UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Verizon NY, Inc., Respondent, and Communication Workers of America, AFL-CIO Authorized Employee Representative	OSHRC Docket No. 12-0768

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO COMPEL DISCLOSURE OF FACTUAL INFORMATION

I. FACTS

Respondent (Respondent or Verizon) provides wireline telecommunications services in the New York region. In about September, 2011, Outside Plant Technician Douglas LaLima was allegedly fatally electrocuted while installing telecommunications cable onto a utility pole. A compliance safety and health officer (CSHO) of the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's worksite(s) at or near New Lots Avenue & Christopher Avenue, Brooklyn, New York 11212, and 4409 Avenue H, 2nd Floor, Brooklyn, New York 11234, on September 14, 2011, and on March 13, 2012, OSHA issued a three item repeat citation, five item serious citation, and two item other than serious citation. Thereafter, Respondent filed a notice of contest. Pleadings have been filed. Discovery is ongoing.

During Respondent's October 9, 2012 deposition of Assistant Area Director (AAD) Mitchel Konca, the Secretary's counsel instructed the AAD not to answer questions related to the names of individuals involved in the decision to issue the citations in this case, on the ground that the names of the deliberators are protected by the deliberative process privilege.[1]

On October 10, 2012, during Respondent's deposition of CSHO Janet Drogowski, the Secretary's counsel objected to, and instructed the CSHO not to answer, questions relating to the number of non-managerial employees she interviewed during her investigation, on the ground that this information is protected by the informer's privilege. Further, the Secretary's counsel similarly objected to and instructed the witness not to answer questions relating to: 1) how the employees interviewed were selected; and 2) whether she was told to disregard statements by management and always accept uncritically what non-management employees told her.

On January 25, 2013, Respondent filed its Motion to Compel Disclosure of Factual Information (Motion to Compel). Verizon seeks to compel further deposition testimony of the CSHO and AAD, as well as an order: 1) requiring the CSHO to answer the question relating to: a) the number of non-managerial employees she interviewed during the course of her investigation, b) how those employees were selected, and c) whether she was told to disregard statements by management and always accept uncritically what non-management employees told her, and 2) requiring the AAD to answer questions relating to the names of individuals involved in the decision to issue the citations in this matter.

Verizon argues that the deliberative process privilege does not protect: 1) the identities of the individuals involved in the decision to cite Verizon because the identities are factual

[1] The Secretary asserts that she objected to the disclosure of the identities of the officials from OSHA's regional office with whom AAD Konca consulted prior to the issuance of the citations in this case.

information,[2] or 2) whether the CSHO was instructed to believe only non-managers and to disregard information provided by management. Verizon also asserts that the informer's privilege does not protect the number of non-managerial employees that the CSHO interviewed during her investigation, and how the CSHO selected the employees that she interviewed.

On February 8, 2013, the Secretary filed her Opposition to Respondent's Motion to Compel Disclosure of Factual Information (Opposition to Motion to Compel). In it, the Secretary withdrew her claim of privilege as to whether the CSHO was told by anyone within OSHA that she is required to believe the statements of non-managers over the statements of managers.[3] The Secretary asserts that she has properly invoked government privileges in this matter and submitted the affidavit of David Michaels, the Assistant Secretary for OSHA, to formally invoke the governmental privileges. Citing to various cases, the Secretary further asserts that the identities of agency officials, beyond the CSHO, AAD, and Area Director (AD), who offered advice and recommendations are protected by the deliberative process privilege in order to protect frank discussions of policy.[4] *See AIDS Healthcare Found. v. Leavitt*, 256 Fed.Appx. 954, 957 (9th Cir. 2007) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)) (privileging from disclosure the identities of agency personnel who reviewed Appellant's grant applications

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[2] In support of its position, Respondent cites to *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1026 (E.D. Cal. 2010); *Grolier Inc. v. FTC*, No. 76-1559, 1979 WL 1641, at *2 (D.D.C. June 11, 1979).

