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STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

St. Joseph Health Services of Rhode Island, Inc.,	:	
vs.	:	C.A. No. 2017-3856
St. Josephs Health Services of Rhode Island Retirement Plan, as amended	:	

MEMORANDUM OF THE OFFICE OF ATTORNEY GENERAL ON PRIVILEGES

According to this Court's directive, the Office of Attorney General ("Attorney General") submits this memorandum concerning certain privileges in response to Special Counsel's subpoena. This memorandum is intended to be a general overview of the asserted privileges because the production of documents, and the assertion of privileges, is ongoing. A more specific memorandum can and will be provided when and if a motion to compel is filed regarding the nature of specific documents and its application to specific privileges. To date, the Attorney General has asserted the following privileges: (1) deliberative process privilege, (2) attorney client privilege, (3) work product privilege, and (4) quasi-judicial privilege.

I. Deliberative Process Privilege

Courts have long recognized a policy that shields against exploring the minds and mental processes of governmental decision makers to enhance the quality of their considerations in reaching decisions. Williams v. City of Boston, 213 F.R.D. 99, 100 (D. Mass. 2003); see also Gomez v. City of Nashua, N.H., 126 F.R.D. 432, 434 (D.N.H. 1989) (citing N.O. v. Callahan, 110 F.R.D. 637 (D. Mass. 1986)). This privilege is known as the "governmental" or "deliberative process" privilege. The United States Supreme Court has described the privilege as necessary to

further the policy of "protect[ing] the decision making process of government agencies and [particularly] documents reflecting advisory opinions, recommendations and deliberations[.]" N.L.R.B. v. Sears Roebuck and Company, 421 U.S. 132, 150 (1975) (internal quotations and citations omitted). The privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news *** [i]ts object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." Center for Biological Diversity v. Norton, 336 F.Supp.2d 114 (D.N.M. 2004) (citations omitted). Indeed, the underlying policy is one 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).

Rhode Island courts have recognized and applied the deliberative process privilege in numerous circumstances. The Rhode Island Supreme Court acknowledged the privilege in In re Commission on Judicial Tenure & Discipline, 670 A.2d 1232 (R.I. 1996). Although the Supreme Court declined to reach the issue, it did note that the "privilege protects the internal deliberations of an agency in order to safeguard the quality of agency decisions." Id. at 1235 (citing Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 1458 (1st Cir. 1992)). Rhode Island Superior Court judges have also examined the deliberative process privilege. See Heritage Healthcare Servs. v. Beacon Mut. Ins. Co., No. PC 02-7016, 2007 WL 1234481 (R.I. Super. April 17, 2007); see also Woodland Manor III Associates, L.P. v. Keeny, C.A. No. 89-2447, 1995 WL 941473 at *3 (R.I. Super. August 31, 1995); see also Rhode Island Economic Development Corporation v. Wells Fargo Securities, LLC, et al., No. PB 12-5616, 2014 WL 3407982 at *2–3 (R.I. Super. July 7, 2014).

As articulated by Rhode Island courts, the deliberative process privilege focuses on two main criteria: whether a document is pre-decisional, and whether a document is deliberative. See Rhode Island Economic Development Corporation, 2014 WL 3407982 at *2. The first criteria looks at when the document was created: "[a] document is pre-decisional if it is 'prepared in order to assist an agency decision maker in arriving at his decision.'" Heritage Healthcare Servs., 2007 WL 1234481 at *14 (quoting Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992)). The second criteria assesses what the document contains: 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 (D.C. Cir. 1975)). In other words, a "deliberative" document is "part of the agency give-and-take-of the deliberative process-by which the decision itself is made." Vaughn, 523 F.2d at 1144. "'Subjective documents which reflect the personal opinion of the writer, rather than the policy of the agency are considered privileged information because they are predecisional.'" New York ex rel. Boardman v. Nat'l R.R. Passenger Corp., 233 F.R.D. 259, 269 (N.D.N.Y.2006) (quoting LNC Invs., Inc. v. Republic of Nicaragua, No. 96 Civ. 6360(JFK)(RLE), 1997 WL 729106, at *1 (S.D.N.Y. Nov. 21, 1997)). To qualify as deliberative, the material sought to be protected "must address 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" Walsky Constr. Co. v. United States, 20 Fed. Cl. 317, 320 (1990) (quoting Vaughn, 523 F.2d at 1143-44). "The privilege does not protect factual or investigative material, except as necessary to avoid indirect revelation of the decision-making process." Scott Paper Co. v. United States, 943 F. Supp. 489, 496 (E.D. Pa. 1996). However, "whenever the unveiling of factual materials would be tantamount to the publication of the evaluation and analysis of the multitudinous facts conducted by the

agency, the deliberative process applies." Nat'l Wildlife Fed'n v. United States Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988) (citation omitted).

