STATE OF NEW YORK

SUPREME COURT COUNTY OF ALBANY

In the Matter of
JOHN L. BUONO, as the Chairman of the NEW YORK STATE THRUWAY AUTHORITY, MICHAEL R. FLEISCHER, as the Executive Director of the NEW YORK STATE THRUWAY AUTHORITY, SHARON P. O'CONOR, as the General Counsel of the NEW YORK STATE THRUWAY AUTHORITY, and MICHAEL FLYNN, as the Director of the Department of Audit and Management Services of the NEW YORK STATE THRUWAY AUTHORITY,

Petitioners,

GEORGE E. PATAKI, Governor of the State of New York,

Intervenor,

-against-

DECISION AND ORDER
INDEX NO. 8031-04

TO QUASH OR MODIFY A SUBPOENA AND SUBPOENA DUCES TECUM ISSUED BY

RICHARD L. BRODSKY, Chair, New York State Assembly Standing Committee on Corporations, Authorities and Commissions,

Respondent.

(Supreme Court, Albany Co. Motion Term)
(RJI No. 0104-080576)

(Justice Joseph R. Cannizzaro, Presiding)

APPEARANCES: Whiteman, Osterman & Hanna, LLP
(Scott N. Fein, Esq., of Counsel)
Attorneys for the Petitioners
One Commerce Plaza
Albany, New York 12260

Assembly Person, Richard L. Brodsky
Self Represented Respondent
New York State Assembly Standing Committee
On Corporations, Authorities and Commissions
Legislative Office Building, Room 423
Albany, New York 12248

Cravth, Swaine & Moore, LLP
(Max R. Shulman, Esq., of Counsel)
Attorneys for the Proposed Intervenor
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

CANNIZZARO, J: Petitioners, public officers and employees of the New York State Thruway Authority[1] move, pursuant to CPLR 2304, to quash and/or modify various subpoenas and subpoenas duces tecum served upon the petitioners on behalf of the respondent Assemblyman Richard L. Brodsky, as Chairman of the New York State Assembly Standing Committee on Corporations, Authorities and Committees. Additionally, the Hon. George E. Pataki, Governor of the State of New York, moves to intervene in this proceeding and joins in petitioners' motion to quash.

Initially, the Court grants the Governor's motion to intervene, and will proceed to address the merits of the issues presented accordingly.

In July of 2003, the respondent, together with the Assembly Standing Committee on Transportation, commenced public hearings inquiring into the New York State Canal

[1] For purposes of this application, it is to be noted that the New York State Canal Corporation is a public benefit corporation created by the legislature in 1992, as a subsidiary of the New York State Thruway Authority.

Corporation's activities relating to the real estate development of the lands abutting the New York State Canal System and, more particularly, the so called "Hutchens Transaction". The Hutchens Transaction involved a plan under which Richard A. Hutchens CC, LLC, hereinafter referred to as "Hutchens", a real estate developer, was sold broad and exclusive rights to cut new residential access channels into the Erie Canal to facilitate recreational residential development along the New York State Canal System. The final agreement between the Canal Corporation and Hutchens granted Hutchens exclusive rights to the entire developable portion of the Canal shoreline. The Assembly Standing Committee hearings were held pursuant to authority of New York State Legislative Law §60 and Rule IV(1)(C) of the Rules of the Assembly, for the purpose of investigating the need for legislation to bring increased accountability, transparency, efficiency and fiscal reliability to operations of public authorities across New York State, as it relates to the proposed legislation sponsored by the respondent and being considered by the Assembly Standing Committee on Corporations, Authorities and Commissions.

