

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 27, 2000

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-96-D
ON BEHALF OF ROYAL SARGENT,	:	DENV CD 99-03
Complainant	:	
v.	:	
	:	
THE COTEAU PROPERTIES CO.,	:	Freedom Mine
Respondent	:	Mine ID 32-00595

**ORDER DENYING MOTION TO COMPEL, IN PART, AND
CONDITIONALLY GRANTING MOTION TO COMPEL, IN PART**

This case is before me on an amended complaint filed by the Secretary of Labor on behalf of Royal Sargent, alleging that Respondent, The Coteau Properties Co, had discriminated against him in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(1). Respondent has moved to compel production of certain documents, to which the Secretary has asserted claims of privilege, and responses to two interrogatories that the Secretary has objected to on grounds of relevance and privilege. For the reasons set forth below, the motion is denied, in part, and granted, in part. However, before ordering production, the Secretary is afforded an opportunity to supply evidence demonstrating the applicability of privileges with respect to certain withheld documents. The evidence may consist of the documents themselves and/or an affidavit and may be submitted *in camera* to the extent necessary to preserve a privilege.

In response to discovery requests, the Secretary interposed objections on grounds of privilege to some twenty-nine documents that were later identified in a "Privilege Log." The privileges asserted were the deliberative process, investigative and informant's privileges. Upon further review, eight of those documents were supplied to Respondent. The Secretary also objected to two interrogatories on grounds of relevance and privilege, although the deliberative process and investigative privileges are no longer asserted. This Order will first address the documents, which will be discussed in two groups, "confidential employee interview statements" and the "investigative report package."

Confidential Employee Interview Statements

The Secretary claimed the informant's privilege and declined to produce sixteen witness statements described as "confidential employee interview statements." Respondent has moved to

compel production of those documents. The Commission has recognized the importance of the informant's privilege in effectuating the purposes of the Act. *Secretary obo Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (Nov. 1984). It is the identity of the informant that is protected by the privilege, not the contents of a statement, except for those portions of the content that would tend to identify an informant. *ASARCO, Inc.*, 12 FMSHRC 2548, 2553-54 (Dec. 1990) (*ASARCO I*). It is the Secretary's burden to establish that the privilege applies. *Id.* Because the privilege is qualified, a party may seek to overcome it by demonstrating that the information is necessary for a fair determination of the case and that its need for the information outweighs the Secretary's need to maintain the privilege. Here, Respondent challenges only application of the privilege and does not seek any information to which the privilege properly applies.

The Secretary asserts, in opposition to the motion, that:

The contents of these statements, while factual in nature, are so intertwined with the identity of the employee that release of the statement would undoubtedly identify the employee. In focusing on the allegations set forth by the complainant in his complaint, MSHA interviewed a select number of employees at Respondent's mine site. The ensuing interviews contain numerous references to information that is specific to certain employees, such as job titles, individual duties and responsibilities, shift assignments, supervisors, personnel actions and, in some cases, the identity of other informants. * * * It is simply not possible for the Secretary to provide Respondent with meaningful portions of the statements without revealing the identity of one or more informants.¹

As the Commission observed in *ASARCO, Inc.*, 14 FMSHRC 1323, 1329 (August 1992) (*ASARCO II*):

It is the judge, not the Secretary, who must determine whether the privilege obtains with respect to a particular document or group of documents and he must be provided with evidence sufficient to make such a determination. In this case, the judge was required to determine whether the statement, which did not contain the name of an informant, would tend to reveal the identity of the informant. Such an analysis may not be possible unless the party invoking the privilege provides the judge with facts that explain how disclosure of the subject material would tend to reveal that informant's identity. In general, a "bald assertion of privilege is insufficient . . . since a trial court must be provided with sufficient information so as to rule on the privilege claim." 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 26.60[1] (2d ed. 1991). * * *

¹ Opposition at p. 5.

