

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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July 13, 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

**AMENDED<sup>1</sup>**  
**ORDER DENYING MOTION TO COMPEL, IN PART, AND**  
**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 moved to compel production of certain documents, to which the Secretary asserted claims of privilege, and responses to two interrogatories that the Secretary objected to on grounds of relevance and privilege. By Order dated June 27, 2000, the motion was denied, in part, and conditionally granted, in part, and the Secretary was afforded an opportunity to submit evidence establishing claims of privilege and addressing other issues. On July 10, 2000, the Secretary's response to the Order was received. The Secretary's submission included; copies of the investigative report and the report summary; a listing of exhibits in the file, indicating whether they had been produced or withheld; copies of the sixteen witness statements at issue, with proposed redactions and an explanation of the proposed redactions for one of the statements; and, a Declaration addressing other issues discussed in the Order.

For the reasons set forth below, the motion to compel is granted in part and the Secretary

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<sup>1</sup> The original order was entered on July 11, 2000. Counsel for Respondent subsequently advised that the footnote describing the operations at the Freedom Mine was inaccurate. In fact, the Freedom Mine has approximately 450 employees. It is the group of employees who might have knowledge or information relevant to the issues in this case, primarily the dragline crews, that is limited, though not as limited as described in the footnote. The inaccurate footnote has been eliminated and the related text has been amended. The changes do not affect resolution of the motion.

is ordered to produce copies of the witness statements and the investigative report, with privileged portions redacted, as indicated below.

### *Confidential Employee Interview Statements*

The Secretary claimed the informant's privilege and declined to produce sixteen witness statements described as "confidential employee interview statements." As noted in the Order, 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 and it is the Secretary's burden to establish that the privilege applies. *ASARCO, Inc.*, 12 FMSHRC 2548, 2553-54 (Dec. 1990).

### Waiver as to Dale Sargent

Though not included in its motion papers, Respondent argued during the conference call that the informant's privilege has been waived as to Complainant's brother Dale Sargent. The basis of the argument is that it was disclosed in litigation of Respondent's motion to dismiss that Dale Sargent contacted MSHA on behalf of his brother, and discussed both the substance of the discrimination complaint and the process for submitting a complaint to MSHA. I am constrained to agree. The informant's privilege protects from disclosure the identity of individuals who furnish information on matters such as safety or discrimination complaints to government personnel. As noted in the June 27, 2000, Order, it is the identity of the informant, i.e. the fact that an individual has furnished such information, that is protected.

Here Dale Sargent's roll in assisting his brother pursue his discrimination complaint is well known. The materials submitted by the Secretary in opposing the motion to dismiss disclose that he contacted MSHA on more than one occasion and discussed both the process for filing a complaint and the substance of the complaint, including the claimed protected activity his brother engaged in and the adverse action. The Secretary argues, in response, that disclosure of the fact that Dale Sargent contacted MSHA to discuss the process for filing a discrimination complaint would not waive the informant's privilege as to any involvement he may have had in the subsequent investigation of the complaint. If Dale Sargent's efforts to assist his brother in filing the complaint were limited to inquiries about a miner's rights, the process for obtaining and submitting complaint forms, and the like, the Secretary's position might be well founded. However, that is not the case here. It has been disclosed that Dale Sargent's efforts went well beyond the procedural issues involved in filing a complaint. He was authorized by Complainant to pursue the complaint on his behalf. Exhibit D to Complainant's response to the February 28, 2000, Order to Show Cause, consists of a fairly detailed statement of the substance of the complaint attributable to Dale Sargent. He clearly has been identified as a person who furnished substantive information to MSHA on the merits of his brother's discrimination complaint. Under the circumstances, his identity is not protected by the informant's privilege and any statements made by Dale Sargent must be produced in their entirety.

## Other Statements

The Secretary submitted copies of the statements and represented that "those portions of the statement[s] which fall within the scope, in the Secretary's opinion, of the Informant's Privilege" were underlined in red. The Secretary's submission appears to indicate, quite clearly, that the Secretary does not contend that the other portions of the statements are protected by the privilege. Nevertheless, counsel for Complainant stated, in a conference call this date, that the Secretary continues to maintain that the statements, in their entirety, are protected by the privilege. The Secretary's position appears attributable to a practice of withholding the entirety of witness statements, unless ordered to produce them after *in camera* review, and/or concerns that some protected portions of the statements may not have been underlined through inadvertence. As to the former, the Secretary is strongly encouraged to review any such practice. Clearly, objections should not be interposed or maintained to the disclosure of information that cannot properly be objected to. As to the latter, as indicated in the Order, none of the materials at issue here will be directly delivered to Respondent. Rather, the Secretary will be ordered to produce materials that are deemed not to be covered by privilege. The Secretary may then decide how to respond to the order.