Prior to the initial public hearings in July of 2003, Assemblyman Brodsky issued a legislative subpoena for documents relating to the Hutchens Transaction, and the petitioners produced several thousand pages of documents. In preparation for continued hearings in October of 2003, the respondent requested certain additional documentation from the petitioners by letters dated August 4 and September 22, 2003. Additional documents were produced by the Canal Corporation, although a number of documents were withheld under a claimed privilege. Two weeks after the October, 2003 hearing, the New York State Comptroller's Office, after conducting its own investigation, voided the Hutchens Transaction. Contemporaneous with the Assembly Standing Committee's inquiry, the New York State Attorney General and the New York State Inspector General, at the request of the Hon. George E. Pataki, Governor of the State of New York, commenced a joint criminal investigation into the activities of the Canal Corporation as it related to the Hutchens Transaction. This culminated in the Attorney General and Inspector General's issuance of a report regarding their investigation on November 29, 2004.

In the meantime, the Canal Corporation provided additional requested documents to the respondent in July, August and September of 2004.

Following the release of the joint Attorney General and Inspector General's report, the respondent scheduled additional legislative hearings for December 21, 2004. On the eve of the scheduled hearings, the petitioners provided the respondent with additional Hutchens Transaction documents. At the December 21, 2004 hearing, New York State Thruway Authority Chairman, Buono indicated his unequivocal support for the full disclosure to the Committee, and affirmatively waived whatever privilege the petitioners might have with respect to same. However, Chairman Buono was subsequently advised by staff that the Governor's Office would not waive its claimed privilege in the requested documents. Consequently, on December 22, 2004, the Canal Corporation provided the respondent with additional documentation and, for the first time, Chairman Buono asserted what petitioners then referred to as the "inter-governmental office communication" privilege as it pertains to communications between the Governor's Office and the Canal Corporation regarding the Hutchens Transaction. In particular, the petitioners asserted that approximately 600 pages of communications between the Canal Corporation and the Governor's Office during the three month period of time between August, 2003 and October, 2003, are protected by the claimed privilege.

This precipitated the respondent issuing the subpoenas at issue, which require the petitioners to appear with all documentation relating to the Hutchens Transaction at the legislative hearings scheduled for December 29, 2004, and to give testimony relating to such matters.

Petitioners now seek to quash the aforementioned subpoenas and subpoenas duces tecum contending that the "inter-governmental office communication" privilege or "deliberative process" privilege or the "executive" privilege precludes the disclosure of approximately 600 pages of material relating to the Hutchens Transaction, which have been delivered to the Court for its *in camera* inspection.[2] Respondent, opposes petitioners' application on the grounds that

the privilege asserted does not apply and, if applicable, the interests advanced by public disclosure far outweigh any interests promoted by upholding the privilege, and that the privilege has been waived.

A motion to quash a subpoena or a subpoena duces tecum is necessarily limited in scope and can challenge only the subpoena's validity or the issuing authority's jurisdiction. Where documents are sought in addition to testimony, such a challenge can include an assertion as to the existence of a privilege which would preclude disclosure of the documents sought or a challenge to the relevancy of the documents sought. See New York Civil Practice, §2304.06, p. 23-69.

The Court shall first address the issue of privilege since the documents will not be subject to disclosure no matter how strong the showing of need or relevancy if the documents sought are in fact privileged. See *Cirale v. 80 Pine Street Corp.*, 35 N.Y.2d 113, 117 (1974). In this regard, whether the privilege asserted is a statutory privilege or a common law privilege, the party moving to quash the subpoena has the burden of establishing his or her right to the privilege. See e.g. *Mahoney v. Staffa*, 184 A.D.2d 886 (3rd Dep't 1992).

Here, petitioners are asserting a statutory privilege against disclosure pursuant to Public Officers Law §87(2)(g), and a common law privilege known as the "deliberative process" privilege or the "official information" or "public interest" privilege, or the "executive" privilege. See *Dipace v. Goord*, 218 F.R.D. 399 (S.D.N.Y. 2003); See also *Cirale v. 80 Pine Street Corp.*, supra; and *Steering Comm. v. Port Auth. (In re World Trade Ctr. Bombing Litig.)*, 93 N.Y.2d 1, (1999).

