IN THE ILLINOIS
INDEPENDENT TAX TRIBUNAL

Michael Rothman and Jennifer Rothman,	)	
	)	
Petitioners,	)	
	)	
v.	)	Nos. 18 TT 30 & 18 TT 132
	)	
Illinois Department of Revenue,	)	Judge Brian F. Barov
	)	
Respondent.	)	

PETITIONERS' MOTION TO COMPEL PRODUCTION

Petitioners, Michael Rothman and Jennifer Rothman (the "Rothmans"), pursuant to Illinois Supreme Court Rules (the "Rules" or "Rule") 201 and 214, move the Tax Tribunal to compel Respondent, the Illinois Department of Revenue ("Department"), to produce documents responsive to Petitioner's Second Request for Production of Documents (the "Second RFP"). The Department has withheld documents responsive to the Second RFP pursuant to an unsupported claim of the attorney-client privilege. In support of this motion, Petitioners incorporate the attached exhibits and state the following:

I. Procedural Background

As part of its response to the Second RFP the Department produced a Privilege Log identifying eight (8) responsive records it withheld from production, claiming: "*Attorney-Client Revenue Privilege, Attorney Work Product and Communications.*" See, ***Exhibit A***. Of the eight documents, the subjects identified were "Meeting Request" (1 document), "Charitable Donations and Illinois

Residency" (1 document), "Draft Residency Regulation" (4 documents), and "Residency Regulation" (2 documents).

In their Rule 201(k) letter to the Department, the Rothmans questioned the factual and legal support for the Department's assertion of both the Attorney-Client and Attorney-Work Product privileges. See, ***Exhibit B***. The Department's response to the Rule 201(k) letter was a supplemental production of five (5) full previously withheld records, the unredacted portion of one (1) previously withheld record (the "Supplemental Production"), and a Revised Privilege Log. ***Exhibit C***.

The Revised Privilege Log identified the subjects of the withheld records as (A) "*Draft Residency Regulation*" and (B) "*Residency Regulation.*" Those same subject categories identified other records produced by the Department in its Supplemental Production. The author of the withheld records is "Paul Caselton" (IDOR Deputy General Counsel – Income Tax) and the attorneys receiving the records are "Gail Nieman, Heidi Scott, Brian Fliflet." The Supplemental Production includes records with the same "Residency Regulation" subject, also authored by Paul Caselton, and received by Gail Nieman and Brian Fliflet. The Revised Privilege Log asserts: "*Attorney-Client Privilege. Confidential communications between the General Counsel and Department attorneys regarding their requested legal opinions.*" This motion seeks to compel production of the selectively withheld records identified in ***Exhibit C***.

A. Applicable rules and regulation

The Tax Tribunal Act requires that parties comply with Illinois Supreme Court Rules for civil proceedings. *See* 35 ILCS 1010/1-60(a). Regulations also state that the Illinois Code of Civil Procedure is applicable. 86 Ill. Admin. Code § 5000.325(a). Under these rules, "a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action[.]" Ill. S. Ct. R. 201(b)(1).

B. Asserting Attorney Client Privilege

Blanket claims of privilege are not allowed. *See* Ill. S. Ct. R. 201(n). "Ordinarily, one who claims to be exempt by reason of privilege from the general rule which compels all persons to disclose the truth has the burden of showing the facts which give rise to the privilege. His mere assertion that the matter is confidential and privileged will not suffice." *Thomas v. Page,* 361 Ill. App. 3d 484, 497 (2d Dist. 2005).

The essential elements for attorney-client privilege are: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser 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 adviser, (8) except the protection be waived." *People v. Adam*, 51 Ill. 2d 46, 48 (1972). (citing 8 Wigmore, Evidence, § 2292 (McNaughton Rev. 1961)). The attorney-client privilege must be confined to its narrowest limits. *Waste Mgmt. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178 (1991).

II. The Department Ineffectively Asserts Attorney-Client Privilege

Like the original Privilege Log, the Revised Privilege Log is devoid of any new facts to give rise to the privilege. The authors and recipients of the withheld communications are all lawyers within the Department's legal staff, but that alone does not establish who, if anyone, sought legal advice from whom, let alone whether legal advice was sought at all. The communications relate to "Draft Residency Regulation" and to "Residency Regulation," the same topics in other communications among the same attorneys, on or about the same dates, that were disclosed in the Supplemental Production. The assertion of attorney-client privilege here is not properly documented, but even had it been, the Department's selective assertion has waived its protection.

