

CCASE:  
IN RE CONTESTS OF RESPIRABLE  
DUST SAMPLE ALTERATION  
CITATIONS

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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

ORDER DIRECTING INSPECTOR GENERAL  
TO SUBMIT DOCUMENTS FOR  
IN CAMERA INSPECTION

At the request of Contestants represented by the law firm of Jackson and Kelly, I issued a subpoena duces tecum which was served on the United States Department of Labor, Office of the Inspector General (OIG) on July 2, 1992. The subpoena directed the OIG to produce all documents in its possession concerning MSHA Internal Investigation No. 890014, OIG Case No. 30-0801-0036, relating to the investigation of alleged tampering with coal dust cassette samples. Some documents were withheld in whole or in part based on claims of privilege.

On July 6, 1992, Contestants filed a motion to compel arguing that the privileges claimed by the OIG do not permit their refusal to comply with the subpoena. On July 7, 1992, Contestants filed an amended motion to compel, seeking, in addition to an order compelling the production of documents called for in the subpoena, the address of Carter Elliott the lead OIG investigator in the case. On July 14, 1992, Contestants filed a supplement to the motion to compel, seeking, in addition to the order sought by the prior motion, an order compelling "a search of possibly related OIG files for AWC materials." On July 22, 1992, Contestants filed a second supplement to the motion to compel. On July 29, 1992, after an order was issued granting an extension of time, OIG filed an opposition to the motion to compel. It filed a memorandum in support of its opposition and a declaration of the Inspector General Julian W. De La Rosa. Also submitted with the opposition were copies of additional documents with certain excisions provided in response to the subpoena duces tecum.

The declaration of Inspector General De La Rosa describes in numbered paragraphs the documents or portions of documents withheld, and the privilege or privileges asserted for the nondisclosure. For convenience in deciding the motion, I will use

Paragraphs 6 and 7 of the declaration indicate that 66 of the 67 Reports of Interviews originally withheld are released to Contestants with the names of the persons interviewed and other information which would lead to disclosure of their identities excised. Also withheld are dust data cards and related materials attached to some of the reports because these would identify the persons interviewed. The declaration further states that excisions were made of any part of interviews which would divulge any OIG investigative techniques or strategies, but I have not seen any indication of such excisions in the 66 reports. The excisions are based on the investigative privilege and the informant privilege. The investigative privilege protects from disclosure documents prepared or received in the course of a civil or criminal investigation, especially when disclosure would interfere with enforcement proceedings. *Black v. Sheraton Corporation of America*, 564 F.2d 531 (D.C. Cir. 1977); *Bristol Meyers Co. v. Federal Trade Commission*, 424 F.2d 935 (D.C. Cir. 1970), cert. denied, 400 U.S. 824 (1970). The informant privilege (also termed the informer's privilege) protects from disclosure the identity of persons furnishing information to law enforcement officials. *Rovaro v. United States*, 353 U.S. 53 (1957); *Secretary/Logan v. Bright Coal Company Inc.*, 6 F.M.S.H.R.C. 2520 (1984). Both are qualified privileges and where disclosure is essential to a fair determination of a case, the privilege must yield. In this case the names of the inspectors who were the subjects of the OIG investigation have been disclosed to Contestants. They have not shown or even asserted that disclosure of the identities of the inspectors for each of the disclosed reports is necessary for their defense. The motion to compel and the motion for in camera inspection will be denied with respect to the excisions having to do with the identity of the subjects of the interviews covered by the reports. The OIG also excised portions of one sentence from four interview reports which contain information covered by Rule 6(e). I accept the representations of the Inspector General with respect to these excisions and will deny the motion to compel. The declaration (paragraph 7) also states that one Report of Interview is being withheld in its entirety because it "contains extremely sensitive information and allegations which are raw and uncorroborated." The long term intelligence gathering abilities of OIG would be compromised, according to the declaration, if it were disclosed. I accept the representations and will not order disclosure of that one Report of Interview.