The majority of the documents requested relate to the 2009 Hospital Conversions Act ("HCA") review of St. Joseph Health Services of Rhode Island ("SJHSRI") and Roger Williams Hospital and Roger Williams Medical Center ("RWMC") to CharterCARE Health Partners ("CharterCARE") and the subsequent 2014 HCA review of CharterCARE, RWMC, SJHSRI, Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect East Hospital Advisory Services, LLC, Prospect CharterCARE, LLC, Prospect CharterCARE RWMC, LLC, Prospect CharterCARE, SJHSRI, LLC. The Attorney General reviewed these transactions under the HCA, R.I. Gen. Laws § 23-17.14-1 et seq., which establishes standards and procedures for certain hospital conversions to be reviewed by the Rhode Island Department of Health ("DOH") and the Attorney General.

Under the HCA, the Attorney General reviews the submitted application, conducts necessary inquiries, and investigates the proposed conversion. The Attorney General then either approves, approves with conditions, or denies the application through a written decision. Subsequently, the Attorney General may monitor any conditions of approval. Throughout this conversion process attorneys within the Office of Attorney General are communicating amongst themselves, their retained experts, and their counterparts at the Department of Health with whom the Attorney General may conduct a joint review under the HCA in an effort to evaluate the proposed transaction. The Attorney General evaluates the submitted application by asking pertinent questions and obtaining relevant evidence from the transacting parties in order to arrive at a determination to approve, approve with conditions, or deny the application. Similarly,

following a decision, when statutorily required, the Attorney General, working with monitoring experts, reviews and evaluates the acquirer's compliance with conditions of approval.

This entire process represents "part of the agency give-and-take-of the deliberative process-by which the decision itself is made," Vaughn, 523 F.2d at 1144, and is protected from disclosure in order to allow for the free flow of communications with the goal to enhance the final decision making product. If "each remark is a potential item of discovery and front page news," those involved with the decision making process are less apt to fully and frankly discuss the panoply of issues and options, thus frustrating the decision making process. Center for Biological Diversity v. Norton, 336 F.Supp.2d 114 (D.N.M. 2004). The Attorney General is thus afforded the protections of the deliberative process privilege like any other governmental agency to "safeguard the quality" of its decision making process. In re Commission on Judicial Tenure & Discipline, 670 A.2d at 1235.

The withheld documents meet the deliberative process privilege's two criteria. First, the withheld documents are pre-decisional. Documents were created prior to the Attorney General's approval of the application, clearly making them pre-decisional. But even documents created after the Attorney General's initial decision on the application are pre-decisional in that they relate to the Attorney General's ongoing monitoring efforts and the subsequent determinations whether the conditions of approval have been satisfied. See R.I. Gen. Laws § 23-17.14-28(d). Regarding the 2014 conversion, after May 16, 2014, the Attorney General began monitoring the hospital conversion process. In the course of monitoring, should circumstances warrant, the Attorney General may decide to take further action and in this respect, post-May 16, 2014 documents may still be pre-decisional to subsequent monitoring determinations. Documents created during this monitoring phase are therefore pre-decisional because they are "prepared in order to assist an

agency decisionmaker in arriving at his decision[,]" for instance whether the approved conditions continued to be met. Heritage Healthcare Servs., 2007 WL 1234481 at *14 (quotations omitted).

Second, the withheld documents are deliberative. Broadly categorized, the withheld documents consist of Attorney General attorneys' notes (of witness interviews, of intra-office communications, of discussions with experts, of communications with the transacting parties), Attorney General's working drafts (including draft questions, draft agreements, draft decision and conditions), correspondence between the Attorney General's attorneys and its hired legal experts/consultants, and draft expert/consultant reports. Attorney notes contain the thoughts, opinions, mental impressions, and cultivated work of government employees tasked with investigating and monitoring. The withheld correspondence, draft questions, and draft reports likewise reveal the "personal opinion of the writer" and the underlying deliberative process. New York ex rel. Boardman, 233 F.R.D. at 269.

While some of the underlying information may be argued to be factual – such as notes of a witness interview – the attorneys who prepared the notes, correspondence, and reports selected, evaluated, and emphasized certain facts in their notes – and omitted other facts in their notes – such that "the unveiling of factual materials would be tantamount to the publication of the evaluation and analysis of the multitudinous facts conducted by the agency." Nat'l Wildlife Fed'n, 861 F.2d at 1119. Such a selective sampling of the nature of statements memorialized without context and without any consideration to other statements made during the interview but not reduced to writing would also be grossly misleading. In other words, to characterize a witness interview based upon selected notes without consideration to other matters discussed but not reduced to writing – for whatever reason – may mischaracterize the very nature of the interview. Ample precedent supports extending the deliberative process privilege to protect precisely these

kinds of documents. See Edelman v. Securities and Exchange Commission, 239 F. Supp. 3d 45, 54 (D.D.C. 2017) (finding that the SEC properly withheld portions of attorney notes on the basis of the deliberative process privilege); see also Holmes v. Hernandez, 221 F. Supp. 3d 1011, 1018 (N.D. Ill. 2016) ("Because the deliberative process privilege covers memoranda and discussions *** leading up to the formulation of an official position, it is broad enough to cover the draft summary reports.") (quotations omitted).

