

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL



In the Matter of)

LABORATORY CORPORATION)
OF AMERICA)

and)

LABORATORY CORPORATION)
OF AMERICA HOLDINGS,)
Respondents.)

DOCKET NO. 9345

**ORDER REGARDING RESPONDENTS' MOTION
TO COMPEL DOCUMENT PRODUCTION**

I.

On February 11, 2011, Respondents filed a Motion to Compel Document Production ("Motion"). Complaint Counsel filed its Opposition on February 18, 2011. As discussed below, the parties have not provided sufficient information in order to properly analyze and resolve the issues presented. Accordingly, supplemental submissions are ORDERED, as set forth below.

II.

Respondents move to compel Complaint Counsel to produce documents responsive to Respondents' First Request for Production of Documents. Respondents assert that Complaint Counsel has improperly withheld relevant documents based on the government deliberative process privilege, the attorney work-product doctrine, and the government informant privilege, and that Complaint Counsel has improperly invoked those privileges. Respondents further assert that Complaint Counsel has not produced responsive communications with the Commission and has not included them on its privilege logs. Respondents further contend that Complaint Counsel's privilege log, as amended, is insufficient.

Complaint Counsel states that of the hundreds of thousands of pages it produced in discovery, Complaint Counsel identified a few hundred specific documents to be withheld. Complaint Counsel contends that all these documents fall within one of the following two categories: (1) communications between Commission staff and the Interim

Monitor and Manager of the Westcliff assets and business, also known as “LabWest”; and (2) communications between Commission staff and the staff of the Office of the Attorney General of California (“CAAG”) relating to coordination of the two agencies’ parallel investigations. Complaint Counsel maintains that the documents are properly withheld based upon the government deliberative process privilege, work-product doctrine, and, for a subset of documents, the government informant privilege. Complaint Counsel admits that it did not undertake to identify or list on its privilege log internal communications within the Commission.

Complaint Counsel, in withholding the requested documents, supplied privilege logs on January 11, 2011, January 18, 2011, and January 25, 2011, attached as Exhibits C, D and E to Respondents’ Motion. Complaint Counsel, in filing its Opposition to the Motion, provided a Declaration of Richard Feinstein, Director of the Bureau of Competition (“Feinstein Declaration”). In his declaration, Feinstein avers that he is ultimately responsible for overseeing the activities of the Bureau’s staff, that he has reviewed a representative sample of the withheld documents, and that he personally determined that the confidentiality of documents must be preserved and directed Complaint Counsel to invoke the deliberative process privilege. Feinstein Declaration. Complaint Counsel also submitted the Declaration of Patricia L. Nagler, a deputy attorney general in the Antitrust Law Section of the CAAG. Ms. Nagler avers, among other things, that the CAAG exchanged information with the FTC regarding the LabCorp/Westcliff merger, and used such information for that office’s decision-making. Nagler Declaration, ¶ 4. The Nagler Declaration further states that disclosure of the information exchanged with the FTC could hamper coordinated investigations between law enforcement agencies.

III.

A. Deliberative Process Privilege

The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 (1975); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, at *8 (Aug. 18, 2000). The justification for the deliberative process privilege, like the justification for any evidentiary privilege, is to protect confidentiality. *Sears*, 421 U.S. at 150-51. This privilege permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated. *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, at *9. “It was developed to promote frank and independent discussion among those responsible for making governmental decisions and also to protect against premature disclosure of proposed agency policies or decisions.” *Warner*, 742 F.2d at 1161 (citations omitted); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, at *9. Compelled disclosure of documents that are protected by the deliberative process privilege “injures the quality of agency decisions.” *Warner*, 742 F.2d at 1162.