Paragraph 8 of the declaration asserts the investigative and informant privileges for 19 pages of OIG memoranda memorializing reviews of personnel files and credit bureau checks on persons OIG intended to interview. The memoranda reveal the identities of such persons and other personal information. I uphold the claims of privilege, and will deny the motion to compel and the request for an in camera inspection.

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Paragraph 9 asserts the investigative privilege for a memo of a conversation between an OIG agent and a New Jersey State Police Detective. The memo concerns the OIG's use of a specific investigative technique used during the investigation, and the declaration states that disclosure of the technique could compromise future OIG investigations. Disclosure of such information is not needed in Contestants' defense, and I will deny the motion to compel and the request for in camera inspection.

Paragraph 10 invokes the deliberative process privilege for three documents (one page each) related to the OIG closing memo sent to MSHA: (1) an undated draft version of the closing memo prepared by Raymond Carroll with handwritten notes by Assistant I.A. Bassett; (2) an undated fax transmission from Carroll to Bassett; and (3) a memo from Carroll to Bassett containing comments on the final version. The documents come within the protection of the deliberative process privilege, but I will direct that they be submitted to me for in camera inspection so that I may determine whether Contestants' need for the document outweighs OIG's interest in confidentiality.

Paragraph 11 asserts the investigative and informant privileges for withheld portions of the table of contents from the OIG file "in order to protect the identities of those persons interviewed by OIG . . . ." I uphold the claims of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 12 asserts the investigative and informant privileges for withheld portions of letters from Raymond Carroll to two Assistant U.S. Attorneys. I uphold the claims of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 13 asserts the investigative and informant privileges for portions of a memorandum from Raymond Carroll to OIG Regional Inspectors which identify a mine inspector and disclose the location of interviews. I uphold the claims of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 14 asserts the investigative privilege for the withheld portion of a letter from Raymond Carroll to an Assistant U.S. Attorney which contains information regarding the investigative techniques used by OIG. I uphold this privilege claim. It also claims the deliberative process privilege for a portion of paragraph five of the letter which "contains a personal characterization by OIG Special Agent Carter Elliott which does not reflect the conclusions of the OIG . . . ." I uphold the privilege claim, but will direct that this portion of the letter be submitted to me for in camera inspection so that I may

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determine whether Contestants' need for the document outweighs  
OIG's interest in confidentiality.

Paragraph 15 asserts the investigative privilege for the  
withheld portions of a report of Carter Elliott containing  
information concerning the investigative techniques used by OIG  
during the investigation. I uphold the claim of privilege, and  
will deny the motion to compel and the motion for in camera  
inspection.

Paragraph 16 asserts the deliberative process privilege for  
withheld portions of a memorandum of Raymond Carroll containing  
"a personal characterization . . . which does not reflect the  
opinion of the OIG . . . ." In addition the locations of the  
personal residences of MSHA inspectors have been withheld, on the  
basis of "personal privacy concerns." I uphold the deliberative  
process privilege, but will direct that the withheld portion of  
the document containing the "personal characterization" be  
submitted for in camera inspection. The personal residences of  
MSHA inspectors need not be disclosed or submitted for  
inspection.

Paragraph 17 indicates that the withheld portions of the OIG  
"predication memorandum" have been disclosed.

Paragraph 18 asserts the deliberative process privilege for  
a draft memorandum from I. A. Bassett of OIG to Jerry Spicer of  
MSHA. The draft was prepared by Raymond Carroll and forwarded to  
OIG headquarters but no further action was taken and it was never  
sent to Spicer. I uphold the claim of privilege, but will direct  
that the document will be submitted for in camera inspection so  
that I may determine whether Contestants' need for the document  
outweighs OIG's interest in confidentiality.

Paragraphs 19 and 20 refer to information received from the  
U.S. Attorney and from an agent of the grand jury which is stated  
to be subject to Rule 6(e) of the Federal Rules of Criminal  
Procedure. I will deny Contestants' motion to disclose the  
information and their motion for in camera inspection for reasons  
previously given in this order.

