

CCASE:  
RESPIRABLE DUST SAMPLE  
ALTERATION CITATIONS  
DDATE:  
19920217  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
2 SKYLINE, 10TH FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

IN RE: CONTESTS OF RESPIRABLE                      Master Docket No. 91-1  
DUST SAMPLE ALTERATION  
CITATIONS

ORDER GRANTING IN PART AND DENYING IN PART  
CONTESTANTS' MOTION TO COMPEL PRODUCTION OF  
EXCISED PORTIONS OF CERTAIN DOCUMENTS AND  
DIRECTING THE SECRETARY TO SUBMIT CERTAIN  
DOCUMENTS FOR AN IN CAMERA INSPECTION

On March 2, 1992, Contestants Kentucky Carbon, et al. filed a motion for an order to compel the Secretary to produce the full text of certain documents of Jerry L. Spicer, Ronald Schell, Paul S. Parobeck, Lawrence M. Beeman, Edward Hugler, and William J. Tattersall which Contestants sought in a request for production of documents. On March 16, 1992, the Secretary filed a memorandum in opposition to the motion. On March 26, 1992, I issued an order staying action on the motion pending Commission action on interlocutory review of my orders of September 13, September 27, and October 7, 1991.

On June 29, 1992, the Commission issued its decision on review of those orders. Therefore, the stay order of March 26, 1992, is VACATED.

The Discovery Plan, initially adopted on June 28, 1991, provided that the Secretary would create a document repository containing copies of all discoverable non-privileged documents in the Secretary's control relating to altered dust filter media, and would compile a list of documents deemed by the Secretary "not to be discoverable or . . . otherwise privileged" (II.A. 1, 3). The documents involved in this motion were not included in the repository, but were produced in response to Contestants' request for production of December 4, 1991. The Secretary responded in mid-January 1992, and the instant motion was filed March 2, 1992. In view of these circumstances, I reject the Secretary's argument that the motion should be denied as untimely filed and not in accordance with the Discovery Plan.

I.

Copies of the documents involved in the motion are attached as Exhibits A through F. Exhibit A contains the notes of Jerry Spicer; B the notes of Ronald Schell; C the notes of Paul Parobeck; D the notes and calendar entries of Lawrence Beeman; E the calendar entries of Edward Hugler; F documents (actually a single document) from the files of Assistant Secretary Tattersall.

Where the documents contain blank areas or blacked-out or whited-out words or phrases, with no notation of a claim of privilege, counsel for the Secretary informed me and counsel for Contestants that these contain entries unrelated to the present litigation. I accept this representation and on this motion will concern myself only with the excised portions of documents for which a specific claim of privilege has been asserted.

With respect to the assertions of privilege, in instances where the Solicitor provides a factual description of the excised portion of the document, I will rule on the privilege claim, even though it is not supported by an affidavit or other formal claim of privilege. Where the assertion is merely conclusory, I will order the Secretary to submit the document for in camera inspection. The documents I am here concerned with are calendar entries and scattered short notes of six MSHA officials and employees. For such documents, it is unnecessary and inappropriate to require a "Vaughan index." See Commission decision, *In Re Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC \_\_\_\_\_ (June 29, 1992), slip op. at 20.

II. Spicer Notes

Spicer's notes contain six pages for only one of which (the fourth page entitled 3/4/91 Coal Staff Mtg) the Solicitor claims privilege. The Secretary states that the excised portion of the document contains a notation about the timing and progress of criminal investigation. She asserts the investigative privilege and the work product doctrine. The notation is sufficiently factual for me to uphold the claim of investigative privilege. Contestants have not shown an overriding need for the document. The motion to compel production is denied.

III. Schell Notes

Two pages of calendar notes made in February and March 1991 are included. The only excision for which privilege is asserted is on March 4. The work product doctrine is asserted and the excised portion of the document is described as follows: "Released information would reveal identity of scientific expert being consulted by attorneys in this litigation." I am not able to rule on the claim of privilege without more factual

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information. The Secretary will be required to produce the document for in camera inspection.

#### IV. Parobeck Notes

Parobeck's notes consist of one page dated October 1, 1991, relating to various scientific tests that could be done. The Secretary claims the deliberative process privilege and the work product doctrine. They are described as "notes reflecting the thought processes and deliberations of an Agency representative in preparation for a report. This report was to be prepared in anticipation of litigation." The description is largely conclusory. I will order the document produced for in camera inspection. v. Beeman Notes

The exhibit contains 19 pages of notes, 17 of which contain privilege claims (only pages 4 and 6 do not). The calendar contains 7 pages, September 1990 through April 1991. No privilege claims are made for calendar entries. (The entries are for the most part blacked-out, which indicates, as I noted above, that they are unrelated to the AWC litigation).

