

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
1331 Pennsylvania Avenue, N.W., Suite 520N  
Washington, D.C. 20004

December 2, 2016

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2016-264-DM
on behalf of JEFFREY PAPPAS,	:	WE MD 16-02
Complainant,	:	
	:	
v.	:	
	:	
CALPORTLAND COMPANY, and	:	Mine ID 04-00011
RIVERSIDE CEMENT COMPANY,	:	Mine: Oro Grande Quarry
Respondents.	:	

**ORDER DENYING RESPONDENTS' JOINT MOTION TO COMPEL**

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”), on behalf of Jeffrey Pappas against CalPortland Company (“CalPortland”) and Riverside Cement Company (“Riverside”), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2). On February 12, 2016, the Secretary filed a discrimination complaint on behalf of Pappas to the Commission. Chief Administrative Law Judge Robert J. Lesnick assigned the matter to me on March 11, 2016. On March 11, 2016, the Secretary filed an amended complaint adding Riverside as a respondent to the proceeding. CalPortland and Riverside each filed an answer to the amended complaint on April 8, 2016. On April 14, 2016, I issued a Notice of Hearing, setting this matter for hearing on December 6–9, 2016, in San Bernadino, CA. The Notice of Hearing also provided guidelines to the parties for completing discovery in this proceeding.

On November 18, 2016, Respondents Riverside and CalPortland filed a Joint Motion to Compel Discovery Responses. The Secretary timely filed a response on November 29, 2016.

**I. BACKGROUND AND ISSUES**

Respondents Riverside and CalPortland each served a set of discovery requests to the Secretary on August 2, 2016, and August 3, 2016, respectively. (Mot. at 2.) The Secretary responded to both discovery requests on September 26, 2016, and objected to certain requests based on privilege. (*Id.*) On October 7, 2016, the Secretary provided a privilege log, asserting the common interest privilege, government informant privilege, and attorney-client privilege as the basis for withholding certain documents. (*Id.*) Respondents now request an order compelling the Secretary to produce the withheld documents identified as Document Nos. 0047-0051, 0234, 0235, and 0236-0237.

According to the Secretary’s privilege log, Document No. 0047-0051 contains an interview of Jeffrey Pappas by MSHA Special Investigator Kyle Jackson, for which the Secretary claims the attorney-client, common interest, and government informant privileges.

(Mot. Ex. 3 at 2.) Document No. 0234 contains documents from Pappas, for which the Secretary claims the common interest privilege. *Id.* Document No. 0235 contains an email from Pappas to Jackson, for which the Secretary claims the common interest and government informant privileges. *Id.* Lastly, Document No. 0236-0237 contains a memorandum from Pappas to Jackson, for which the Secretary claims the common interest and government informant privileges. *Id.*

## II. PRINCIPLES OF LAW

### A. Scope of Discovery

Under Commission Procedural Rule 56, parties may use depositions, written interrogatories, requests for admissions, and requests for documents or objects to “obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.” 29 C.F.R. § 2700.56(a)–(b). A party served with a request for production must respond within 25 days of service and state the basis for any objections in its answer. 29 C.F.R. § 2700.58(c).

Commission Judges may look to the Federal Rules of Civil Procedure for guidance on any procedural question not governed by the Mine Act, the Commission’s Procedural Rules, or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). Under Federal Rule 26(b)(1), a party may discover “any non[-]privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1). The scope of discovery under the Federal Rules is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Commission Procedural Rule 56(e), 29 C.F.R. § 2700.56(e), allows parties to engage in discovery as long as it does not “unduly delay or otherwise impede disposition of the case” and is “completed at least 20 days prior to the scheduled hearing.” For good cause shown, Commission Judges may “extend or shorten the time for discovery.” *Id.*

### B. Limitations on Discovery: Privileged Matter

As noted above, Commission Rule 56(b) excludes privileged material from the scope of discovery. *See* 29 C.F.R § 2700.56(b). The Federal Rules of Civil Procedure also limit discovery to “non[-]privileged” matter. Fed. R. Civ. P. 26(b)(1). However, parties withholding information on the basis of privilege must expressly make such a claim and “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A).

#### 1. Attorney-Client Privilege

The Commission has noted that the attorney-client privilege generally protects communications made by a client in confidence to his attorney. *ASARCO, Inc.*, 12 FMSHRC

2548, 2559 (Dec. 1990). Attorney-client privilege serves to promote full and frank communication between attorneys and their clients. *Upjohn Co. v. United States*, 449 U.S. 383, 388 (1981). The privilege rests on the need for advocate and counselor to know all that relates to the client's reasons for seeking representation to effectively carry out his or her objectives. *Trammel v. United States*, 445 U.S. 40, 41 (1980). The party asserting the privilege has the burden to prove the privilege applies. *United States v. Layton*, 855 F.2d 1388, 1406 (9th Cir.1988); *United States v. Landof*, 591 F.2d 36, 38 (9th Cir.1978).

