

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,)	
)	
Complainant,)	
)	
v.)	OSHRC Docket No. 16-1052
)	
Huttig Building Products, Inc.,)	
)	
Respondent,)	
)	
)	

ORDER GRANTING IN PART TO THE EXTENT INDICATED HEREIN AND DENYING IN PART RESPONDENT’S MOTION TO COMPEL AND DENYING WITHOUT PREJUDICE RESPONDENT’S MOTION TO RESCHEDULE THE HEARING AND DEADLINES PRECEDING THE HEARING

I. FACTS

On or about December 11, 2015, Respondent’s employee, Enrique Treviño, was operating a Caterpillar NR4000 Rider Reach Electric standup forklift at Respondent’s Davenport, Florida facility (worksite), when he collided against a lower horizontal crossbar of a storage-rack shelving system. As a result of this accident, Mr. Treviño was fatally injured. A compliance safety and health officer (CSHO) of the Occupational Safety and Health Administration (OSHA) conducted inspections of Respondent’s worksite between December 11, 2015, and December 15, 2015, and on June 7, 2016 OSHA issued a three item serious citation, and one item other than serious citation. Pleadings have been filed. Discovery is ongoing.

On August 30, 2016, Respondent requested a copy of OSHA’s Investigation File. The Secretary produced the Investigation File on December 9, 2016. The Secretary redacted or partially redacted parts of the investigation file.¹

¹ The Secretary asserts that she redacted or partially redacted part of the investigation file to protect OSHA’s internal, pre-decisional deliberations; OSHA’s investigative techniques; and the identifying information of persons

On December 30, 2016, Respondent submitted a “Golden Rule Letter” to the Secretary seeking to meet and confer to resolve the discovery dispute.² On January 27, 2017, the Secretary sent some Investigation File documents with more limited redactions to Respondent hoping to address the concerns raised in the Golden Rule Letter. On February 8, 2017, the Secretary released another document production that included the production of unredacted DOLHUTTIG 000208-000211.

It’s the Court’s understanding that the Secretary has redacted material on about 46 pages as of February 9, 2017; excluding the withholding of interview notes.

On February 9, 2017, Respondent filed its Motion to Compel and Memorandum in Support of Motion to Compel. Respondent requests, based on the Secretary’s alleged misuse of the deliberative process privilege, an order compelling the Secretary to provide all or portions of 41 pages comprising: [000023-000030], [000050-000061], [000042-000049], [000205-000206], [000138-000146], and [000078-000079]. Respondent further requests, based on the Secretary’s alleged misuse of the informer’s privilege, an order compelling Secretary to provide: 1) appropriately redacted documents relating to interviews with hourly employees [000218]; 2) any notes or statements relating to interviews with Respondent’s managers and supervisors; and 3) all documents relating to interviews of third-party witnesses. In addition, Respondent objects to the redactions of: [000023-000030], [000135-000137], [000138-000146], [000180 and 000195], and [000218].

who provided confidential information to OSHA during the inspection.

² The “golden rule” letter is derived from Rule 32.6 of the Local Court Rules Clay County Circuit Court Seventh Judicial Circuit of Missouri. Rule 32.6:

In any civil action where answers to discovery are more than three days late, the attorney who propounds the discovery shall mail a "golden rule" letter to opposing counsel. The "golden rule" letter shall notify opposing counsel of exactly what discovery has not been answered, the date the discovery was due, and shall provide opposing counsel with a date ten (10) days in the future when the discovery must be received by the propounding attorney.

In the alternative, Respondent requests that this Court perform an *in camera* review of the redacted material withheld under the deliberative process and informer's privileges.

Respondent argues that the Secretary has improperly asserted the deliberative process privilege relating to these documents because: 1) the Secretary failed to properly assert the privilege; 2) some of the documents are purely factual; and 3) the Secretary is incorrect about the pre-decisional nature of some of the documents. Respondent also argues that the Secretary has improperly asserted the informers privilege by withholding: 1) non-identifying factual information; 2) information related to non-employee third parties and Respondents supervisors; and 3) information for which any privilege has been waived. Last, Respondent asserts that its understanding of the Secretary's conclusions regarding the cause of the accident is critical to both its defense and to maintain compliance with safety standards.

