals, either directly or indirectly, the substance of a confidential communication by the client. See Fischel, 557 F.2d at 211-212; Ohio-Sealy Mattress, 90 F.R.D., at 28. This interpretation of the privilege comports with the above-stated purpose of the privilege to protect and thereby encourage a client's full-disclosure of relevant facts to an attorney, without concealing everything said and done in connection with an attorney's legal representation of a client in a matter. "An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction." Fischel, 557 F.2d, at 212.

Furthermore, while the privilege ensures that a client cannot be compelled to disclose communications with his attorney, it does not protect disclosure of the underlying facts communicated to the attorney; put another way, "[t]he attorney-client privilege does not protect against discovery of underlying facts from their source, merely because those facts have been communicated to an attorney." United States v. El Paso Company, No. 81-2484 (9th Cir. August 13, 1982), citing Upjohn, 449 U.S., at 395.

Additionally, while the fact that a document is authored by in-house counsel, rather than by an independent attorney is not relevant to a determination of whether such a document is privileged, O'Brien v. Board of Education of City School District of City of New York, 86 F.R.D. 548, 549 (S.D.N.Y. 1980), the attorney-client privilege is only available as to communications revealing confidences of the client or seeking legal advice. Id.; SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), interlocutory appeal dismissed, 534 F.2d 1031 (2d Cir. 1976). "The purpose of the privilege is to protect and foster the client's freedom of expression. It is not to permit an attorney to conduct his client's business affairs in secret." Fischel, 557 F.2d, at 211; see generally Fisher v. United States, 425 U.S. 391, 403-405 (1976); Sedco International v. Cory, Nos. 81-2007; 81-2056 (8th Cir. August 2, 1982).

As was stated in Ohio-Sealy Mattress, 90 F.R.D., at 28, "communications from the attorney to the client should be privileged only if it is shown that the client had a reasonable expectation in the confidentiality of the statement; or, put another way, if the statement reflects a client communication that was necessary to obtain informed legal advice [and] which might not have been made absent the privilege." Citing In re Walsh, 623 F.2d. 489, 494 (7th Cir.), cert. denied sub nom. Walsh v. United States, 449 U.S. 994 (1980).

B. Work Product Doctrine

The NRC's discovery rules regarding the work product doctrine are set out in 10 CFR § 2.740(b)(2), which provides:

> (2) Trial preparation materials. A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

These rules are adapted from Rule 26(b)(3) of the Federal Rules of Civil Procedure, Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974), which is itself a derivation of the Supreme Court's decision in Hickman v. Taylor, 329 U.S. 495 (1947). See Advisory Comm. Note to 1970 Amendments to Fed. R. Civ. Proc., 48 F.R.D. 459, 499 (1970).

As the Supreme Court observed in Hickman, 329 U.S., at 508, the work product doctrine is distinct from and broader than the attorney-client privilege. The Court further explained this doctrine in United States v. Nobles, 422 U.S. 225, 238-239, wherein it stated:

> At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself (footnote omitted).

While we agree with LILCO that this is a qualified privilege, see Nobles, 422 U.S., at 237-238, we believe its formulation of the questions which must be addressed in applying this doctrine under 10 CFR § 2.740(b)(2), September 13 Reply, at 8, fails to adequately consider

whether materials for which this privilege is claimed reflect an attorney's mental impressions and opinions. See Upjohn Co. v. United States, 449 U.S. 383, 397-398 (1981).

In In re Murphy, 560 F.2d 326 (8th Cir. 1977), the U.S. Court of Appeals for the Eighth Circuit clarified the qualified work product doctrine privilege afforded to materials prepared in anticipation of litigation by Rule 26(b)(3) of the Federal Rules of Civil Procedure under Hickman and its progeny. The court stated:

> The rule establishes a qualified immunity for ordinary work product -- that which does not contain the mental impressions, conclusions or opinions of the attorney. Such work product is discoverable only upon a showing of substantial need and an inability to secure the substantial equivalent of the items through alternate means without undue hardship. 560 F.2d, at 334.

The Murphy court was careful to distinguish the protection to be afforded to so-called "ordinary work product" from that which Rule 26(b)(3) provides for "an attorney's opinion work product." While noting that some courts have allowed discovery of such matters simply upon a showing of "sufficient good cause", 560 F.2d, at 336, citing United States v. Brown, 478 F.2d 1038, 1041 (7th Cir. 1973), the Murphy court concluded that in light of the Supreme Court's holding in Hickman v. Taylor, 329 U.S. at 511, an attorney's thoughts to be inviolate,

> [i]t is clear that opinion work product is entitled to substantially greater protection than ordinary work product. Therefore, unlike ordinary work product, opinion work product can not (sic) be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. See Fed. R. Civ. P. 26(b)(3). In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. See Hickman v. Taylor, supra. Our unwillingness to recognize an absolute immunity for opinion work product stems from the concern that there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against the non-discovery of an attorney's mental impressions. Absent such a compelling showing, the attorney's opinion work product should remain immune from discovery. 560 F.2d, at 336 (footnotes omitted).

The Murphy court was careful to note, however, that its ruling does not shield opinion work product materials from judicial scrutiny in the form of in camera inspection. 560 F.2d, at 336, n. 20.

A recent opinion of the U.S. Court of Appeals for the Fifth Circuit qualifies the application of the work product doctrine privilege for attorney's opinion work product for in-house counsel. In United States v. El Paso Company, No. 81-2484 (5th Cir. August 13, 1982), a case in which the appellant had raised the attorney-client and work product privileges in opposition to a subpoena of the U.S. Internal Revenue Service, the court stated:

> The work product doctrine is not an umbrella that shades all materials prepared by a lawyer, however. The work product doctrine focuses only on materials assembled and brought into being in anticipation of litigation. Excluded from work

> product materials, as the advisory committe notes to Rule 26(b)(3) make clear, are "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation...." 48 F.R.D., at 501.

