

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF
RHODE ISLAND, INC.,
Petitioner,

v.

ST. JOSEPH HEALTH SERVICES OF
RHODE ISLAND RETIREMENT
PLAN, AS AMENDED,
Respondent,

C.A. No. PC-2017-3856

and

BANK OF AMERICA, IN ITS
CAPACITY AS TRUSTEE OF
RESPONDENT,
Nominal Respondent.

ORDER

This matter came on for hearing on Special Counsel for Receiver’s motion to compel the Rhode Island Department of Health (RIDOH) to comply with a subpoena duces tecum. During argument, this Court held that it will conduct an *in camera* review to determine whether RIDOH’s witness interview notes reviewing Prospect/CharterCARE under the Hospital Conversion Act at the Attorney General’s office invokes the deliberative process privilege. Upon reviewing the interview notes *in camera*, it is hereby

ORDER, ADJUDGED, AND DECREED

1. The deliberative process privilege “protects the internal deliberations of an agency in order to safeguard the quality of agency decisions.” *In re Commission on Judicial Tenure and Discipline*, 670 A.2d 1232, 1235 n.1 (R.I. 1996) (citing *Town of Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438, 1458 (1st Cir. 1992)). It “rests

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on a policy of affording reasonable security to the decision-making process within a government agency.” *Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995). The privilege precludes from disclosure “documents reflecting advisory opinions, recommendations, and deliberations compromising a process by which governmental decisions and policies are formulated.” *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1226 (10th Cir. 2007).

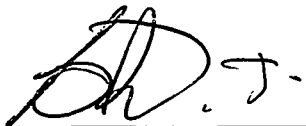
2. “For the deliberative process privilege to apply to a document, courts . . . have looked to see whether the document was both ‘pre-decisional’ and ‘deliberative.’” *Rhode Island Economic Development Corp. v. Wells Fargo Securities, LLC*, PB-12-5616, 2014 WL 3407982, at *2 (R.I. Super. July 7, 2014) (Silverstein, J.) (citing *Heritage Healthcare Servs., Inc. v. Beacon Mut. Ins. Co., et al.*, PC-02-7016, 2007 WL 1234481, at *14 (R.I. Super. Apr. 17, 2007) (Silverstein, J.)). “A document is pre-decisional if it is ‘prepared in order to assist an agency decisionmaker in arriving at his [or her] decision.’” *Heritage Healthcare Servs., Inc.*, 2007 WL 1234481 at *14 (quoting *Nadler v. U.S. Dep’t of Justice*, 955 F.2d 1479, 1491 (11th Cir. 1992)). A document is “deliberative such that it ‘makes recommendations or expresses opinions on legal or policy matters.’” *Id.* at *15 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 173 U.S. App. D.C. 187 (D.C. Cir. 1975)). The privilege does not, however, “extend to factual or objective material outside of the deliberative process or severable from otherwise privileged documents.” *U.S. v. Board of Educ. Of City of Chicago*, 610 F. Supp. 695, 698 (N.D. Ill. 1985); *see also EPA v. Mink*, 410 U.S. 73, 87-88, 93 S.Ct. 827, 836, 35 L.Ed.2d 119 (1977) (internal citations omitted) (“[I]n the absence of a claim that disclosure would jeopardize state secrets . . . memoranda consisting only of compiled factual material or purely factual material

contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.”).

3. However, “[e]ven if a document satisfies the criteria for protection under the deliberative process privilege, nondisclosure is not automatic. The privilege ‘is a qualified one,’ *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), and ‘is not absolute.’ *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 n.5 (D.C. Cir. 1994).” *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). “Thus, in determining whether to honor an assertion of the privilege, a court must weigh competing interests.” *Id.* (citing *First Eastern Corp.*, 21 F.3d at 468 n.5); *see also U.S. v. Board of Educ. Of City of Chicago*, 610 F. Supp. 695, 698 (N.D. Ill. 1985) (quoting *Resident Advisory Board v. Rizzo*, 97 F.R.D. 749, 751 (E.D. Pa. 1983) (“When the [deliberative process] privilege does apply, it is qualified rather than absolute and ‘can be overcome if the party seeking discovery shows sufficient need for the otherwise privileged material.’”). “At bottom, then, the deliberative process privilege is ‘a discretionary one.’” *Texaco Puerto Rico, Inc.*, 60 F.3d at 885 (quoting *In re Franklin Nat’l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979)). “In deciding how to exercise its discretion, an inquiring court should consider, among other things, the interests of the litigants, society’s interest in the accuracy and integrity of factfinding, and the public’s interest in honest, effective government.” *Id.* (citing *Warner Communications, Inc.*, 742 F.2d at 1162). “Consequently, ‘where the documents sought may shed light on alleged government malfeasance,’ the privilege is routinely denied.” *Id.* (quoting *In re Franklin*, 478 F. Supp. at 582).

4. Here, this Court finds that the witness interview notes, although pre-decisional, are merely “factual or objective material outside of the deliberative process” and thus are not deliberative. *See Board of Educ. Of City of Chicago*, 610 F. Supp. at 698.
5. Moreover, RIDOH has failed to “provide ‘precise and certain reasons for preserving the confidentiality of the information’” and has failed to “‘specifically describe the information that is purportedly privileged.’” *Woodland Manor III Assocs., L.P. v. Keeny*, 1995 WL 941473, at *3 (R.I. Super. Ct. Aug. 31, 1995) (quoting *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 640 (S.D.N.Y. 1991)) (“In this case, only general policy reasons were advanced in support of the privilege claim, and no attempt to specifically describe the privileged information was made.”).
6. Lastly, this Court finds that “the interests of the [pensioners], society’s interest in the accuracy and integrity of factfinding, and the public’s interest in honest, effective government” favors denying this qualified privilege. *Texaco Puerto Rico, Inc.*, 60 F.3d at 885.
7. Accordingly, the original documents will be available for review by Special Counsel to the Receiver on or after 12:00 pm on Thursday, June 7, 2018 in Courtroom 7 of the Licht Judicial Complex, Rhode Island Superior Court, 250 Benefit Street, Providence, R.I. 02903.

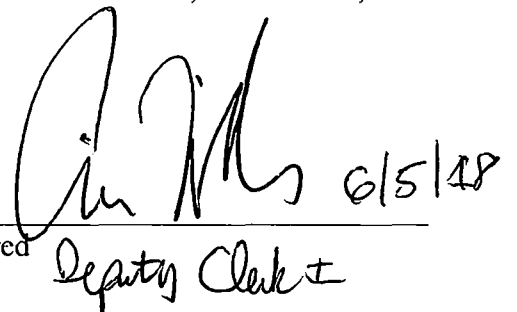
Ordered



Dated

6/5/18

Entered



Deputy Clerk