Respondent also requests that the Court reschedule the hearing date and litigation deadlines leading up to the hearing.

On March 6, 2017, the Secretary filed Complainant's Response to Respondent's Motion to Compel. The Secretary asserts that she has properly invoked government privileges in this matter and submitted the affidavit of the Acting Assistant Secretary of Labor for OSHA, Dorothy Dougherty, to formally invoke the privileges. The Secretary further claims that all documents over which the deliberative process privilege was asserted fall into one of three categories, which are commonly recognized as protected deliberations: 1) internal communications within the agency reflecting its non-final deliberations and analysis of the investigation; 2) notes reflecting the CSHO's personal analysis and non-final thoughts created during the investigation; or 3) non-final unsigned drafts of agency documents. The Secretary also argues that Respondent has not shown a substantial need for the information allegedly protected by the deliberative process

privilege.

The Secretary further asserts that the informer's privilege has been properly asserted to protect the identity of non-managerial employees and other individuals the CSHO interviewed during the course of the investigation. The Secretary concedes that Messrs. Virgil Hernandez, Kevin Stevens, and Michael Woods are managers, and has produced all notes from the CSHO's interviews with these individuals. The Secretary argues that the informer's privilege extends to any person who assists the Secretary with witness statements. *Film Allman, LLC*, No. 14-1385, 2015 WL 6941313, at *5 (O.S.H.R.C.A.L.J. Sept. 28, 2015), *aff'd* No. 15-15720, 2017 WL 1046085 (11th Cir. March 20, 2017) (unpublished). He further argues that Respondent's unsupported assertions that it "knows" that certain individuals were interviewed by OSHA are insufficient to waive the privilege. *Donald Braasch Constr., Inc.*, 17 BNA OSHC 2082, 2084 (No. 94-2615, 1997) ("It is not enough . . . that the identity of the informant or informants appears obvious."). The Secretary also argues that Respondent has not articulated any substantial need for the redacted or withheld informer's information and that Respondent has failed to demonstrate it cannot gather relevant facts through other means.

On March 13, 2017, Respondent filed its Reply to the Secretary's Response to Respondent's Motion to Compel. In its Reply, Respondent reiterated its position that Complainant has failed to properly assert the deliberative process and informer's privilege. Respondent argued that, despite providing a "declaration" from Acting Assistant Secretary Dorothy Dougherty as its formal assertion of privilege, Complainant has not provided sufficient reasons for asserting the privilege over the documents. Respondent also argues that Complainant's Response lacks specificity and relies on overbroad assertions of the deliberative process privilege. Further, Respondent argues that it has made a sufficient showing of necessity

in regards to the cause of the accident and fatality. In addition, Respondent argues that Complainant has failed to justify its withholding of any notes from OSHA's interviews of Messrs. Sixto Santos and Stevens pursuant to the informers privilege. Respondent further contends that the Complainant is incorrect in redacting in full every set of notes from every single interview of hourly employees and third party witnesses. Last, Respondent reasserted its position that its need to obtain the underlying information from OSHA's notes regarding Eli Caraballo's interview outweighs the government's entitlement to assert the privilege.

On March 20, 2017, the Secretary filed Complainant's Surreply in Response to Respondent's Reply Regarding its Motion to Compel. Complainant asserts that the Court should not consider arguments or evidence that were raised for the first time in Respondent's Reply to the Secretary's Response to Respondent's Motion to Compel. *Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) ("As we repeatedly admonished, '[a]rguments raised for the first time in a reply brief are not properly before a reviewing court.'" (internal citation omitted)). The Complainant argues that the Court should not consider Respondent's arguments or evidence about: 1) Mr. Santos' alleged waiver of the informer's privilege, 2) Mr. Stevens' alleged waiver of the informer's privilege, and 3) the alleged "need" for Mr. Caraballo's purported interview statement.