Page 1, entitled 9/17/90 staff meeting (the pages are not numbered; some are not dated; I am considering them in the order in which they appear in the exhibit), claims work product and deliberative process privileges for an entry described as "references discussion on litigation strategy and issues to be considered in developing enforcement strategy." A further notation claims investigative privilege for an entry described as "Discusses I.G. Investigation and use of MSHA personnel on other ongoing investigations." These notations are sufficiently factual for me to determine that the claimed privileges apply. No overriding need for the document has been shown by Contestants. The motion to compel is denied.

Page 2 is headed 9/17 Abnormal White Centers. The Secretary asserts the attorney-client, work product, and investigative privileges for an entry described as "U.S. Attorney discussion on litigation strategy and to release this information would reveal the thought processes of the U.S. Attorney and how the criminal case was developed." She asserts the attorney-client and work product privileges for another entry described as "Discussion of litigation concerns between Sol and MSHA." Each of these assertions contains sufficient factual material for me to uphold the privilege claims, the work product and investigative privileges in the first case; the attorney-client privilege in the second. Contestants have not shown an overriding need for the document. The motion to compel is denied.

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Page 3 is headed AWC continued. The Secretary asserts the attorney-client, work product, and deliberative process privileges. The deleted entry is described as "Discussions on contacts with U.S. Attorney regarding AWC litigation strategy, including thoughts and impressions of attorneys concerning the developments of the criminal case questions with MSHA officials present." I uphold the deliberative process and work product privileges. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

Page 5 is entitled Peluso AWC. The Secretary claims the work product privilege for a deletion described as "Discussion of scientific opinion and possible report of Secretary's potential expert prepared in anticipation of litigation." I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the page for my in camera inspection.

Page 7 is entitled 10/26 (cont). The Secretary asserts that lines 1 to 29 contain "[d]iscussion of strategy in ongoing criminal investigations with the U.S. Attorney and other MSHA officials. Discussions of legal strategy regarding AWC criminal enforcement and civil enforcement." She claims the investigative, deliberative process, and attorney-client privileges. I uphold her assertion of the investigative privilege. The description is not sufficient to support the other claimed privileges. Lines 30 to 39 are described as deliberations on other potential target companies for criminal investigation, and as to the role of special investigations for the U.S. Attorney's Office. The Secretary claims the investigative and work product privileges. I uphold her assertion of the investigative privilege, but not the work product claim. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

Page 8 is headed 10/31 Leighton Farley. The Secretary claims the work product, attorney-client, and investigative privileges for an entry described as "Discussion of strategy for negotiating criminal plea agreement between MSHA, U.S. Attorneys, and Solicitor's Office attorneys." I uphold her claim of the investigative privilege. The description is not sufficient to support the other claimed privileges. Contestants have not shown an overriding need for the document. The motion to compel is denied.

Page 9 is headed Mike Carey. The Secretary asserts the attorney-client, work product, and deliberative process privileges for an entry described as "Discussion of opinions and theories on U.S. Attorney negotiating plea agreement with Solicitor's Office attorneys and U.S. Attorneys participating and giving advice and opinion on such matter." I uphold her claim of

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the attorney-client and work product privileges. The motion to compel is denied.

Page 10 is entitled AWC Jerry/Ed/Ron. The Secretary asserts the work product, attorney-client, and deliberative process privileges for a deletion described as "Discussion of Legal opinions and theories regarding U.S. Attorney negotiating criminal plea agreements with Solicitor's Office attorneys and expressing." Although this description appears to be incomplete, I find it sufficient to uphold the claim of work product privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

Page 11 begins with the Secretary's assertion of the deliberative process, work product, and investigative privileges for a deletion described as "Discussions of possible legal strategy against other companies and how to proceed criminally and/or civilly." I uphold her claim of the work product privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied. In the middle of page 11, after the notation Ed Clair AWC, the Secretary asserts the attorney-client and work product privileges for a deletion described as "Discussions between Solicitor's Office and MSHA on U.S. Attorney's negotiations on plea agreements and development of ongoing criminal investigations." I uphold her claim of both these privileges. The motion to compel is denied. At the bottom of page 11, after the notation AWC-Clair, Hugler, Mascolino, Schell, White, the Secretary asserts the attorney-client privilege for a deletion described as "Discussions between Solicitor's Office and MSHA on U.S. Attorney's negotiations on plea agreements." I uphold her claim. The motion to compel is denied.