[3] The Secretary has stated that Verizon can rely on her written averment that the CSHO stated that she has not received an instruction to believe the statements of employees without regard to statements given by managers. The Secretary asserts that any follow-up questioning on this topic would be cumulative and unnecessary.

[4] The Secretary also argued that the two cases cited by Respondent in support of its position are distinguishable. She asserts in *Thomas*, the court noted that the manner in which the Governor exercised his discretion in revoking the petitioner's parole was the issue in the case, and therefore weighed heavily against any assertion of the deliberative process privilege. She also stated that the court did not address the identity of other persons with whom the principal actors consulted for recommendations and opinions prior to drafting the final report. The Secretary also asserted that *Grolier, Inc.* has been superseded by later decisions in its district and Circuit; *e.g. See Coffield v. City of La Grange, Georgia*, 913 F. Supp. 608, 616 (D.D.C. 1996) ("this Circuit has recognized that if a document is deliberative in nature, the identity of the author is also privileged") (citing *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). The Court agrees with the Secretary that the two cases cited by Respondent are distinguishable for the reasons discussed by the Secretary.

despite Appellant's claim that the identities were "purely factual material"); *see also Brinton v. Dep't of State*, 636 F.2d at 604 (because "agency records are indeed deliberative, it is appropriate to apply [Freedom of Information Act (FOIA)] Exemption 5 to the documents themselves, as well as to the names of their authors"); *Coffield v. City of La Grange, Georgia*, 913 F. Supp. at 616 ("[I]f a document is deliberative in nature, the identity of the author is also privileged, because of the potential chilling effect and harm to the deliberative process. This reasoning applies equally to internal routing notations that identify agency personnel involved in the deliberative process …."); *Tax Reform Research Group*, 419 F. Supp. 415, 423 (D.D.C. 1976)("one aspect of the deliberative process therefore protected … is the identify of persons giving particular advice on a policy matter."). The Secretary also argues that Respondent has not shown a sufficient need for the identities of the OSHA Regional Office officials and asserts that their names are not relevant to the issues to be tried in this case.

The Secretary further asserts that the manner by which the CSHO decided which employees to interview, as well as the number of non-managerial employees that she interviewed are protected by the informer's privilege. She states that disclosing the number of employees that the CSHO interviewed would tend to reveal the identity of informants. She further asserts that disclosing the manner in which the CSHO identified employees to interview would assist Verizon in identifying informants.[5] The Secretary argues that the information sought by Respondent is not essential for its preparation for the trial and that Verizon has not demonstrated a sufficient need to overcome the informer's privilege.

On March 11, 2013,Verizon filed its Reply in Further Support of Its Motion to Compel Disclosure of Factual Information (Reply). In its Reply, Respondent reiterated its reliance upon

[5] The Secretary asserts that there are 100 employees that work at the facility at issue, including about 40 linemen.

Thomas and *Grolier, Inc.* It further argued that the cases cited by the Secretary in support of her position that the identities of deliberators beyond the CSHO, AAD and AD are protected show that all of the deliberators should be identified where there is no risk that the identities would reveal any information about their opinions or mental impressions. Verizon also argues that the Secretary has the burden to establish the applicability of any privilege and that the burden shifts to Verizon to overcome the applicable privilege by demonstrating a substantial need for the protected information.[6] In its Reply, Verizon acknowledges that the Secretary has withdrawn any assertion of privilege with regard to the question of whether the CSHO was instructed to credit statements made by Verizon non-management, and disregard statements made by Verizon management. Verizon maintains that it is entitled to have the CSHO answer the question in her own words, along with any follow-up questions relating to her answer. Verizon also reiterated its position that the number of non-managerial employees the CSHO interviewed during the course of her investigation and how the interviewees were selected are not protected by the informer's privilege.