III. Privilege, if Applicable, Was Waived By Selective Disclosure

The burden of showing that the attorney-client privilege applies is on the party asserting the privilege or protection. *Janousek v. Slotky*, 2012 IL App (1st) 113432, ¶ 23. With the adoption of Illinois Rule of Evidence ("IRE") 502(a), subject matter waiver occurs "only if [it is] intentional, the disclosed and undisclosed communications or information concern the same subject matter, and they ought in fairness be considered together."

The Supplemental Production disclosed communications *after* the Department considered the Rothman's Rule 201(k) letter explaining the inapplicability of the Attorney-Client and Work Product privileges. The disclosure through the Supplemental Production disclosure was intentional, not inadvertent.

Therefore, waiver of the privilege for the withheld documents is governed by IRE 502(a).

The Department produced an 11/1/12 communication authored by Gail Neiman (IDOR General Counsel), with the subject "*Draft Residency Regulation*," and addressed to attorneys on her staff, Paul Caselton, Brian Fliflet and Heidi Scott. Despite that production, the Department is withholding one communication of the *same* date, 11/1/12, and another one dated 11/1/12-11/2/12, both authored by Paul Caselton, with the subject "*Draft Residency Regulation,*" and addressed to Gail Neiman, Brian Fliflet and Heidi Scott.

Another withheld communication, dated 11/2/12-11/9/12, is from Gail Neiman to Paul Caselton and Brian Fliflet, with the subject "*Residency Regulation*." The Department, however, has *already* disclosed an 11/14/2012 communication from Paul Caselton to Gail Neiman and Brain Fliflet, with the subject "*Residency Regulation*."

The "ought in fairness" language in IRE 502(a) mirrors Federal Rule of Evidence ("FRE") 502(a), which in turn relied on FRE 106, which IRE 106 replicates.[1] Under IRE 106, whenever a party introduces a writing, the opposing party may require disclosure "of any other part of or any other writing or recorded statement which ought in fairness to be considered together." [2] This is to prevent a party from using privilege as both a "shield" and a "sword," as the Department does

[1] *Ruebner and Durcova,* Survey of Illinois Law: Waiver of Attorney Client Privilege and Work Product Protection, 37 Southern Illinois University Law Journal 825, 836 (2013).

[2] Id; Il. R. EVID. Committee Commentary (2).

here. The Department's shield is the Revised Privilege Log describing the withheld records as "*Email string and attachment*," but the Revised Privilege Log is also the sword asserting privilege to cut the thread linking that "email string" to those already disclosed, made on or about the same date or dates, regarding the same subjects, and involving the same persons. Under IRE 502(a), the selectively withheld email string and attachments "ought in fairness" to be considered together with the associated email strings and attachments of the Supplemental Production.

IV. Asserting Attorney-Client Privilege Masks the Unauthorized Application of the 'Deliberative Process' FOIA Exemption.

The Revised Privilege Log asserts the judicially recognized Attorney-Client privilege to mask the Department's use of a statutory disclosure exemption under the Freedom of Information Act ("FOIA") – the deliberative process exemption -- that Illinois courts expressly refuse to recognize as a privilege. [3] The Rothmans are not involved in FOIA litigation with the Department.

The Supplemental Production contains several versions of amendments to IDOR's residency regulation, Section 100.3020, marked "Draft- For Discussion Purposes Only." The versions bear three different dates, October 30, 2012, November 2, 2012, and November 14, 2012, and they reveal the draft amendments to the Residency Regulation that may be the subject of the email strings the Department selectively seeks to cloak with privilege. See ***Exhibit D***.

[3] The so-called "deliberative process privilege" is a statutory exemption from disclosure of public records under section 7(1)(f) of the Illinois Freedom of Information Act ("FOIA"), which, for executive agencies, provides "Preliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body." 5 ILCS 140/7(1)(f).

