

Some personal identifiers have been redacted for privacy purposes.



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

KROESCHELL ENGINEERING CO., INC.,

Respondent.

OSHRC Docket No. 21-0606

ORDER ON MOTION FOR PROTECTIVE ORDER

The underlying citation alleges 12 violations of the permit-required confined spaces standard, 20 C.F.R. § 1910.146, alleged to have occurred in early December 2020 at the Captain James A. Lovell Federal Health Care Center in North Chicago, which is Veterans Administration (VA) facility.

The Secretary has filed a motion for a protective order dated March 4, 2022 seeking to prohibit testimony affecting the Secretary's claimed informer's privilege and law enforcement privilege in the deposition of [redacted] that is scheduled for 2:00 p.m. Central Time on March 10, 2022. The Respondent, Kroeschell Engineering Co., Inc., filed a response dated March 8, 2022.

[redacted] is not a current or former employee of the Respondent. The papers of record indicate that at the time of the inspection [redacted] was a VA employee at the subject North Chicago facility with the title Occupational Health Safety Specialist, but that he is now retired from the VA.

Papers of record also reflect that OSHA had issued to the VA a “Notice of Unsafe of Unhealthful Working Conditions” pursuant to 29 C.F.R. pt. 1960 and Executive Order 12196 that alleged eleven violations of the permit-required confined spaces standard arising out of the same events and conditions that gave rise to the citation issued to the Respondent.

In opposing the motion, the Respondent has filed an affidavit of [redacted] dated March 7, 2022 which states in part as follows: “I now and forever hereby waive and release the informer's privilege for the above titled proceedings and for all relevant and material matters. I intend that this waiver and release be applicable to all proceedings related to the above titled case.” The affidavit does not expressly state whether [redacted] did, or did not, provide information to the government in its underlying investigation in this matter. In other words, the affidavit at face value does not establish whether [redacted] has “informer” status.

On March 9, 2022 the undersigned conducted a telephone conference with counsel regarding the motion, at the conclusion of which the undersigned described the contours of the following ruling. This order formalizes that oral ruling. To the extent the terms of this order differ from the oral ruling, this order supersedes that oral ruling and is controlling.

Discussion

Law Enforcement Privilege

The Secretary’s motion for “a protective order prohibiting Respondent from inquiring into ... matters that would implicate OSHA’s internal law enforcement techniques and procedures” during the deposition of [redacted] is DENIED. The record on the motion does not reflect that [redacted] has personal knowledge of any such “internal law enforcement techniques or procedures,” nor does it demonstrate that any personal knowledge of such that he may have would be subject to protection by any cognizable law enforcement privilege.

Informer's Privilege

The Secretary's motion for a protective order "prohibiting Respondent from inquiring into ... whether ... [redacted] did or did not communicate with OSHA during OSHA's inspection of the instant matter or any related matters," is provisionally GRANTED, but would be DENIED if [redacted] states on the record at the outset of his deposition that he understands the protections afforded to persons identified as informers in Commission proceedings and states that he wishes voluntarily to waive the protections that the informer's privilege accords to individuals.

Accordingly, after [redacted] is sworn at his deposition on March 10, 2022 but before he responds to any substantive questioning, counsel for the Secretary is instructed to read the following to him (excluding the footnotes) and elicit responses to the questions indicated:

The informer's privilege belongs to the government. The informer's privilege does not belong to an individual informant. In proceedings before the Occupational Safety and Health Review Commission such as this one, the informer's privilege permits the government to withhold from disclosure the identity of persons who have furnished information to OSHA officials on violations of Occupational Safety and Health Act.¹

The informer's privilege is applicable by the mere fact that an individual has supplied information relevant to the investigation of alleged OSHA violations.² The informer's privilege is not limited to only those individuals who have given negative or complaining information.³

The informer's privilege recognizes the obligation of citizens to cooperate in the enforcement of the law and encourages the fulfillment of that obligation by preserving the anonymity of the person supplying the information.⁴ In Commission proceedings, another purpose of the informer's privilege is to protect employees

¹ *Donald Braasch Constr., Inc.*, 17 BNA OSHC 2082, 2083 (No. 94-2615, 1997).

² *Birdair, Inc.*, 23 BNA OSHC 1493 (No. 10-0838, 2011).

³ *Id.*

⁴ *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *Quality Stamping Products, Co.*, 7 BNA OSHC 1285 (No. 78-235, 1979).

from retribution by their employers.⁵ But even so, the informer's privilege applies to persons who are *not* employed by an employer that has been investigated or cited for an OSHA violation.⁶ And the informer's privilege applies even when it may seem obvious that a particular individual has given information to OSHA officials.⁷

Even though the informer's privilege belongs to the government, an individual may waive the protections of anonymity and confidentiality that the government's informer's privilege affords an individual, but only if the individual voluntarily chooses to disclose whether they provided information to the government.⁸ An individual who voluntarily chooses to disclose that they have provided information to the government may also voluntarily choose to disclose, or choose not to disclose, what information they provided to the government.⁹ In other words, an individual may choose to waive only the protection of anonymity, or may choose to waive both the protections of anonymity and confidentiality.¹⁰

QUESTIONS:

Do you understand the protections of anonymity and confidentiality that an individual may have under the government's informer's privilege?

Do you have any questions about the protections that may be afforded an individual under the government's informer's privilege?

Responses: [*Note to counsel:* If [redacted] responds that he does not fully understand, then counsel for the Secretary should re-read the instruction and inquire again. If after a second reading [redacted] indicates that he does not fully understand, or if he responds that he has questions, then counsel for the Secretary is instructed to contact the

⁵ *Quality Stamping Products*, at 1288.

⁶ *Donald Braasch*, 17 BNA OSHC at 2082 n. 4.

⁷ *Id.* at 2084.

⁸ *Massman-Johnson (Luling)*, 8 BNA OSHC 1369, 1371 (No. 76-1484, 1980).

⁹ *Id.* Even though the informer's privilege entitles the government to withhold the content of an informer's statement to the extent that it would reveal the identity of the informant, the Commission's decision in *Massman-Johnson* strongly suggests that an individual who has voluntarily disclosed their informer status does not concomitantly voluntarily waive the right of confidentiality in the substance of their communication to the government.

¹⁰ *Id.*

undersigned, who will then join the remote deposition to address on the record questions that [redacted] may have, and if appropriate amend the ruling on this order.]

QUESTIONS:

In responding to questions during this deposition, do you voluntarily wish to disclose whether you provided information to the government?

If you do choose voluntarily to disclose that you provided information to the government, do wish also to disclose what that information was?

Responses: [*Note to counsel:* If [redacted] provides other than clear affirmative or negative response(s), counsel for the Secretary is instructed to contact the undersigned, who would then join the remote deposition on the record.]

As discussed during the telephone conference, the undersigned will be available during the deposition on March 10, 2022 to address any issues or objections that relate to application of the government's informer's privilege *that the parties are not successful in satisfactorily addressing without the undersigned's immediate involvement during the deposition.* The parties should note that any potential objection "to the competence, relevance, or materiality of testimony ... is not waived by failure to make an objection before or during the deposition, unless the ground for it might have been corrected at that time." Fed. R. Civ. P. 32(d)(3)(A).

SO ORDERED.

/s/ William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: March 10, 2022