In reaching its holding that a tax pool analysis prepared by in-house counsel should not be afforded work product protection, the El Paso court found that a determination of whether work product protection should be afforded to documents prepared by in-house counsel should focus on whether these documents were called into being by virtue of business imperatives, or the press of litigation, and concluded the former to be the case.

Additionally, the Fifth Circuit noted that El Paso's tax litigation was being handled by outside counsel and that even though an attorney from El Paso's tax department served as co-counsel, outside counsel took the lead in directing the conduct of El Paso's tax suits. Relying on United States v. Gates, 35 F.R.D. 524 (D. Colo. 1964) (IRS documentary files on the taxpayer were not work product when referred to U.S. Justice Deparmtent Attorneys who were prosecuting the case) and Able Investment Co. v. United States, 53 F.R.D. 485 (D. Neb. 1971) (denying work product protection to documents prepared by the IRS which impartially evaluated the strengths and weaknesses of the IRS's and the taxpayer's positions), as well as other cases, and comparing Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir.), cert. denied. 429 U.S. 920 (1976) (investigation reports of the NLRB prepared after a charge has been

filed are the NLRB attorney's work product as prepared in contemplation of litigation), the El Paso court concluded that documents prepared by in-house counsel should be afforded work product protection only if prepared in contemplation of litigation.15/

We therefore conclude that to be privileged from discovery by the work product doctrine, as codified in 10 CFR § 2.740(b)(2), a document must be both prepared by an attorney, or by a person working at the direction of an attorney, and prepared in anticipation of litigation. Ordinary work product, which does not include the mental impressions, conclusions, legal theories or opinions of the attorney (or other agent), may be obtained by an adverse party upon a showing of "substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent

---

15/ "Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Wright & Miller, Federal Practice and Procedure: Civil § 2024, at 198 (1970) (footnote omitted).

See also Able Investment Co., supra, 53 F.R.D. at 49 (documents prepared routinely by a government attorney who did not try the case and before litigation commenced not privileged. "The documents in all probability do not fix the government's theory of the case to be used at trial, because trial counsel should and undoubtedly would set the defense from all available facts and theories whether or not conceived or expressed by personnel at the various stages of the settlement process....")

of the materials by other means." 10 CFR § 2.740(b)(2). Opinion work product is not discoverable, so long as the material was in fact prepared by an attorney or other agent in anticipation of litigation, and not assembled in the ordinary course of business, or pursuant to public requirements unrelated to ligitation.

In applying the guidance above to our rulings which follow, we note that the County's radiological response plan, although required to be provided to the NRC by the applicant prior to the issuance of a full-power license, see 10 CFR §§ 50.33(g) and 50.47 (as amended by the Commission on July 13, 1982, 47 Fed. Reg. 30233), is being prepared by the County pursuant to the laws of the State of New York. See N.Y. Executive Law §§ 20, et seq. (McKinney). While we recognize that any plan which is eventually produced by Suffolk County may be the subject of contentions during Phase II of our emergency planning proceedings, we believe that materials relating solely to the preparation of Suffolk County's own plan are not items prepared in anticipation of litigation, but materials assembled in the ordinary course of business and pursuant to public requirements which would exist independent of this litigation.

C. The Executive Privilege for Intragovernmental Communications

At the outset of this discussion, we note that we do not agree with LILCO's argument that no common law executive or governmental privilege exists under the NRC regulations. We, like LILCO, have found no NRC case either recognizing or refusing to recognize this privilege outside of the context of Exemption 5 of the Freedom of Information Act or discovery against either the Staff or the Advisory Committee on Reactor Safeguards (ACRS) pursuant to 10 CFR §§ 2.744 and 2.790 (which provide for a qualified privilege for such materials). LILCO does not assert, however, that the same public policies which led to the judicial adoption of an executive privilege do not exist in NRC proceedings, such that this Board should not recognize this privilege.

We believe that the Commission's adoption of the substance of Rule 26(b) of the Federal Rules of Civil Procedure in enacting 10 CFR § 2.740(b) requires that we recognize those same privileges which the Federal Courts have recognized under that Federal rule of civil procedure in interpreting section 2.740(b). See Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975).

Additionally, we reject LILCO's claim, (September 13 Reply, at 9), that those cases cited to us by Suffolk County involving Exemption 5 of the Freedom of Information Act (FOIA) are inapplicable here as

precedent. Exemption 5 provides a statutory exemption from disclosure by those agencies covered by the FOIA for "inter-agency or intra-agency memorandums (sic) or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). In EPA v. Mink, 410 U.S. 73, 86 (1973), the Supreme Court held that the discovery rules for claims of executive privilege "can only be applied under Exemption 5 by way of rough analogies." Commission precedent, which has dealt with this question to date only in the context of discovery and FOIA requests directed to the Staff or to the Advisory Committee on Reactor Safeguards (ACRS), has expressly adopted Mink and has relied upon both Exemption 5 and civil discovery precedent in its rulings. Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2) CLI-74-18, 7 AEC 313 (1974); Consumers Power Company (Palisades Nuclear Power Facility) ALJ-80-1, 12 NRC 117, 121 (1980).