For instance, a draft dated October 30, 2012, leaves the safe harbor against presumed residence for Illinois presence that is in aggregate less than 9-months, but it adds proposed presumptions based on "receiving a homestead exemption" and on being "present in Illinois more days that he or she is present in any other state." See, *e.g.,* DOR 004460, DOR004461. These proposed presumptions are now found in the regulation as amended in 2013. A separate draft, also dated October 30, 2012, is nearly identical, *except*, this draft also removes the "satisfactory evidence" standard necessary to overcome the presumptions under the original 1990 regulation and replaces it with a proposed new standard of "clear and convincing evidence to the contrary." See, *e.g.,* DOR004453, DOR 004454. That change too appears in the regulation as amended in 2013.

A draft of November 2, 2012, mirrors the October 30th "clear and convincing evidence" draft, but it makes additions to paragraph (g)(1) and adds a new paragraph (g)(2). See, *e.g.*, DOR004477, DOR004478. Clearly, some advice or discussion on November 1 and November 2, 2012 – two dates in which there are communications over which attorney-client privilege is asserted - may have caused the change from the October 30th to the November 2nd drafts.

By the November 14, 2012, draft, the original 1990 presumption and evidentiary standard reflected in the drafts of October 30th and November 2nd has been removed. In their stead, the November 14th draft contains only the newly proposed "homestead," and "in Illinois more days" presumptions and the "clear and convincing evidence" standard, plus the revisions to paragraph (g)(1) and addition of

paragraph (g)(2). See, *e.g.,* DOR004467, DOR004468. These revisions appear in the regulation as amended in 2013.

Illinois courts decline to recognize a "deliberative process" privilege for the discovery of certain advice and discussions between government officials concerning the formulation of governmental decisions and policy. *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521,522-23 (1998). Recall that there was no statutory change to the IITA regarding residency that preceded the flurry of Department activity on a draft residency regulation between September 4th and November 14th of 2012. Recall also that the appellate court decision on July 16, 2012, in *Cain* v. *Hamer*, 2012 IL App. (1st) 112833, was in favor of the taxpayers and involved an attempt by the Department to assert residency *within* the 9-month Illinois presence regulatory safe-harbor against a residency presumption adopted in 1990. Neither the reasonableness, application, nor validity of the 1990 regulatory presumption were at issue in *Cain*. The appellate court simply found that the Cains' annual 50 / 50 split of presence in Florida and in Illinois, did not render the purpose of their Illinois presence to be other than temporary or transitory. Plainly, the 2013 amendments to the regulation are not necessary on account of the *Cain* decision or of any amendments to the IITA. Therefore, the perceived purpose and rationale for the Department's 2013 amendment to the regulation are to be found, if at all, in the deliberations the Revised Privilege Log seeks to cloak with attorney-client privilege.

The Department's stated rationale for amendment of the regulation in the 2012 Illinois Register was: "This rulemaking amends the regulation providing

guidance on determining whether or not an individual is a resident of Illinois to address issues that have arisen in recent years." 36 Ill. Reg. 18149, emphasis added. The Department could hardly have been more vague about its purpose and rationale. Selectively shielding deliberations about the regulation adds opaqueness to vagueness.

The Rothmans' presence in Illinois never once exceeded the 9 month in-state presence safe-harbor against a residency presumption in the 1990 regulation. The Rothmans provided some of the same proofs of a changed domicile as were provided in *Cain* –, *e.g.*, drivers' licenses, voting registrations, residential real estate, vehicle registrations, etc. Nevertheless, the Department's Auditor here (i) specifically focused on whether the Rothmans spent more days in Illinois than in any other state, and (ii) dismissed all presented proofs of a change of domicile as the "usual" things, holding these proofs to a "clear and convincing" standard. The factors the Auditor applied are relevant only under the 2013 amendments to the Residency Regulation. [4]

An administrative agency deserves no deference to fickle regulatory interpretations of a statute. The withheld communications may be the only record of a purpose and rationale for the Department's amendment of the regulation in

[4] The Auditor's email to management in support of his request for the imposition of a negligence stated: "The TPs had the usual administrative things that they "checked off" to change their residency; driver's licenses, voter's registration, vacation homes purchased, no Illinois homestead, etc. . . . the TPs were in Illinois at least 220 days in each of the audit scope years . . . Our Regulations (100.3020) clearly show that presence is a factor and they thereby intentionally disregarded it to avoid Illinois taxation." DOR 001639-001640. The auditor mischaracterized the Rothman's Florida home as a "vacation" home, concluded without speaking to them that they "checked-off" residency items rather than made permanent choices and changes, and, put forward the oxymoron that the Rothmans disregarded a regulation, i.e., they spent too much time in Illinois relative to Florida(?), in order "to avoid Illinois taxation."

