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April 26, 2007

Via Facsimile 212-788-8769

Jeff Mulligan
Executive Director/Access Officer
NYC Board of Standards and Appeals
40 Rector Street 9th Floor
New York, NY 10006-1705

Re: Freedom of Information Law Requests
Shearith Israel Project at 8,10, 12 West 70th Street, New York, New York
FOIL Appeal No. 05-18-5A.

Dear Mr. Mulligan:

Thank you for your letter of April 17, 2007 responding to my renewed FOIL Request and to earlier FOIL requests¹. I am hereby renewing my FOIL request for documents relating to the above application.

I am somewhat puzzled by the FOIL documents provided. Apart from filings, there is only one document provided in your response which in any way relates to communications between the applicant and BSA relating to the April 2, 2007 application. This is the e-mail dated April 9, 2007 from Lori Cuisinier, counsel for the Congregation, to the Jed Weiss of the BSA:

Jed Weiss

From: Lori Cuisinier [LCuisinier@frigot.com]
Sent: Monday, April 09, 2007 12:18 PM
To: Jed Weiss
Subject: re: shearith..

hi jed
how are you?
just wondered when we might expect comments back on shearith israel.
please let me know.
thank you.
lori

¹http://www.protectwest70.org/2007-docs/2007-04-17_BSA_Response_to_Foil.pdf. Although your letter was dated April 17, 2007, it was not received by me in the mail until Wednesday, April 26, 2007.

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There is no e-mail response to this e-mail and there are no notes of any telephone calls to or from BSA and Ms. Cuisinier or any one else representing the Congregation in response to this email, or otherwise. Do I then assume that Ms. Cuisinier was ignored?

Further, I once again must take exception to your assertions of Attorney-Client privilege:

Please be aware that certain records of this agency were not disclosed because they are exempt. Specifically, e-mails to and from the Board's counsel are subject to attorney-client privilege and therefore are exempt. Further, e-mails between Board staff are exempt pursuant to FOIL § 87(2)(g), which provides that the Board may not disclose materials that "are inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; or iv. external audits, including but not limited to audits performed by the comptroller and the federal government"

Clearly, BSA cannot simply shield all of its records and notes by having an attorney involved in all documentation relating to the Application I suggest that you consult with the Corporation Counsel as to our position.

That simply is not the law. The statement that "e-mails to and from the Board's counsel are subject to attorney-client privilege are therefore exempt" is not an accurate statement of the law. The applicable attorney-client privilege law is that contained in the Civil Practice Law and Rules (CPLR) which applies in general to New York state litigation.

If your statement is taken literally, you seem to be asserting that an e-mail from BSA counsel to Mr. Friedman is subject to attorney client privilege. If you are saying this, then your position has no support under the CPLR. The fact that you have provided no e-mails to and from BSA counsel or to and from counsel for the Congregation suggests that this might be your position.

Even so, the CPLR does not provide a shield for every communication to and from an agency attorney as shown by excerpts from just a few cases indicated below.

Although typically arising in the context of a client's communication to an attorney, the privilege extends as well to communications from attorney to client. The privilege is of course limited to communications -- not underlying facts (*Upjohn Co. v United States*, 449 U.S., at 395-396, *supra*). In order for the privilege to apply, the communication from attorney to [*378] client must be made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." (*Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 593.) The communication itself must be primarily or predominantly of a legal character (*id.* , at 594).

[Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 378 \(N.Y. 1991\)](#)

Further, HN5while the privilege protects communications with counsel, it does not apply to "information obtained from or communicated to third parties or to underlying factual information" (Eisic Trading Corp. v Somerset Mar., 212 A.D.2d 451, 451, 622 N.Y.S.2d 728 [1995] [citations omitted]; see Matter of Civil Serv. Empls. Assn. v Ontario County Health Facility, 103 A.D.2d 1000, 478 N.Y.S.2d 380 [1984], lv dismissed 64 N.Y.2d 816, 476 N.E.2d 325, 486 N.Y.S.2d 926 [1985]). The memorandum at pages 49-50, while written [***6] to counsel by respondent's employee, contains only factual information gained through an investigatory interview with a third party. In addition to being purely factual, it is unlikely that the memorandum was to be kept confidential as it was in response to the letter at pages 35-37 which was disclosed to a third party, implying that the answer would also be disclosed. Consequently, as respondent failed to meet its burden of establishing a FOIL exemption for those documents, pages 35-37 and 49-50 should have been disclosed.

[Morgan v. N.Y. State Dep't of Env'tl. Conservation, 9 A.D.3d 586, 588 \(N.Y. App. Div. 2004\)](#)

As set forth above, HN8the attorney-client privilege does not bar disclosure of all communications between counsel and client. [***19] (Matter of Jacqueline F., supra.) Only those communications which have as their purpose the obtaining by the client, or the providing by the attorney, of legal advice or assistance, come within the privilege. It is for that reason that communications between counsel and other third parties are not privileged. (See, Matter of King v Ashley, 179 NY 281 [1904]; Kenford Co. v County of Erie, 55 AD2d 466, 469 [4th Dept 1977].) Thus, for example, correspondence, conferences and telephone conversations between opposing parties, or opposing counsel, as well as other communications made in the presence of other third parties, are not within the scope of the privilege. (See, Matter of Stefano v C. P. Ward, Inc., 19 AD2d 473 [3d Dept 1963].)

[Orange County Publs. v. County of Orange, 168 Misc. 2d 346, 356 \(N.Y. Misc. 1995\)](#)

As to the other exceptions you assert, you do not provide sufficient information to addresses those exceptions. But, the complete absence of any meaningful disclosure suggests abuse there as well.

Please provide a privilege list.

I note as well that in an Article 78 proceeding as to, for example, the recusal request, the CPLR will permit discovery of all these documents related to contacts between the agency and the applicant, or, for example, the Mayor's office and the agency. Indeed, the abuse of the FOIL process by the agency provides gravitas to the recusal request.

Please consider this letter to be an appeal of the prior FOIL determinations of the agency.

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Sincerely,

A handwritten signature in cursive script that reads "Alan D. Sugarman". The signature is written in black ink and is positioned above the printed name.

Alan D. Sugarman