After a careful review of the statements, I am satisfied that the redactions proposed by the Secretary cover material that either would directly identify, or would tend to identify, the informant. The universe of employees and former employees at Respondent's mine who may have knowledge or information relevant to the issues in this case, primarily the dragline crews, is relatively small. Information such as a person's work assignments, presence at certain events, whether or not he had made safety complaints and the nature of any such complaints, would, individually and in combination, tend to identify a particular person. While some of the information that is proposed to be redacted appears to pose a relatively small potential of identifying the person who made the statement, that information is also generally of limited, if any, relevance to the issues involved in this proceeding. On the whole, I am satisfied that the un-redacted portions of the statements provide Respondent with all of the factual portions of the statements that it is entitled to at this stage of the litigation.

The Secretary will be directed to produce copies of the witness statements, with the portions underlined in red redacted. The Secretary is also invited to inquire of persons who have submitted statements, whether or not they wish to take advantage of the privilege. It is possible that significant discovery disputes might be avoided and the litigation process significantly advanced. This is particularly true of any witnesses who will be deposed.

### *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.

The motion was denied as to the documents associated with the report, with the exception of the file's exhibit list, because of the possibility that it might identify items in addition to those at issue in the motion that have not already been produced. The listing of exhibits submitted by the Secretary establishes that all of the exhibits have been produced, with the exception of the sixteen witness statements and the list of persons interviewed. Consequently, the motion as to the exhibit list is denied, as set forth in the June 27, 2000, Order.

The Special Investigative Report consists of an introductory statement, a summary of supporting evidence for complainant, a summary of supporting evidence for respondent, and a conclusion and recommendation. The conclusion section is protected by the deliberative process privilege, in that it consists of the recommendations, analysis and conclusions of the investigators and the District Manager. However, the other portions of the report, the introductory statement and supporting evidence discussions, contain factual information that is not protected by the deliberative process or investigatory files privileges. Respondent is entitled to that information to the extent that it does not disclose the identity of an informant.

Pages 1 through the third paragraph of page numbered 13 contain a brief introductory statement and largely verbatim recitals of statements of the complainant and his brother. Complainant's statements were produced and I have concluded that any statements by Dale Sargent are not protected by the informant's privilege. The portion of the report from the discussion of Exhibit No.24 on page numbered 26 up to the last paragraph on page numbered 38, consists of a factual discussion of documents and statements that have been produced to Respondent. The Secretary will be directed to produce those portions of the report.

The material after the third paragraph on page numbered 13 up to the discussion of Exhibit No. 24 on page numbered 26 and the last paragraph on page numbered 38 and the remainder of that section of the report ending on page numbered 39, consists of a discussion of statements made by individuals whose identity is protected by the informant's privilege. That information, to the extent Respondent is entitled to it, is contained in the redacted witness statements that I have directed the Secretary to produce. No purpose would be served by requiring the Secretary to make corresponding redactions to the report's discussion of the statements. The motion as to those portions of the report will be denied.

### *The Interrogatories*

The Declaration of Sandra L. Yamamoto, Chief of the Technical Compliance and Investigation Division for Coal Mine Safety and Health, establishes, to my satisfaction, that all factual information known at the time that the initial determination was made is included in the report and statements. The motion as to interrogatories numbered 7 and 16 is, therefore, denied, consistent with the discussion in the June 27, 2000, Order.

*Conclusion and Order*

The motion to compel is granted as to those portions of the Special Investigative Report identified above and any Confidential Employee Interview Statements of Dale Sargent and other witness statements redacted as described above. In all other respects, the motion is denied.

The Secretary is directed to produce to Respondent within five business days: the following portions of the Special Investigative Report — page 1 through the third paragraph of page numbered 13 and the discussion of Exhibit No.24 on page numbered 26 up to the last paragraph on page numbered 38; and copies of witness statements, redacted as proposed by the Secretary.

The Secretary is directed to produce to Respondent prior to the close of the deposition of Dale Sargent, scheduled for July 12, 2000, any Confidential Employee Interview Statements by Dale Sargent, in their entirety.

Michael E. Zielinski  
Administrative Law Judge

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