On March 22, 2013, the Secretary filed her Surreply to Respondent's Motion to Compel (Surreply) in which she asserts that Verizon misstated the holdings in the *Brinton* and *Coffield* cases. She stated that in *Brinton*, the D.C. Circuit court did not hold, as Verizon asserts, that the identities of the authors of pre-decisional advisory documents could be disclosed so long as no information regarding their opinions or mental impressions was revealed. The Secretary argues that OSHA should not be "forced to operate in a fishbowl" by having to identify every person who was in any way consulted by the CSHO, AAD, or AD before the citations were issued. She

[6] Verizon argues that it is entitled to learn "the identities of those involved in the decision to issue the Citation, and the roles those individuals played."

reiterated her argument that the informer's privilege protected any information which would tend to identify the informants, including the number of employees interviewed and the manner in which the CSHO determined which employees to interview. Lastly, the Secretary argued that Verizon should not be permitted to depose the CSHO again because it would be a waste of time.

The case is set for trial to commence on September 16, 2013.

II. DISCUSSION

The deliberative process privilege protects government materials that comprise or reflect the process by which governmental decisions and policies are made. *National Labor Relations Board v. Sears, Roebuck & Co.* (*NLRB v. Sears*), 421 U.S. 132, 150 (1975); *Dudman Commc'n Corp. v. Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987).[7] It allows the government to withhold information that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. *See NLRB v. Sears,* 421 U.S. at 150; *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena* (*Carl Zeiss*), 40 F.R.D. 318, 324 (D.D.C. 1966); *Stone and Webster Constr., Inc.,* 23 BNA OSHC 1939, 1941 (No. 10-0130 and 10-0169, 2012) (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The deliberative process privilege is unique to the Government and releases it from discovery obligations otherwise imposed on private litigants. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (deliberative process privilege is "unique to the government").

The Government has the initial burden of demonstrating that the requested materials are within the deliberative process privilege. Once such a showing is made, the requesting party

[7] *See Equal Employment Opportunity Comm'n v. Albertson's LLC, f/k/a Albertson's, Inc.*, Civ. No. 06-01273-CMA-BNB, 2008 WL 4877046 at *1 (D. Col. Nov. 12, 2008)("Federal common law recognizes the deliberative process privilege.")

must make a showing of substantial need to overcome the privilege in civil litigation. *See NLRB v. Sears*, 421 U.S. at 149, n. 16. Respondent has made no such showing in this case.

The deliberative process privilege has three purposes. First, it protects "creative debate and candid consideration of alternatives within an agency and, thereby, improves the quality of agency policy decisions." *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).[8] It is premised upon the notion that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." *NLRB v. Sears*, 421 U.S. at 150-151, *quoting U. S. v. Nixon*, 418 U.S. 683, 705 (1974); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 882 (5th Cir. 1981) ("Government officials would hesitate to offer their candid and conscientious opinions to superiors or co-workers if they knew that their opinions of the moment might be made a matter of public record at some future date").[9]

Second, the deliberative process privilege protects the public from confusion that would result from disclosure of internal agency discussions or statements that have not in fact been adopted as the agency's position. *Russell*, 682 F.2d at 1048 (citing *Jordan v. U.S. Dep't of*

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[8] Congress was concerned that if agencies were "forced to 'operate in a fish bowl,' S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." *Dudman,* 815 F.2d at 1567. The Court agrees with the Secretary that OSHA should not be "forced to operate in a fishbowl" by having to identify every person who was in any way consulted by the CSHO, AAD, or AD before the citations were issued.

