# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**1730 K STREET NW, 6TH FLOOR**

**WASHINGTON, D.C. 20006**

July 10, 1997

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEVA 93-146-B |
| CONSOLIDATION COAL COMPANY | : | |

BEFORE: Marks, Riley and Verheggen, Commissioners[1]

## DECISION

BY: Riley and Verheggen, Commissioners

This interlocutory review of consolidated civil penalty and contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@), concerns a discovery order dated June 6, 1996, by Administrative Law Judge Gary Melick requiring the Secretary of Labor to provide Consolidation Coal Company (AConsol@) with copies of certain documents over which the Secretary has asserted the work-product privilege and copies of other documents over which the Secretary has asserted the deliberative process privilege. 18 FMSHRC 1131 (June 1996) (ALJ). In an order dated June 20, 1996, the judge denied the Secretary=s motion for stay and certification for interlocutory review of the June 6 order. The Commission granted the Secretary=s Petition for Interlocutory Review and stayed the judge=s order pending the Commission=s review. For the reasons that follow, we reverse the judge=s order requiring the Secretary to produce the documents we find to be protected by the work-product privilege, affirm the judge=s order requiring production of those documents the Secretary alleges are protected by the deliberative process privilege, and remand this matter for further proceedings.

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[1] Chairman Jordan recused herself in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

I.

Factual and Procedural Background

This case arises out of an explosion at Consol=s Blacksville No. 1 mine in Monongalia County, West Virginia, on March 19, 1992, which resulted in the deaths of a Consol employee and three employees of contractor M. A. Heston, Inc. Civil penalty proceedings, based on citations and orders alleging violations of various ventilation standards, were initiated by the Secretary on March 9, 1993, but were thereafter stayed because of a related criminal investigation. 18 FMSHRC at 1131. After that investigation was concluded, hearings eventually took place in several related cases, but the instant matter was continued. *Id.*

On February 22, 1996, Consol moved, pursuant to Commission Procedural Rule 59, 29 C.F.R. ' 2700.59, for an order compelling discovery. *Id.* When disputes over two of the four categories of information requested in that motion were not resolved by the parties, the judge issued his order which is the subject of the Secretary=s interlocutory appeal.

The first documents at issue are five memoranda prepared by Mine Safety and Health Administration (AMSHA@) special investigator George Bowman (Athe Bowman memoranda@). The Bowman memoranda consist of three summaries of statements that were the product of interviews conducted earlier by the MSHA accident investigation team, and two summaries of interviews conducted by special investigator Bowman of people who are not Consol employees. S. Resp. & Objection to Consol=s Second & Third Req. for Produc., Attach. A, at 4 n.1. According to the Secretary, each of five individuals who are the subject of the Bowman memoranda Aalso provided testimony to MSHA=s accident investigation team in the presence of Consol=s counsel and representatives. These statements have been provided to Consol.@ S. Br. at 13 n.11.

The second set of documents at issue was generated in connection with MSHA=s internal review of its actions at the Blacksville No. 1 mine around the time of the explosion. That review resulted in the issuance of a public document entitled AInternal Review of MSHA=s Actions at the Blacksville No. 1 Mine, Consolidation Coal Company, Monongalia County, West Virginia,@ dated August 17, 1993 (AInternal Review Report@). The stated purpose of the MSHA internal review was Ato evaluate MSHA=s actions at the Blacksville No. 1 Mine and to make recommendations for improvements where appropriate.@ *Id*. at 2. Consol requested the judge to rule on various privilege claims the Secretary had made with respect to 55 files of documents prepared, used, or reviewed in connection with the preparation of the Internal Review Report. 18 FMSHRC at 1134.

II.

The Bowman Memoranda

1. Judge=s Decision

After refusing to produce the Bowman memoranda on the ground that they are protected from discovery by the attorney work-product privilege, the Secretary provided the judge with a copy of each of the Bowman memoranda for in camera inspection. 18 FMSHRC at 1132. The judge found that the memoranda Acontain only the reported statements of the interviewees and do not contain any mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.@ *Id*. The judge did not directly decide whether the Bowman memoranda are eligible for protection as work product. Instead, he based his order requiring the Secretary to produce the documents on Consol=s asserted need for the Bowman memoranda Ato compare present recollections against prior statements and to ascertain whether there are any contradictions in witness statements.@ *Id*. at 1134. The judge decided that, Awhether or not the work product privilege applies@ to the Bowman memoranda, AConsol has a substantial need for those documents and has no other way of obtaining the precise information.@ *Id*. Characterizing as Acritical@ the comparison that Consol seeks to make, the judge ordered the Secretary to produce copies of the five Bowman memoranda. *Id*.