2013. The determination the Tax Tribunal will make here may ultimately be a close call on the interpretation of the IITA in the Department's amended regulation. Given that possibility, the Rothmans are entitled to discovery of evidence of deliberations about policy that may show the fickleness of the Department's rule making, and provide the basis to withhold deference to its regulation in this case.

The "mere assertion" of privilege is insufficient to establish the Attorney-Client privilege. *Share v. Marshall Field & Co.*, 26 Ill. App. 3d 728,730 (1974); *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d 541, 551 (2004). It is equally insufficient to authorize a privilege not recognized by Illinois courts. The withheld communications "ought in fairness" be considered with those selectively disclosed in the Rule 201(k) process.

WHEREFORE, we respectfully request that this Tribunal grant Petitioners' Motion to Compel Discovery, and any further relief the Tribunal deems appropriate.

Dated: November 29, 2022

Respectfully submitted,

/s/ Michael J. Wynne

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IN THE ILLINOIS
INDEPENDENT TAX TRIBUNAL

Michael Rothman and Jennifer Rothman,	)	
	)	
Petitioners,	)	
	)	
v.	)	Nos. 18 TT 30 & 18 TT 132
	)	
Illinois Department of Revenue,	)	Judge Brian F. Barov
	)	
Respondent.	)	

NOTICE OF SERVICE

TO: See attached Certificate of Service

PLEASE TAKE NOTICE that on November 29, 2022, Petitioners, Michael and Jennifer Rothman, through its counsel JONES DAY, are serving **Petitioners' Motion to Compel Discovery**, in the above-captioned matter, true copies of which are attached hereto and herewith served upon you.

Dated: November 29, 2022

Respectfully submitted,

/s/ Michael J. Wynne

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CERTIFICATE OF SERVICE

I, Michael Wynne, one of the undersigned attorneys for the Petitioners, Michael and Jennifer Rothman, hereby certify that on November 29, 2022, I caused a copy of **Petitioners' Motion to Compel Discovery**, in the above-captioned matter, to be served on all parties of record in this cause by electronic mail addressed to the attorneys below:

Seth Schriffman
Special Assistant Attorney General
Illinois Department of Revenue
100 West Randolph Street, 7-900
Chicago, IL 60601

By: */s/ Michael J. Wynne*

ILLINOIS INDEPENDENT TAX TRIBUNAL

MICHAEL ROTHMAN and JENNIFER ROTHMAN, Petitioners,	)	
v.	)	18 TT 30
	)	18 TT 132
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	Brian Barov, Administrative Law Judge

DEPARTMENT'S OBJECTIONS AND RESPONSES TO PETITIONER'S SECOND REQUEST FOR PRODUCTION
PRIVILEGE LOG

BATES NUMBER	TYPE	DATE	SUBJECT	AUTHOR(S)	RECIPIENT(S)	PRIVILEGE
Inapplicable	Email string	9/4/12-9/5/12	Meeting Request	Brian A. Hamer	Brian Fliflet; Gail Neimann	Attorney-Client Revenue Privilege, Attorney Work Product and Communications
Inapplicable	Email	10/4/12	Charitable Donations and Illinois Residency	Gail Niemann	Jim Nichelson; Brian Fliflet; Paul Caselton; Adam Howell	Attorney-Client Revenue Privilege, Attorney Work Product and Communications
Inapplicable	Email and attachment	10/30/12	Draft Residency Regulation	Heidi Scott	Gail Neimann; Brian Fliflet; Paul Caselton	Attorney-Client Revenue Privilege, Attorney Work Product and Communications
Inapplicable	Email and attachment	11/1/12	Draft Residency Regulation	Gail Neimann	Heidi Scott; Brian Fliflet; Paul Caselton	Attorney-Client Revenue Privilege, Attorney Work Product and Communications