Page 12 is headed 11/8 (cont). The Secretary asserts the work product and attorney-client privileges for an entry described as "Discussions between Solicitor's office and MSHA on U.S. Attorney's negotiations on plea agreements and on further criminal case/investigation development." She also asserts the work product and attorney-client privileges for another entry described as "Discussions between Solicitor's Office and MSHA on U.S. Attorney's negotiations on plea agreements and on further criminal case development and procedures." I uphold these privileges for both entries. The motion to compel is denied.

Page 13 contains a notation dated 11/28 for which the Secretary claims the deliberative process privilege because it would reveal "Suggested and rejected computations regarding AWC civil penalties." I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the page for my in camera inspection. Page 13 also contains a notation dated 11/29, for which the Secretary claims the work product privilege because it would reveal a "Request and

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description of information needed in negotiating criminal plea agreement." I uphold her claim of the work product privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

Page 14 is headed 12/7 Nelson Cohen - AWC Pittsburgh. The Secretary asserts the attorney-client, investigative, and work product privileges for an entry described as "Discussion of information needed by attorneys to be provided by MSHA for ongoing investigations and further assisting in the development and procedures of criminal investigations and litigation." I uphold her claim of the investigative and work product privileges. Contestants have not shown an overriding need for the document. The motion to compel is denied.

Page 15 is dated 2/25/91. The Secretary asserts the attorney-client privilege for an entry described as "Discussions between Solicitor's Office attorneys and MSHA on litigation strategy." I uphold her claim. The motion to compel is denied.

Page 16 is headed 3/4 Staff Meeting. The Secretary asserts the attorney-client, work product, and investigative privileges for a deletion described as "Discussion between MSHA employee and Asst. U.S. Attorney concerning the development and procedures of handling criminal actions on AWC cases." She asserts the same privileges for another deletion described as "Discussion with U.S. Attorney on strategy in proceeding against target company." For both entries, I uphold the Secretary's claim of the attorney-client and investigative privileges. The motion to compel is denied.

Page 17 contains a notation dated 3/5, for which the Secretary claims attorney-client and work product privileges because it would reveal "Discussion between MSHA and Solicitor's Office attorneys on strategy regarding AWC litigation involving certain companies." I uphold her claim of work product privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

Page 18 contains a notation dated 3/13, for which the Secretary claims attorney-client and investigative privileges because it would reveal "results obtained in ongoing criminal investigations and opinions on further developments with opinions and advice from U.S. Attorneys to MSHA." I uphold her claim of both these privileges. The motion to compel is denied.

Page 19 is completely deleted. The Secretary asserts the investigative privilege for an entry described as "Information which indicates discussions about developments in criminal investigations and might lead to information protected by 6(e) grand jury matters." I uphold the Secretary's assertion of the investigative privilege. Contestants have not shown an

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overriding need for the document. The motion to compel is denied.

## VI. Hugler Notes

The exhibit consists of pages from 1989, 1990, and 1991 calendars and identifies the excised portions by numbers which correspond to lists detailing the Secretary's claims of privilege.

### 1989 Calendar Entries

1. The Secretary asserts the investigative, attorney-client, and work product privileges for an entry reflecting conversation with the U.S. Attorney regarding the approach and progress of the on-going criminal investigation. I uphold the Secretary's claim of the investigative privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

2. The Secretary asserts the work product privilege for an entry reflecting the concerns of the U.S. Attorney and information relating to the on-going criminal investigation. I uphold the Secretary's claim. Contestants have not shown an overriding need for the document. The motion to compel is denied.

3. The Secretary asserts the investigative, work product, attorney-client, and deliberative process privileges for notes of a meeting with the U.S. Attorney, MSHA, and the Solicitor's office revealing information pertaining to the on-going criminal investigation and potential criminal charges and civil enforcement action. I uphold the Secretary's claim of the investigative and work product privileges. Since the Contestants have not shown an overriding need for the document, the motion to compel is denied.

4. The Secretary asserts the investigative and deliberative process privileges for an entry reflecting development of the investigation and revealing the identity of a potential target. I uphold the Secretary's claim of the investigative privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

5. The Secretary asserts the attorney-client, investigative, work product, and deliberative process privileges for notes of a meeting with the U.S. Attorney and Department of Justice reflecting development and coordination of investigations and MSHA's participation regarding criminal investigation and civil enforcement. I uphold the Secretary's claim of the investigative and work product privileges. Contestants have not



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shown an overriding need for the document. The motion to compel is denied.