2. Disposition

The Secretary contends that the Bowman memoranda are protected by the work-product privilege because they are documents prepared by the Secretary=s representative in anticipation of litigation. S. Br. at 7-8. The Secretary claims that because the Bowman memoranda constitute Aopinion@ work product, they should be afforded the highest protection under Rule 26(b)(3) of the Federal Rules of Civil Procedure, and that the judge erred in implicitly determining the Bowman memoranda to be merely Aroutine@ work product. *Id*. at 8-10. The Secretary also argues that, even if the Bowman memoranda are routine work product, the judge erred in finding that Consol had demonstrated both a substantial need for the material and that it was unable to obtain substantially the same information by other means. *Id*. at 10-13. The Secretary maintains that Consol=s asserted need for potential impeachment material does not rise to the level of a substantial discovery need, and that Consol can depose the five individuals at issue. *Id.* at 13-16.

Consol responds that, because the Bowman memoranda are the work of a non-attorney, and because the judge explicitly held that the memoranda contain no opinions, comments, or revelations of Bowman=s mental impressions, the lowest level of work-product protection is appropriate. C. Br. at 9-10. Consol also contends that the judge correctly found that Consol has both a substantial need for the documents and no other way of obtaining the precise information contained therein. *Id.* Consol argues that it may be able to make other use of the Bowman memoranda in addition to using it for impeachment purposes, such as to discover information regarding the consistency of MSHA=s application of some of its ventilation regulations. *Id*. at 11.

Consol also states that depositions of the individuals who are the subject of the Bowman memoranda would not necessarily produce the same information special investigator Bowman obtained. *Id*.

Commission Procedural Rule 56(b), 29 C.F.R. ' 2700.56(b), provides that parties may obtain discovery of any relevant matter that is not privileged. The work-product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[2] In *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege, stating:

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[2] Commission Procedural Rule 1(b), 29 C.F.R. ' 2700.1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission=s Procedural Rules, or the Administrative Procedure Act. Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party=s representative (including the other party=s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party=s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental

> In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:
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> 1. Adocuments and tangible things;@
>
> 2. Aprepared in anticipation of litigation or for trial;@ and
>
> 3. Aby or for another party or by or for that party=s representative.@
>
> It is *not* required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery Aonly upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party=s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.@ If the court orders that the materials be produced because the required showing has been made, the court is then required to Aprotect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.@

*Id*. at 2558 (citations omitted). The burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege, but once that party has met its burden, the burden shifts to the party seeking disclosure to make a requisite showing that there is substantial need and undue hardship to overcome the privilege. *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff=d*, 983 F.2d 1047 (2d Cir. 1992).

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> impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Bowman memoranda are plainly Adocuments,@ and there is no argument that, in preparing them, special investigator Bowman was not acting in his capacity as a Arepresentative@ of a Aparty@ to the litigation, in this case the Secretary.[3] We further find that the documents have been Aprepared in anticipation of litigation or for trial,@ because each was prepared after MSHA had filed civil penalty proceedings against Consol on March 9, 1993. The memoranda thus were prepared not only in Aanticipation@ of litigation, but in the midst of it. Each of the Bowman memoranda therefore clearly meet the three requirements for the work-product privilege set forth in *ASARCO*.

We also find that the judge erred in ruling that Consol had established a Asubstantial need@ for the Bowman memoranda. As the basis for his ruling, the judge cited Consol=s need for the materials Ato compare present recollections against prior statements and to ascertain whether there are any contradictions in witness statements,@ characterizing that comparison as Acritical.@ 18 FMSHRC at 1134. A number of courts, however, have concluded that, by itself, the desire to determine through discovery whether potential impeachment material exists within protected work product does not constitute a Asubstantial need@ for purposes of the work-product privilege.[4]

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[3] The Commission has conducted its own in camera review of those documents the judge ordered the Secretary to produce in his June 6, 1996, ruling.

