STATE OF ILLINOIS

In re the matter of:	:	
Rendered Services, Inc. Respondent.	:	 Docket No. 74 RTV-R Sub 15 81440 MC
Hearing on fitness to hold a Commercial Vehicle Relocator's License pursuant to Section 401 of the Illinois Commercial Relocation of Trespassing Vehicles Law, 625 ILCS 5/18a-401.	:	

STAFF'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL DISCOVERY

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), through its attorney, Benjamin J. Barr, and files pursuant to 83 Ill. Adm. Code 200.190 its Response to Rendered Services, Inc. ("Respondent"), Motion to Compel Discovery.

A. Staff's Interrogatory Answer No. 4

1) Whether discovery should be allowed is dependent upon the relevance and materiality of the information to be discovered. People v. Williams, 267 Ill. App. 3d 82, 87, 640 N.E.2d 981, 985 (2d Dist. 1994). Accordingly, great latitude is allowed in the scope of discovery, and the concept of relevance for discovery purposes is broader than the concept of relevance for purposes of the admission of evidence at trial. Leeson v. State Farm Mut. Auto. Ins. Co., 190 Ill. App. 3d 359, 365, 546 N.E.2d 782, 787 (1st Dist. 1989). However, discovery should be denied, when there is insufficient evidence that the requested discovery is relevant. Rokeby–Johnson v. Derek Bryant Insurance Brokers, Ltd., 230 Ill.App.3d 308, 317, 171 Ill.Dec. 670, 594 N.E.2d 1190 (1992). TTX Co. v. Whitley, 295 Ill. App. 3d 548, 557, 692 N.E.2d 790, 797 (1st Dist. 1998). When an objection to a discovery request is based on

relevance, the party seeking the discovery has the obligation to establish how the discovery requested is relevant. Zagorski v. Allstate Ins. Co., 2016 IL App (5th) 140056, ¶ 35, 54 N.E.3d 296, 307.

2) Here, the Respondent's request for the disciplinary files of Commission Police Officers and Investigators amounts to a mere smoke-screen in which the Respondent is attempting to shift the focus of this proceeding away from the its fitness to hold a Commercial Relocator's License and on to the actions of the Commission. In making such an argument the Respondent cites only to one case, People v. Robinson. However, People v. Robinson is not applicable to the issue here. The issue in People v. Robinson was whether the trial court erred in granting the State's motion in limine seeking to prevent the defendant from using the disciplinary file of a police officer to *impeach* that officer. The issue here is whether or not the disciplinary files of Commission Police Officers and Investigators are relevant to the Respondent's fitness and therefore discoverable. For that reason, People v. Robinson should not be considered to be applicable.

3) Conversely, in Fabiano v. City of Palos Hills, the plaintiff sought relief from the First District Appellate Court after the trial court denied the plaintiff's discovery request seeking "undisclosed portions of the personnel files" of police officers. Fabiano v. City of Palos Hills, 336 Ill. App. 3d 635, 659, 784 N.E.2d 258, 279 (1st Dist. 2002). The Appellate Court held that the trial court did not abuse its discretion by denying the plaintiff's motion to compel discovery because of the plaintiff's speculative argument that the personnel files "*may* contain evidence relevant to defendant's credibility or suggesting a pattern of misconduct by the defendants." Id.

The Appellate Court went so far as to say that "[t]he discovery requests were merely a 'fishing expedition,' which would have been conducted with the hope of finding something relevant." Id. *quoting* Snoddy v. Teepak, Inc., 198 Ill.App.3d 966, 969, 145 Ill.Dec. 64, 556 N.E.2d 682 (1990).

4) Like in Fabiano, the Respondent's request is nothing more than a fishing expedition in "the hope of finding something relevant." Here, Respondent's argument in support of its request for personnel files does not even amount to speculation. The Respondent offers no sustenance showing that any Commission Police Officer or Investigator has been derelict in his or her duties. Moreover, the overreaching breath of the Respondent's request is clearly evidenced by the fact that the Respondent does not attempt to narrow its request to one Officer, who may or may not have anything of value in his or her personnel file, but seeks the personnel files of *all* Officers and Investigators who have ever issued a citation to the Respondent. Given the sensitive nature of what is contained in personnel records, the Respondent should be denied the opportunity to "probe" those files on a mere whim.

5) Moreover, the Respondent's argument that it is "entitled" to the personnel files to probe behind the issuance of the citations to determine whether they were even meritorious or whether impressible considerations affect this case or this proceeding is both meritless and irrelevant to this matter. The issue here is not whether the citations that were issued are valid, but whether the Respondent is fit to hold a Commercial Relocator's License. The Respondent's argument is better suited at a contested citation hearing. Furthermore, the reason why a particular relocator may have been set for a fitness hearing is irrelevant as "the Commission may at any

time during the term of the license make inquiry into the management, conduct of business, or otherwise to determine that the provisions of Chapter 18a and the regulations of the Commission promulgated thereunder are being observed." 625 ILCS 5/18a-401.