The Supreme Court expressed the opinion in Mink that certain inherent differences exist between discovery in civil litigation and disclosure under the FOIA which might militate a different balancing of the equities of disclosure under these two proceses. 410 U.S., at 86-87 and n. 34. Among those equities to be considered civil discovery cases, which are not considered in FOIA cases are the requesting party's need

for the documents in the context of the particular case, or the nature of the case itself. See NLRB v. Sears, 421 U.S. 132, 149, n. 16.[16/]

The Supreme Court also stated in Mink, however, that "Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible common-sense approach that has long governed private parties' discovery of such documents in litigation with Government agencies." 410 U.S., at 91. Based on this guidance, we conclude it to be appropriate to look to cases decided under Exemption 5 of the FOIA for guidance in resolving claims of executive privilege in NRC proceedings related to discovery, so long as this is done using a common-sense approach which recognizes any differing equities presented in such FOIA cases. This has been the practice in Federal case law. See, e.g., Smith v. FTC, 403 F. Supp. 1000, 1015, n. 45 (D. Del. 1975).

16/ Cf. Consumers Power Company, supra, 12 NRC at 122-126, concluding, that while, based on Sears, the need of a litigant seeking discovery against the Staff pursuant to the FOIA and its exemptions in 10 CFR § 2.790 need not be considered, as such, previous Commission decisions had permitted disclosure of material otherwise protected from disclosure by the executive privilege, where such disclosures were found to be in the public interest. Compare Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-74-17, 7 AEC 313 (1974) (permitting disclosure) with Consumers Power Company (Midland Plant, Units No. 1 & 2) ALAB-33, 4 AEC 701 (1971) (denying disclosure).

We also reject LILCO's argument that the County has waived its claims of executive privilege by its participation as a litigant in this proceeding. The cases cited to us by LILCO as authority do not stand for this proposition. Indeed, there is NRC precedent to the contrary. See Consumers Power Company (Palisades Nuclear Power Facility) ALJ-80-1 (Smith, J.), 12 NRC 117, 127-128 (1980), which distinguishes three Federal cases which come much closer to the mark than those cited to us by LILCO. We do not believe that a waiver of the executive privilege occurs solely by virtue of a government becoming a litigant, for we believe this would render the existence of such a privilege to be purely illusory.

The privilege against disclosure of intragovernment documents containing advisory opinions, recommendations and deliberations is a part of the broader executive privilege recognized by the courts. See, e.g., United States v. Nixon, 418 U.S. 683, 705-711 (1974). The purpose behind the privilege is to encourage frank discussions within the government regarding the formulation of policy and the making of decisions. United States v. Berrigan, 482 F.2d 171, 181 (3rd Cir. 1973). This is because "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances...to the detriment of the decision-making process." Nixon, 418 U.S., at 705 (footnote omitted). Furthermore, "documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been

effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency." Federal Open Market Committee of the Federal Reserve System v. Merril, 443 U.S. 340, 360 (1979).[17/]

The executive privilege is a qualified privilege, and does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets. EPA v. Mink, 410 U.S., at 87-88; Smith, supra, 403 F. Supp. at 1015. Furthermore, even communications which fall within the protection of the privilege may be disclosed upon an appropriate showing of need. United States v. Leggett & Platt, Inc., 542 F.2d 655, 658-659 (6th Cir. 1976) cert. denied, 430 U.S. 945 (1977). See also Smith, 403 F. Supp., at 1015-1016. In determining the need of a litigant seeking the production of documents covered by the executive privilege, an objective balancing test is employed, weighing the importance of the documents to the party seeking their production and the availability elsewhere of the information contained in the documents against the government interest in secrecy. Legget & Platt, supra, 542 F.2d, at 658-659.

17/ The Supreme Court held that a different result would obtain under Exemption 5 of the FOIA for information which the government has generated in the process of awarding a contract because the Government's rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn. Id.

"[T]he burden is upon the claimant of the executive privilege to demonstrate a proper entitlement to exemption from disclosure," Smith, 403 F. Supp., at 1016, including a demonstration of "precise and certain reasons for preserving" the confidentiality of the governmental communication. Id., citing Black v. Sheraton Corp., 371 F. Supp. 97 (D.D.C. 1974).

IV. Rulings on Discoverability of Documents for Which Privileges are Claimed

We apply the above legal guidance in making the following rulings on the County's claims of privilege. Specific legal citations are omitted where they would be redundant to those set forth in the preceding pages. Documents are discussed seriatim in the order in which they appear in the County's August 11, August 24 and September 2, 1982 letters. The Roman group numbers assigned by the County has been retained. Individual documents have been numbered with each group for clarity of identification. The description quoted is the County's as it appears in its letters.

Group I (Attorney-Client and Executive Privileges Claimed)

1. A letter from Patricia A. Dempsey, Assistant County Attorney, to Robert C. Meunkel, dated

February 3, 1982, regarding use of school buses and school building in case an evacuation is required.

2. A letter from Robert C. Meunkel to Patricia Dempsey dated February 24, 1982, regarding school district participation during a radiological emergency.

3. A letter from Robert C. Meunkel to Patricia A. Dempsey, dated April 30, 1981, regarding legal documents necessary to guarantee availability of facilities, equipment and services required for an evacuation plan.

4. A letter from Richard A. Strang, Deputy Commissioner, Department of Transportation, to Patricia Dempsey, dated August 20, 1980, regarding time estimates for evacuation.

Item I.1 is a request by an in-house county attorney for information from the County Planning Director to aid her in responding to a letter from a third party who had requested certain information. This request does not appear to relate in any way to legal advice sought by the client, legal services or assistance in some legal proceeding. Accordingly, we conclude that the attorney-client privilege does not apply to this document.

Additionally, this document does not appear in any way to reveal intragovernmental deliberations, such that its disclosure would inhibit internal deliberative processes. We therefore find that the executive privilege does not apply to this document and order that it be produced.