While the Secretary's argument may go somewhat beyond a bald assertion of the privilege, it falls far short of presenting factual evidence from which application of the privilege can be determined, aside from information directly identifying an informant, e.g. name, address, etc. Several of the statements withheld are quite lengthy. The Secretary argues, for example, that all parts of twelve and sixteen page statements that are admittedly "factual in nature" are so intertwined with the identity of the informant as to be covered by the privilege. Information, such as, job title and duties and responsibilities may be privileged if unique to the informant, or to such a small group of persons that the informant would tend to be identified. Without competent evidence establishing that the entire statement consists of such information and that it would disclose an informant's identity, however, the Secretary clearly has not satisfied her burden. Portions of a statement that disclose the identity of other informants would also be privileged. However, if a statement identifies other individuals who may have knowledge of certain matters, the names of such individuals would not be privileged, solely because they may also have been interviewed in conjunction with the investigation.

Because the Secretary has not satisfied her burden of establishing that the entirety of each statement is covered by the privilege, the motion to compel as to the statements is conditionally granted. Before ordering the Secretary to produce the statements, with only directly identifying information redacted, however, the Secretary will be given an opportunity to provide evidence that any other portion of each of the withheld statements is covered by the privilege. The Secretary may submit copies of the statements for *in camera* review and/or may submit an affidavit by a person with knowledge of the facts relied upon. If the contents of an affidavit would tend to disclose privileged information, it too could be submitted *in camera*. See, *ASARCO II*, 14 FMSHRC at 1330, 1333. The Secretary's representatives will determine the precise nature of any evidence to be submitted in support of the privilege claim. However, because of the volume of material involved, it would appear difficult to sustain the burden as to the entirety of each of the statements without submitting both copies of the statements and an affidavit.

The Investigative Report Package

The other documents at issue consist of a 41 page "Special Investigation Report" and related documents; a summary analysis; a list of exhibits; a list of persons interviewed; and, the assignment control worksheet. In addition to the informant's privilege, the deliberative process and investigative privileges were variously interposed as objections to the production of these documents.²

² Respondent contends that the deliberative process and investigative privileges have not been properly invoked. The Secretary submitted an affidavit by Marvin W. Nichols, Administrator for Coal Mine Safety and Health, Mine Safety and Health Administration, U.S. Department of Labor, invoking privileges with respect to the five documents at issue. I find that the affidavit is sufficient to invoke the claimed privileges. See, *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 999-1001 (June 1992).

The deliberative process privilege was first discussed by the Commission in *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 990-93 (June 1992). Following a brief review of the origin of the privilege the Commission observed:

The breadth of the privilege is described by the court in *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753 [772] (D.C. Cir. 1978):

This privilege protects the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated' (citations omitted). The privilege attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.

To be covered by the privilege, the material must be both "pre-decisional" and "deliberative." *Id.* Purely factual material that does not expose an agency's decision making process is not covered by the privilege, unless it is so inextricably intertwined with deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection. It is the Secretary's burden to prove that the privilege applies to material it seeks to protect from disclosure. *Id.* 14 FMSHRC at p. 993. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1246-47 (July 1997). A party seeking to overcome the privilege has the burden of demonstrating that its need for the information outweighs the governmental interest in protecting it from disclosure.

Respondent contends that the privilege applies only to writings directly involved in the formulation of agency "policy" -- that the decisions made with respect to a discrimination complaint involve only "the application of already-established law and policy to facts"³ and are not covered by the deliberative process privilege. I reject that contention and hold that the Secretary's decision making process, by which a determination is made whether or not to initiate a discrimination proceeding under the Act, is the type of governmental decision to which the deliberative process privilege applies. *See, In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC at 993.

The Secretary has represented, preliminarily, that none of the documents associated with the report contains factual information that is not also contained in the report.⁴ This representation should be confirmed, by affidavit, in response to this Order. Because it appears that there is no additional factual information contained in the other documents, the major portions of which clearly appear to be covered by the informant's and deliberative process

³ Motion to Compel, at p. 6.

⁴ A conference call was held with the parties' representatives on June 26, 2000.

privileges, the motion as to those documents is denied, with one exception.⁵ The exhibit list identifies all exhibits in the investigative file, not just those that may have been referenced in the report. As a consequence, it is possible that the list may include items in addition to those at issue in this motion that have not already been produced. The Secretary is directed to provide, for *in camera* review, a list of any such items along with any evidence that the existence of such an item on the exhibit list is protected from disclosure.

