

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

ST. JOSEPH'S HEALTH SERVICES OF )  
RHODE ISLAND )

VS. )

C.A. NO. PC-2017-3856

ST. JOSEPH'S HEALTH SERVICES OF )  
RHODE ISLAND RETIREMENT PLAN )

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON MAY 31, 2018

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE.....THE RECEIVER  
MAX WISTOW, ESQUIRE.....SPECIAL COUNSEL  
STEPHEN MORRIS, ESQUIRE.....DEPT. OF HEALTH

GINA GIANFRANCESCO GOMES  
COURT REPORTER

C E R T I F I C A T I O N

I, Gina Gianfrancesco Gomes, hereby certify that the succeeding pages 1 through 13, inclusive, are a true and accurate transcript of my stenographic notes.



GINA GIANFRANCESCO GOMES  
COURT REPORTER



1 various documents that were pertinent to the subpoena and  
2 found every document that had anything to do that was  
3 responsive to the subpoena and brought those to court  
4 this morning, delivered them to counsel. They are here  
5 on the table, counsel table, in one box and one large  
6 binder. And to the best of my knowledge, this is  
7 everything that is responsive that is in possession of  
8 the department, responsive that is to the subpoena.

9 THE COURT: Thank you, counsel.

10 MR. MORRIS: You're welcome.

11 THE COURT: Does counsel wish to be heard?

12 MR. WISTOW1: I want to be brief, your Honor. I'm  
13 not satisfied that there has been the kind of compliance  
14 that was required and let me explain our position. The  
15 subpoena was filed and served over two months ago. It  
16 was returnable over six weeks ago. We gave a thirty-day  
17 extension and got absolutely nothing but a request for  
18 another 30-day extension. We filed a motion to compel on  
19 May 18th. It was heard a week ago, May 24th. At the  
20 hearing counsel was candid enough to indicate they had  
21 done absolutely nothing to comply with the subpoena.

22 Now , here is where we are today, your Honor. Last  
23 night after close of business there was a filing with the  
24 Court and I received notice from the Court, I should say  
25 my office did, at 9:14 a.m. this morning. The Court I

1 will ask to take judicial notice that I was hanging out  
2 in the court preliminary to a hearing so I didn't even  
3 know about this until I got back to the office. Now,  
4 what I can see, and I think this is very important, your  
5 Honor, is paragraph two of the response to the subpoena  
6 which I'm sure your Honor has, paragraph two says, "RIDOH  
7 will provide all documents responsive to the subpoena  
8 including those documents deemed confidential by the  
9 Department of Attorney General pursuant to Rhode Island,  
10 et cetera, prior to 2:00 p.m. on May 31, 2018." Now,  
11 about a minute before 2:00 I was handed what appears here  
12 and I accept those. They were not tendered  
13 conditionally. There is no condition. There is a  
14 request within the response that says DOH herein requests  
15 documents. I took these in my custody. I don't agree to  
16 any confidentiality about them, which was long since  
17 waived in any event.

18 Now, in addition to what has been filed here, I  
19 shouldn't say filed - delivered to me, which I have no  
20 means to evaluate, none - there was a privilege log  
21 attached to the reply and that privilege log is based  
22 exclusively on a delivery of privilege. I got myself  
23 where I don't know where to end the sentence so I'll  
24 start over again. The only privilege claimed was the  
25 delivery privilege.

1           Now, first of all, there is really insufficient  
2 basis to determine from the documents that were produced  
3 whether or not the delivery of privilege should apply.  
4 But let me say that there is three decisions from the  
5 Superior Court that I think make it clear that based on  
6 what is submitted here there is no deliberative  
7 privilege and those cases are -- and, actually, I didn't  
8 know we were going to have this. I would have submitted  
9 a memo. I just got all this stuff recently. I'm going  
10 to hand up the cases to your Honor and I am giving  
11 defense counsel a copy. The first case is from 1995 and  
12 it's Judge Gibney's decision and I refer you  
13 specifically, your Honor, to page two.

14           Before I do that, to put this in context, which I  
15 really haven't had an opportunity to prepare this  
16 properly, but to put it in context if your Honor looks at  
17 the log, the so called privilege log, the deliberative  
18 process, what you can see is that they all involve  
19 interviews on various dates in the months immediately  
20 presiding the approval of the hospital conversion by the  
21 attorney general and by the Department of Health. And  
22 they indicate that these interviews took place on April  
23 9th, April 30th, April 1st, April 4th, April 8th, April  
24 9th, April 30th. And to show you the extreme relevance  
25 of these documents, the first one indicates who is

1 present. Topic, financial operations and other issues  
2 including St. Joseph's Pension Plan, and you see St.  
3 Joseph's Pension plan is mentioned in every one of those  
4 meetings without exception.