[4] *See, e.g., In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3rd Cir. 1979) (desire to impeach witness= testimony does not, by itself, overcome protection afforded interview memorandum); *Hauger v. Chicago, Rock Island & Pacific R.R. Co.*, 216 F.2d 501, 508 (7th Cir. 1954) (rights of litigant in work product of lawyers and agents not required to give way to adversary=s right of discovery upon adversary=s mere surmise or suspicion that impeaching material might be found in work product); *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 93 (E.D. Mo. 1980) (mere speculation that contemporaneous statement may prove to be contradictory or impeaching not sufficient to overcome limited privilege applicable to trial preparation materials); *see also Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1377 (8th Cir.

1975) (to overcome limited investigatory privilege requires more than surmise that witnesses had made earlier inconsistent statements which might be used to impeach them).

Neither the judge=s decision nor Consol=s brief cites any reason why Consol believes the Bowman memoranda may contain potential impeachment material. Without such an explanation, it is impossible to find that Consol has a Asubstantial need@ for the Bowman memoranda under Rule 26(b)(3). Moreover, the Secretary has stated that all of the five individuals who are the subject of the Bowman memoranda Aprovided testimony to MSHA=s accident investigation team in the presence of Consol=s counsel and representatives [and t]hese statements have been provided to Consol.@ S. Br. at 13 n.11. Thus, to the extent that the five witnesses testify at trial, Consol will be able Ato compare present recollections against prior statements and to ascertain whether there are any contradictions in witness statements@ (18 FMSHRC at 1134), without examining the Bowman memoranda.[5]

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[5] In fact, as those statements were more contemporaneous with the accident than the interviews conducted by Bowman, their probative value is much greater than the Bowman memoranda. *Compare Smith v. Diamond Offshore Drilling*, 168 F.R.D. 582, 584 (S.D. Tex. 1996) (ordering production of witness statements taken immediately following accident on basis of substantial need and undue hardship exception to work-product privilege) *with Carson v. Mar-Tee Inc.*, 165 F.R.D. 48, 50 (E.D. Pa. 1996) (refusing to find substantial need on basis of impeachment value where purportedly inconsistent statement given months after auto accident to

We therefore reverse the judge=s finding that Consol has established a substantial need for the Bowman memoranda,[6] and consequently conclude that the Bowman memoranda are protected from discovery by the work-product privilege as asserted by the Secretary.[7]

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insurance adjuster was not statement most contemporaneous with accident). Moreover, three of the Bowman memoranda are merely second-hand summaries of interview statements taken a number of months before the summaries were prepared. Their value as impeachment material is therefore highly questionable, which further militates against a finding that a substantial need for the material has been established. To overcome the work-product privilege, Athe impeachment value must be substantial because every prior statement has some impeachment value and otherwise the exception would swallow the rule.@ *Duck v. Warren*, 160 F.R.D. 80, 83 (E.D. Va. 1995) (quoting *Suggs v. Whitaker*, 152 F.R.D. 501, 507-08 (M.D.N.C. 1993)).

[6] As for Consol=s argument that it has a substantial need for the Bowman memoranda to discover information regarding the consistency of MSHA=s application of some of its ventilation regulations, we saw no such information during our in camera review of the Bowman memoranda.

[7] In light of our holding, we need not decide whether the judge correctly ruled that Consol also sufficiently demonstrated that it has no other way of obtaining the substantial equivalent of the Bowman memoranda without undue hardship. Nor do we need to address whether the Bowman memoranda constitute opinion work product and, if so, what higher level of protection would therefore be appropriate under Rule 26(b)(3).

III.