Item I.2 is a letter from the County Planning Director to an in-house County attorney, apparently responding to Item I.1. It too seeks no legal advice, legal services or assistance in any legal proceeding. Furthermore, as it provides factual information to counsel for disclosure to a third party outside the County government, it cannot be said this information was intended to remain confidential between attorney and client. The attorney-client privilege therefore does not apply.

This document does contain information describing certain factual matters which are to be contained in the County's predecisional plan. We believe the information to be wholly factual. However, even if we assume these matters not to be entirely factual, and thus protected by executive privilege, in balancing the County's need for secrecy against LILCO's need for this information, we believe the intended disclosure of this information to a third-party outside the County government waives any claim which the County might make as to the need that this information be kept secret. We therefore order that this document be produced.

Item I.3 is a letter from the County Planning Director to an in-house County attorney seeking legal advice as to legal agreements necessary for its evacuation plan. As such, it is privileged from production under the attorney-client privilege. We reject LILCO's assertion that factual material contained in this document should be

disclosed; while the facts contained in this letter may or may not be disclosable in other contexts, they are privileged in this attorney-client communication.

Item I.4 is a letter from the County Deputy Commissioner of Transportation to an in-house County attorney, which appears to be both responding to an inquiry regarding compliance with certain NRC requirements for time estimates and transmitting certain correspondence. The referenced attachments are not included in the County's in camera submission and have apparently been disclosed as no longer being confidential. As a communication between attorney and client regarding compliance with legal requirements, we find this document to be privileged from disclosure, even though the facts which it contains should have already been disclosed. If these facts (summarized in the second paragraph of the letter) have not been disclosed, the County is directed to do so. LILCO has a substantial need for this information, to be able to coordinate its plans for emergencies with the County's.

Group II (Work Product Privilege Claimed)

1. PRC Voorhees' notes on LILCO's emergency plan.

2. Memorandum to Dr. Edward P. Radford from Chris McMurray, Counsel to Suffolk County, dated May 25, 1982, regarding Dr. Radford's review of the LILCO plan.

3. Comments on the Shoreham Nuclear Power Station emergency plan authored by Dr. James Johnson.

4. A letter from Dr. Kai T. Erikson to Christopher M. McMurray, dated May 13, 1982, regarding Dr. Erikson's review of the LILCO plan.

5. A letter from Christopher M. McMurray, Counsel to Suffolk County, to Dr. Kai Erikson, dated May 3, 1982, regarding a review of LILCO's plan.

6. A letter from Christopher M. McMurray, Counsel to Suffolk County, to James H. Johnson, Jr., dated April 21, 1982, regarding a review of the LILCO plan.

7. A letter to Herbert Brown, Counsel to Suffolk County, from James H. Johnson, dated July 26, 1982, regarding a review of Suffolk County's plan.

Item II.1 is a document which the County states in its Response, at 10, to have been prepared by a Consultant to assist the County's attorneys in formulating contentions. We believe this document, therefore, to be ordinary work product.

The County also asserts that LILCO cannot demonstrate the need to obtain this document since the consultant who authored it (apparently Mr. Kanen of PRC Voohees) was made available for deposition where his views regarding the LILCO Plan could be examined. LILCO observes in

its Reply, at 15, however, that Mr. Kanen stated at his deposition that he could not "recall the very issues" upon which he commented for the County, Kanen Deposition Tr. 129, and asserts that its inability to obtain this information from Mr. Kanen establishes its need for this information.

We believe LILCO has established its need for this information, which is admitted by the County to be relevant to its contentions. LILCO has been unsuccessful in its attempt to get this information by deposition, and we believe that it would cause LILCO undue hardship to require that LILCO seek this information by other means, such as interrogatories, at this late date. Therefore, we order that Item II.1 be disclosed.

Item II.2 is a memorandum from a County attorney actively engaged in its emergency planning litigation to a consultant. It clearly is non-disclosable attorney opinion work product and need not be produced.

Item II.3 is a document containing the technical comments of a County Consultant on the LILCO plan, together with a transmittal letter to Counsel for the County. Like Item II.1, if this is work product at all, it is ordinary work product and may be disclosed upon a showing of substantial need. It appears that these technical comments are also pertinent to the requirement, independent of this litigation, that the

County prepare a plan and coordinate it with the LILCO plan. Accordingly, it is arguable the document is not work product prepared for litigation.

LILCO states in its Reply, at 15, that it was unable to question Dr. Johnson at his deposition about this critique, because counsel for the County asserted these matters to be privileged under the work product doctrine. See Johnson Deposition Tr. 140, 145-146.

We agree that the counsel for the County improperly precluded further inquiry into this matter with his objections. The purpose of discovery is to allow a party to learn about its opposition's case, and the work product doctrine may not be expanded so as to require a party to await litigation before learning the technical opinions of its opposition's experts. Additionally, LILCO requests this information to ensure that its plan is properly coordinated with the County's. Therefore, for the reasons stated above with respect to Item II.1, we order that Item II.3 be disclosed.

Item II.4 consists of a letter from a consultant to a County attorney containing technical comments on the LILCO plan. Like Item II.3, if this is work product at all, it is ordinary work product.

LILCO asserts that it needs this item because at his deposition, the consultant stated that he was unable to be specific about his

opinions on the LILCO plan since he did not have certain necessary material with him at the time. Erikson Deposition Tr. 112.

We order that Item II.4 be produced for the reasons stated above with respect to Item II.3.

Item II.5 is a letter from Counsel for Suffolk County to two consultants, regarding their review of the LILCO plan and enclosing what the letter describes as "an outline of the County's concerns." We believe the facts recited in this letter to be intermingled with litigation preparation strategy and therefore to be protected attorney opinion work product. While the enclosures to this letter were not provided to the Board for in camera inpsection, these also would appear to be attorney opinion work product. Accordingly, this item need not be disclosed.