The Attorney General acknowledges that the privilege is "not absolute; rather, the privilege is qualified and subject to judicial oversight." Pacific Gas & Elec. Co. v. United States, 70 Fed. Cl. 128, 134 (2006). Indeed, "the privilege will not apply when an agency itself places its deliberations at issue." Rhode Island Economic Development Corporation, 2014 WL 3407982 at *3 (citing In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 898 F. Supp. 2d 603, 608 (S.D.N.Y. 2012) (finding that because the New Jersey Department of Environmental Protection (NJDEP) put at issue their deliberations regarding relative risks and benefits of using a gasoline additive, the NJDEP had waived its deliberative process privilege)). Such is not the case here. In Rhode Island Economic Development Corporation, the Superior Court found that "the deliberations of the [Economic Development Corporation] are a central issue to the case" brought by that agency and, consequently, "[i]f the parties were able to baldly assert the deliberative process privilege, they may well indeed be able to withhold damaging documents while releasing only favorable documents." Rhode Island Economic Development Corporation, 2014 WL 3407982 at *3. Consequently, "use of the privilege as a sword rather than a shield" vitiated the privilege. Id.

However, this narrow exception – and Rhode Island Economic Development Corporation's application of it – must be viewed in context. There, the plaintiff attempted to withhold documents while simultaneously pursuing its claim against defendants. Such a posture was manifestly unfair

and prejudicial to a competent defense. See id. (noting that the documents were "necessary for Defendants to defend against the EDC's claims" and that use of the privilege there was "inequitable"). No comparable inequities exist here. The Attorney General is defending a subpoena and the State of Rhode Island is not a plaintiff in any civil litigation. The assertion of the privilege here is not being raised as a sword, and moreover the Attorney General has not put in issue its decision-making process regarding either the 2009 or 2014 hospital conversions that are implicated by the subpoena. If a plaintiff or third party could pierce the deliberative process privilege simply by placing or arguing that the custodian's decision-making process is a central issue, the privilege would be illusory. Accordingly, the equities favor invocation of the deliberative process privilege here.

II. Attorney Client Privilege

Certain withheld documents are also protected by the attorney client privilege. As a general matter, the attorney client privilege serves "to encourage full and frank communications between attorneys and their clients[.]" Mortgage Guarantee & Title Co. v. Cunha, 745 A.2d 156, 158–59 (R.I. 2000). As such, "communications made by a client to his attorney for the purpose of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure." Id. (quotations omitted). These attorney-client communications are held inviolate and afforded the highest level of protection. See State v. von Bulow, 475 A.2d 995, 1005–06 (R.I. 1984) (explaining that the attorney-client privilege is "a narrow exception" that "limits * * * full disclosure"). Notably, this can include attorney notes. See In re: OM Group Securities Litigation, 226 F.R.D. 579, 588 (N.D. Ohio 2005) (holding that interview notes of company employees prepared by outside counsel hired by the company were

protected by the attorney-client privilege because they were prepared confidentially by outside counsel in order to provide legal advice to the company).

The attorney client privilege applies to government attorneys. See Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (privilege "unquestionably" applies to conversations between government lawyers and administrative personnel), aff'd, 734 F.2d 18 (7th Cir.1984); see also Restatement (Third) of Law Governing Lawyers § 74 (2000) ("[T]he attorney-client privilege extends to a communication of a governmental organization."). The Second Circuit explained this rationale in depth:

> "We believe that, if anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest. See 1 Paul R. Rice, Attorney-Client Privilege in the United States § 4:28, at 4 (2d ed. 1999) ("If the government attorney is required to disclose [internal communications with counsel] upon grand jury request, it is sheer fantasy to suggest that it will not make internal governmental investigations more difficult, to the point of being impossible.... To the extent that the protection of the privilege is justified in any corporate context, the need within the government is equal, if not greater.").
> ***
> [W]e think it insufficient to jettison a principle as entrenched in our legal tradition as that underlying the attorney-client privilege. *** The privilege serves to promote the free flow of information to the attorney (and thereby to the client entity) as well as to the individual with whom he communicates. [] The government attorney requires candid, unvarnished information from those employed by the office he serves so that he may better discharge his duty to that office." In re Grand Jury Investigation, 399 F.3d 527, 534–35 (2d Cir. 2005) (emphasis added) (internal citations omitted); see also Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005) ("Review of both our sister circuits' precedents and outside authority confirm that a government entity can assert attorney-client privilege in the civil context.").