On March 27, 2017, the Court directed *in camera* review of the documents redacted by Complainant.³

On March 29, 2017, the Secretary provided the Court with pages DOLHUTTIG [000023-000030], [000042-000061], [000078-000079], [000135-000146], [000180], [000195], [000205-

³ The Court also found Complainant had complied with the provisions of Commission Rule 52(d)(1) and relevant case law and had properly, formally asserted deliberative process and informer's privileges through an affidavit signed by the Secretary of Labor's designee, OSHA's Interim Assistant Secretary Dorothy Dougherty.

000206], [000208-000211], and [000218].⁴

The case is set for trial to commence on May 23, 2017.

II. DISCUSSION

A. DELIBERATIVE PROCESS PRIVILEGE

1. Protects Certain Government Materials from Disclosure

The deliberative process privilege protects government materials that comprise or reflect the process by which governmental decisions and policies are made. *Nat'l Labor Relations Board v. Sears, Roebuck & Co. (NLRB v. Sears)*, 421 U.S. 132, 150 (1975); *Dudman Comm'n Corp. v. Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987).⁵ 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), *aff'd* 385 F.2d 979 (D.C. Cir. 1967); *Stone and Webster Constr., Inc.*, 23 BNA OSHC 1939, 1941 (No. 10-0130, 2012) (Consol.) (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").

B. INFORMER'S PRIVILEGE

1. Protects the identity of Informers from Disclosure

The Commission has long recognized the applicability of an informer's privilege in its

⁴ For brevity, in this Order the Court will refer to the bates stamped marked pages at issue without their prefix "DOLHUTTIG".

⁵ *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.")

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 at 2083 (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 Roviario v. United States*, 353 U.S. 53, 59 (1957); *Donald Braasch Constr., Inc.*, 17 BNA OSHC at 2083. The informer's privilege is applicable to any person furnishing information to OSHA concerning violations of the OSH Act. *Massman-Johnson (Luling)*, 8 BNA OSHC 1369, 1372 (No. 76-1484, 1980). The fact that prospective witnesses are management personnel does not render the privilege inapplicable. *Id.*

C. *IN CAMERA* REVIEW OF REDACTED PAGES AT ISSUE

1. 000023-000030

a. *Deliberative Process Privilege:*

To determine whether particular materials fall under the privilege, courts look first to whether the material is "predecisional" – made before the deliberative process was completed. The material [000023-000030] is a Memorandum written by Area Director (AD) Leslie L. Grove III with the subject "Notification of Results of Fatality Investigation." The Secretary redacted "portions of the final version of the 'Notification of Results of Fatality Investigation' memorandum." Complainant's Response to Respondent's Motion to Compel at 3. The Memorandum was written for Kurt A. Petermeyer, the Regional Administrator. The material, was originally dated May 20, 2016, and later amended on June 2, 2016. OSHA issued the

citations on June 7, 2016, thus, these materials were written before the deliberative process was completed. Second, the material must also be “deliberative.” The statement itself must be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The privilege does not “protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.” *In re Sealed Case*, 121 F.3d at 737.

The Secretary has various material redacted throughout the memo. First, on [000023] the Secretary redacted a penalty amount proposed as of the date of the memo. The citations were issued on June 7, 2016, and the penalty amount proposed in the citations was \$21,000. The penalty amount proposed as of the date of the memo was properly redacted. The proposed penalty amount could be different; but in any event reflects the predecisional deliberative process of the Secretary. Complainant also redacted brief information under the heading: “ACCIDENT RELATED”. The information is properly redacted as it also reflects OSHA’s predecisional deliberative process.

Next, on [000025] the material discusses the different interpretations of why decedent on the day before the accident was “going in circles” on Powered Industrial Truck (PIT) #15, the same machine the decedent was using on the day of the accident. The Secretary properly asserted the privilege over this material because it contains opinions from both the agency and individuals. It is not purely factual.