Item II.6 is also a letter from Counsel for Suffolk County to a consultant discussing the LILCO plan in the context of litigation strategy. As such, we deem it to be attorney opinion work product and privileged from disclosure.

Item II.7 is a letter from a consultant to Counsel for Suffolk County enclosing a list of consultants qualified to review "our work". This reference to "our work" does raise the question of whether these persons would be employed in this litigation or as reviewers of the County's own plan (which is not work product). However, on balance

this does seem to be general to litigation preparation, and we will consider this material to be ordinary work product. We do not believe this information to be disclosable as LILCO has no apparent need to know such information.

Group III (Executive Privilege Claimed)

1. A document authored by Fred Finlayson titled "Criteria for Establishing EPZ Boundaries."

2. A memo to Frank Jones, Deputy County Executive, from Philip B. Herr, dated May 12, 1982, regarding radiological emergency response plan demographics.

3. Meeting notes authored by Peter Polk regarding review of LILCO on-site plan.

4. Meeting notes authored by Peter Polk, dated April 29, 1982, regarding Suffolk County radiological emergency response plan.

5. All Steering Committee minutes.

6. A letter to Dr. Lee Kopelman, Executive Director, Nassau/Suffolk Regional Planning Board, from Richard A. Strang, Director of Traffic Safety, dated February 23, 1981, regarding legislation regarding emergency response planning.

Item III.1 is a factual technial summary of criteria which should be considered in establishing emergency planning zone boundaries, describing the NRC guidelines as they have been applied with respect to certain other nuclear facilities. We do not believe it to contain advisory opinions or recommendations protected by the

executive privilege. Accordingly, we direct that this item be disclosed.

Item III.2 is a memo to the Deputy County Executive from a consultant regarding the Suffolk County plan and related demographics. As this letter discusses options for the use of demographics for planning purposes, we believe it to be predecisional document protected by the executive privilege.

We believe that LILCO has demonstrated sufficient need for this document to overcome this privilege. Once again, LILCO needs this information to ensure that its plan is coordinated with the County's and/or to be prepared to litigate this matter with the County, should their positions differ. We therefore conclude that this item should be disclosed. Furthermore, since the attachment to this document is a factual statistical population table, we find it to fall outside the executive privilege and to also be discoverable. Accordingly, both of these matters should be disclosed.

Items III.3 and III.4 are minutes of meetings held between the County's attorneys and consultants to discuss LILCO's and the County's Plan, respectively. These minutes do contain recommendations, advice and opinions and are therefore entitled to the executive privilege. LILCO has not demonstrated any need for these items and they need not be disclosed.

Item III.5 is described by the County as "all Steering Committee minutes." What has been provided to the Board is three pages of minutes from one Steering Committee meeting held April 12, 1982. While it is unclear to this Board how these Steering Committee minutes are distinguished from Steering Committee "activity reports", such as Items VII.4 and VII.5, we assume, since we have not been otherwise informed, that this report is, in fact, "all Steering Committee minutes" and not, just an example.

As this item does discuss advice, opinions and recommendations regarding the scoping (and personnel involved) of the County's plan, we deem it to be entitled to the executive privilege. There are few, if any, technical substantive facts and matters included. LILCO has shown no particular need for this item and it need not be disclosed.

Item III.6 is a letter to the Executive Director of the Nassau/Suffolk Regional Planning Board from the Suffolk County Director of Traffic Safety with regards to legislation related to emergency response planning. It contains predecisional advice and opinions on legislative options. Even though the County notes that this legislative proposal was never acted upon, we believe this document to be entitled to executive privilege based upon the authorities which we have cited above. As LILCO asserts no reason why we should hold otherwise, there is no need for disclosure of this item.

Group IV (Attorney-Client Privilege Claimed)

1. Memorandum from Frank R Jones, Deputy County Exeuctive, to Herbert H. Brown, Esq., dated April 16, 1982, regarding supplements to March 29 draft emergency evacuation documents submitted to NRC.

2. A letter from Christopher M. McMurray to Patricia Dempsey, Esq., County Attorney's office, dated May 10, 1982 regarding scope of services for Kai Erikson and Jim Johnson.

Item IV.1 is a memorandum from the Deputy County Executive transmitting documents related to draft emergency evacuation planning to an attorney for submittal to the NRC. The enclosures to this document are not included in this in camera submittal, presumably because they were submitted to the NRC and are thus no longer confidential. This document discusses legal services to be performed by the attorney, even though it has no apparent substantive content. It is therefore entitled to the attorney-client privilege.

Item IV.2 is a letter to an in-house County attorney from an outside attorney representing the County in this litigation enclosing the proposed scope of services for several consultants. As this letter relates, at least in part, to the services of consultants involved in litigation on behalf of the County, we hold this document to be privileged from production under the attorney-client privilege even though it has no apparent substantive content.

The enclosure to this letter (the proposed scope of services) is not included in this in camera submittal, presumably because it has already been disclosed. LILCO states in its Reply, at 17, that it believes that it has a copy of this document.

Group V (Work Product Privilege Claimed)

1. Letter from Philip B. Herr to Christopher McMurray, Attorney, dated July 6, 1982 regarding panel on behavior under stress.

2. Letter from Christopher M. McMurray to Dr. Fred Finlayson, dated July 15, 1982 regarding LILCO testimony on PRA.

3. Letter from Christopher M. McMurray to Robert J. Budnitz, dated July 15, 1982 regarding LILCO testimony on PRA.

4. Letter from Christopher M. McMurray to Dr. Fred Finlayson, dated July 13, 1982 regarding social survey.

5. Letter from Fred C. Finlayson to Christopher M. McMurray, dated July 1, 1982 regarding interaction with authors of SAI and PL&G reports.

