FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., Room 6003
WASHINGTON, D. C. 20006-3868
Telephone No.: 202-653-5454
Telecopier No.: 202-653-5030

January 6, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-299-DM
ON BEHALF OF DIANE KROCK,	:	SC MD 99-09
Complainant	:	
	:	Point Comfort Facility
v.	:	
ALCOA ALUMINA AND CHEMICAL,	:	Mine ID 41-00320
LLC,	:	
Respondent	:	

ORDER TO SUPPLEMENT OPPOSITION TO MOTION

In this discrimination proceeding, brought by the Secretary on behalf of Diane Krock against Alcoa Alumina & Chemical, L.L.C. (Alcoa), the company has moved to "compel the Secretary . . . to return to Alcoa copies of Alcoa's . . . electronic mail messages ('e-mails') which were generated by and received by Alcoa employees . . . [and] which . . . are admittedly in Complainant's possession" (Motion to Compel 1). The Complainant has opposed the motion and has asserted that the e-mails are protected from discovery by the informant's privilege as codified at 29 C.F.R. § 2700.61. Although I find below that she has not provided facts sufficient to establish her claim of privilege, I will allow the Complainant additional time within which to supplement her opposition.

BACKGROUND OF THE MOTION

(1) Shortly after the proceeding was initiated, counsel for Alcoa requested by letter that MSHA voluntarily send counsel a copy of the file the agency complied while investigating the Complainant's discrimination charges;

(2) Counsel for the Secretary responded by forwarding selected portions of the file, but withheld certain parts she claimed were privileged;

(3) By subsequent letter, and following an inquiry by counsel for Alcoa, Counsel for the Secretary stated that she "with-held e-mail messages from a miner, which were given to . . . [the MSHA investigator] during the course of his investigation" (Alcoa Brief In Support of Motion 2, citing Exh. C);

(4) Counsel for Alcoa protested and again requested the return of the e-mail messages;

(5) Counsel for the Secretary once more refused to send the e-mails, stating that she "[could] not turn over the e-mail messages without disclosing the identify [sic] of a government informant who provided a print out of the messages to MSHA" (Id., citing Exh. E).

(6) Alcoa then initiated a Request for Production of Documents and the Secretary produced copies of e-mails from an Alcoa hourly employee, Miguel Monroy. The copies were dated from March 22, 1999 through March 24, 1999 and were from the Complainant to groups of Alcoa employees, including Monroy. Some of the e-mails contained attachments (Id., Exh. F). Alcoa maintains the e-mails were printed from Monroy's Alcoa-owned computer located at Alcoa's facility and that Monroy admitted as much during his deposition (Id., 4);

(7) Respondent also maintains that during the same deposition, Monroy identified an Alcoa fax cover sheet where by he sent 4 pages of documents to an MSHA instigator by an Alcoa fax machine. A handwritten message of the cover sheet states: "Here is what you asked for. Hope this is enough". The cover sheet states that it and the documents are being sent by "Mike Monroy" (Id., 4-5, Exh. G). When he was deposed the MSHA investigator confirmed the fax number on the cover sheet was his fax number. During his deposition Monroy agreed that only his handwriting appeared on the fax cover sheet (Id., 5, Exh. J 4). Questions regarding what Monroy might have sent to the investigator, indeed, whether or not he participated in the investigation, were repeatedly objected to by counsel for the Secretary on the basis the facts relating to such information were protected by the informant's privilege (See Id. Exh. J 3 et seq.).

WHAT ALCOA WANTS

Alcoa wants the e-mail messages that are in the possession of the Complainant to be returned. It argues they are the property of the company. They were generated by Alcoa equipment, were sent over Alcoa's internal computer network and were received by Alcoa's employees. The company asserts that it is "likely" that information contained in the withheld e-mails is the proprietary and confidential information of Alcoa. Further, the company asserts the internal e-mails are business records of Alcoa and that the Complainant did not have the right to obtain such records from an Alcoa employee without following proper discovery procedures or without Alcoa's consent. It asserts that regardless of the identification of the employee who

made the e-mails available to MSHA, they are the private property of the company and they must be returned to Alcoa. Finally, at the very least, Alcoa asserts the e-mails should be returned in redacted form to prevent the identification of the employee who made them available to MSHA (Motion to Compel 5-6).