In Rhode Island, the party asserting the privilege has the burden to set forth the following elements:

> "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [a] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." von Bulow, 475 A.2d at 1004–05 (quoting United States v. Kelly, 569 F.2d 928, 938 (5th Cir.), cert. denied, 439 U.S. 829, 99 S.Ct. 105, 58 L.Ed.2d 123 (1978)).

Communications between members of the Attorney General or other State offices related to this hospital conversation fall squarely within the attorney client privilege.

In the governmental context, as here, the client is the State itself, represented through the Office of Attorney General. See In re Witness Before Special Grand Jury 2000-2, 288 F.3d 289, 291 (7th Cir. 2002) (noting that the client is "the State of Illinois itself, represented through one of its agencies."). Thus, the state agency itself must assert the privilege and show that it has not been waived. von Bulow, 475 A.2d at 1004–05.

The Attorney General maintains the attorney client privilege on behalf of the State of Rhode Island. Most obviously, the privilege covers the withheld documents relating to experts and consultants hired by the Attorney General. This includes retainer agreements and the work performed by retained experts as described in invoices, which "reveal the motive of the client [the Attorney General] in seeking representation *** or the specific nature of the services provided[.]" Gusman v. Comcast Corp., 298 F.R.D. 592, 600 (S.D. Cal. 2014) (quotations omitted). Such "detailed information of bills, billing documents, and agreements between [the Attorney General] and [his] attorney falls within the attorney-client privilege[.]" Paul v. Winco Holdings, Inc., 249 F.R.D. 643, 654 (D. Idaho 2008).

Other withheld documents – including attorneys notes and correspondence – are similarly protected by the attorney-client privilege. These notes and correspondences were created by

attorney employees of the Attorney General's office who were (and are) lawyers in the State of Rhode Island. These documents were created in confidence in the course of providing a legal opinion to Attorney General Kilmartin (and former Attorney General Lynch) on the pending application for a hospital conversion and subsequent monitoring, if applicable. All of the documents created in concert with these confidential communications thus qualify as protected by the attorney client privilege. See von Bulow, 475 A.2d at 1004–05.

III. Work Product Privilege

Additionally, the withheld documents are shielded from disclosure by the work product privilege. Work product privilege stems from Rhode Island Superior Court Rule of Civil Procedure 26(b)(3), which provides, in relevant part:

> "[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivisions (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative *** only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." (Emphasis added).

As our Supreme Court has held, the first clause of Rule 26(b)(3) requires one to determine "as a preliminary matter, [] whether, in light of the nature of the document or tangible material and facts of the case, the document can be said to have been prepared or obtained because of the prospect of litigation, by or for an adverse party or its agent." Henderson v. Newport Cnty. Reg'l Young Men's Christian Ass'n, 966 A.2d 1242, 1247 (R.I. 2009) (internal quotations omitted); see also State of Maine v. United States Dep't of the Interior, 298 F.3d 60, 68 (1st Cir. 2002) (concluding that a document is covered by the work-product privilege as long as it has been prepared because of the prospect of litigation). As our Supreme Court has explained,

> "[T]he protective ambit of Rule 26(b)[(3)] was not meant to be restricted to material that had been prepared subsequent to the initiation of litigation. On the contrary, * * * the rule was meant to be applied to materials gathered when litigation is merely a contingency. Thus, the rule's privilege may be invoked for materials prepared either in anticipation of litigation or for trial." Fireman's Fund Insurance Co., 120 R.I. 744, 748-49, 391 A.2d 84, 87 (1978).

Our Supreme Court recently explained the "anticipation of litigation" requirement further in DeCurtis v. Visconti, Boren & Campbell, Ltd., 152 A.3d 413, 427–29 (R.I. 2017). There, the Court found that antenuptial agreements were not prepared in anticipation of litigation, noting that:

> "Although these documents were prepared in an attempt to simplify an unfortunate end to the client's marriage, an event that may or may not occur, we are not convinced that they rise to the level of a document prepared in anticipation of litigation. Contracts of this nature are prepared during an arm's-length transaction, by two parties with the hope that the documents collect dust in the home of a happily married couple. A potential dissolution of the marriage is far too attenuated from the creation of an antenuptial agreement to qualify as having been prepared in anticipation of litigation. Furthermore, these agreements are entered into in an effort to avoid protracted litigation by setting forth each spouse's respective rights and expectations regarding the disposition of his or her property in the event of divorce. This purpose is echoed in the underlying policy of all contracts, which are binding agreements between the parties, including the procedure and remedies available in the event of a dispute. Were this Court to declare that these contracts constitute attorney work product, this interpretation would apply to the universe of agreements, shielding many contracts from disclosure.
>
> The policy that underlies the work product doctrine does not lend itself to shielding these agreements. *** The production of completed and executed contracts does not provide the requesting party with an unfair advantage in the litigation. We also note that, once the agreement is finalized and executed, the agreement belongs to the parties, not to the attorney who drafted it. For these reasons, we are of the opinion that final and executed antenuptial and postnuptial agreements are not work product." DeCurtis, 152 A.3d at 427–29.[1]

Because the withheld documents were prepared in anticipation of litigation, one of two species of work product privilege may attach: (1) opinion work-product, which contains the

[1] Significantly, the Court noted in a footnote that "[t]hat is not to say that an earlier or incomplete draft of an agreement may not be protected by the work product doctrine; by their very nature, pre-drafts may contain both mental impressions and legal strategy." Id. at n.5 (emphasis added).

"mental impressions of an attorney or his or her legal theories," and is absolutely immune from discovery; or (2) factual work-product, which more broadly contains "any material gathered in anticipation of litigation," and is subject to only qualified immunity. Henderson, 966 A.2d 1242, 1247–48 (R.I. 2009) (emphasis in original).

Factual work-product, in contrast to opinion work product, has a qualified protection and it may be pierced upon a showing that the complainant "(1) [] has substantial need for the materials in preparation of its case and (2) [] is unable to obtain the information by other means without undue hardship." State v. Lead Indus. Ass'n., 64 A.3d 1183, 1193 (R.I. 2013) (citing Crowe Countryside Realty Assocs., Co. v. Novare Eng'rs, Inc., 891 A.2d 838, 842 (R.I. 2006)). However, even documents with factual information may be deemed opinion work product if it reveals sufficient information about an attorney's mental impressions. See Dir. Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1308 (D.C. Cir. 1997) ("[P]urely factual material embedded in attorney notes may not deserve the super-protection afforded to a lawyer's mental impressions *** At some point, however, a lawyer's factual selection reflects his focus; in deciding what to include and what to omit, the lawyer reveals his view of the case."). (Emphasis added).

Several categories of withheld documents – attorneys' notes and drafts, correspondence between the Attorney General's attorneys and its legal experts/consultants, and draft expert reports – qualify as opinion work product. The attorneys' notes are suffused with the attorney creator's thoughts and opinions and detail the attorney's mental processes in assessing the application and conducting monitoring. The correspondence between the Attorney General's attorneys and its consultants consists of discussions with the Attorney General's retained experts. The draft expert reports prepared by retained consultants address certain aspects of the hospital conversion process.

Protecting these documents from disclosure accords with well-established precedent. See Crowe Countryside Realty Assocs., Co., 891 A.2d at 847 (noting that the Superior Court rule 26(b)(3) "requires that a court protect all core or opinion work product of an attorney[.]"); see also State v. Usenia, 599 A.2d 1026, 1030 (R.I. 1991) (finding that "[c]learly, these [attorney] notes were attorney-work product and thus protected from discovery."); see also DeCurtis, 152 A.3d at 429 n.5

Alternatively, the documents cited supra that are not determined to be opinion work product are nonetheless protected by the factual work product privilege. As noted supra, all of these documents were gathered in anticipation of litigation and are thus entitled to the qualified privilege. See Henderson, 966 A.2d at 1247–48 (noting that factual work-product contains "any material gathered in anticipation of litigation[.]"); see also Fireman's Fund Insurance Co., 120 R.I. at 748-49, 391 A.2d at 87 ("[T]he rule was meant to be applied to materials gathered when litigation is merely a contingency.").

A party seeking to pierce the factual work product privilege bears the burden of proving substantial need or undue hardship. See Lead Indus. Ass'n., 64 A.3d at 1194 ("The burden of demonstrating that the protected document nevertheless is discoverable because of substantial need and a resulting injustice or undue hardship is on the party seeking discovery."); see also DeCurtis, 152 A.3d at 428 ("The party seeking to overcome the document's qualified immunity has the burden to prove (1) a substantial need of the document and (2) a resulting injustice or undue hardship from immunizing the document[.]") (quotations omitted). Special Counsel has not demonstrated any substantial need here. Rather, the instant matter stands in contrast with situations where courts have found a substantial need for factual work product documents, such as evidence necessary to a competent defense. Cf. Cabral v. Arruda, 556 A.2d 47, 50 (R.I. 1989) (deeming

surveillance materials to be work product yet subject to discovery as the result of undue hardship because the photographs were to be introduced at trial to rebut the plaintiff's testimony). The case at hand thus falls far short of establishing a particularized substantial need.