In regards to Public Officers Law §87(2)(g), there is no legal authority for petitioners' proposition that Public Officers Law §87(2)(g), applies to information sought pursuant to a

[2] Although the petitioners and intervenor attempt to assert what they contend are distinguishable privileges, it is clear from the case law that the privileges asserted are synonymous with each other. *DiPace v. Goord*, 218 FRD 399 (S.D.N.Y. 2003).

legislative subpoena. In fact, the complete lack of case law or other authority indicates that Public Officers Law §87(2)(g), simply has no application here.

In regards to the deliberative process privilege, the Court notes that in *Dipace v. Goord*, the United States District Court for the Southern District of New York stated that:

"The deliberative process privilege is a 'sub-species' of the work product doctrine. It has also been called the 'official information' privilege, the intragovernmental opinion' or 'governmental opinion' privilege, and the 'executive' privilege. The privilege shields from disclosure intra-agency or inter-agency 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' Restated, the privilege protects 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.' As a matter of policy, 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, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

The privilege applies to both intra-agency and inter-agency communications. For a particular inter-agency or intra-agency document to be protected by the privilege, the agency must show that the document is both 'predecisional' and 'deliberative.'

A document is 'predecisional' when it is 'prepared in order to assist an agency decisionmaker in arriving at his decision.' This element distinguishes 'predecisional' documents prepared before a final agency decision, which are protected, from 'postdecisional memoranda setting forth the reasons for an agency decision already made,' which are not. Grumman Aircraft Eng'g Corp., 421 U.S. at 184; accord Resolution Trust Corp. v. Diamond, 137 F.R.D. 634, 641 (S.D.N.Y. 1991) (privilege does not cover 'materials related to the explanation, interpretation or application of an existing policy, as opposed to the formulation of a new policy).

A document is 'deliberative' if it is 'actually . . . related to the process by which policies are formulated.' Thus, the privilege does not protect 'a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment.' While an agency need not actually demonstrate that a specific decision was made in reliance on the allegedly predecisional material, [the agency] must show that the material was prepared to assist the agency in the formulation of some specific decision. In other words, while the agency need not show *ex post* that a decision was made, it must be able to demonstrate that, *ex ante*, the document for which [the deliberative process] privilege is claimed related to a specific decision facing the agency.(Most citations omitted)" See *Dipace v. Goord*, supra at, 403-404.

Here, petitioners have failed to meet their burden of demonstrating that the documents at

issue are either predecisional or deliberative in nature. To the contrary, based on the Court's *in camera* review, the Court finds that the documents asserted to be privileged are merely postdecisional memoranda setting forth nothing other than information pertaining to the Hutchens Transaction, a determination that had already been made. As a result, the Court finds that petitioners have failed to meet their burden of demonstrating their entitlement to the privilege asserted.

Even if the Court were to find that the deliberative process privilege applied to the documents at issue, the Court notes that the privilege is a qualified privilege. In particular, in *Cirale v. 80 Pine Street Corp.*, the Court of Appeals stated that:

"...'official information'" in the hands of governmental agencies has been deemed in certain contexts, privileged. Such a privilege attaches to 'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged.' The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality.....Public interest encompasses not only the needs of the government, but also the societal interests in redressing private wrongs and arriving at a just result in private litigation. Thus, the balancing that is required goes to the determination of the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure. (Citations omitted)" *Cirale v. 80 Pine Street Corp.*, supra at 117-119.

The Court went on to state that:

".. we do not hold that all government information is privileged or that such information may be withheld by a mere assertion of privilege. There must be specific support for the claim of privilege. Public interest is a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case. Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct. (Citations omitted)" *Cirale v. 80 Pine Street Corp.*, supra.

Here, the petitioners have failed to establish their entitlement to the privilege asserted in that they have failed to show that the disclosure sought by the respondent would jeopardize the public interest. Rather, the Court's *in camera* review fails to reveal anything in the documents at

issue that would support the petitioners' contention that disclosure would be more harmful to the interests of government when balanced against the governmental and public interests advanced by allowing disclosure. In this regard, we are the people's government, made for the people, by the people and answerable to the people. Consequently, inasmuch as government is the people's business, it necessarily follows that its operations should be at all times open to the public view. Openness, accountability and transparency are as essential to honest governmental administration as freedom of speech is to representative government.