The MSHA Internal Review Material

1. Judge=s Decision

The judge was also provided, for in camera review, the MSHA internal review files at issue, which had been each assigned a AFile Number@ in the AVaughn index@ the Secretary had submitted in support of his objections to Consol=s discovery requests.[8] 18 FMSHRC at 1134-35. The judge ordered the Secretary to produce those Amaterials relating to the interviews of MSHA enforcement personnel and specifically to questions regarding compliance with ventilation plan and other relevant regulations.@ *Id*. at 1135. The judge concluded, based on his Aexamination of the files . . . submitted by the Secretary[,]@ that only portions of the documents included within the Secretary=s File 16(b) would thus be included in the order for production. *Id*. The judge quoted the Secretary=s Vaughn index as describing File 16(b) to contain A[i]nterview questions and review team notes, including notes on interviewee answers and on interviewer=s impressions for 24 MSHA employees.@ *Id.* The judge ruled Athat only the identifying information on page one of each form questionnaire (questions 1-6) and the following questions and answers are relevant to the issues herein: page 3 (questions 2-6), pages 4 and 5, page 11 (questions 6-8), page 12 (question 6), page 25 and page 26 (questions 1-6).@ *Id.*

The judge denied the Secretary=s deliberative process privilege claim with respect to that material. He found that the questions and answers at issue were not related to the process by which MSHA policies are formulated, concerned primarily factual matters, and to the extent that Aopinions@ were included within them, those opinions either were not related to the deliberative process or were related to the issues at bar, which the judge stated to include the Areasonably prudent person@ test, unwarrantable failure, and negligence. *Id.* at 1136. The judge found that Consol therefore had a substantial need for the material and also would be unable, without undue hardship and additional delay to the proceeding, to obtain its substantial equivalent. *Id.*

2. Disposition

While the judge=s order states that File 16(b) contains questionnaires of 24 MSHA interviewees (18 FMSHRC at 1135), for our in camera review the Secretary forwarded excerpts of the interview questionnaires for only 13 MSHA employees. According to the Secretary=s cover letter forwarding the documents, only 13 employees answered interview questions that either

[8] A AVaughn index@ is an index containing an itemization of documents with a correlated indication of the basis for each privilege claimed. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1002 n.15 (June 1992).

correspond to the form questionnaire questions specifically identified in the judge=s decision, or concern compliance with ventilation plan and other regulations relevant to the issues in the case. S. Letter dated October 17, 1996. According to the Secretary, 6 of the 13 employees were asked the specific questions referred to by the judge. *Id*. The Secretary states that she submitted excerpts from the interview questionnaires of the other seven employees in accordance with the language in the judge=s order limiting production to Aquestions regarding compliance with ventilation plan and other relevant regulations.@ *Id*. (quoting 18 FMSHRC at 1135).

In claiming on review that the material at issue from File 16(b) is protected from disclosure by the deliberative process privilege, the Secretary contends that the documents were generated pursuant to a program designed to critically evaluate MSHA=s enforcement activities and recommend appropriate improvements, and therefore must be considered to be part of the protected deliberative process. S. Br. at 19-23. The Secretary asserts that factual material in the File 16(b) documents at issue cannot be segregated and disclosed without revealing the deliberative process of MSHA in preparing its Internal Review Report. *Id*. at 23.

Consol responds that the judge should be upheld because he based his ruling on his in camera inspection of the documents at issue, and limited his order of production to the non-deliberative, factual information contained in File 16(b). C. Br. at 15-20. Consol also claims that the judge=s decision is supported by his determination that Consol has a substantial need for the information, which cannot be obtained by other means. *Id*. at 20. Consol contends that the Secretary is implicitly invoking a Aself-critical analysis@ privilege, which has not been well-received by a majority of the federal courts. *Id*. at 21-25.

In *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (June 1992) (A*Dust Cases*@), the Commission described the deliberative process privilege as one designed to protect Athe >consultative functions= of government by maintaining the confidentiality of >advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.=@ *Id*. at 992 (quoting *Jordan v. United States Dep=t of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978)). The Commission defined the privilege as one which Aattaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.@ *Id*. Protected by the privilege are Apre-decisional@ communications that are Adeliberative,@ meaning that the communication Amust actually be related to the process by which policies are formulated.@ *Id*. (quoting 591 F.2d at 774) (emphasis omitted).