Additionally, there is no indication that Special Counsel "will be unable to discover this evidence through alternative channels." DeCurtis, 152 A.3d at 429. Numerous other parties were involved in the hospital conversion process and are involved in the subsequent monitoring. Special Counsel has subpoenaed several of them and thus far has chosen not to seek documents from other entities where information may be gleaned without abrogating any privilege. See Henderson, 966 A.2d at 1249 ("[P]laintiffs still are not foreclosed from obtaining any information potentially presented in the [requested document] from other avenues. They have the opportunity to retain their own expert to conduct a review of defendant's policies and procedures at various points in time. The plaintiffs also could gather the information, by way of interrogatories or through questions raised at deposition[.]"). Special Counsel has not presented any evidence that these other means of obtaining the information are insufficient or that he meets the high burden necessary to establish a "substantial need." See DeCurtis, 152 A.3d at 428; see also Lead Indus. Ass'n., 64 A.3d at 1194 ("[B]ecause the [requesting party] was not foreclosed from obtaining material equivalent to [the requested document] from other avenues, we hold that the [requesting party] has not met its burden of establishing undue hardship."). Accordingly, the withheld documents are entitled to factual work product protection.

IV. Quasi-Judicial Privilege

The Rhode Island Supreme Court has expressly recognized "immunity from testifying about the judicial or quasi-judicial officer's mental process in evaluating the evidence and reaching a decision." Champlin's Realty Associates v. Tikoian, 989 A.2d 427, 439 (R.I. 2010). In

Champlin's, the Coastal Resources Management Council ("CRMC"), reviewed an application to extend the existing marina into the Great Salt Pond on Block Island. By statute, the CRMC had such authority "to grant applications for such expansions of existing marinas." Id. at 431 (citing R.I. Gen. Laws § 46-23-6(4)(iii)). A CRMC subcommittee granted a modified (scaled-down) application to proceed with the expansion, id. at 433, but the full CRMC failed to approve the recommendation. Id. at 433. Pursuant to the Administrative Procedures Act, R.I. Gen. Laws § 42-35-15, an appeal to the Superior Court ensued. During the APA appeal, the Superior Court allowed an evidentiary hearing and it was during this hearing that testimony was elicited concerning the CRMC members' mental and decision-making process. On certiorari to the Rhode Island Supreme Court, such testimony was found to be improper pursuant to the quasi-judicial immunity privilege.

Specifically, the Rhode Island Supreme Court noted that "[t]he United States Supreme Court has held that because a judge could not be subjected to similar inquiry it was improper to question the Secretary of Agriculture at trial and at a deposition with respect to how he considered the evidence before him in his rate-setting responsibilities." Id. at 439 (citing United States v. Morgan, 313 U.S. 409, 420-22 (1941)). The Rhode Island Supreme Court continued that "the administrative decision makers at the CRMC cannot and should not have been questioned about their mental process in making recommendations to the full council or participating in decision making." Id. "Only factual matters not reaching the examiner's bases, reasons, mental processes, analyses or conclusions are fair subjects for inquiry." Id. While prior to Champlin's the Court recognized "quasi-judicial immunity only in terms of immunity from suit," id., in Champlin's the Court held that "agency adjudicators also are cloaked with immunity from rendering testimony about their mental processes in reaching decisions just as judicial officers are – lest the compulsion of the testimony of agency adjudicators about their mental process become a favored litigation

technique." Id. It is well settled that other entities reviewing applications are also entitled to quasi-judicial immunity.

For instance, in Diva's Inc. v. City of Bangor, 411 F.3d 30 (1st Cir. 2005), the Court of Appeals examined whether the Bangor City Council was entitled to quasi-judicial immunity for its role in denying a special amusement (adult entertainment) license. Although Diva's concerned quasi-judicial immunity from liability – as opposed to a privilege from testifying – the First Circuit Court of Appeals made clear that this type of regulatory process was entitled to quasi-judicial immunity. See id. at 40-41 ("We agree that the officials enjoy absolute immunity from personal liability because they were acting in a quasi-judicial capacity when they denied the special amusement permit"). Thereafter, the Court of Appeals applied a "functional approach" to immunity whereby "actions taken in the performance of a particular function are to be accorded the level of immunity appropriate to that function." Id. at 41. In doing so, the Court of Appeals detailed its analysis for "how closely analogous the adjudicatory experience of a Board member is to that of a judge * * *

> [f]irst, does a Board member, like a judge, perform a traditional 'adjudicatory' function, in that he decides facts, applies law, and otherwise resolves disputes on the merits (free from direct political influence)? Second, does a Board member, like a judge, decide cases sufficiently controversial that, in the absence of absolute immunity, he would be subject to numerous damages actions? Third, does a Board member, like a judge, adjudicate disputes against a backdrop of multiple safeguards designed to protect [the complaining party's] rights?"