Next on [000025-000026] the Secretary completely redacted a section titled “Incident Causation Theory.” The Secretary properly asserted the privilege over the first two paragraphs and items 1-3 with a few exceptions. 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). Although this material contains factual information, it is the agencies analysis of the facts, which is protected under the deliberative process privilege. However, there are a few discrete parts of this section which are purely factual and are not protected by the deliberative process privilege. The Court orders the production of this limited factual material. Pages 000025-000026, with the unredacted material, are attached at Tab A. The rest of the material in these pages was written prior to the issuance of the citation and contains deliberative material concerning Complainant's investigative conclusions and theory on the causation of the accident. Complainant properly asserted the deliberative process privilege over the redacted material on these two pages; except as otherwise noted.

Last, on [000027] the Secretary completely redacted a section titled "Special Circumstances/Problems." This section discusses the history of using section 5(a)(1) of the Occupational Safety and Health Act of 1970 (OSH Act)⁶ for standup PIT. This material was correctly redacted because it identifies the precedent that the Secretary may use to support Complainant's case.

b. Informer's Privilege:

The Secretary has also redacted various material throughout these pages on the basis of the assertion of the informer's privilege. First, on [000023-000024] the Secretary identifies the name of an informer. This information was correctly redacted. Similarly, the names of other informers are identified in pages [000024-000025] and this information was also correctly redacted.⁷ Lastly, on [000026] the Secretary properly redacted information that may reveal an

⁶ *See* 29 U.S.C. §§ 651 to 678 (1978).

⁷ The Court acknowledges that it is well settled that the informer's privilege is waived once the identity of the informer is voluntarily disclosed. *See Roviario v. United States*, 353 U.S. at 60). The disclosure of names of persons who conveyed information to OSHA during its investigation does not constitute a voluntary disclosure of

informer's identity.

2. 000042-000061

a. Deliberative Process Privilege:

The Secretary has various material redacted throughout the document [000042-000049]. The Secretary identifies this information as pre-issuance email correspondence between OSHA and its internal electrical expert, Terry Wilkins,⁸ regarding the violations proposed in a draft fatality memo.

First, on [000042], the Secretary redacted an email sent from AD Grove to Terry Wilkins. The date on this email is June 2, 2016. This email involves internal deliberations about comments made by AD Grove. The Secretary has properly redacted this email. This material contains predecisional recommendations and candid discussion among members of the agency regarding the proposed citations.

Next, on [000042] and [000044] the Secretary redacted an email from Mr. Wilkins to AD Grove and Maveline Perez, the Deputy Area Director (DAD) in OSHA's Tampa Area Office.⁹ This email appears to be part of the chain of the above discussed email and is dated June 1, 2016. The Secretary has properly asserted the deliberative process privilege over this email. The email contains the candid discussion among members of the agency regarding the future issuance of citations.

Next, the Secretary has redacted in its entirety "Comments Regarding Proposed Fatality Violation Tampa Area Office," on [000045-000046]. This material dated June 1, 2016, contains comments and recommendations made by Mr. Wilkins regarding the possible citations OSHA

any such person as an "informer" and does not waive the Secretary right to assert the informer's privilege over information that is otherwise protected from disclosure through the assertion of the informer's privilege.

⁸ Mr. Wilkins is an OSHA electrical engineer.

⁹ The email on [000044] is the same as the email on the bottom of [000042].

intended to issue. The “Comment” section contains some purely factual information that was incorrectly redacted by the Complainant. The Court orders the production of this factual material. Page [000045], with the unredacted material, is attached at Tab B. The remainder of the material in these two pages was written prior to the issuance of the citation and contains deliberative material concerning Complainant’s investigative conclusions and recommendations. Complainant properly asserted the deliberative process privilege over the redacted material on these two pages; except as otherwise noted.