6. The Secretary asserts the investigative and deliberative process privileges for an entry reflecting discussion with MSHA special investigators regarding the on-going criminal investigation and the effect of expanding the criminal investigation upon MSHA's resources. I uphold the Secretary's claim of investigative privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

7. The Secretary asserts the deliberative process privilege for an entry described as "Notes reflect Hugler's thought-process for providing an appropriate MSHA response to hypothetical future events." This description is not sufficient to enable me to rule on the asserted privilege. I will order the document produced for in camera inspection.

8. The Secretary asserts the investigative, attorney-client, and work product privileges for notes of a report on a meeting between MSHA and U.S. Attorneys regarding development of the on-going criminal investigation, use of information, and evaluation of the case. I uphold the Secretary's claim of the investigative privilege, but not the attorney-client or work product privileges. Contestants have not shown an overriding need for the document. The motion to compel is denied.

#### 1990 Calendar Entries

1. The Secretary asserts the investigative, attorney-client, and work product privileges for notes of a meeting with the Solicitor's office and MSHA regarding the criminal investigation and prerequisites for civil enforcement actions. I uphold the Secretary's claim of attorney-client privilege. The motion to compel is denied.

2. The Secretary asserts the investigative, attorney-client, and deliberative process privileges for notes of a meeting with the Solicitor's office and MSHA to discuss a decision regarding the on-going criminal investigation. I uphold the Secretary's claim of the investigative and deliberative process privileges, but not the attorney-client privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

3. The Secretary asserts the attorney-client, deliberative process, and investigative privileges for notes of a conference call between Hugler, MSHA personnel, the Solicitor's office, and U.S. Attorneys regarding the progress of on-going criminal investigations and possible action by MSHA. I uphold the Secretary's claim of the deliberative process and investigative

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privileges. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

4. The Secretary asserts the investigative privilege for an entry reflecting a development in an on-going criminal investigation. I uphold her claim. Contestants have not shown an overriding need for the document. The motion to compel is denied.

5. The Secretary asserts the attorney-client, work product, and deliberative process privileges for an entry reflecting confidential discussions at a civil enforcement strategy meeting between Hugler and the Solicitor's Office. I uphold the Secretary's claim of all three privileges. The motion to compel is denied.

6. The Secretary asserts the attorney-client, work product, and deliberative process privileges for an entry reflecting confidential discussions at a meeting with Doug White involving possible civil actions and litigation strategy. I uphold the Secretary's claim of all three privileges. The motion to compel is denied.

7. The Secretary asserts the deliberative process and attorney-client privileges for an entry reflecting Hugler's concerns about a possible Peabody plea agreement and a related privileged communication to the Solicitor's office. I uphold the Secretary's claim of the attorney-client privilege. The motion to compel is denied.

8. The Secretary asserts the deliberative process, investigative, and attorney-client privileges for an entry reflecting consideration of MSHA's response to developments in an on-going criminal investigation and a privileged communication between the Assistant U.S. Attorney and MSHA. I uphold the Secretary's claim of the attorney-client and investigative privileges. The motion to compel is denied.

9. The Secretary asserts the attorney-client, investigative, and work product privileges for notes of a confidential discussion between MSHA and the Solicitor's office regarding plea bargain negotiations between the U.S. Attorney and Peabody. I uphold the Secretary's claim of the work product privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

10. The Secretary asserts the deliberative process privilege for an entry reflecting "Hugler's thinking regarding issues and concerns that must be discussed and resolved prior to initiation of civil enforcement action by MSHA." This description is not sufficient to determine the claim of

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privilege. I will order the document produced for in camera inspection.

11. The Secretary asserts the attorney-client, work product, and deliberative process privileges for notes of a confidential discussion between MSHA and the Solicitor's office regarding MSHA's civil enforcement options. I uphold the Secretary's claim of the attorney-client privilege. The motion to compel is denied.