Inapplicable	Email string	11/1/12	Draft Residency Regulation	Paul Caselton	Brian Fliflet; Gail Neimann; Heidi Scott	Attorney-Client Revenue Privilege, Attorney Work Product and Communications
Inapplicable	Email string and attachment	11/1/12-11/2/12	Draft Residency Regulation	Paul Caselton	Gail Neimann; Heidi Scott; Brian Fliflet	Attorney-Client Revenue Privilege, Attorney Work Product and Communications
Inapplicable	Email string and attachment	11/2/12-11/9/12	Residency Regulation	Gail Neimann	Brian Fliflet; Paul Caselton	Attorney-Client Revenue Privilege, Attorney Work Product and Communications
Inapplicable	Email and attachment	11/14/12	Residency Regulation	Paul Caselton	Gail Neimann; Brian Fliflet	Attorney-Client Revenue Privilege, Attorney Work Product and Communications

ILLINOIS INDEPENDENT TAX TRIBUNAL

Michael Rothman and Jennifer Rothman, Petitioners,	)	
v.	)	18 TT 30 & 18 TT 132
	)	Judge Brian F. Barov
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	

DEPARTMENT'S OBJECTIONS AND RESPONSES TO PETITIONERS' SECOND REQUEST FOR PRODUCTION

NOW COMES the Illinois Department of Revenue ("Department"), pursuant to Illinois Supreme Court Rule 214 and 86 Ill. Amin. Code § 5000.325, and responds to Petitioners' Second Request for Production.

GENERAL OBJECTIONS

1. Department objects to Petitioners' Second Request for Production to the extent the Requests seek information that is not discoverable. Only facts that may lead to relevant evidence are discoverable.

2. Department objects to Petitioners' Second Request for Production to the extent the Requests seek confidential taxpayer information pursuant to 35 ILCS 5/917.

3. Department objects to Petitioners' Second Request for Production to the extent the Requests seek information subject to Attorney-Client Privilege or Attorney Work Product Privilege.

4. Department objects to Petitioners' Second Request for Production to the extent the Requests are overly broad.

5. Department objects to Petitioners' Second Request for Production to the extent the Requests are unduly burdensome.

6. Department objects to the Petitioners' Second Request for Production to the extent the Requests seek any confidential information involving the Informal Conference Board ("ICB") process. *See* 86 Ill. Admin. Code 215.120(c) and (e).

7. Department's investigation is ongoing. Department will seasonably supplement its responses as required by Illinois Supreme Court Rule 214(d).

8. Each general objection above is incorporated into each of the Department's Responses/Answers to Petitioners' Second Request for Production.

WRITTEN RESPONSES TO PRODUCTION REQUESTS

REQUEST NO. 1: With respect to Department regulation 86 Ill. Admin. Code § 100.3020, produce any and all documents and communications generated, received, compiled, archived or otherwise maintained by the Department relating to the Department's promulgation and adoption of the amendment to 86 Ill. Admin. Code§ 100.3020, that was published in Volume 36, Issue 52, December 28, 2012, page 18149 of the Illinois Register.

ANSWER: The Department objects to Request 1 as being unduly burdensome, vague, ambiguous, and overly broad. The Department also objects to Request 1 based on relevance to the extent it seeks documents which deal with amended Regulation 100.3020 beyond subsection (f), which is what was addressed in Petitioners' first amended petition in case 18-TT-30, para. 53 and petition in case 18-TT-132, para. 57. The Department also objects to the extent this Request seeks information subject to Attorney-Client Privilege and Attorney Work Product Privilege. Notwithstanding the General Objections and specific objections, the Department is providing documents DOR 004144 through 004396, and accompanying privilege log in response to this Request.

REQUEST NO. 2: With respect to Department regulation 86 Ill. Admin. Code§ 100.3020, produce any and all documents and communications generated, received, compiled, archived or otherwise maintained by the Department's former employee, Paul Caselton, that relate to the Department's promulgation and adoption of the amendment to 86 Ill. Admin. Code§ 100.3020, that was published in Volume 36, Issue 52, December 28, 2012, page 18149 of the Illinois Register.