[9] Many of the cases discussing the scope of the deliberative process privilege have arisen in the context of claims that certain documents are exempt from the disclosure requirements of the FOIA under Exemption 5 which permits nondisclosure of "inter-agency or intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5)(2009). While the FOIA itself does not create "evidentiary privileges for civil discovery," *Kerr v. United States District Court for the North. Dist. of Calif.*, 511 F.2d 192, 197 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976), cases construing Exemption 5 of the FOIA are relevant precedent for purposes of defining the scope of the privilege because Exemption 5 exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears*, 421 U.S. at 149. The key difference between the scope of Exemption 5 of the FOIA and the scope of the deliberative process privilege in the context of civil discovery is that, in the latter case, the courts may override a claim of a privilege depending on "the extent of the litigant's need in the context of the facts of his particular case; or on the nature of the case." *Id.* at 149, n. 16; *Environmental Protection Agency v. Mink*, 410 U. S. at 86.

Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978)(en banc). The principal concern here is that the public might treat tentative, early-on, unofficial statements of agency employees as the agency's official position. *See Russell*, 682 F.2d at 1048-49. Third, the privilege protects "the integrity of the [government's] decision-making process" by ensuring that "officials should be judged by what they decided, not for matters considered before making up their minds." *Id.* at 1048 (citing *Jordan*, 591 F.2d at 773).

To determine whether particular materials fall under the privilege, courts look to (1) whether the material is "predecisional" — whether it was generated before the adoption of an agency policy or position in order to assist in arriving at that final decision — and, (2) whether it is "deliberative" — "whether it reflects the give-and-take of the consultative process." *Coastal States Gas Corp.*, 617 F.2d at 866. The exemption generally covers "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id., Renegotiation Board v. Grumman Aircraft Eng'g Corp*., 421 U.S. 168, 184 (1975), *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Analysis and evaluation of facts are within the scope of the privilege. *See Skelton v. U.S. Postal Service,* 678 F.2d 35, 38 (5th Cir 1982). The Court finds that the names of individuals, and the roles that they played, involved in the decision to issue the citations in this case or with whom the CSHO, AAD, or AD may have consulted prior to the issuance of the citations, beyond those of the CSHO, AAD, and AD, are included within the scope of the privilege. *See EPA v. Mink*, 410 U.S. at 87; *AIDS Healthcare Found. v. Leavitt*, 256 Fed.Appx. at 957; *Brinton v. Dep't of State*, 636 F.2d at 604; *Coffield v. City of La Grange, Georgia*, 913 F. Supp. at 616; *Tax Reform Research Group*, 419 F. Supp. at 423.

The deliberative process privilege is not absolute; it is a qualified privilege. *Carl Zeiss,*

40 F.R.D. at 318*, In re Sunrise Sec. Litig.*, 109 B.R. 658, 665-67 (E. D. Pa. 1990). After concluding that the privilege is properly invoked, the courts must balance the public interest in non disclosure with the individual need for the information as evidence. *Committee for Nuclear Responsibility v. Seaberg*, 463 F.2d 788, 791 (D.C. Cir. 1971), *Carl Zeiss,* 40 F.R.D. at 327. The factors to be weighed include the (1) degree to which the proffered evidence is relevant, (2) extent to which it may be cumulative, and (3) opportunity of the party seeking disclosure to prove the particular facts by other means. *U. S. v. AT&T Company,* 524 F. Supp. 1381 (D.D.C. 1981), *In re Franklin Nat'l Bank Sec. Litig.,* 478 F. Supp. 577 (E.D. N.Y. 1979). To compel disclosure, the Respondent must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender." *Carl Zeiss,* 40 F.R.D. at 328-29.

Claims of privilege are addressed at Rule 52(d)(1) of the Commission Rules of Procedure.[10] Complainant has complied with the provisions of Commission Rule 52(d)(1) and relevant case law providing guidance as to how to assert the deliberative process privilege.[11] Complainant has formally asserted the deliberative process privilege and has provided a supporting affidavit by an appropriate official. The Secretary of Labor's designee, Assistant Secretary of Labor for OSHA David Michaels, personally reviewed all relevant deposition

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[10] Commission Rule 52(d)(1) reads: (1) *Claims of privilege*. The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from the Judge or the Commission, or in response to a motion to compel, the claim shall: Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon in camera, that is, with the record and hearing room closed to the public, or *ex parte*, that is without the participation of parties and their representatives. The judge may enter an order and impose terms and conditions on his or her examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be disclosed until after the examination is completed. *See* 29 C.F.R. § 2200.52d(1)(2009).