12. The Secretary asserts the deliberative process privilege for notes reflecting Hugler's thoughts in preparation for a meeting with the U.S. Attorney regarding initiation of civil enforcement proceedings during on-going criminal investigations. I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

13. The Secretary asserts the investigative, work product, and attorney-client privileges for notes of a meeting with the U.S. Attorney, Solicitor's office, and MSHA regarding the Peabody plea agreement and future conduct of criminal investigations. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

14. The Secretary asserts the deliberative process privilege for notes reflecting "Hugler's concerns and opinions during meeting with U.S. Attorney, Solicitor's office, and MSHA regarding Peabody plea agreement and future conduct of criminal investigation." I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

15. The Secretary asserts the investigative, deliberative process, and work product privileges for notes of a telephone conversation with the U.S. Attorney concerning the future course of criminal investigations and potential evidence. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

16. The Secretary asserts the attorney-client, investigative, deliberative process, and work product privileges for notes of a confidential discussion with the U.S. Attorney concerning the Peabody case, information pertaining to criminal investigations, investigative techniques, and the effect of criminal investigations on civil enforcement proceedings. I uphold the Secretary's claim of the investigative and attorney-client privileges. The motion to compel is denied.

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16A. The Secretary asserts the investigative privilege for a note indicating the potential target of criminal investigation. I uphold the Secretary's claim. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

17. The Secretary asserts the investigative privilege for an entry reflecting considerations given to the effect of the Peabody plea agreement language on pending DOL investigations. I uphold the Secretary's claim. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

#### 1991 Calendar Entries

1. The Secretary asserts the deliberative process privilege for notes of "Hugler's preparation for meeting later that day to discuss the Peabody plea. These notes reflect Hugler's beliefs and advice relating to MSHA's public statement on the plea." I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

2. The Secretary asserts the attorney-client, work product, and deliberative process privileges for notes of a confidential meeting regarding preparation of the press release concerning the Peabody plea. The description is not sufficient to enable me to rule on the asserted privileges. The Secretary is directed to produce the document for my in camera inspection.

3. The Secretary asserts the deliberative process privilege for notes reflecting Hugler's thoughts and outlining his suggested organization of the proposed press release. I deny the Secretary's claim of privilege. The motion to compel is granted.

4. The Secretary asserts the deliberative process privilege for a note identifying an entity against which MSHA was considering initiating civil action prior to April 4, 1991. I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

5. The Secretary asserts the deliberative process and attorney-client privileges for a note of a discussion regarding an entity and the timing of proposed civil action against that entity. I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

6. The Secretary asserts the deliberative process, attorney-client, and work product privileges for notes of a meeting with the Solicitor's office to plan a briefing for the

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Acting Secretary regarding AWCs and proposed enforcement actions. I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

7. The Secretary asserts the deliberative process privilege for notes of a briefing for the Acting Secretary regarding AWCs and proposed enforcement actions. I uphold the Secretary's claim. Contestants have not shown an overriding need for the document. The motion to compel is denied.

8. The Secretary asserts the deliberative process and work product privileges for notes of discussions regarding proposed enforcement actions and assignments of responsibilities. I am unable to rule on the asserted privileges with this description. The Secretary is directed to produce the document for my in camera inspection.

9. The Secretary asserts the deliberative process, attorney-client, investigative, and work product privileges for notes of a "confidential discussion of progress of investigations and DOL position with DOJ regarding which types of cases should be pursued criminally. In preparation for discussions with U.S. Attorneys." I uphold the Secretary's claim of the investigative and work product privileges. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

9A. The Secretary asserts the investigative, work product, and attorney-client privileges for a note regarding a possible target of criminal investigation and an exchange of comments between MSHA and U.S. Attorneys. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

10. The Secretary asserts the investigative, deliberative process, and work product privileges for notes of a confidential briefing on an on-going criminal investigation. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

11. The Secretary asserts the investigative, work product, and attorney-client privileges for notes of a confidential report on on-going criminal investigations. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

VII. Tattersall Document

The exhibit consists of a single page and identifies two excised portions by numbers which correspond to a list detailing the Secretary's claims of privilege. The document is described as an unrelated, unsigned summary of the AWC investigations, marked "Confidential," prepared in early 1990.

1. The Secretary asserts the investigative and work product privileges for an entry revealing the techniques, timing, and pace of a criminal investigation and the strategy and opinions of government attorneys and investigators. The description is conclusory. I will order the document produced for in camera inspection.

2. The Secretary asserts the investigative privilege for an entry revealing the location and potential targets of possible criminal investigations. The description is conclusory. I will order the document produced for in camera inspection.

ORDER

In accordance with the above discussion, the Secretary is ORDERED to produce on or before August 3, 1992, the document denominated No. 3 in the Hugler Calendar-1991. She is further ORDERED to submit to me on or before August 3, 1992, for my in camera inspection the documents described in the above discussion. In all other cases, her claim of privilege is upheld, and the motion to compel is DENIED.

James A. Broderick  
Administrative Law Judge