To establish the attorney-client privilege, a party must demonstrate that the communication was made by a client in confidence for the purpose of seeking legal advice from an attorney acting in the capacity of an attorney. *See Fisher v. United States*, 425 U.S. 391, 403 (1976); *United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980). The party must also demonstrate that the privilege with respect to the communication has not been waived. *Flores*, 628 F.2d at 526.

The attorney-client privilege is generally waived when the privileged communication is voluntarily disclosed to a third party. *Clady v. Los Angeles Cnty*, 770 F.2d 1421, 1433 (9th Cir. 1985) (citing *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir.1981)). However, the attorney-client privilege may extend to third parties who have been engaged to assist the attorney in providing legal advice. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (citing *Smith v. McCormick*, 914 F.2d 1153, 1159–60 (9th Cir. 1990)); *see also United States v. Kovel*, 296 F.2d 918, 921–922 (2d Cir. 1961).

## **2. Common Interest Privilege**

The common interest privilege is an extension of the attorney-client privilege. *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012); *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (“the ‘common interest’ . . . rule is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other”). The privilege not only protects the confidentiality of communications passing from a party to his or her attorney, but also from “one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.” *United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005) (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). The parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement, whether written or unwritten. *Pacific Pictures Corp.*, 679 F.3d at 1129. There is no requirement that actual litigation be in progress for the common interest privilege to apply. *Gonzalez*, 669 F.3d at 980 (citing *Cont'l Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964); *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996)).

## **3. Informant's Privilege**

Under the informant's privilege, the Secretary may “withhold from disclosure the identity of persons furnishing information of violations of law to [MSHA].” *Bright Coal Co.*, 6 FMSHRC 2520, 2522 (Nov. 1984); *see also* 29 C.F.R. § 2700.61 (prohibiting Commission Judges from disclosing or ordering disclosure of an informant's name to an operator “except in

extraordinary circumstances.”) Informants are people who have “furnished information to a government official relating to or assisting in the government’s investigation of a possible violation of law, including a possible violation of the Mine Act.” *Id.* at 2525. The informant’s privilege protects from disclosure material that “tend[s] to reveal an informant’s identity.” *ASARCO, Inc.*, 14 FMSHRC 1323, 1330 (Aug. 1992) (“*ASARCO II*”). The Secretary must demonstrate why disclosure would tend to reveal the miner’s identity, but his burden “is not necessarily high” and may be satisfied by an affidavit “setting forth how or why disclosure . . . would tend to reveal the identity of an informant.” *Id.* at 1329–30.

A requesting party may overcome the informant’s privilege if, in the totality of the circumstances, the information is “essential to fair determination.” *Bright Coal*, 6 FMSHRC at 2526. To do so, the requesting party must demonstrate that its need for the information outweighs the Secretary’s need to maintain the privilege to protect the public interest. *Id.*

### III. ANALYSIS AND CONCLUSIONS OF LAW

I note at the outset that the deadline to complete discovery in this matter was November 16, 2016. 29 C.F.R. § 2700.56(e). Respondents filed their joint motion to compel on November 18, 2016. Although I may extend the discovery period for good cause shown, Respondents’ motion does not show any good faith attempt on Respondents’ part to confer with the Secretary to resolve this discovery dispute since receiving the Secretary’s privilege log on October 7, nor does the motion provide any explanation why Respondents waited over 40 days after receiving the Secretary’s privilege log to file their motion. Respondents’ motion is therefore untimely. Nevertheless, I address the parties’ arguments in regard to each requested document below.

#### A. Document Nos. 0047-0051, 0235, and 0236-0237

The Secretary asserts the common interest and informant’s privileges for Document Nos. 0047-0051, 0235, and 0236-0237.<sup>1</sup> (Mot. Ex. 3 at 2; Daquiz Decl. at 2.) The Secretary states these documents memorialize communications with Pappas aimed at furthering the Secretary’s and Pappas’ interests in this matter and neither party has waived its privileges. (Daquiz Decl. at 2.) The Secretary also states the documents contained information that could identify other confidential witnesses. (*Id.*) According to the privilege log, the documents contain an interview with Pappas from MSHA Special Investigator Kyle Jackson, an email from Pappas to Jackson, and a memo from Pappas to Jackson. (Mot. Ex. 3 at 2.)