Paragraph 21 asserts the investigative and informant  
privileges for a handwritten note containing a reference to the  
location of an interview conducted by OIG. I uphold the claims of  
privilege, and will deny the motion to compel and the motion for  
in camera inspection.

Paragraph 22 asserts the attorney-client privilege for a  
note from Raymond Carroll concerning a telephone conversation  
with OIG counsel Howard Shapiro. The note describes information  
and advice given to Carroll. I uphold the claim of privilege, and  
will deny the motion to compel and the motion for in camera

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inspection.

Paragraph 23 claims the attorney-client privilege for withheld portions of a handwritten note from Carroll concerning a meeting involving Carroll, MSHA counsels Doug White and Page Jackson, OIG counsels Sylvia Horowitz and Howard Shapiro, and OIG agent Carter Elliott. The withheld portions of the document describe information and advice provided by OIG counsel to Carroll. I uphold the claim of privilege, and will deny the motion to compel and the motion for in camera inspection.

Paragraph 24 states that the Inspector General believes "it is inappropriate" to disclose the home address of former OIG Special Agent Carter Elliott and has instructed OIG counsel to resist such disclosure. Carter Elliott was, according to Contestants' motion to compel, the lead OIG investigator in the investigation of the MSHA inspectors. He has since retired from the Government. According to OIG counsel he is aware of the outstanding subpoena for his testimony. OIG counsel argues that Mr. Elliott's address is contained in his official personnel file which is protected from disclosure by the Privacy Act, 5 U.S.C. 552a(a)(5). Section (b)(11) of the Act permits disclosure "pursuant to the order of a court of competent jurisdiction." OIG argues that as an administrative law judge I am not a court of competent jurisdiction. It does not dispute my jurisdiction to compel discovery under the Fed. Rules of Civ. P., nor my jurisdiction to issue subpoenas. In Barron's Law Dictionary, (2d ed. 1984) p. 82, a "competent court" is defined as "one having proper jurisdiction over the person and property at issue." The issue in the cases before me are whether mine operators, including Contestants, were involved in altering the weights of respirable dust samples. The OIG investigation concerned a closely related matter, "the possible tampering of respirable dust sample cassettes by mine safety inspectors." (OIG memorandum, p. 2). Mr. Elliott was involved as a Government agent in that investigation. He may have information important to Contestants' defense. The cases before me have been consolidated for an issues trial scheduled to commence on December 1, 1992. To facilitate the early completion of discovery, I will order OIG to disclose the home address of Mr. Elliott unless he agrees to present himself for his deposition. If, as OIG counsel asserts, the release of his address may compromise his and his family's safety, and subject him to harassment, he can avoid these consequences by agreeing to testify.

Contestants further seek an order to compel a search of other OIG files possibly related to those covered by the subpoena duces tecum. No good reason has been advanced for broadening the scope of the subpoena, and the request will be denied.

ORDER

Therefore, IT IS ORDERED

1. The motion to compel is DENIED with respect to the withheld documents or portions of documents described in paragraphs 6, 7, 8, 9, 11, 12, 13, that part of paragraph 14 referring to a description of investigative techniques, 15, 19, 20, 21, 22, and 23 of the Declaration of Inspector General Julian W. De La Rosa.

2. The motion to compel is GRANTED with respect to paragraph 24 of the Declaration referring to the home address of Carter Elliott, unless on or before September 15, 1992, Mr. Elliott agrees to present himself for a deposition by Contestants' counsel.

3. The OIG is DIRECTED to submit to me for in camera inspection on or before September 15, 1992, the withheld documents or portions of documents described in paragraph 10, that part of paragraph 14 referring to paragraph five of the letter, that part of paragraph 16 containing the personal characterization of Raymond Carroll, and paragraph 18 of the Declaration of the Inspector General.

4. The motion to compel a search of other "possibly related OIG files for AWC materials" is DENIED.

James A. Broderick  
Administrative Law Judge