6. Letter from Christopher M. McMurray to Dr. Fred Finlayson, dated June 18, 1982 regarding documents pertaining to LILCO's consequence analysis.

Item V.1 is a letter from a County consultant recommending and evaluating persons for a County witness panel on behavior under stress. Clearly this material was prepared in anticipation of litigation by a consultant working at the direction of an attorney and should be

accorded at least ordinary work product privilege and perhaps even opinion privilege relating to non-factual litigation strategy. As LILCO does not establish any need for this information, we deem it to be privileged from discovery.

Items V.2 and V.3 are both letters from an attorney to consultants requesting their review of LILCO PRA testimony. While neither of these documents appears to reveal attorney opinions or thought processes, we believe these documents to have clearly been prepared in anticipation of litigation. They are therefore entitled to at least ordinary work product protection, even though their substance is of little value. LILCO has not shown any need for these materials. Therefore, they are held to be privileged from discovery.

Item V.4 is a transmittal letter from a County attorney to a consultant. The County's in camera submission shows that with the exception of a handwritten note at the bottom of this letter, the County does not claim work product privilege for this item. We do not believe this sentence or any portion of this letter reveals the opinion, impressions or legal theories of an attorney or other agent. The County asserts that this document was prepared in anticipation of litigation. Response at 13.

As we believe this letter to lack any substantitive content, we find it difficult to accept that the County believes there to be any

reasons to waste this Board's time ruling on a privilege claim such as this, considering the many "real world" issues which are raised by this proceeding. Based solely on the persons between whom this communication is made we do believe this to be arguably prepared in anticipation of litigation and therefore ordinary work product.

As we do not believe there to be any substance to this letter worth discovering, we cannot imagine that LILCO could possibly need it. We therefore see no need to order it disclosed. The enclosure, a social survey, was disclosed previously.

Item V.5 is a letter from a consultant to a County attorney requesting permission for interaction with the authors of LILCO-sponsored studies regarding various issues. As such, we believe it to be at least partially prepared in anticipation of litigation, even though such discussions might have application to the County's own planning efforts. We believe this document entitled to ordinary work product protection.

As LILCO could obviously learn of any such interactions from its own consultants, we do not believe it possible for them to demonstrate any need for the disclosure of such information. Accordingly, disclosure of this item is unnecessary, and is considered work product which need not be disclosed.

Item V.6, like Item V.4, is a transmittal letter from a Suffolk County Attorney to a consultant, containing no mental impressions or opinions. We afford this non-substantive letter ordinary work product privilege for the same reasons as Item V.4, and find this item non-disclosable since there is no reason LILCO could need it.

Group VI (Attorney-Client and Executive Privileges Claimed)

1. Memorandum from Patricia A. Dempsey to Frank R. Jones, dated January 27, 1982 regarding the development of the County's radiological emergency response plan, interface between the County attorney's office and the Department of Planning, and the role of the legislature in the preparation of the County's plan.

2. Memorandum from Patricia A. Dempsey to Frank R. Jones, dated March 12, 1982 regarding Judge Brenner's order that all parties produce any draft plans prepared for its emergency planning efforts.

3. Memorandum from Chris McMurray to Frank Jones, Chairman SCRERP Steering Committee, dated May 6, 1982 regarding the SCRERP personnel.

4. Letter from Peter A. Polk to Christopher M. McMurray, dated August 4, 1982 regarding establishment of EPZ boundaries.

Item VI.1 is a memorandum from an in-house County attorney to the Deputy County executive giving legal advice and stating legal opinions about the preparation of the County's plan. This document is clearly privileged under the attorney-client privilege.

Item VI.2 is a memorandum from an in-house Counsel to the Deputy County Executive discussing recent developments in this proceeding. While this document does not contain attorney advice or opinions, it does appear to clearly fall within the context of rendering legal services. Item VI.2 should therefore be held privileged as a communication between attorney and client and is not discoverable.

Item VI.3 is a memorandum from a County attorney to the Deputy County Executive and Chairman of the Suffolk County Radiological Emergency Response Plan (SCRERP) Steering Committee summarizing activities which had been undertaken to date. Although prepared by an attorney, this document does not contain legal advice, opinions or appear to display services of a legal nature. In fact, the author appears to have served as the recorder charged with preparing the minutes of the meeting. We therefore conclude that the attorney-client privilege does not apply.

Nor do we believe this material to be protected by the executive privilege. This appears to be merely a factual account of who is doing what in preparing the County plan, not a predecisional document containing advisory opinions, recommendations or deliberations. Accordingly, the document should be disclosed.

Item VI.4 is a communication from a County consultant to a County attorney stating the establishment of Suffolk County's EPZ limits. We do not believe the attorney-client privilege to apply to these facts. This letter does not seek legal advice, nor do we believe that a County consultant should be considered the attorney's client.

We do not believe this matter to be protected by executive privilege, since it appears to be purely factual in nature and does not contain advice, opinions or recommendations. Accordingly, we order that Item VI.4 disclosed.

Group VII (Executive Privilege Claimed)

1. Activity report by Kathleen Goode, Suffolk County Executive's Office, dated June 18, 1982 regarding meeting between PRC Voorhees and Department of Emergency Preparedness.

2. Memorandum from Charles R. Skinner to Frank Jones, Deputy County Executive, dated June 21, 1982 regarding public education about SCRERP.

3. Memorandum from Charles R. Skinner to Frank Jones, Deputy County Executive, dated June 21, 1982 regarding meeting with Director of Fire Safety, Ron Buckingham.

4. Activity report by Kathleen Goode, County Executive's office, dated June 4, 1982, regarding SCRERP Steering Committee meeting.