6) Likewise, by arguing that an "[o]fficer may have been derelict in or breached his investigatory duties," the Respondent is once again attempting to turn the attention of this proceeding away from its own business practices. Id. at 2. If the Respondent believes that a citation was issued because of some "improper reason," such argument should have been made prior to resolving the citation, not during this fitness hearing. Even so, the Respondent does not need the personnel files to "probe behind the issuance of the citation to determine whether they were even meritorious" as such a determination could be made by analyzing the facts of the citation in dispute. Granting the Respondent's discovery request would shift the focus of this matter away from the Respondent's fitness and on to the employment record of Commission's Officers and Investigators. Additionally, allowing the Respondent to "probe" files that have no relevance to this proceeding would only cause further delay. Therefore, the Respondent's request should be denied.

B. Staff's Supplemental Interrogatory Answers No. 1

7) Approximately at the end of September 2016, the Respondent as part of its answers to Staff's discovery requests delivered multiple boxes to Staff containing over 35,000 tow invoices. Commission Police Officers and Investigators are in the process of reviewing each invoice for compliance with the Illinois Commercial Relocation of Trespassing Vehicles Law. Therefore, Staff is unable to identify

witnesses until after the Respondent's response to Staff's data request has been fully analyzed. Staff is aware of its obligation to supplement its responses to the Respondent's interrogatories and will do so upon identifying potential witnesses. Additionally, the Respondent has received all investigation files that span the timeframe of this proceeding which resulted in administrative citations being issued against the Respondent. Therefore, the Respondent is on notice that Staff potentially may call some or all of the complainants from those investigations. Consequently, the Respondent's request should be denied.

C. Staff's Supplemental Interrogatory Answers No. 3

8) The Respondent's objection to Staff's answer to interrogatory number 3 is without merit. Staff objected to the Respondent's interrogatory because the interrogatory is irrelevant to the Respondent's fitness to operate as a commercial vehicle relocator. The type of training, when the training occurred, and who provided the training has no relevance as to whether the Respondent is fit to a hold a Commercial Vehicle Relocator's License. Specifically, the fact that an Officer or Investigator may have been trained on a Friday in May as opposed to a Tuesday in August does tend to prove or disprove that the Respondent is fit to hold a Commercial Vehicle Relocator's License. Likewise, the fact that an Officer may have been trained by the Chief of Police at the time while another Officer was trained by someone else is similarly irrelevant to the matter before the Court. The Respondent's request is another attempt to shift the focus of this proceeding away from its fitness and on to the actions of Commission Police Officers and Investigators.

9) Furthermore, when an objection to a discovery request is based on relevance, the party seeking the discovery has the obligation to establish how the discovery requested is relevant. Zagorski at 307. As such, the burden is on the Respondent to show why the request is relevant. However, the Respondent in its Motion to Compel did not address the relevancy behind its request and therefore its request to compel an answer should be denied.

10) Additionally, even though Staff objected to the Respondent's interrogatory, Staff provided the Respondent with a verified answer by a Commission Police Sergeant. While the Respondent might not have gotten the information it was hoping to get, even if Staff was compelled to re-answer the question, Staff would be unable to provide any more detail than what has already been provided as the exact dates of training and the names of individuals providing the training are unknown.

D. Attorney-Client and Work Product Privileges

11) The attorney-client privilege is based upon the confidential nature of the communications between the lawyer and client. Ctr. Partners, Ltd. v. Growth Head GP, LLC, 2012 IL 113107, ¶ 30, 981 N.E.2d 345, 355. The privilege is one of the oldest privileges for confidential communications known to the common law and "has been described as being essential to the proper functioning of our adversary system of justice." Ctr. Partners, Ltd. v. Growth Head GP, LLC, 2012 IL 113107, ¶ 30, 981 N.E.2d 345, 355. The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information. *Id.* However, while the formulation of the privilege suggests that only communications by the client are protected from

disclosure, "the modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client." People v. Radojcic, 2013 IL 114197, ¶ 40, 998 N.E.2d 1212, 1221.

12) The Illinois Supreme Court's position in People v. Radojcic negates the Respondent's argument that the first and fifth communications listed in Staff's privilege log are not privileged since the communications originated from a Commission attorney to a Commission representative, "as opposed to communications originating directing from Commission representatives" to a Commission attorney. It is not in dispute that the parties involved in these communications are part of an attorney-client relationship.