Respondents argue that Pappas and the Secretary do not have an attorney-client relationship, and therefore, the common interest privilege does not apply because the privilege only extends the attorney-client privilege. (Mot. at 3.) Respondents also argue that the government informant’s privilege does not apply because the privilege only protects informants’

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<sup>1</sup> The privilege log also lists the attorney-client privilege for Document No. 0047-0051. (Mot. Ex. 3 at 2.) The Secretary admits the Secretary is not Pappas’ attorney for the purposes of this proceeding. (Resp. at 3, n.7.) However, the Secretary states the attorney-client privilege was identified as the basis for withholding documents because the common interest privilege extends the protections of the attorney-client privilege. (Daquiz Decl. at 2.)

identity and not the documents in their entirety. (Mot. at 4.) Respondents note the informant's privilege does not apply to Pappas because his identity has been revealed. (Mot. at 4.)

The common interest privilege protects communications from one party to the attorney for another party where a joint strategy has been decided upon and undertaken by the parties and their counsel. *Austin*, 416 F.3d at 1021 (citing *Schwimmer*, 892 F.2d at 243). Although Pappas has not retained separate counsel, he is his own legal representative and a party to this proceeding. The Secretary's decision to pursue Pappas' discrimination complaint pursuant to section 105(c)(2) of the Mine Act establishes a joint strategy agreed upon between the two parties. I therefore determine that the common interest privilege applies to confidential communications between Pappas and counsel for the Secretary.

The common interest privilege, by extension of the attorney-client privilege, also protects communications to third parties who have been engaged to assist attorneys in providing legal advice. *See Richey*, 632 F.3d at 566; *Smith*, 914 F.2d at 1159-60 (concluding that a defendant's communication with her psychiatrist was protected up to the point of testimonial use); *see also Kovel*, 296 F.2d at 921-922 (holding that the privilege extends to communications made by a client to an accountant employed by the attorney to assist in providing legal advice). While not an attorney, "the role of an MSHA investigator is to provide an opinion on the merits of a discrimination complaint which is provided to the Solicitor's Office in contemplation of potential litigation."<sup>2</sup> *McGlothlin v. Dominion Coal Corp.*, 36 FMSHRC 3052, 3053 (Nov. 2014) (ALJ). Consequently, the MSHA investigator may be deemed to be a subordinate of an attorney, whose communications with a prospective complainant are privileged. *See id.*

MSHA assigned Jackson to conduct an investigation after MSHA received Pappas' discrimination complaint alleging he was improperly discharged. (Am. Compl. at 5.) The purpose of Jackson's investigation was for MSHA to identify whether Pappas had a claim for discrimination and to inform the Secretary whether an action may be brought. I thus determine that Jackson, although not an attorney, was engaged to assist the Secretary's counsel in providing legal advice. The common interest privilege therefore extends to confidential communications that Pappas made to Jackson as a party engaged to assist the Secretary's counsel.<sup>3</sup>

Further, the government informant's privilege protects the identity of informants who furnished information to the government regarding possible violations of the law. *Bright Coal Co.*, 6 FMSHRC at 2522-25. The Secretary states that the requested documents contain information that could identify confidential witnesses other than Pappas. (Daquiz Decl. at 2.) Respondents have not addressed how producing such information would be essential to fair determination to overcome the privilege. I therefore determine that Respondents' need for the information does not outweigh the need to maintain the privilege to protect the public interest.

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<sup>2</sup> Although the judge's decision is not binding, I take his reasoning as persuasive authority.

<sup>3</sup> I also note that the Secretary's counsel does in fact represent MSHA in this matter, and thus attorney-client privilege also protects communications between Jackson, as MSHA's representative, and the Secretary's counsel.

For the reasons above, I determine that the common interest privilege applies in regard to the confidential interview, email, and memo provided by Pappas to Jackson. Additionally, I conclude that informant's privilege applies to the portions of these documents that tend to reveal the identity of government informants other than Pappas.

**B. Document No. 0234**

The Secretary asserts the common interest privilege for Document No. 0234. (Mot. Ex. 3 at 2; Daquiz Decl. at 2.) The Secretary also states Document No. 0234 memorializes communications with Pappas aimed at furthering the Secretary's and Pappas' interests in this matter. (Daquiz Decl. at 2.) The Secretary states that the Secretary and Pappas have not waived the privilege. (Daquiz Decl. at 2.) The privilege log identifies Document No. 0234 as documents from Pappas. (Mot. Ex. 3 at 2.)

Respondents assert the same arguments made for the other documents, claiming that Pappas and the Secretary do not have an attorney-client relationship, and therefore, the common interest privilege does not apply. (Mot. at 3.)

As determined above, the Secretary has established the existence of a joint strategy with Pappas in his decision to pursue Pappas' discrimination complaint under section 105(c)(2) of the Mine Act. Because the documents contain confidential communications between Pappas and the Secretary made to further their joint legal interests, I determine the common interest privilege also applies to these documents.

**IV. ORDER**

Based on the reasons above, Riverside and CalPortland's joint motion to compel is hereby **DENIED**.



Alan G. Paez  
Administrative Law Judge

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