Drawing on Supreme Court and other case law on the privilege, the Commission also recognized that Apurely factual material that does not expose an agency=s decision making process does not come within the ambit of the privilege.@ *Dust Cases*, 14 FMSHRC at 993. In instances in which factual material can be segregated from otherwise protected deliberative material, courts will order it disclosed unless the party opposing disclosure can show that the material is Aso inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of deliberative information that is entitled to protection.@ *Providence Journal Co.*

*v. United States Dep=t of the Army*, 981 F.2d 552, 562 (1st Cir. 1992). In such cases, courts have held factual material to be protected by the privilege Awhere they were convinced that disclosure >would expose an agency=s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency=s ability to perform its functions.=@ *Quarles v. United States Dep=t of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting *Dudman Communications Corp. v. United States Dep=t of the Air Force*, 815 F.2d 565, 568 (D.C. Cir. 1987)). The government bears the burden of proving that no segregable information exists which is not protected by the privilege. *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1250 (4th Cir. 1994).

1. Was the File 16(b) Material Part of the ADeliberative Process@?

We reject the judge=s conclusion that the File 16(b) material at issue was not A>deliberative= in the sense that [the questions and answers contained therein] are related to the process by which a policy is formulated.@ 18 FMSHRC at 1136. The judge gives no reasoning in support of his conclusion, and it is contrary to court holdings that the deliberative process privilege protects documents generated by an agency in the course of conducting a supplemental accident investigation designed to educate the agency so that it can improve its future safety performance. *See, e.g., Cooper v. United States Dep=t of the Navy*, 558 F.2d 274, 276-78 (5th Cir. 1977); *Brockway v. United States Dep=t of the Air Force*, 518 F.2d 1184, 1192-94 (8th Cir. 1975).

Moreover, the issue presented here was directly addressed in *Ashley v. United States Dep=t of Labor*, 589 F. Supp. 901 (D.D.C. 1983). In *Ashley*, the documents in question had also been Agenerated . . . in connection with an in-house self-evaluation and improvements program,@ under which an MSHA internal review was routinely conducted after serious mine accidents. *Id.* at 904. As in this case, the MSHA internal review was supplemental to the primary accident investigation and was conducted Afor the purpose of agency self-evaluation and improvement in mine safety enforcement procedures.@ *Id*. at 909 & n.7. The court in *Ashley* found the documents protected as part of the deliberative process because the documents were Aintended to contribute to the process of *changing* agency procedures.@ *Id*. at 908.

The same is true with respect to the File 16(b) material in this case. The questionnaire material at issue clearly was used in drafting the Internal Review Report, which made a number of recommendations to change MSHA procedures. Much of the factual background information included in the Internal Review Report was drawn from the questionnaire answers. As it is plain that the documents were Aintended to contribute to the process of *changing* agency procedures,@ we find them to be Adeliberative@ communications subject to the deliberative process privilege.

2. Does the File 16(b) Material Include Protected Factual Information?

Our in camera inspection revealed that, with one exception, all of the questions in the interview questionnaire that the judge ordered the Secretary to produce were designed to elicit purely factual information. In addition, all of the answers given, including to the one question which requested an opinion of two MSHA enforcement personnel, provided strictly factual information, some of which appears in the Internal Review Report released to the public. Consequently, we affirm the judge=s ruling that the material at issue is not protected by the deliberative process privilege on the ground that it contains purely factual information.

The Secretary does not claim that the File 16(b) material at issue here is covered by the deliberative process privilege because it contains Aadvisory opinions, recommendations and deliberations@ the Commission identified in the *Dust Cases* as protected by the privilege. Rather, relying almost exclusively on language from the district court=s opinion in *Ashley* and an affidavit below in support of her claim that all of the File 16(b) material is protected from discovery, the Secretary maintains that the *factual* material contained within the documents at issue is protected because it cannot be disclosed without revealing MSHA=s deliberative process. S. Br. at 23. We find all of the Secretary=s arguments in support of this position unavailing.

With respect to Asegregable factual material,@ the court in *Ashley* required MSHA to Ademonstrate that the withheld documents contain no reasonably segregable factual material, which must be disclosed unless to do so would compromise the private remainder of the documents.@ 589 F. Supp. at 910. The court explained:

> For purposes of this segregability requirement, the District of Columbia Circuit has drawn a rough distinction between documents which are primarily evaluative, analytical or recommendatory, from which factual material need not be disclosed if it is inextricably intertwined, and documents which are Asubjective@ only because the author has chosen which facts are important or which issues to highlight. All factual material in documents of the latter variety must be disclosed unless the agency can demonstrate that the document supports a specific, identifiable decision, that revelation of the factual material would reveal aspects of the agency=s decisionmaking process, and that the factual material at issue is available to the public in some other, albeit less convenient, form.