[11] The "head of the department" having control over the requested information must (1) make a formal claim; (2) provide a detailed specification of the information for which the agency is claiming the privilege; and (3) base this assertion of the privilege on his or her actual personal consideration. *See Landry v. FDIC,* 204 F.3d 1125, 1135 (D.C. Cir. 2000)(citing *Northrop Corp. v. McDonnell Douglas Corp.,* 751 F.2d 395, 399 (D.C. Cir. 1984)).

transcripts and a summary of the litigation at issue. He determined that a formal assertion of the deliberative process privilege was appropriate and identified the precise information for which the privilege was asserted.[12] The Court finds Mr. Michaels to be an appropriate "head of the department" entitled to assert the deliberative process privilege before the Court. The Court also finds that Mr. Michaels' assertion that revealing the names of officials who have pre-decision consultations with compliance officers and area office managers about possible citations is shielded from disclosure by the deliberative process privilege is well reasoned and supported by sufficient explanation.[13] Evidence regarding the basis or strategy of prosecutorial decisions or investigations is rarely subject to disclosure. The Court finds that the Secretary has established the basis for her assertion of the deliberative process privilege. The names of individuals, and the roles that these individuals played, involved in the decision to issue the citations in this case or with whom the CSHO, AAD, or AD may have consulted prior to the issuance of the citations, beyond those of the CSHO, AAD, and AD, are materials that are protected from disclosure to Respondent since they are pre-decisional in nature and deliberative.[14] Respondent has also failed to establish that the disclosure of the sought after information is critical to its defense of this matter and that the need for disclosure of the information is greater that the public interest in non-disclosure. *See NLRB v. Sears Roebuck,* 421 U.S. at 168; *EPA v. Mink,* 410 U.S. at 73.

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[12] Specifically, Mr. Michaels asserted that revealing the names of officials who have pre-decision consultations with compliance officers and area office managers about possible citations "would have a chilling effect on the openness with which those officials will offer opinions and advice on legal and policy matters in future cases." Michaels Affidavits, dated February 4, 2013, at ¶ 13.

[13] *See Miller v. Mehltretter*, 478 F. Supp. 2d 415, 430 (W.D.N.Y. 2007)(documents and evidence that tended to show how or why a decision was made by agent or office to use a grand jury subpoena were subject to deliberative process privilege); *Startzell v. City of Philadelphia,* Civ. No. 05-05287, 2006 WL 2945226 at *2 -*3 (E.D.Pa. Oct. 13, 2006)("testimony regarding how 'the D.A.'s Office works with the Department of Police to bring criminal charges' was subject to the deliberative process privilege"); *Thompson v. Lynbrook Police Dep't.,* 172 F.R.D. 23, 26-27 (E.D.N.Y. 1997)(memoranda referring to steps taken by attorneys in completing their investigation not discoverable under the deliberative process privilege.).

[14] It is the Court that ultimately determines the validity of a claim of privilege to documents. *Frazee Constr. Co.,* 1 BNA OSHC 1270, 1273 (No. 1343, 1973).

Respondent has also failed in meeting its burden of showing a particularized need for access to the sought after material following the Secretary's showing that the deliberative process privilege protects the material from disclosure.[15] The Court finds that Respondent does not need access to the sought after information to understand or defend the claims pending against it.[16]

