

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947  
TELEPHONE (302) 856-5264

August 13, 2013

Craig A. Karsnitz, Esquire  
Timothy Jay Houseal, Esquire  
William E. Gamgort, Esquire  
Young Conaway Stargatt & Taylor  
1000 North King Street  
Wilmington, DE 19801

Frederick H. Schranck, Esquire  
DE Department of Transportation  
P.O. Box 778  
Dover, DE 19903

Mary Page Bailey, Esquire  
Department of Justice  
820 N. French Street, 6<sup>th</sup> Floor  
Wilmington, DE 19801

RE: *State of Delaware, Department of Transportation v. AMEC  
Environmental & Infrastructure, Inc., f/k/a AMEC E&I, Inc., f/k/a  
MACTEC Engineering and Consulting, Inc.*  
C.A. No. S11C-01-031 RFS

Upon Defendant's Motion to Compel.  
Granted in Part. Denied in Part.

Dear Counsel:

In a companion Memorandum Opinion, I ruled that the deliberative process privilege is not available to the Department in regard to 178 documents listed in its privilege log. The three remaining documents are addressed herein.

The Department concedes that a memorandum dated on the log as January 3, 2011 (argued as January 20, 2011), has been shared with a third party and the work product immunity is thus waived. Counsel's highlighted portions of this memorandum shall be redacted in accordance with DRE 403, and a clean copy provided to AMEC as soon as reasonably possible.

The Department claims work product immunity for a memorandum dated July 17, 2009. However, the parties agree that Ober-Kaler worked as a claims consultant under O'Connell & Lawrence (the lead claims consultant) until the fall of 2009, when the Department retained Ober-Kaler as counsel. A specific date has not been provided, but the parties agree that it occurred in the fall of 2009. On these facts, the memorandum is not immune from discovery and shall be provided to AMEC as soon as reasonably possible.

The third document is a memorandum dated September 25, 2009, by which time Ober-Kaler was counsel for the Department. The privilege log describes this document as "Discussion of outline and plan for analysis of failure of embankments." This language, albeit brief, suggests that the facts and opinions of counsel are entwined in such a way that the two cannot be separated in a meaningful way. As advisory work of counsel, this memorandum is not available to AMEC under Super.Ct.Civ.R. 26(b)(3).

**IT IS SO ORDERED.**

Very truly yours,

*/s/ Richard F. Stokes*

Richard F. Stokes

Original to Prothonotary  
xc: Counsel for Figg Bridge Engineers, Inc.