*Id*. (citations omitted). The Secretary argues that, as in *Ashley*, her deliberative process privilege claim should be upheld here because the factual material in dispute supports specific, identifiable decisions, that revelation of it would reveal aspects of MSHA=s decisionmaking process, and that it is already available to the public in the Internal Review Report. S. Br. at 23.

The Secretary is mistaken in her reading of *Ashley*. The court there only ordered the Secretary to produce the first type of factual information described in *Ashley* **C** that which was not Ainextricably intertwined@ in documents that were Aprimarily evaluative, analytical or recommendatory@ material. *See* 589 F. Supp. at 910-12. The court found that all of the MSHA documents it held to be protected by the deliberative process privilege Acontain[ed] the personal opinions, evaluations, or recommendations of agency staff.@ *Id*. at 909. In contrast, the File 16(b) material at issue here not only includes no such material, but actually is more like the material found to be easily segregable and thus *unprotected* by the court in *Ashley* **C** information from short field reports regarding observations made by MSHA personnel. *See id*. at 911.

In addition, the Secretary provides no support, other than conclusory statements, for her claim that the File 16(b) material at issue here meets the requirements for protection of factual material set forth in *Ashley*. The *Ashley* court found that AMSHA=s affidavits describe *in detail* how *each document* was or may be utilized and how it fits into the agency=s deliberative process.@ *Id*. at 909 (emphasis added). Here, the only support for the Secretary=s claim that the questionnaire excerpts should be protected is an affidavit submitted below by an MSHA official in support of the Secretary=s position that *all* of the questionnaire files should be covered by the privilege.

Moreover, courts only protect from disclosure under the deliberative process privilege factual material in underlying documents when it is clear that there was an evaluation made by an agency regarding which facts it would rely upon and those which it would disregard. *Compare Playboy Enterprises, Inc. v. United States Dep=t of Justice*, 677 F.2d 931, 935-36 (D.C. Cir. 1982) (mere act of selecting facts to appear in report does not render such report deliberative), *with Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (protecting factual summaries as deliberative where record established that agency personnel preparing such summaries engaged in evaluative process in choosing which facts to include in summary and which to exclude).[9] But the File 16(b) material at issue here differs little from the factual background material already made public in the Internal Review Report. Because the evidence submitted by the Secretary does not establish that an evaluative process took place with respect to the File 16(b) material in question during preparation of the Internal Review Report,[10] we find the

[9] The dissemination of the Internal Review Report as a public document distinguishes this case from *Cooper* and *Brockway*, cases in which the deliberative process privilege was successfully invoked to protect from disclosure the factual content of investigative documents which formed the basis for confidential internal review reports.

[10] We are not persuaded by the Secretary=s claim that the factual material at issue should be considered protected material simply because it comes from Aanswers which the [internal review team members] thought important enough to note.@ S. Br. at 24. Such an argument has been rejected in similar situations. *See, e.g., ITT World Communications, Inc. v. FCC*, 699 F.2d 1219, 1239 (D.C. Cir. 1983) (refusing to protect notes containing what appeared to be no more than Astraightforward factual narrations@ where agency had Apresented no evidence that the notes [were] evaluative in nature@ in support of claim that agency personnel had made subjective

material at issue to be Apurely factual material that does not expose [MSHA]=s decision making process@ and thus hold that the material is not protected by the deliberative process privilege.

While neither the judge nor the Secretary addressed the issue, the File 16(b) material in question does include two instances in which MSHA interviewees were asked an identical question which requested not facts, but rather their respective opinion on a matter. Specifically, an MSHA ventilation supervisor, in the second question on page 5 of his interview questionnaire, and another MSHA official, in the second question on page 4 of his interview questionnaire, were asked whether MSHA should have taken a specified action. Because both, instead of giving an opinion, indicated in their answers that the action had been taken, their answers, as factual information, are not protected material under the deliberative process privilege.