The Commission has long recognized the applicability of an informer's privilege in its proceedings. *Stephenson Enters., Inc.*, 2 BNA OSHC 1080, 1082-83, (No. 5873, 1974), *aff'd*, 578 F.2d 1021 (5th Cir. 1978). The informer's privilege is the government's right "to withhold from disclosure the identity of persons furnishing information on violations of the law to law-enforcement officers, …." *Donald Braasch Constr., Inc.,* 17 BNA OSHC 2082, 2083 (No. 94-2615, 1997)(citation omitted). The purpose of the privilege is to protect the identity of informers, including the protection of a communication to the extent that its contents would reveal the informer's identity. *Id*. The Secretary may invoke the informer's privilege to prevent disclosure of the identity of individuals who assist in OSHA investigations. *See Roviaro v. United States, 353 U.S. 53, 59 (1957)*; *Donald Braasch*, 17 BNA OSCH at 2083. In this case, the Secretary has properly asserted the informer's privilege to protect the number of non-managerial employees the CSHO interviewed during the course of her investigation and how those employees were selected for interview. *See* Michaels Affidavit, dated February 4, 2013, at ¶¶ 6 - 10. Mr. Michaels determined that a formal assertion of the informer's privilege was appropriate and identified the precise information for which the privilege was asserted.[17] The

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[15] *See U.S.E.E.O.C. v. Cont'l Airlines*, *Inc.,* 395 F. Supp. 2d 738, 741-42 (N.D. Ill., 2005).

[16] *See U.S.E.E.O.C. v. Cont'l Airlines*, *Inc.,* 395 F. Supp. 2d at 745 (Equal Employment Opportunity Commission's internal decisionmaking process not relevant to enforcement action.).

[17] Specifically, Mr. Michaels asserted that the disclosure of the privileged material may: 1) interfere with an investigative or enforcement action taken by OSHA under an authority delegated or assigned to OSHA; 2) adversely affect persons who have provided information to OSHA; or 3) deter other persons from reporting a violation of law or other authority delegated or assigned to OSHA. Michaels Affidavit, dated February 4, 2013, at ¶ 10.

Court also finds that Mr. Michaels' assertion that revealing the number of non-managerial employees the CSHO interviewed during the course of her investigation and how those employees were selected for interview is shielded from disclosure by the deliberative process privilege is well reasoned and supported by sufficient explanation.

Respondent argues that it has a substantial need to know the number of non-managerial employees the CSHO interviewed during the course of her investigation and how those employees were selected for interview. Respondent bears the "heavy" burden of showing that disclosure of the information sought is necessary to its case. *United States v. Lewis*, 40 F.3d 1325, 1335 (1st Cir. 1994) (citations omitted); *see also United States v. Robinson,* 144 F.3d 104, 106 (1st Cir. 1998). An employer can overcome the informer's privilege by showing that: (1) it has a substantial need for the information that outweighs the government's entitlement to the privilege, and (2) the information is essential to the preparation of its case and it is unable to obtain it by any other means). *See Donald Braasch*, 17 BNA OSHC at 2085. Respondent's arguments fall short of meeting its burden. By interviewing its own employees, Respondent would have access to the same sources of information as OSHA. Second, Respondent has not shown why knowing the number of non-managerial employees the CSHO interviewed during the course of her investigation and how those employees were selected for interview is its exclusive means of obtaining information about the circumstances relevant to the citations. Indeed, it has already been provided with the CSHO's redacted interview notes. The Court finds that Respondent has failed to make the necessary showing to overcome the Secretary's assertion of the informer's privilege with regard to ascertaining the number of non-managerial employees the CSHO interviewed during the course of her investigation and how those employees were selected for interview.

The informer's privilege applies not only to the name of the informer, but also to any information that would aid in identifying the informer. *U.S. v. Hughes,* 658 F.2d 317, 321 (5th Cir. 1981) (informer's address protected), *People ex rel. Sandstrom v. Pueblo County, Colo.*, 904 P.2 874, 877 n. 2 (1995) (identity of hearsay declarant who provided information to informer might be privileged if identity would reveal identity of informer); *Esparaza v. State Miss.,* 595 So. 2d 418, 424 (1992) (name of person who informer claims he saw make buy from defendant privileged as this would disclose informer's identity). Similarly, the communications of an informant are privileged to the extent necessary to prevent the disclosure of the informer's identity. *See People v. Galland*, 86 Cal. Rptr. 3d 841, 848 (2008) (communications from informant privileged if they would tend to disclose identity of the informer), *U.S. v. Cartegena,* 593 F.3d 104, 113 (1st Cir. 2010) (disclosure of informer's conversations properly denied where they would provide circumstantial evidence of identity), *In re Apollo Group, Inc. Securities Litigation*, 251 F.R.D. 12, 34 (D.D.C. 2008) (content of communication privileged only if it would tend to reveal identity of informer).[18]