THE COMPLAINANT'S RESPONSE

The Complainant responds that in fact she withheld 21 pages of e-mail messages from her response to Alcoa's first request for production of documents and from Alcoa's informal request for MSHA's investigation file. The e-mail messages were withheld because their format and content would identify the miner(s) who provided information to the MSHA special investigator during the course of his investigation. On the other hand, the Complainant did turn over to Alcoa all of the e-mail messages that Ms. Krock provided to MSHA, including those from Monroy. Although the Complainant has waived the government informant's privilege with respect to Krock and to any information she has provided MSHA, it has not waived the privilege with respect to any other miners (Complainant's Response 2).

THE RULING

Counsel for the Secretary argues, and I agree, that in resolving the issues raised in the motion, protection of the informant's privilege must remain paramount. It bears repeating that it is the well-established right of the government to withhold from disclosure the identity of persons furnishing information of possible violations of law to enforcement officials. The privilege is designed to protect the public interest by maintaining the free flow of information to the government concerning possible violations and to protect the person supplying such information from possible retaliation (Sec. Ex Rel Logan v. Bright Coal Co., Inc., 6 FMSHRC 2520, 2522-23 (November 1984)). Although this issue has arisen in the context of e-mail messages, it is no different from a situation in which a miner gives an internal company memoranda to an MSHA investigator and return of the memoranda would identify the informer. In the latter instance, and, I believe in this, the identity of the informer must be protected, provided the government can establish the document(s) would tend to reveal the identity of the informer (Asarco, Inc., 14 FMSHRC 1323, 1329 (August 1992)). The burden of proof on the government is not necessarily a high one. For example, the Commission has held that an affidavit setting forth why disclosure of the material might tend to reveal the informer's identity may be sufficient (Asarco, 14 FMSHRC at 1330).

The Secretary asserts that the identity of those who provided the e-mails to the MSHA special investigator is revealed by their "format and content" (Complaint's Response 2). In my view, if this is so it ends the matter. As Counsel for the Secretary points out, "it is the identity of the informant, not the contests of the information" — and, I would add, not the form of the information — that is protected (Id.).

Further, I agree with the Secretary that, except for Ms. Krock, the record does not indicate that the Secretary, or any other person, expressly has identified any individual as an informant nor does it show any express waiver of the privilege by any miner (Complaint's Response 3).

For the privilege to be relinquished there must be a definite identification or waiver (See Thunder Basin Coal Co., 15 FMSHRC 2228, 2236 (November 19993)). It is not enough that evidence may suggest the identification or even may point strongly to the identification if it is conceivable there are others who may be the informant.

Counsel for the Secretary has suggested that to protect any legitimate privacy concerns of the company the parties could be governed by a protective order requiring the Complaintant not to produce the privileged e-mail messages to third parties and to destroy the e-mail messages once litigation in the case is completed and the file is closed (Complainant's Response 3). Alcoa opposes the suggestion (Alcoa's Reply 2).

The suggestion is premature. As matters now stand, the Secretary's assertion of privilege is just that, an assertion. The Commission has noted that an assertion usually is not enough to sustain the privilege (Asarco at 1329, quoting 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶ 26.60[1]). To meet her burden of proof, the Secretary must establish how or why disclosure of the sought after e-mails will identify the informant(s). An affidavit explaining this may be sufficient. Or, the Secretary may offer an on-record explanation and request it be accompanied by an in camera inspection of the documents. The choice is the Secretary's, but whatever course she chooses the record must contain facts upon which a ruling can be based. If she cannot establish such facts, Alcoa's motion must be granted.

ORDER

ACCORDINGLY, the Secretary **SHALL HAVE** 10 days within which to supplement her Response by offering facts to support her opposition to Alcoa's motion to compel.

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified Mail)

Suzanne F. Dunne, Esq., Office of the Solicitor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202

Timothy P. Ryan, Esq., Jill M. Szafranski, Esq., Eckert Seamans Cherin & Mellott, LLC, 44th Floor, 600 Grant Street, Pittsburgh, PA 15219

/gl