5 THE COURT: And I had a chance to review the  
6 exhibits.

7 MR. WISTOW: Now, also, each one of the documents  
8 that they claim to be privileged is the same. Michael  
9 Dexter's handwritten notes taken during the meeting. The  
10 meetings are with interviews. All of them are called  
11 interviews. For example, the first one is an interview  
12 with Prospect CharterCare, Pat Rocha, Ed Santos, Joe  
13 Denars, Steve Aleman, representatives of that entity, and  
14 what they appear to have here based on the description is  
15 the notes by Mr. Dexter, who I believe he's a lawyer.  
16 May I inquire of counsel if Mr. Dexter is a lawyer?

17 MR. MORRIS: He is not.

18 MR. WISTOW: So he was making the notes of what was  
19 said. In that context I would refer your Honor to Judge  
20 Gibney's decision in 1995 on page two where she says,  
21 "The Attorney General's broad and conclusory allegation  
22 that the deliberative process and law enforcement  
23 privileges apply to this case is also without merit. The  
24 deliberative process privilege focuses on advisory  
25 opinions, recommendations, and deliberations constituting

1 part of the process by which governmental decisions and  
2 policies are formulated. The privilege does not extend  
3 to purely factual materials. In evoking the deliberative  
4 proces privilege, an agency must provide precise and  
5 certain reasons for preserving the confidentiality of the  
6 information and the said privilege must specifically  
7 describe the information that is purported to be  
8 privileged. In this case only general policy reasons  
9 were advanced in support of the privilege claim, and no  
10 attempt to specify to specifically describe the  
11 privileged information was made."

12 More important than that generalized statement by  
13 Judge Gibney, which I believe supports our position, are  
14 two decisions by Judge Silverstein, more recent  
15 decisions. One is from 2007 which is the Heritage  
16 Healthcare Services, Inc. Again, I will hand that up to  
17 your Honor and counsel, and I refer your Honor  
18 specifically to page eight, paragraph 14. And your Honor  
19 will see that Judge Silverstein said, "Courts applying  
20 this privilege," he was talking about the deliberative  
21 privilege, "have looked to determine whether a document  
22 was pre-decisional," which I perceive is the case here.  
23 They are all pre-decision. "And whether it was  
24 deliberative in order to ascertain whether a particular  
25 document should fall within this privilege." I admit the



1 rest of the paragraph talks about pre-decision and I  
2 concede it is. I to to the next paragraph, "It is not  
3 enough that a document precedes a decision, however. It  
4 must be deliberative such that it makes recommendations  
5 or expresses opinions on legal or policy matters," citing  
6 the federal case. "Stated differently, it must be part  
7 of the agency give-and-take of a deliberative process by  
8 which the decision itself is made. In contrast, purely  
9 factual materials are not considered deliberative and,  
10 therefore, are not privileged. In this case, however,  
11 the contents of the examination report in addition to  
12 containing facts found in the books of Beacon, will  
13 contain conclusions and recommendations as the examiners  
14 find reasonably warranted from the facts. These are  
15 recommendations which the Director of DBR might  
16 ultimately reject, and may decide not to make the report  
17 public. As noted above, privileges must be strictly  
18 construed in light of their intended purposes."

19 And, finally, not to bore the Court unduly, but  
20 Judge Silverstein in 2014 made what I believe is the most  
21 recent decision involving deliberative privilege, and I  
22 would like to hand that case up to your Honor, that was  
23 in Rhode Island Economic Development Corporation vs.  
24 Wells Fargo, sometimes called the 38 Studios case, from  
25 which I'm still trying to recover. Your Honor will note

1 in passing that the list of lawyers who were involved in  
2 the court case in opposition to us, the list exceeds the  
3 length of the judge's decision, for whatever that's  
4 worth. In any event, on page six, Judge Silverstein  
5 found, "For the deliberative process privilege to apply  
6 to a document, courts, including this Court, have looked  
7 to see whether the document was both pre-decisional and  
8 deliberative. A document is pre-decisional if it is  
9 prepared in order to assist an agency decisionmaker in  
10 arriving at his decision. Further, a document is  
11 deliberative such that it makes recommendations or  
12 expresses opinions on legal or policy matters."

13 Now, I think in fairness of what I suggest here is  
14 to the extent there are recommendations or policies as  
15 opposed to simply recitation of facts, I propose that  
16 these be delivered to your Honor in camera and if there  
17 are recommendations on policy matters, those can be  
18 redacted and I find that to be the simplest solution to  
19 this problem because it appears on its face that these  
20 may be just factual recitations of what was said by the  
21 representatives of the hospital. Thank you, your Honor.

22 THE COURT: Counsel, let me ask. There was a number  
23 of documents it appears through reading your papers there  
24 was some consultation with the Attorney General's Office.  
25 The documents that were marked either delivered or

1 confidential was that in some way done with the same  
2 documents as the Attorney General's Office? I'm just  
3 trying to understand how you got them.

