**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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April 7, 2016

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| JONATHAN BETHEL WOODWARD,<br>Complainant,<br><br>v.<br><br>CARMEUSE LIME AND STONE,<br>Respondent. | DISCRIMINATION PROCEEDING<br><br>Docket No. SE 2016-59-DM<br>SE-MD-15-23<br><br><br><br>Mine: Filled Products – North Mill<br>Mine ID: 09-01094 |

**ORDER**

This proceeding is before me upon a complaint of discrimination under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3). The complaint was initially filed with the U.S. Department of Labor's Mine Safety and Health Administration (MSHA), which conducted an investigation pursuant to section 105(c)(2) but declined to pursue the matter through litigation. The Complainant subsequently initiated this case before the Commission on his own behalf pursuant to 105(c)(3).

*Procedural Background*

In February 2016, the Respondent requested a subpoena to compel MSHA to produce its investigative file in the matter of *Woodward v. Carmeuse Lime & Stone*, MSHA Case No. SE-MD-15-23. The Respondent had previously filed a FOIA (Freedom of Information Act) request for the investigative file. MSHA had replied with a letter stating that the statutory time limits for processing the request could not be met due to "unusual circumstances." The delay would have made production untimely for litigation purposes, as a hearing is scheduled for May 9-12, 2016. In order to protect the rights of both parties to this litigation, on February 24, 2016, I issued a subpoena to MSHA under Rule 60(a) of the Commission's procedural rules, 29 C.F.R. § 2700.60(a), and section 113(e) of the Mine Act, 30 U.S.C. § 823(e), and ordered MSHA to submit the entire investigative file to the Court within thirty days for *in camera* review and distribution of properly releasable documents to the parties.

On March 24, 2016, the Secretary of Labor filed a letter asserting he "cannot comply" with my order, citing FOIA (5 U.S.C. § 552), the Privacy Act (5 U.S.C. § 552a), and the Secretary's own regulations at 29 C.F.R. Part 2, Subpart C ("Employees Served with Subpoenas"). The Secretary did, however, produce a redacted version of the investigative file in

response to the Respondent's FOIA request.[1] Claiming exemptions under subsections (b)(7)(C) and (b)(7)(D) of FOIA, the Secretary withheld two documents identified in his disclosure as Exhibits 3 and 8 containing statements of interviews with two unnamed individuals.

The Respondent has now filed a letter asking me to enforce my February 24 subpoena and order and compel the Secretary to produce the two withheld interview statements. The Respondent argues that such action is necessary so that the parties may have access to the factual material gathered by the Secretary during his investigation of the discrimination complaint.

*Discussion*

The sole issue before me is whether the Secretary must release for *in camera* review the two withheld interview statements, Exhibits 3 and 8, sought by the Respondent.

My February 24 subpoena and order directing MSHA to produce the entire investigative file, including the two withheld interview statements, were issued under the authority of section 113(e) of the Mine Act, which provides in pertinent part:

> In connection with hearings before the Commission or its administrative law judges under this Act, the Commission and its administrative law judges may compel the attendance and testimony of witnesses *and the production of books, papers, or documents, or objects,* and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence … In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States … within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as contempt thereof.

30 U.S.C. § 823(e) (emphasis added). Thus, Congress has expressly authorized Commission ALJs to compel the production of documents by issuing a subpoena or order that is enforceable in the federal district courts. *See, e.g.*, *Justice v. Gateway Eagle Coal Co.*, 2014 WL 4491138 (Aug. 22, 2014) (ALJ) (unpublished order requesting enforcement of subpoena); *Justice v. Gateway Eagle Coal Co.*, 36 FMSHRC 2371 (Aug. 2014) (ALJ) (order compelling Secretary to produce documents for *in camera* review); *Olson v. Triton Coal Co.*, 25 FMSHRC 649 (Oct. 2003) (ALJ) (same).

[1] The Respondent submitted a copy of the file to this Court. The Secretary still has not submitted any documents to the Court and maintains that he is barred from doing so for the reasons set forth in his March 24 letter, which was submitted after he had responded to the FOIA request.

Consistent with this Congressional authorization, the Commission's procedural rules provide that the "Commission and its judges are authorized to issue subpoenas, on their own motion or on the oral or written application of a party, requiring the attendance of witnesses and the production of documents or physical evidence." 29 C.F.R. § 2700.60(a). A person served with a subpoena may move to revoke or modify it within five days of service. *Id.* § 2700.60(c). The judge should grant the motion if the subpoena seeks information outside the proper scope of discovery, does not describe with particularity the evidence sought, or for any other reason is found to be invalid or unreasonable. *Id.* Neither the Mine Act nor the procedural rules contain any other limitations on the Commission's or Commission ALJs' subpoena authority.

In refusing to comply with my subpoena and order, the Secretary contends that this matter involves "an intersection between the *Touhy* regulations, the Privacy Act, the Freedom of Information Act (FOIA), issues of privilege, and the scope of subpoenas." Sec'y Resp. at 2. However, the Secretary has failed to identify any privileges or exemptions that excuse him from producing the subpoenaed documents for *in camera* review.

The *Touhy* regulations are set forth in 29 C.F.R. Part 2, Subpart C. These regulations were promulgated by the Secretary to implement internal procedures for Department of Labor employees to follow when responding to subpoenas. *See* 29 C.F.R. §§ 2.20 to 2.25; *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (upholding authority of head of Department of Justice to promulgate similar rules). As explained in one of the cases cited by the Secretary in his subpoena response, these are intra-agency "housekeeping rules" promulgated under the authority conferred by 5 U.S.C. § 301. *Herr v. McCormick Grain-The Heiman Co.*, No. 92-1321-PFK, 1994 WL 324558, *1 (D. Kan. June 28, 1994). The enabling statute provides, in full:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301. The statute does not authorize the Secretary to refuse to comply with a court order or subpoena, and the Secretary's *Touhy* regulations do not and cannot create such a privilege. The regulations merely delegate exclusive authority to one of the Secretary's high-ranking subordinates to respond to subpoenas after being furnished with a written summary of the information sought and its relevance to the proceeding. In this case, the Secretary is aware which documents are sought and why they are relevant to this proceeding. He cannot hide behind his own intra-agency procedures as a rationale for refusing to comply with the subpoena and order.