5. Activity Report by Kathleen Goode, County Executive's Office, dated July 1, 1982 regarding meeting of Steering Committee.

Item VII.1 is a description of those matters discussed in a meeting between the County Department of Emergency preparedness and representatives of a consulting firm. While we believe portions of this document to be entitled to executive privilege, we also believe some portions to be disclosable as they recite only facts, not advisory opinions, recommendations and deliberations. We conclude, however, that LILCO's need for this information, both in this litigation and in attempting to coordinate its planning efforts with those of the County, together with its unavailability from other sources requires the production of this document in its entirety. Therefore, Item VII.1 shall be disclosed.

Item VII.2 is a memorandum from the Office of Management and Research to the Deputy County Executive making certain predecisional recommendations for public education and training. Clearly this is matter privileged under the executive privilege. We do not know whether these recommendations were followed. We therefore cannot objectively determine the need of LILCO, but LILCO cannot tell us without knowing none of the document's contents. Accordingly, on close call, we hold this item should be disclosed to LILCO under a confidentiality agreement to be signed by LILCO. If LILCO determines that it needs to use this document in the case, we will consider at that time whether such disclosure should be limited, and if so, the extent of any limitation.

Item VII.3 is also a memorandum from the Office of Management and Research to the Deputy County Executive, describing points made at a meeting with the Director of Fire Safety. This document is largely factual in nature. The County apparently recognizes this, as its September 10, 1982 in camera submission claims executive privilege for only the third (numbered "1"), fourth (numbered "2") and last paragraphs of this memorandum. While arguably these three paragraphs might be said to contain opinions and thus be protected by executive privilege, we believe LILCO's need for this information, both for litigation and in coordinating its plan with the County's, far outweighs any need for secrecy which the County might have for this information; this is because NUREG-0654 requires co-ordination of LILCO's and the County's response plans. The County's asserted need for secrecy of this information is an anathema to this idea. Accordingly, we order that this document be disclosed in its entirety.

Items VII.4 and VII.5 are "Activity Reports" of Steering Committee meetings. Based upon the markings in the County's September 10, 1982 in camera submission, it appears that the County only claims privilege for three paragraphs in Item VII.4 (the first, second and fourth paragraphs under the heading "summary of discussions") and one and one-half paragraphs in Item VII.5 (the third and last portion of the fourth paragraphs under the heading "Report"). We believe the materials to be privileged, as claimed by the County, since they

contain preliminary opinions and recommendations. We do not believe there is a need for LILCO to obtain this preliminary matter.

The portions of Items VII.4 and VII.5 which the County asserted in its September 10 to be privileged need not be disclosed. The County should disclose the remaining portions of these items, for which no privilege was asserted.

Group VIII (Attorney-Client Privilege Claimed)

1. A memorandum from Patricia A. Dempsey, Assistant County Attorney, to David J. Gilmartin, County Attorney, and Frank R. Jones, dated August 7, 1981 regarding the County's contract for preparation of a Shoreham radiological emergency response plan and a resolution by Legislator Prospect containing certain provisions for that contract.

2. A memorandum from Herb Brown to Frank Jones, undated (but subsequent to Kirkpatrick, Lockhart, Hill, Christopher & Phillips' retention in February 1982), regarding expenditure of County funds for the purposes of effecting and implementing a radiological emergency response plan.

3. A memorandum to Frank Jones from Herb Brown, undated, regarding a draft letter from Peter F. Conalan to LILCO.

4. A memorandum from Frank Jones to Herb Brown, Esq., dated April 29, 1982, regarding a meeting scheduled for May 13, 1982 with LILCO, FEMA, and the NRC Staff.

Item VIII.1 is a memorandum from a County attorney to another County attorney and to the Deputy County Executive discussing a

proposed contract between the County and LILCO and a resolution containing proposed language for that contract. This communication is clearly covered by the attorney-client privilege as it occurred during the course of rendering legal services and advice. It need not be disclosed.

Item VIII.2 is a memorandum from Counsel for the County to the Deputy County Executive consisting of draft language for a proposed resolution regarding the expenditure of County funds for the purposes of effecting and implementing a radiological emergency response plan. It is clearly a predecisional communication involving legal advice and services and is therefore privileged from production.

Item VIII.3 is a memorandum from a County attorney to the Deputy County Executive commenting on a draft letter to LILCO from the County Executive. The County's September 10 in camera submission indicates that the County seeks only to assert this privilege for the text of the attorney's handwritten note to the Deputy County Executive. The draft letter itself was presumably sent since no privilege is claimed for it. This memo, including the handwritten note which is devoid of any substance, contains no legal advice. Indeed, it appears to be a mere transaction of the County's own business, unrelated to either the litigation at hand or any legal requirements. We therefore conclude the attorney-client privilege does not apply to this document and order it disclosed.

Item VIII.4 is a memorandum from the Deputy County Executive to a County attorney advising him of a meeting scheduled with LILCO, FEMA, and the NRC Staff. We believe the first paragraph of this memo to be revealed by the County's description of this item. Arguably, the second paragraph of this memo does seek the attorney's legal advice, even though we believe that asserting privileges for devoid of any substance such matters as this to be a patently ludicrous waste of the County's time and resources, not to mention LILCO's or our own. We order that this memo be disclosed with the second paragraph deleted.

Group IX (Attorney-Client and Executive Privileges Claimed)

1. A memorandum from Patricia A. Dempsey to Frank R. Jones, dated March 16, 1982, regarding Shoreham licensing proceedings - funding for ERG and MHB.

2. A memorandum from Patricia A. Dempsey, Assistant County Attorney, to Frank R. Jones, Chairman of the Steering Committee, dated June 7, 1982, regarding the County's radiological emergency response plan and contracts with consultants providing services for that plan.