4 MR. MORRIS: I was not present for the hearing at  
5 the time.

6 THE COURT: I understand that.

7 MR. MORRIS: In having conversations with staff, and  
8 Mr. Dexter is here, which notes they're referring to is  
9 in court here today. We did have a conversation with the  
10 attorney general but it was not about matching up  
11 documents.

12 THE COURT: Sure.

13 MR. MORRIS: As a matter of fact, we can tell by  
14 looking at the documents that most of the documents that  
15 we found that were responsive have a number on them that  
16 indicates that they were deemed confidential and that  
17 those same documents were, in fact, provided by the  
18 Attorney General to our understanding. So to the extent  
19 the Court is asking if the notes were something that was  
20 the same, no. They were completely separate and Mr.  
21 Dexter's notes, certainly if the Court wants to look at  
22 them and see if there is something that should be  
23 excluded or not, we are happy to comply with that.

24 THE COURT: Thank you very much. Counsel, you may  
25 recall from earlier in this case the Attorney General at

1 the Court's direction had filed a memorandum of law  
2 dealing with several privileges, including deliberative  
3 process, but the Court agrees. Really what needs to  
4 happen is to get an appreciation of what is within these  
5 documents listed on any log for the Court to review them  
6 in camera to either make appropriate redactions or to  
7 have further oral argument. I would like to cut to the  
8 chase as far as that's concerned. What the Court is  
9 going to order -- Attorney Wistow, are there other  
10 documents that are deemed privileged other than the  
11 deliberative process from the Department of Health?

12 MR. WISTOW: No, the only thing that may be a little  
13 confusing that I think needs clarification is in the  
14 course of the case it was made clear that designating  
15 something confidential would not make it confidential if  
16 it came from another source. And the very point I'm  
17 making here is this was delivered to us. I'm not talking  
18 about the stuff your Honor is going to see.

19 THE COURT: I understand that.

20 MR. WISTOW: This was delivered for us without  
21 condition and I accepted it without condition.

22 THE COURT: Okay. Let me deal with the deliberative  
23 process, which appears is not confidential document but  
24 the deliberative process privilege. The Court is going  
25 to order that the Department of Health deliver to the

1 Court for in-camera inspection those documents underlying  
2 the documents listed in the privilege log. Counsel, any  
3 idea in terms of how large a tranche of documents we're  
4 talking about?

5 MR. MORRIS: I believe these are notes taken on a  
6 spiral notepad easily copied and delivered to the Court I  
7 would think within a week or less.

8 THE COURT: Why don't we do this: By next Tuesday  
9 at noontime have them delivered to the Court. This way I  
10 can conduct the review right away. It's Thursday. It  
11 doesn't seem like it's going to take a long time to do.  
12 The Court will conduct an in-camera inspection. Let the  
13 parties know what other oral argument or any other issues  
14 the Court may identify and make a determination in terms  
15 of whether or not they fall under the privilege itself.

16 MR. MORRIS: Should I file those electrically or  
17 bring them to the Court?

18 THE COURT: I would ask let's have it physically  
19 delivered to the clerk of court. Have the documents  
20 sealed and then it will come to me and I'll be in touch  
21 with the parties at some point next week.

22 MR. MORRIS: I'll take care of that first thing  
23 Tuesday morning.

24 THE COURT: Thank you. The only issue is that I  
25 understand there was a response by the Department of

1 Health. The documents have been turned over to the  
2 Special Counsel and Special Master at this point without  
3 any resolution as far as the confidentiality of  
4 documents. Certainly, you know, I encourage the parties  
5 to attempt to reach some sort of agreement but the Court  
6 is not going to compel at this point. At this point  
7 based on the representations from the Department of  
8 Health, the responsive documents, the subpoena had been  
9 turned over to Special Counsel, we dealt with the  
10 deliberative process issues that once they come in  
11 Tuesday, the Court will look at over the next couple of  
12 days so certainly we can get back to the parties by next  
13 week.

14 MR. WISTOW: What I would suggest, because,  
15 apparently, these are handwritten notes in a spiral  
16 notebook, sometimes it's more difficult to read these  
17 things in copies. I am hoping that the Court would  
18 require the originals to be turned over. I think it  
19 would be a lot easier for the Court to read.

20 THE COURT: I'm going to leave it to counsel to see.  
21 Certainly, if I open up a binder, and you know as well as  
22 me, if they are not good copies and I can't make it out,  
23 you will get a phone call from my clerk saying give me  
24 the originals.

25 MR. MORRIS: I will ensure that they are as easy to

1 read as they are from the originals.

2 THE COURT: Mr. Dexter's handwriting is probably  
3 good. Mine may not be very good. We're going to leave  
4 this open just because counsel hasn't had the opportunity  
5 to review the documents to make sure they are, in fact,  
6 responsive but that will conclude for today. Thank you  
7 very much.

8 (A D J O U R N E D.)

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