Next, the Secretary redacted an email from Therese Coleman, a Supervisory Safety and Occupational Health Specialist at OSHA, to Mr. Wilkins on [000047]. The Secretary has properly redacted this email under the deliberative process privilege. The email contains predecisional candid discussion between agency employees regarding the possible citations OSHA intended to issue.¹⁰

Next, on [000049] the Secretary properly redacted what appears to be a draft letter. The deliberative process privilege generally covers “draft documents . . . which reflect the personal opinion of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d at 866.

Lastly, on [000050-000061] the Secretary redacted the content of a draft Memorandum written by AD Grove with the subject “Notification of Results of Fatality Investigation,” dated February 29, 2016. This material is a draft of the Memorandum, dated May 20, 2016, Amended June 2, 2016 [000023-000030]. The Secretary has properly asserted the deliberative process privilege with respect to the redactions at [000050-000061]. *See Lead Indus. Ass’n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 86 (2d Cir. 1979); *Mobil Oil Corp. v. U.S. E.P.A.*, 879 F.2d 698, 703 (9th Cir. 1989) (noting that agency need not show to what extent a

¹⁰ The email on the bottom of [000047] is the same as the email on the bottom of [000042] and [000044].

draft differs from final document because to do so would “expose what occurred in the deliberative process between the draft's creation and the final document's issuance”).

3. 000078-000079

a. Deliberative Process Privilege:

The document [000078] is an unsigned draft letter from David Michaels, Assistant Secretary of Labor, to Mrs. Sandy Trevino, the widow of the deceased. The final version of the letter has been produced. Complainant’s Response to Respondent’s Motion to Compel at 10. Production of a final version of a document does not waive the Secretary’s right to assert the deliberative process privilege for earlier drafts. *See In re Sealed Case*, 121 F.3d at 741) (Waivers “should not be lightly inferred” and the release of material “only waives [the] privilege for the document or information specifically released and not for related material.”). The Secretary has properly asserted the deliberative process privilege for redactions made on this draft letter and the privilege has not been waived as to it.

Next, the document [000079] is an email from AD Grove to OSHA’s April Streets. This email, sent on December 23, 2015, is predecisional and the redacted phrase is deliberative. The Secretary properly asserted the privilege for the redaction appearing on [000079].

4. 000135-000146

a. Deliberative Process Privilege:

First, the Secretary asserts the deliberative process privilege for a portion of the material on [000138]. This is page 1 of 9 of a document titled “Inspection Narrative Inspection #1112261 Huttig Building Products CSHO-V5603.” Although this document is not dated, the Secretary states that the document is “the CSHO’s pre-decisional analysis of the case.” Complainant’s

Response to Respondent's Motion to Compel at 10.¹¹ To assert the privilege, the statement itself must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d at 1144. These pages relate to OSHA's Inspection Narrative. The redacted two portions on [000138] are not "purely factual." The Secretary properly asserted the deliberative process privilege over these materials.

Next, the Secretary also redacted a portion of the material on [000141-000144]. This material appears to be an earlier draft of [000025-000027]. The Secretary has properly asserted the deliberative process privilege with respect to [000141-000144].

Next, the Secretary redacted much of the material on [000145-000146]. The redacted information reflects predecisional agency discussion. The Secretary has properly asserted the deliberative process privilege with respect to [000145-000146].

b. Informer's Privilege:

On [000135-000137] [000139-000140], the Secretary redacted the names and further information of both employees and other persons contacted during OSHA's investigation. The informer's privilege does not just protect the identity of employees. Rather, "it is applicable to any person furnishing information to the government regarding violations of Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, regardless of the informer's employment relationship to the cited employer." *Donald Braasch Const., Inc.*, 17 BNA OSHC at n. 4 (citing *Quality Stamping*, 7 BNA OSHC 1285, 1287 (No. 78-235, 1979)). The Secretary has properly asserted the informer's privilege to protect the identity of the individuals and information listed in [000135-000137] and [000139-000140].