Id. at 41 (quoting Bettencourt v. Bd. of Registration, 904 F.2d 772, 782 (1st Cir. 1990). The Diva's Court answered each of these three questions in the affirmative.

With respect to the first inquiry, the Court noted that the City Council members acted in an "adjudicatory" function when they "held a hearing, heard testimony, asked questions, discussed the matter, made their decision, and then provided a written explanation of their reasoning." Id.

Moving to the second factor, the Court concluded that "the act of denying a special amusement permit can be controversial, and can prompt litigation, as it did in this case." Id. Without such immunity, the Court explained, "it would be extremely difficult to get people to serve as City Council members." Id. Lastly, the Court of Appeals concluded that "there are procedural safeguards that operate to protect a special amusement permit applicant from the violation of its constitutional rights." Id. In this respect the Court noted Diva's exercised its statutory right to request a written explanation of the reasons for the City Council's denial and then appealed the City Council's decision to the City's Board of Appeals. Id. Accordingly, the City Council's decision to deny a special amusement permit was entitled to quasi-judicial immunity.

Here, similar to the process statutorily delegated to the CRMC, the General Assembly has required that any hospital seeking conversion receive the approval of the Office of Attorney General and the Department of Health. Like the licensing and permitting process, the Attorney General's approval is a perquisite to a hospital conversion. See R.I. Gen. Laws §§ 23-17.14-5(a)("A conversion shall require review and approval from the department of attorney general and from the department of health in accordance with the provisions of this chapter"); § 23-17.14-6(a)("No person shall engage in a conversion with a for profit corporation as the acquirer and a not-for-profit corporation as the acquire involving the establishment, maintenance, or operation of a hospital or a conversion subject to §§ 23-17.14-9 without prior approval of both the department of attorney general and the department of health."); § 23-17.14-9 ("All conversions which are limited to not-for-profit corporations which involve the establishment, maintenance, or operation of a hospital require prior approval of both the department of attorney general and the department of health or, if eligible for expedited review under § 23-17.14-12.1, prior approval of the

department of health and subject to the authority of the attorney general pursuant to § 23-17.14-21 hereof."). This approval process is functionally adjudicatory in nature.

For example, after an application is submitted for the Attorney General's review, the Office of Attorney General must determine within thirty days whether the "application is complete," and if not, "shall specify all additional information the applicant is required to provide." R.I. Gen. Laws § 23-17.14-7(b)(1). According to the procedure set forth in R.I. Gen. Laws § 23-17.14-7(b), the applicant is thereafter permitted an additional thirty (30) days to provide the specified information and if the Office of Attorney General "determines the additional information submitted by the applicant is insufficient, the application will be rejected without prejudice to the applicant's right to resubmit, the rejection to be accompanied by a detailed written explanation of the reasons for the rejection." R.I. Gen. Laws § 23-17.14-7(b)(2).

More importantly, after the 2014 application was deemed complete, the Attorney General must "approve, approve with conditions directly related to the proposed conversion, or disapprove the application within one hundred twenty (120) days of the date of acceptance of the application." R.I. Gen. Laws § 23-17.14-7(b)(4). According to the Hospital Conversion Act, "[i]n reviewing an application * * * the department of the attorney general shall consider [thirty enumerated considerations]." R.I. Gen. Laws § 23-17.14-7(c). As such, by statute, the Attorney General must apply the facts of the specific application to specific legal criteria. Applying specific facts to a legal criteria to arrive at a written legal determination is quintessentially a judicial or adjudicatory function.

As the United States Supreme Court has explained under different circumstances:

> "[a] case arises, within the meaning of the Constitution, when any question respecting the Constitution, treatise or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.' * * * A declaration on rights as they stand must be sought, not on rights which may arise in the future * *

> * and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. * * * The form of the proceeding is not significant. It is the nature and effect, which is controlling." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 478 (1983)(emphasis added)(quoting Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819 (1824).

Later, with specific reference to Feldman's case – the denial of a waiver by a bar examining committee for an applicant to take the bar examination – the United States Supreme Court concluded that such a denial was judicial in nature. The Court explained that "Feldman argued on policy ground that the rule should not be applied to him because he had fulfilled the spirit, if not the letter, of Rule 46I(b)(3). Id. at 480. In short, the Court noted, Feldman was "seeking 'a declaration on rights as they [stood] . . . not on rights which [might] arise in the future.'" Id. As such, this inquiry required:

> "the District of Columbia Court of Appeals to determine in light of existing law and in light of Feldman's qualifications and arguments whether Feldman's petition should be granted. The court also had before it legal arguments against the validity of the rule. When it issued a per curiam order denying Feldman's petition, it determined as a legal matter that Feldman was not entitled to be admitted to the bar without examination or to sit for the bar examination." Id. at 480-81 (emphasis added).