A document must meet two requirements for the deliberative process privilege to apply. First, the document must be predecisional – it must have been generated before the adoption of an agency’s policy or decision. *Warner*, 742 F.2d at 1161 (citing *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). Second, the document must be deliberative in nature, containing opinions, recommendations, or advice or recommendations that contribute to the government’s decision-making process. *Id.*; *Tigue v. United States Dept. of Justice*, 312 F.3d 70, 76 (2d Cir. 2002). Thus, the exemption “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.” *Warner*, 742 F.2d at 1161. Purely factual material that does not reflect deliberative processes is not protected. *Id.* (citing *EPA v. Mink*, 410 U.S. 73, 87-89 (1973)). However, factual material that is so interwoven with the deliberative material so as to be not severable is covered by the deliberative process privilege. *Id.* (citing *Binion v. Department of Justice*, 695 F.2d 1189, 1193 (9th Cir. 1983)).

The deliberative process privilege is a qualified privilege and can be overcome where there is a sufficient showing of need. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, at *9 (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *U.S. v. Farley*, 11 F.3d 1385, 1386 (7th Cir. 1993)). A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government’s interest in nondisclosure. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, at *9 (citing *Warner*, 742 F.2d at 1161). Among the factors to be considered in making this determination are: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. *Id.* (citations omitted).

Assertion of the deliberative process privileges requires: (1) a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, at *9-10 (citing *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000)). The initial burden of showing the privilege applies is on the government. *Redland Soccer Club, Inc. v. Dep’t of Army*, 55 F.3d 827, 854 (3rd Cir. 1995) (citing *Schreiber v. Society for Savings Bancorp*, 11 F.3d 217, 221 (D.C. Cir. 1993)). To meet it, the government must present more than a bare conclusion or statement that the documents sought are privileged. *Id.* Otherwise, the agency, not the court, would have the power to determine the availability of the privilege. *Id.*

B. Work-product Doctrine

The attorney work-product doctrine limits discovery of materials prepared in anticipation of litigation. As provided under Commission Rule 3.31(c)(5):

Hearing preparations: Materials . . . [A] party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its 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 Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

16 C.F.R. § 3.31(c)(5). *See also* Fed. R. Civ. P. 26(b)(3): “[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he 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 impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

The principles of the work-product doctrine have been developed in federal courts from the landmark decision in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947), which held that “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Coastal States Corp.*, 617 F.2d at 864. The purpose of the privilege, however, is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself. *Id.*

As explained in *Jordan v. U. S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978):

The work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest. . . . [T]he purpose of the privilege is to encourage effective legal representation within the framework of the adversary system by removing counsel's fears that his thoughts and information will be invaded by his adversary This focus . . . is reflected in the specific limitation of the privilege to materials “prepared in anticipation of litigation or for trial.”

Id.

IV.

Upon review of the Motion, Opposition, privilege logs, and Feinstein and Nagler Declarations, it cannot be determined whether any or all of the withheld documents are discoverable, or are protected by the deliberative process privilege or attorney work-product doctrine. For example, the agency here, as in *Redland Soccer*, has provided only a general identification of the documents that fall within the two categories of documents being withheld and concludes, in general terms, that the documents are protected by the deliberative process privilege. The description given for these categories of documents withheld provides little information for determining whether any individual document actually meets the standard for invoking the deliberative process privilege. Thus, whether each of the documents qualifies for the deliberative process privilege cannot be determined based on the declarations submitted. Similarly, based upon the Motion, privilege logs, Opposition, and the Feinstein and Nagler Declarations, it cannot be determined whether any or all of the withheld documents are subject to the attorney work-product doctrine.

Justice and fairness mandate both that Respondents obtain discovery to which they are legally entitled and that privileged documents be protected as required by law. Accordingly, Complaint Counsel will be given the opportunity to prepare a proper affidavit or declaration.

Therefore, Complaint Counsel is hereby ORDERED to provide further evidence and briefing in support of its asserted privileges. This shall include one or more declarations that will demonstrate, in accordance with applicable legal standards and this Order, that each and every document sought to be withheld, including each page and portion thereof, has in fact been reviewed and is in fact protected from disclosure. Complaint Counsel shall make this filing within 7 business days.

Respondents are hereby ORDERED to file a response to Complaint Counsel's supplemental filing and in further support of their Motion to Compel. Respondents shall make such filing within 7 business days of the date on which Complaint Counsel's submission is due.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 24, 2011