Lastly, the Secretary asserts the informer's privilege over material on [000141-000143].

¹¹ [000146] states "A Fatality Memo to Assistance Area Director was sent on 05/09/2016," thus the Court can assume it was issued following May 9, 2016. The Court accepts Complainant's representation that it was written before June 7, 2016.

The Secretary also asserted the deliberative process privilege over the same material. Since the deliberative process privilege was properly asserted, whether or not the informer's privilege was properly invoked need not be further addressed.

5. [000180]

a. *Informer's Privilege:*

On [000180], the Secretary redacted the name and further information of a person contacted during OSHA's investigation. The Secretary properly asserted the informer's privilege with regard to [000180].

6. [000195]

a. *Informer's Privilege:*

On [000195], the Secretary redacted the name and identifying related information of a person contacted during OSHA's investigation. The Secretary properly asserted the informer's privilege with regard to [000195].

7. 000205-000206

a. *Deliberative Process Privilege:*

On [000205-000206], the Secretary completely redacted the material just leaving the title of the document on each page; i.e. "Questions for Virgil" and "Questions for Huttig", respectively. The Secretary asserts that this material is "the Compliance Safety and Health Officer's ("CSHO") draft list of proposed questions for Respondent's manager Virgil Hernandez and other management witnesses." Complainant's Response to Respondent's Motion to Compel at 3.

First, in regards to [000205], the Respondent argues that the Complainant waived its privilege, on the basis that it was disclosed to a non-federal party. The alleged disclosure

occurred as a representative of the Respondent was present during the interview of Mr. Virgil. Privileges relating to the deliberative process privilege may be waived. *Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992) (“Where an authorized disclosure is voluntarily made to a non-federal party, the government waives any claim that the information is exempt from disclosure under the deliberative process privilege.”); *Gen. Elec. Co. v. U.S. E.P.A.*, 18 F.Supp.2d 138, 140–141 (D.Mass.1998) (“the privilege is waived under certain circumstances if the documents have been disclosed to a third party that is not an agency”); *see also Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242 (D.C.Cir.1977). Such waiver “should not be lightly inferred,” and release of the material “only waives [the] privilege for the document or information specifically released, and not for related material.” *In re Sealed Case*, 121 F.3d at 741. Respondent’s representative’s attendance at the interview where a document entitled “Questions for Virgil” may, or may not, have been used, in part, or in its entirety, by the CSHO during the course of an interview does not amount to disclosure of the document. In order for disclosure to occur, the Complainant must have voluntarily authorized disclosure of the document itself. *See Stone & Webster Constr., Inc.*, 23 BNA OSHC at 1943. The Court has insufficient information before it to conclude that such a disclosure by the Secretary occurred. The Secretary properly asserted the deliberative process privilege over [000205] and no waiver of that privilege has occurred.

Second, [000206] contains “Questions for Huttig.” This document does not contain any purely factual information. The Secretary properly asserted the deliberative process privilege over [000206].

8. 000218 [Interviews]

a. *Informer’s Privilege:*

[000218] is a place holder indicating that certain interview statements of non-management personnel have been withheld pursuant to the informer's privilege. Respondent argues that it is entitled to appropriately redacted documents relating to interviews with hourly employees.¹² The Secretary has not voluntarily disclosed the identity of any of these persons as informers in the case.

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 informant's identity). Similarly, the communications of an informant are privileged to the extent necessary to prevent the disclosure of the informant'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).¹³

After careful review of the notes pertaining to these interviews, the Court did not find any content that would not reveal, or not tend to reveal, the identity of any informer.

¹² *But see* the Commission has held that supervisory and managerial personnel "are entitled to the protection of the informer's privilege when communicating information concerning workplace hazards to the government." *Massman-Johnson (Luling)*, 8 BNA OSHC at 1372.

¹³ 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).

b. The informer's privilege has not been waived as to interviews.