Applying such facts to existing law, the Supreme Court determined, was a judicial inquiry.

For a non-profit to for-profit conversion, such as the 2014 conversion, Rhode Island law requires the Office of Attorney General to consider thirty enumerated criteria – and apply this criteria to the pending application – in considering whether to grant or deny the application. See R.I. Gen. Laws § 23-17.14-7(c). "In short, [this process requires] 'a declaration on rights as they [stood] . . . not on rights which [might] arise in the future[.]'" Feldman, 460 U.S. at 480 (quoting In re Summers, 325 U.S. 561, 567 (1945)).

Moreover, as applied to the 2014 application, the Hospital Conversations Act requires the Attorney General to publish notice that written comments may be received from the public concerning the proposed conversion, see R.I. Gen. Laws § 23-17.14-7(b)(3), and permits the

Attorney General to "require any person, agent, trustee, fiduciary, consultant, institution, association, or corporation directly related to the proposed conversion to appear * * * and there under oath to produce for the use of the director and/or the attorney general any and all documents and any other information relating directly to the proposed conversion that the director or the attorney general may require." R.I. Gen. Laws § 23-17.14-14(a).

After receiving and reviewing all the above-referenced information – the application, public comment, and information produced through document requests or interviews – the Office of the Attorney General issued a written decision analyzing the evidence and applying the evidence to the statutory criteria. In doing so, similar to the City Council in Diva's, the Attorney General "held a hearing, heard testimony, asked questions, discussed the matter, made their decision, and then provided a written explanation of their reasoning." Diva's Inc., 411 F.3d at 41. As such, the first Bettencourt prong is satisfied.

Second, this Court must consider whether the subject matter of this case is sufficiently controversial that, in the absence of absolute immunity, the Office and its employees would be subject to numerous damages actions. The Special Counsel's engagement directive – "to investigate potential liability or obligation of any persons or entities to pay damages or funds to the Plan" – provides the answer to this inquiry. If the City Council's denial of a special amusement permit was sufficiently controversial to subject its employees to damages actions, the Attorney General's consideration of a multi-million dollar conversion of health care entities affecting the lives of those associated with the entities involved and its citizens – particularly considering the Special Counsel's engagement – certainly satisfies this requirement.

Lastly, the Attorney General reviews hospital conversion matters against a backdrop of safeguards designed to affect an aggrieved party. Specifically, R.I. Gen. Laws § 23-17.14-34(a)

provides that "any transacting party aggrieved by a final order of the department of health or the attorney general under this chapter may seek judicial review by original action filed in the superior court." The Superior Court may "affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the applicant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) Unreasonable; (2) In violation of constitutional or statutory provisions; (3) In excess of the statutory authority of the agency; (4) Made upon unlawful procedure; (5) Affected by other error or law; (6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (7) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." R.I. Gen. Laws § 23-17.14-34(d). Again, if a request to obtain a written decision and an appeal to a City Board of Appeals is sufficient to meet the third Bettencourt prong, a written decision (issued without request) with an automatic appeal to the Superior Court must also satisfy the third prong. See Diva's Inc., 411 F.3d at 41.[2]

For all these reasons, because the Office of Attorney General functionally acts in a quasi-judicial manner when it reviews an application for a hospital conversion, the mental impressions and decision making thoughts of those involved are protected from discovery.

[2] Numerous other cases have recognized quasi-judicial immunity. See e.g., Wang v. New Hampshire Bd. of Registration in Medicine, 55 F.3d 698 (1st Cir. 1995)(members of Board entitled to quasi-judicial immunity for revoking medical license); Bettencourt v. Bd. of Registration in Medicine, 904 F.2d 772 (1st Cir. 1990)(same); Johnson v. Rhode Island Parole Bd. Members, 815 F.2d 5 (1st Cir. 1987)(parole board members entitled to quasi-judicial immunity); Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989)("the guardian ad litem and conservator are non-judicial persons fulfilling quasi-judicial functions"); Sinapi v. Rhode Island Bd. of Bar Examiners, 2016 WL 1562909 * 3 (Board of Bar Examiner members who denied application for special testing accommodations entitled to quasi-judicial immunity) (D.R.I. 2016).

V. Conclusion

For the foregoing reasons, the Attorney General has asserted these privileges: (1) deliberative process privilege, (2) attorney client privilege, (3) work product privilege, and (4) quasi-judicial privilege.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 5th day of January 2018, I electronically filed and served this document through the electronic filing system to all on record. The document electronically filed is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Karen M. Ragosta