Under the circumstances presented, it is evident that full public disclosure of all matters pertaining to the Canal Corporation's involvement with the Hutchens Transaction best serves the public and governmental interests implicated, by assuring full accountability on the part of those involved.

Accordingly, the Court finds that the asserted privilege does not preclude disclosure of the documents at issue. The Court notes further that as a result of this finding, the Court need not address the claim of waiver of the privilege asserted by respondent.

Lastly, in regards to the issue of relevancy,

"[a] subpoena may not be vacated unless the person subpoenaed can demonstrate that the subpoena calls for documents that are utterly irrelevant to any proper inquiry or that the futility of uncovering anything legitimate is inevitable or obvious. Not only must subpoenaed documents be material to any non-judicial investigation, but the issue or subject of an investigation must also be relevant to the powers conferred upon the non-judicial body. However, a non-judicial subpoena will withstand a quash challenge so long as the subpoena bears a reasonable relation to the subject matter under investigation and the public purpose to be achieved." See New York Civil Practice, §2304.12, p. 23-76, 23-77. See also *Kalkstein v. DiNapoli*, 228 A.D.2d 28, 30-31 (3rd Dep't 1997).

In regards to a subpoena issued by a Legislative Committee, in particular, it is clear that the Court's role is to determine whether the Committee's inquiry relates to a subject upon which legislation may be enacted and whether the information sought is material and relevant to that inquiry. See *Urbach v. Farrell*, 229 A.D.2d 275, 278 (3rd Dep't 1997). In fact, a public official seeking court enforcement of a non-judicial subpoena must show its authority, the relevancy of

the items sought and some factual basis for inquisitorial action. In other words, the public official must show that the records bear a reasonable relation to the subject matter under investigation and the public purpose to be served. See *Kalkstein v. DiNapoli*, 170 Misc. 2d 165, 170-172 (1996).

Here, although petitioners assert that the documents sought are irrelevant and immaterial to the investigation being conducted by the respondent, they offer nothing to support their assertions. On the other hand, the respondent has demonstrated his authority to issue the subpoena. He has also stated that the legislative purpose of the investigation is to aid in the enactment of legislation that fosters increased accountability, transparency, efficiency and fiscal responsibility to operations of public authorities across New York State. More particularly, respondent has stated that the hearings at which he seeks petitioners to testify and to produce the documents sought, are designed to develop information about the operations of the New York State Thruway Authority and the Canal Corporation including, but not limited to, financial reporting, fair policies, procurement lobbying, obstruction of investigations, and other actions of the Thruway Authority with specific reference to the Hutchens Transaction and related proceedings, so that required changes and reform via legislation can be accomplished. Based on its review of the documents, the Court finds that the documents sought bear a reasonable relation to the subject matter under investigation and the public purpose to be achieved.

Accordingly, in view of the foregoing, the motion to quash the legislative subpoenas at issue is denied, and any temporary restraint previously imposed is hereby vacated.

All papers, including this decision and order, are being returned to respondent's counsel. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

This memorandum shall constitute both the decision and the order of the Court.

IT IS SO ORDERED.

DATED: ALBANY, NEW YORK
DECEMBER 30, 2004

Hon. Joseph R. Cannizzaro, J.S.C.

PAPERS CONSIDERED:
Order to Show Cause, issued December 29, 2004
Affirmation of Sharon P. O'Conor, Esq, affirmed December 29, 2004
Petitioner's Memorandum of Law In Support of Petitioner's Motion to Quash, dated December 29, 2004
Respondent's Memorandum of Law in Opposition to Petitioners' Motion to Quash, received December 29, 2004
Petitioner's Reply Memorandum of Law, dated December 29, 2004
Notice of Motion to Intervene, dated December 30, 2004
Affirmation of Max R. Shulman, affirmed December 30, 2004
Memorandum of Law, dated December 30, 2004