Item IX.1 is a memo from an in-house County attorney to the Deputy County Executive, discussing an attached funding resolution. We believe this matter to contain predecisional advice, recommendations and opinions. We do not believe these opinions to be of a legal nature, but instead, intended to carry out the County's own intragovernmental

business. Therefore, while we do not believe this matter protected by attorney-client privilege, we do find it to be privileged under the executive privilege. We do not believe that LILCO has any need for such funding resolutions and find this item to be protected from disclosure.

Item IX.2 is also a memorandum from an in-house County attorney to the Deputy County Executive discussing the costs of the services of the consultants assisting in preparing its emergency response plan. Our analysis of this document and the privileges claimed by the County is similar to that which we stated for Item IX.1. However, here we believe the first of the three vertical columns, of the attached describing the scope of services for each consultant, to be necessary information for LILCO to prepare for the litigation. We do not know if the information was otherwise made available. Accordingly, we direct that the first column of the attachment be disclosed since it involves little, if any, advice or opinions, but that the cover memorandum and remainder of the attachment need not be disclosed.

Group X (Executive Privilege Claimed)

1. A memorandum to Frank Jones from Hal Bishop, Research Analyst, Suffolk County, dated November 19, 1981, regarding divergent views of Planning Department and Emergency Preparedness Department re: location of the alarm center for Shoreham and making recommendation to resolve that issue.

2. A memorandum from David J. Buckley, Chief of Headquarters, Suffolk County Police Department,

to Chief Inspector DeWitt C. Treder, dated May 11, 1982, regarding the provisions of a draft license agreement between LILCO and SCPD for co-habitation of radio towers. Attached are the following:

A. Memorandum from Roy E. Monaco to E. W. Quinn, dated April 29, 1982, regarding a draft agreement intended to cover installations of radio equipment by LILCO and SCPD on each other's properties.

B. The draft agreement referred to in the immediately preceding document.

C. A memorandum from Ed Quinn to Wes Chupp, dated May 3, 1982, regarding a revised first draft of the radio tower agreement with LILCO.

3. A memorandum from Hal Bishop, Research Analyst, to John R. Heilbrunn, Principal Research Analyst, dated September 25, 1981, regarding Bishop's review of the outline of the Suffolk County radiological emergency response plan.

Item X.1 is a memorandum from a County research analyst to the Deputy County Executive regarding the divergent views among County planners as to the appropriate location for the Alarm Center for Shoreham. Attached is a memorandum containing predecisional recommendations as to the resolution of that matter. While we do believe a good deal of the information contained in this document to be factual, we do not see any practical way to segregate this factual material from the policy advice and recommendations of the authors. Accordingly, we find this document to be covered by the executive privilege. However, we see a need for LILCO to have this information in order to assure full coordination and if there is a dispute, even to

prepare for litigation. It is not clear that this information is available from other sources. Accordingly, this item should be produced.

Item X.2, and attachments A and C all relate to intragovernmental communications regarding a proposed draft license agreement between LILCO and the Suffolk County Police Department for the sharing of radio towers. As the County also asserts privilege as to attachment B, the draft license agreement, we presume this document has not yet been communicated to LILCO. We therefore conclude this matter to be protected from disclosure by the executive privilege as relating to predecisional matters. Nor do we believe any currently apparent need of LILCO for this information could overcome this privilege, as requiring this release could compromise its bargaining position. See Federal Open Market Committee, supra, 443 U.S., at 360. If it later appears there is a dispute threatening coordination between LILCO and the County with regard to this matter, we would entertain a renewed request for the information in this document based upon demonstration of need.

Item X.3 is a memorandum from a County Research Analyst to the Principal Research Analyst regarding providing his technical and policy comments on an outline of the County Plan. Attached to the memorandum are pages taken from the outline. The memo notes that this outline is one of several and that as the information has not been commented upon, its statements should be viewed as general criticisms.

We have no problem concluding this document to consist of internal comments, advice and recommendations of a predecisional nature, and therefore covered by the executive privilege. At the same time, we note the materials in this item appear to be relevant to the present litigation, as well as in assisting LILCO in its coordination of its planning efforts with those contained in the County plan. We are unaware of any information in the drafts of the County plan which have been released to date which provides this information. We assume the County previously has provided the attachments at the time the Board required that the draft plans be furnished. In light of LILCO's need for this information and its unavailability from other sources, we are ordering that Item X.3 be disclosed.

V. Order

It is therefore ORDERED that the County produce as soon as possible the documents and portions of documents as described above. A summary listing of our rulings is attached as Appendix A.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 21, 1982

APPENDIX A

Summary of Rulings

Group I

1. Disclosed
2. Disclosed
3. Privileged
4. Privileged

Group II

1. Disclosed
2. Privileged
3. Disclosed
4. Disclosed
5. Privileged
6. Privileged
7. Privileged

Group III

1. Disclosed
2. Disclosed (Attachment ordered disclosed)
3. Privileged
4. Privileged
5. Privileged
6. Privileged

Group IV

1. Privileged
2. Privileged

Group V

1. Privileged
2. Privileged
3. Privileged
4. Privileged
5. Privileged
6. Privileged

Group VI

1. Privileged
2. Privileged
3. Disclosed
4. Disclosed

Group VII

1. Disclosed
2. Disclosed (under confidentiality agreement)
3. Disclosed
4. Privileged (Disclose unprivileged portions)
5. Privileged (Disclose unprivileged portions)

Group VIII

1. Privileged
2. Privileged
3. Disclosed
4. Privileged (Disclosed in part)

Group IX

1. Privileged
2. Privileged (Disclosed in part)

Group X

1. Disclosed
2. Privileged
3. Disclosed