The Respondent argues that it is aware of at least three interviews for which it has not been provided documents to which it is entitled: Complainant's two interviews with Mr. Santos and one interview with Mr. Stevens. Respondent asserts that Mr. Santos is a supervisory employee and argues that regardless, he has waived the privilege by requesting copies of all documents from OSHA related to his interviews.¹⁴ In regards to Mr. Stevens, Respondent claims that it knows that he spoke to OSHA's Compliance Officer the day of the accident and requests all notes related to this and any subsequent interview(s) with him. In addition, Respondent argues that the informant's privilege with respect to Mr. Stevens has been waived because he has requested a copy of OSHA's notes from his interviews.¹⁵ Respondent's Reply to the Secretary's Response to Respondent's Motion to Compel, at 6. As previously mentioned above, the Court finds that Messrs. Stevens' and Santos' supervisory positions do not preclude them from the protection of the informer's privilege. Further, letters from interviewees requesting copies of documents relating to their interviews do not amount to a voluntary disclosure of the identities of any informers by the Complainant. With respect to the alleged interviews with Messrs. Stevens and Santos, the informer's privilege has not been waived.

c. There is no Exculpatory Information in the records of interviews.

Complainant asserts Respondent has made no showing that the redacted materials likely include any exculpatory evidence. Complainant's Response to Respondent's Motion to Compel, at 19. The Court agrees and is unaware of any exculpatory information requiring disclosure

¹⁴ Respondent does not cite to any case law to support its position; and the Court is aware of none. Furthermore, Complainant disputes Respondent's assertion that Messrs. Santos or Wood are supervisors. (Motion to Compel at 16).

¹⁵ Respondent does not cite to any case law to support such a proposition.

contained in the interview notes at [000218].¹⁶

D. RESPONDENT HAS NOT DEMONSTRATED A SUFFICIENT NEED THAT COMPELS DISCLOSURE OF PRIVILEGED MATERIAL

Respondent argues that it has a substantial need that outweighs the government's entitlement to assert a privilege over the notes of interviews conducted by OSHA. 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 similar sources of information as OSHA. Second, Respondent has not shown why its access to OSHA's interview notes is its exclusive means of obtaining information about the circumstances relevant to the citations. 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 OSHA's interview notes of non-managerial persons interviewed during the course of her investigation. *See Verizon NY, Inc.*, No. 12-0768, 2013 WL 1557878, at *4 (April 3, 2013)(ALJ).

III. CONCLUSION

For the aforementioned reasons, Respondent's Motion to Compel is GRANTED, in part, only to the extent indicated herein, pertaining to unredacted material appearing at Tabs A

¹⁶ *See Latite Roofing and Sheet Metal LLC*, 23 BNA OSHC 1369, 1370 (No. 09-1074, 2010) (ALJ) citing to *Frazee Constr. Co.*, 1 BNA OSHC 1270, 1274 (No. 1343, 1973) ("In administrative hearings exculpatory information in an agency's possession or file data, which may aid respondent's presentation of his case must be disclosed by the agency.").

through B, and DENIED, in all other respects. In addition, Respondent's motion to reschedule the hearing and litigation deadlines is premature, without basis, and is DENIED WITHOUT PREJUDICE.

IV. ORDER

WHEREFORE IT IS ORDERED THAT the Court finds that the Secretary improperly asserted the deliberative process privilege for the unredacted material appearing at Tab A [000025-000026] and at Tab B [000045] only; and these now further partially unredacted pages are produced herein;

IT IS FURTHER ORDERED THAT Respondent's motion to reschedule the hearing and litigation deadlines is DENIED WITHOUT PREJUDICE¹⁷; and

IT IS FURTHER ORDERED THAT Respondent's Motion to Compel is DENIED in all other respects; except as indicated herein.

SO ORDERED.

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

Dated: April 19, 2017
Washington, D.C.

Attachments
Tabs A - B

¹⁷ After considering the results of this Order, Respondent may file a motion seeking adjustments to the litigation schedule after meeting and conferring with Complainant by April 28, 2017.