The Secretary asserts that the Privacy Act, 5 U.S.C. § 552a, prohibits disclosure of the investigative file without the permission of the individual to whom the file pertains – in this case, the Complainant. However, this prohibition is expressly inapplicable to disclosures that are made "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). The

Secretary cites *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985), as standing for the proposition that "a routinely issued subpoena does not overcome the Privacy Act's prohibition on disclosure without consent." Sec'y Resp. at 4. However, that case concerned a grand jury subpoena. As explained by the D.C. Circuit, that particular type of subpoena does not fall under § 552a(b)(11) because it does not necessarily originate with a court of competent jurisdiction, as it can be issued by a prosecutor without an agency head, grand jury, or judge reviewing it to ensure that the relevant privacy interests are being carefully considered and weighed against the need for information. 779 F.2d at 79-85. By contrast, the subpoena in question here was issued by this Court with the stated intent of reviewing the subpoenaed records *in camera* before distributing the releasable portions. The Privacy Act does not bar disclosure under these circumstances.

The Secretary also references FOIA in its response to the subpoena and cites FOIA Exemptions 7C and 7D, 5 U.S.C. § 552(b)(7)(C)-(D), as justification for refusing to produce the two interview statements identified as Exhibits 3 and 8 in its FOIA response to the Respondent.

To the extent that the Secretary relies on the FOIA exemptions to establish a discovery privilege, this reliance is misplaced. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984). FOIA was enacted to require agencies to disclose records to the public, not to create new privileges for agencies to withhold information in contexts where a privilege would not otherwise exist. As the D.C. Circuit explained in *Friedman v. Bache Halsey Stuart Shields*, information unavailable under FOIA is not necessarily unavailable through discovery, in which context the litigant's need is a key factor that must be weighed against the government's interest in confidentiality. *Id.* In addition to litigants' needs, discovery implicates the court's interest in developing a complete and accurate record. Courts have the ability to pursue this interest while still protecting confidential information by conducting *in camera* review and sealing records upon request.

Although the FOIA exemptions are not discovery privileges, they are relevant to this case in that they reflect a Congressional preference for cautious treatment of certain types of sensitive government information. Exemptions 7C and 7D provide that the following documents need not be disclosed in a FOIA response:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis.

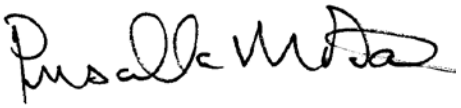
5 U.S.C. § 552(b)(7).

Presumably, the two documents that the Secretary has refused to release are the memoranda of interviews of the Complainant and either a confidential miner informant or an MSHA employee. Both interviewees have a privacy interest in nondisclosure of personal information such as addresses and phone numbers, and any interviewee other than the Complainant has an interest in nondisclosure of his identity and his connection with the

investigation. However, this does not provide a basis for the Secretary to withhold the documents in their entirety. *See Justice v. MSHA*, Civil Action No. 2:14-14438, slip op. at 30-31 (S.D.W. Va. July 31, 2015) (unpublished order) (citing *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995)). In *Justice v. MSHA*, which concerned a FOIA suit filed by a coal miner to compel MSHA to release the entire investigative file related to his discrimination complaint, MSHA withheld several memoranda of interviews under color of Exemptions 5 and 7C. In discussing Exemption 7C, the District Judge weighed MSHA's interest in maintaining the privacy of the individuals mentioned in the file against the public interest in disclosure, which he characterized as an overriding interest in shedding light on MSHA's performance of its statutory duties. *Id.*, slip op. at 27-32. He concluded that MSHA's general claim of exemption under 7C failed to meet the agency's burden of justifying its wholesale withholding of the interview memoranda, and the appropriate resolution was to submit the documents to the court for *in camera* review and release of segregable non-exempt information. *Id.* at 32-33. This makes sense, because withholding entire documents "reach[es] far more broadly than is necessary to protect the identities of individuals mentioned" therein, and is "contrary to FOIA's overall purpose of disclosure." *Nation Magazine*, 71 F.3d at 896. Personally identifying information should be redacted from FOIA-responsive documents under Exemptions 7C and 7D. However, segregable factual information within the documents is not subject to those exemptions and must be disclosed.

This case, unlike *Justice v. MSHA*, is not a FOIA case. Exemptions 7C and 7D identify relevant privacy interests. However, because this is a discovery matter, these privacy interests must be balanced against the litigants' and the Court's strong interest in developing a complete record in this particular case. When a dispute arises over the balancing of these interests, as it has in this case, the appropriate remedy is *in camera* review. If there are overriding privacy concerns or the identity of a miner witness is protected under 29 C.F.R. § 2700.62, I will make that determination after reviewing the documents and will release the miner's identity at the appropriate time as prescribed by that rule. If the Complainant's interview statement is one of the withheld documents, there is nothing that prevents the disclosure of this document under the rules of evidence and the Respondent is entitled to it.

The Secretary of Labor is hereby **ORDERED** to produce the two interview statements for *in camera* review by submitting them directly to me by mail marked "Private, Judge's Eyes Only" within ten (10) days of the date of this order.



Priscilla M. Rae
Administrative Law Judge

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