ANSWER: The Department objects to Request 2 as being unduly burdensome, vague,

ambiguous, and overly broad. The Department also objects to Request 2 based on relevance to the extent it seeks documents which deal with amended Regulation 100.3020 beyond subsection (f), which is what was addressed in Petitioners' first amended petition in case 18-TT-30, para. 53 and petition in case 18-TT-132, para. 57. The Department also objects to the extent this Request seeks information subject to Attorney-Client Privilege and Attorney Work Product Privilege. Notwithstanding the General Objections and specific objections, the Department is providing documents DOR 004144 through 004396, and accompanying privilege log in response to this Request.

Respectfully submitted,

By: Seth J. Schriftman
/s/ Seth J. Schriftman
Special Assistant Attorney General

Dated: February 22, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Illinois Department Of Revenue's Objections and Responses to Petitioners' Second Request for Production was served via e-mail on the 22nd day of February, 2022 by e-mailing them to Michael J. Wynne and Jennifer C. Waryjas at mwynne@jonesday.com and jwaryjas@jonesday.com.

By: /s/Seth J. Schriftman

EXHIBIT B

JONES DAY

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October 17, 2022

BY E-MAIL:

SETH.SCHRIFTMAN@ILLINOIS.GOV

Seth Schriftman
Special Assistant Attorney General
Illinois Department of Revenue
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Re: 18-TT-30 & 18-TT-132 –R. 201(k) Consultation - Second Request for Production of Documents – Privilege Log

Dear Seth:

Pursuant to Illinois Supreme Court Rule 201(k) we request a personal consultation to attempt to resolve differences we have with the Department's assertion of privilege to withhold disclosure of communications identified in the *Department's Objections and Responses to Petitioner's Second Request for Production Privilege Log. See,* Exhibit A. By requesting this consultation on this discrete topic we are not foregoing the right and duty to consult with you regarding other differences we have with the Department's production to date.

Specifically, we differ with the Department on the two privileges asserted to withhold production of the communications in Exhibit A, namely: (i) Attorney-Client Privilege, and (ii) Attorney Work Product and Communications.

(i) Attorney-Client Privilege

All the items listed in the Privilege Log from October 30, 2012, through November 14, 2012, are categorized in the Subject column as pertaining to a "Draft Residency Regulation" or to a "Residency Regulation." Illinois courts have declined to recognize a "deliberative process privilege" to protect certain advice and discussions between government officials concerning formulation of governmental decisions and policy. *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521, 522-23 (1998). The Department is attempting to dress the unrecognized deliberative process privilege in formal attorney-client privilege dress, simply because attorneys are the

officials involved in formulating governmental decisions and policy. That is an insufficient assertion of privilege.

Additionally, the Subject description for the September 4, 2012, item as "Meeting Request" does nothing to clothe the communication with any privilege, let alone the attorney-client privilege, and if the topic of the meeting regarded the formulation of governmental decisions and policy the attorney-client privilege would not cloak the communication from disclosure. The meeting description for October 4, 2012, under the Subject description "Charitable Donations an Illinois Residency" also does not denote that the attorney-client privilege applies, and the inclusion of Jim Nichelson and Adam Howell among the recipients, who were the Department's legislative liaisons at the time, strongly suggests that the communication regards the formulation of governmental decisions and policy that are not protected by the deliberative process privilege and do not become so under the attorney-client privilege simply because attorneys are the officials formulating governmental decisions and policy.

(ii) Attorney Work Product and Communications

We note that the communications listed in the Privilege Log all occurred in the months of September through November of 2012. The audit that gave rise to this litigation did not commence until 2017. It is not possible for the Department to have had communications protected by the Attorney Work Product doctrine in 2012 regarding litigation with the Mike and Jennifer Rothman about an audit initiated in 2017 and litigation commencing in 2018.