The informer's privilege protects against the disclosure of information that can assist an employer in identifying informants in order to make any retaliation impossible.[19] The Secretary has conceded that the CSHO interviewed only linemen from the Avenue H Garage. Requiring the CSHO to identify the number of non-managerial employees she interviewed during the course of her investigation and explain she how selected those employees for interview may provide information to Verizon that might ultimately reveal the identity of informants. The

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[18] Once statements by the informer have been redacted of identifiable material, the informer's privilege is not a bar to disclosure of the remainder of any such statements. *See Brock v. Frank v. Panzarino, Inc.,* 109 F.R.D. 157 (E.D.N.Y. 1986), *Reich v. Great Lakes Collection Bureau, Inc.*, 172 F.R.D. 58, 61 (W.D.N.Y. 1997).

[19] *See Birdair Inc.*, 23 BNA OSHC 1493, 1495 (No. 10-0838, 2011) (mere fact that individual supplied information relevant to investigation could lead to retaliation that privilege is intended to prevent).

Secretary believes that Respondent may discern that the pool of possible informants may be limited to about 40 employees who work at the Avenue H Garage. If all were linemen, requiring the CSHO to disclose that she interviewed 40 employees and explain how she selected those employees, may tend to reveal the identity of informers and expose them to possible retaliation, especially when coupled with the CSHO's redacted interview notes that have already been disclosed to Verizon. The Court need not quantify the risk that such an outcome may occur; it need only find that such a risk exists, and it does so here based upon the information before it.

The Secretary has withdrawn her claim of privilege as to whether the CSHO was told by anyone within OSHA that she is required to believe the statements of non-managers over the statements of managers. Verizon maintains that it is entitled to have the CSHO answer the question in her own words, along with any follow-up questions relating to her answer. Verizon is correct.

III. CONCLUSION

For the aforementioned reasons, Respondent's Motion to Compel is GRANTED IN PART and DENIED IN PART, to the extent indicated herein.

IV. ORDER

WHEREFORE IT IS ORDERED THAT Respondent's Motion to Compel is GRANTED IN PART and DENIED IN PART to the extent indicated herein;

IT IS FURTHER ORDERED THAT the names of individuals, and the roles that these individuals played, involved in the decision to issue the citations in this matter or with whom the CSHO, AAD, or AD may have consulted prior to the issuance of the citations, beyond those of the CSHO, AAD, and AD, are materials that are protected from disclosure to Respondent by the deliberative process privilege, and to the extent Respondent's Motion to Compel seeks such

information it is DENIED;

IT IS FURTHER ORDERED THAT the number of non-managerial employees the CSHO interviewed during the course of her investigation, and how those employees were selected, is information that is protected from disclosure to Verizon by the informer's privilege, and to the extent Respondent's Motion to Compel seeks such information it is DENIED; and

IT IS FURTHER ORDERED THAT to the extent Respondent's Motion to Compel seeks to continue the CSHO's deposition, it is GRANTED to the extent that Verizon may continue the CSHO's deposition for up to 45 minutes with the scope of Respondent's questioning limited to whether or not the CSHO was told by anyone that she is required to believe the statements of non-managers over the statements of managers, along with any follow-up questions relating to her answer(s).[20]

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: April 3, 2013
Washington, D.C.

[20] Alternatively, the parties may jointly agree to a stipulation.