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decisions in taking those notes), *rev=d on other grounds*, 466 U.S. 463 (1984). Moreover, our in camera inspection revealed that in many instances, with respect to the same question, some review team members recorded an interviewee=s answer while others did not.

We also reject as a ground for protecting the File 16(b) factual material from disclosure the Secretary=s claim that Abecause the interview notes are at issue in this case, the findings of fact [in the Internal Review Report] >necessarily were premised on an assessment and resolution of the relative credibility of [the] statements= given by the interviewees.@ S. Br. at 23 (quoting *Providence Journal*, 981 F.2d at 562). Unlike the record before the court in *Providence Journal*, there is no support here for the Secretary=s claim that she made credibility determinations in deciding what information from the questionnaire answers should be reflected in the Internal Review Report and what information should be left out. The Secretary has not cited, and we were not able to find, any instance in the documents at issue in which differing or inconsistent accounts were given regarding the same subject.

Moreover, the question itself is not necessarily protected simply because it requested opinion information. Standing alone, it establishes nothing more than MSHA=s desire to know what course of action individual employees felt should have been taken. As the Internal Review Report itself indicates that there was a difference of opinion among MSHA employees on the subject, disclosure of the fact that MSHA inquired into the subject as part of its internal review can hardly be said to invade MSHA=s deliberative process. Even opinion information is not protected by the deliberative process privilege when its disclosure would not reveal the deliberative process within the agency.[11] Accordingly, we affirm the judge=s production order as to all of the File 16(b) material.[12]

IV.

Conclusion

For the foregoing reasons, we reverse the judge=s order requiring the Secretary to produce the Bowman memoranda, affirm the judge=s order requiring production of MSHA internal review File 16(b) material, and remand this matter for further proceedings.

James C. Riley, Commissioner

[11] *See, e.g., Mead Data Central, Inc. v. United States Dep=t. of the Air Force*, 566 F.2d 242, 256 n.40 (D.C. Cir. 1977); *Dudman Communications*, 815 F.2d at 1568.

[12] We thus need not address the judge=s findings that the File 16(b) material in question must also be produced by the Secretary because Consol has a substantial need for the information and would be unable to obtain the substantial equivalent of the information contained therein by other means and without undue hardship and further delay to the proceedings.

Theodore F. Verheggen, Commissioner

Commissioner Marks, concurring in part, dissenting in part:

I am in agreement with my colleagues= conclusion that the Bowman memoranda are protected from discovery because of the work-product privilege, and that therefore the judge=s decision to the contrary should be reversed.

With respect to the MSHA Internal Review File 16(b) material at issue, I conclude, as do my colleagues, that the documents are deliberative communications subject to the deliberative process privilege. However, contrary to my colleagues, I also conclude that the subject material contains factual material that, if disclosed, does pose a risk of exposure of MSHA=s decisionmaking process.

In this regard, I am particularly persuaded by the Secretary=s argument that disclosure of the specific questions and responses will clearly reflect what was important to the interview team conducting the review and thereby impermissibly trample upon the Secretary=s deliberative process. S. Br. at 23. As such, I find that my colleagues= reference to *Quarles v. United States Dep=t of the Navy*, 893 F.2d 390 (D.C. Cir. 1990), is directly on point **C** factual material should be protected by the privilege when disclosure Awould expose an agency=s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency=s ability to perform its functions.@ Slip. Op. at 9 (citing 893 F.2d at 392). Moreover, Abecause the interview notes are at issue in this case, the findings of fact >necessarily were premised on an assessment and resolution of the relative credibility of [the] statements= given by the interviewees.@ S. Br. at 23(quoting *Providence Journal Co. v. United States Dep=t of the Army*, 981 F.2d 552, 562 (1st Cir. 1992)).

Thus, I strongly feel that the approach taken by my colleges needlessly results in a conclusion that seriously threatens to undermine an important Secretarial effort **C** to conduct an internal review of its own actions to see if the enforcement of the Mine Act is being conducted in the best possible way. To justify the disclosure of such material **C** material we all conclude is properly subject to the deliberative process privilege **C** the Commission should have been presented with far more compelling reasons than those provided by Consol.

Accordingly, I dissent and I would reverse the judge=s order requiring the production of the material in File 16(b).

Marc Lincoln Marks, Commissioner