Moreover, the attorney work product privilege protects documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, and protects the mental impressions, conclusions, opinions or legal theories of an attorney *in anticipation of litigation or for trial. Hickman v. Taylor,* 329 U.S. 495 (1947). The phrase in Illinois Supreme Court Rule 201(b)(2) describing work product - "made in preparation for trial" - relates to those materials which reveal the shaping process by which the attorney has arranged the evidence for use in trial – they must have been created for pending or impending litigation in order to be protected from disclosure and not created because of a mere prospect of litigation. See, Eizenga v. Unity Christian Church of Fulton, Illinois, 2016 IL App. (3d) 150519; *Lawndale Restoration Ltd. Partnership v. Accordia of Illinois, Inc.*, 367 Ill. App. 3d 24, 32 (2006). The Privilege Log here does not identify any specific litigation to which the Subjects therein - Meeting Request, the Charitable Donations and Illinois Residency, the Draft Residency Regulation, and the Residency Regulations – related at in 2012, let alone how they relate to litigation initiated in 2018. Draft regulations and regulations are prepared as statements of general applicability to anyone outside the agency and which, as such, are required by the Administrative Procedure Act to be adopted by regulation. Such regulations may at some point

be relevant to or be the subject of litigation, but a mere prospect of litigation does not render every regulation one that is prepared in anticipation of impeding or pending litigation.

Conclusion

The party asserting a privilege has the burden of "establishing all elements of the privilege" and must present factual evidence to establish the required elements; the "mere assertion" of privilege is insufficient to establish it. *Share v. Marshall Field & Co.*, 26 Ill. App. 3d 728, 730 (1974); *Pietro v. Marriott Senior Living Services, Inc.* 348 Ill. App. 3d 541, 551(2004). Here, the Department has presented no factual evidence of the required elements and therefore has merely asserted the attorney-client communications and attorney work product privileges. This mere assertion is insufficient to withhold production of the communications.

We therefore request a consultation pursuant to Rule 201(k) to resolve our differences regarding the Department's mere assertion of privileges and its insufficiency to withhold production in this litigation.

Very truly yours,

Michael J. Wynne

Cc: R. Kulekowskis, IDOR
Rebecca.Kulekowskis@Illinois.gov
S. Budzileni, IDOR
Susan.Budzileni@Illinois.gov

EXHIBIT C

ILLINOIS INDEPENDENT TAX TRIBUNAL

MICHAEL ROTHMAN and JENNIFER ROTHMAN, Petitioners,	)	
v.	)	18 TT 30 18 TT 132
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	Brian Barov, Administrative Law Judge

DEPARTMENT'S UPDATED OBJECTIONS AND RESPONSES TO PETITIONER'S SECOND REQUEST FOR PRODUCTION PRIVILEGE LOG

BATES NUMBER	TYPE	DATE	SUBJECT	AUTHOR(S)	RECIPIENT(S)	PRIVILEGE
Inapplicable	Email string	11/1/12	Draft Residency Regulation	Paul Caselton	Brian Fliflet; Gail Neimann; Heidi Scott	Attorney-Client Privilege. Confidential communications between the General Counsel and Department attorneys regarding their requested legal opinions.
DOR004471-DOR004480	Email string and attachment	11/1/12-11/2/12	Draft Residency Regulation	Paul Caselton	Gail Neimann; Heidi Scott; Brian Fliflet	Attorney-Client Privilege. Confidential communications between the General Counsel and Department attorneys regarding their requested legal opinions. A redacted version is being provided.
Inapplicable	Email string and attachment	11/2/12-11/9/12	Residency Regulation	Gail Neimann	Brian Fliflet; Paul Caselton	Attorney-Client Privilege. Confidential communications between the General Counsel and Department attorneys regarding their requested legal opinions.

EXHIBIT D

October 30, 2012 – DOR004460-61

October 30, 2012 – DOR004453-54

November 2, 2012 – DOR004477-78

November 14, 2012 – DOR004467-68

but to none in Illinois. He has no business interests in Illinois. C has little social life in Illinois, more in Minnesota, and has no relatives in Illinois. Neither B nor C is a resident of Illinois. The connection of each to Minnesota, the state of domicile, in each year is closer than it is to Illinois. Their presence here is for temporary or transitory purposes.

AGENCY NOTE: If, in the foregoing example, the facts are reversed so that Illinois is the state of domicile and B and C are visitors to Minnesota, B and C are residents of Illinois.

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Commented [R2]: How does one "make . . . any other financial instrument"?

Commented [R3]: Shouldn't we make this reciprocal, i.e. we won't use it against you, but you can't use it to support residency elsewhere? Maybe "residence or nonresidence" covers it, but we don't really have presumptions of non-residence.

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