13) Respondent next attempts to argue that the privilege has been waived as to communications #1 and #5 from Staff's privilege log on the grounds that "a party impliedly waives the attorney-client privilege by voluntarily injecting either a factual or legal issue into the case." Respondent's Motion at 5, 6 citing Fox Moraine, LLC v. United City of Yorkville, 2011 IL App. (2d) 100017. However, the Respondent's misconstrues this principle. The court in Fox Moraine was quoting directly from Lama v. Preskill, 353 Ill. App. 3d 300 (2d Dist. 2004). In Lama, the Court explained that this type of waiver typical applies when clients sue their attorneys for malpractice, or when lawyers sue their clients for fees, a waiver applies to the earlier communications between the now-adversarial parties. In those instances, the underlying issue of the new claim would clearly be the communications discussed in previous representation and thus at issue in the new litigation. However, here, the privilege has not been waived as Staff has not made the subject of either

communication an issue in the case. The issue here is whether the Respondent is fit to hold a Commercial Vehicle Relocator's License and not the communication itself. Under the Respondent's argument, all communications between an attorney and a client would be waived since the subject of those communications are obviously going to involve factual and legal issues about a pending matter. Therefore, the Respondent's request as to communications #1 and #5 should be denied as they are protected by attorney-client privilege which has not been waived.

14) Additionally, communication #1 from Staff's privilege log is also protected by the work product doctrine. The work-product doctrine provides a broader protection than the attorney-client privilege, and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts. Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 144 Ill. 2d 178, 196, 579 N.E.2d 322, 329 (1991). Opinion or "core" work product, which consists of materials generated in preparation for litigation which reveal the mental impressions, opinions, or trial strategy of an attorney, is subject to discovery upon a showing of impossibility of securing similar information from other sources. Id. Here, the document that Staff is claiming privilege to was made in preparation for litigation and reveals the mental impressions and opinions of Staff. The fact that a press release was issued in March of 2016 and the document in question was dated August 26, 2015 does in and of itself mean that when the document was prepared that litigation was not contemplated. There are a number of factors and considerations that explains a gap in between the time that a party first contemplates litigation and the time a suit, or in this case, a fitness

hearing, is actually brought. A party may wish to gather additional evidence and documentation or to identify additional witnesses. Staff should not be denied the protection of the work product doctrine simply because it waited to formally request a fitness hearing of the Respondent. Denying Staff, or any litigant for that matter, the protection of the work product doctrine on the basis that the time a document was drafted in preparation of litigation and the time the litigant actually brought suit would only encourage litigants to file ill-prepared lawsuits that would be a challenge to defend. Therefore, the Respondent's request as to communication #1 should be denied as it is also protected by work product privilege.

15) In regards to communications #2, #3, #5, and #6 on Staff's privilege log, the control group test would not apply as the communications involved top level employees of the Commerce Commission's Police Department. Both Kim Castro, the former Chief of Police, and Sergeant Tim Sulikowski would obviously be considered "top management" who had the ability to make a final decision on a matter. Moreover, as argued above, it is irrelevant whether the communication originated from a Commission attorney or a Commission representative. Therefore, the Respondent's request as to communications #2, #3, #5, and #6 should be denied as they are attorney-client communications.

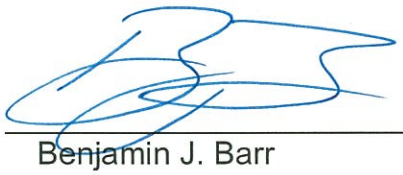
16) In regards to communication #4 and communications #7 through #11, an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion forms the basis of any final decision by those with actual authority, is properly within the control group. Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.

2d 103, 120, 432 N.E.2d 250, 258 (1982). The remaining individual would fall within this context as she is consulted on key issues concerning industries the Commerce Commission regulates, including relocation towing. Therefore, the Respondent's request as to these communications should be denied.

WHEREFORE, Staff respectfully requests that the Administrative Law Judge enter an order denying Respondent's Motion to Compel in its entirety.

Respectfully submitted,

Staff of the Illinois Commerce Commission

By: 
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ILLINOIS COMMERCE COMMISSION

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NOTICE OF FILING

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SERVED VIA E-MAIL

PLEASE TAKE NOTICE that on January 9, 2017, I filed with the Director of Processing, Transportation Division, Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, **STAFF'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL DISCOVERY**, a copy of which is hereby served upon you.

Benjamin J. Barr

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure that a copy of the attached **STAFF'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL DISCOVERY**, were sent via electronic mail to the to the above listed persons on January 9, 2017.

Benjamin J. Barr