The Secretary has described the Special Investigative Report as consisting of an introduction, a summary of witness statements and a conclusion. The conclusion section appears likely to be protected by the deliberative process privilege, in that it would normally consist of the recommendations, analysis and conclusions of the investigators. However, the factual portions of the report, the summary of witness statements and other information, would appear to be information to which Respondent is entitled, at least to the extent that it does not disclose the identity of an informant. Aside from the portion of the report consisting solely of the investigators' analysis, recommendations and conclusions, the Secretary has not satisfied her burden of demonstrating the applicability of the privilege and the motion, as to the report, is conditionally granted.

Before ordering the Secretary to produce the report, with only the investigators' analysis, recommendations and conclusions redacted, however, the Secretary will be given an opportunity to provide evidence that any other portion of the report is covered by the privilege. The Secretary may submit a copy of the report for *in camera* review and/or may submit an appropriate affidavit.

The Interrogatories

Interrogatory numbered 7 consisted of the following request:

Describe the complete basis for the Secretary's determination, communicated to Royal Sargent and Coteau in the letter from Sandra L. Yamamoto, dated December 30, 1998 * * * , "that a violation of Section 105(c) has not occurred."

The Secretary objected to the interrogatory on grounds of relevance and deliberative process, investigative and informant's privileges. The deliberative process and investigative privileges are no longer asserted.

⁵ The Secretary has also interposed an objection on grounds of "investigatory files privilege" to production of the report, the summary and the list of exhibits. Respondent argues that the investigative privilege is no broader than, and is subject to the same limitations as, the deliberative process privilege. As to the documents at issue here, I agree with Respondent. The issues raised by the motion to compel will be decided upon application of the deliberative process and informant's privileges.

Interrogatory numbered 16 read:

Identify each person * * * who participated on behalf of the Secretary in the determination, after the reopening of the investigation, that a violation of Section 105(c) of the Mine Act had occurred. If the determination that discrimination had occurred is claimed to ultimately have been made by one person, specifically identify that person.

The secretary objected on grounds of relevance and deliberative process privilege. Only relevance is now asserted as an objection.

The fact that the Secretary initially concluded that no discrimination had occurred and later reached an opposite conclusion, as well as the particular rationale for each conclusion and the identities of individuals who participated in the latter decision are not relevant. However, factual information, including potentially exculpatory facts known to the Secretary at the time of the initial decision, would certainly be relevant and cannot be withheld unless protected by the informant's privilege.

It is likely that all factual information known to the Secretary at that point in the process is included in the investigative report and the witness statements and/or in the information already produced in response to discovery. As noted above, the statements must be produced except to the extent that they are protected by the informant's privilege and factual information contained in the report must be disclosed, except to the extent that it is protected by the informant's or deliberative process privileges.

If the Secretary can establish, by affidavit, that the facts known at the time that the initial determination was made are included in the report and statements, Respondent will have received all factual information to which it is entitled. Accordingly, the motion to compel responses to interrogatories numbered 7 and 16 is denied, at this time, subject to a demonstration that pertinent factual information responsive to interrogatory numbered 7 is included in the report and statements.

Conclusion and Order

Respondent is generally entitled to relevant factual information in possession of the Secretary that has properly been requested through discovery. The informant's privilege may bar access to factual information, but only to the extent that it identifies or tends to identify a person who has provided information to the Secretary. The deliberative process privilege protects from disclosure information regarding the Secretary's pre-decisional deliberations, information that is of marginal, if any, relevance and unlikely to be factual in nature. It is possible that some factual information may properly be withheld pursuant to the deliberative process privilege, if it would disclose privileged information, however, at this stage of the litigation it is unclear whether any of the materials at issue fall within that category.

The motion to compel as to the Special Investigative Report, a portion of the exhibit list and the Confidential Employee Interview Statements is conditionally granted. On or before Friday, July 7, 2000, the Secretary may submit evidence establishing the applicability of the informant's and deliberative process privileges to any portions of the report, exhibit list and statements that the Secretary continues to object to producing. That evidence should also address whether there are additional facts known to the Secretary at the time of the initial decision that are not included in the report and statements. On consideration of any such evidence, a further order will be issued with respect to those documents.

As to the remainder of the documents and interrogatories numbered 7 and 16, the motion is denied.

Michael E. Zielinski
Administrative Law Judge

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