U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 11 July 2012

IN THE MATTER OF:

CATE JENKINS,
Complainant,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

CASE NO.: 2011-CAA-3

ORDER GRANTING THE COMPLAINANT'S REQUEST TO COMPEL RESPONSES TO DISCOVERY

On June 8, 2012, the Complainant submitted her Third Motion to Compel EPA's Responses to Complainant's Document Requests and Interrogatories. The Complainant is seeking an Order directed at ensuring the adequacy of the Respondent's responses to her discovery requests. On June 21, 2012, the Respondent submitted its Opposition to Complainant Cate Jenkins' Third Motion to Compel Agency's Responses to Complainant's Document Requests and Interrogatories.

Background

The discovery process leading up to the hearing in this matter has been long and tortured. In response to motions to compel filed by the Complainant, I have issued several Orders directing the Respondent to provide documents or information that I found was not entitled to be withheld. In my first Order, issued on September 29, 2011, I overruled the Respondent's objections on irrelevance grounds, and directed the Respondent to respond to a number of the Complainant's document requests.[1] I also directed that for those documents for which the

[1] The Respondent's claim that "There has never been any suggestion that EPA has failed to produce actual records ordered to be produced, as opposed to having failed to generate a complete privilege log that identified the universe of responsive privileged records," is disingenuous. See Respondent's Opposition at 4, fn. 2. Obviously, if the Respondent does not identify all of the responsive documents in the "universe," privileged or otherwise, neither the Complainant nor the Court will be aware that there are "actual records" that must be ordered to be produced. In other words, the Respondent's compliance with my Orders to produce specific, "actual" documents does not absolve it of its failure to produce or identify the "universe" of specific, "actual" documents responsive to discovery requests or Orders in the first instance.

Respondent claimed a privilege, the Respondent produce a privilege log describing each document and the applicable privilege.[2]

The Respondent produced a privilege log, but in response to the Complainant's second motion to compel, on February 9, 2012, I issued an Order requiring the Respondent to turn over one of the documents on the privilege log, and to produce the remaining requested documents, which the Respondent had withheld on the grounds of privilege, for *in camera* review. On February 29, 2012, I issued an Order finding that these documents were not protected by privilege, and ordering that they be produced.

The hearing began on April 30, 2012, but was suspended on May 3, 2012, during the testimony of Ms. Suzanne Rudzinski, the deciding official in connection with the Complainant's termination, when it became clear that a document clearly responsive to the Complainant's discovery requests had not been produced. Further discussion with the parties, and particularly Respondent's counsel, Mr. Winick, also cast serious doubts on the adequacy of the Respondent's responses to the Complainant's discovery requests preceding the hearing. Under those circumstances, I adjourned the hearing so that Complainant's counsel could question Mr. Winick, by deposition, about his efforts to comply with her discovery requests, and my Orders to compel production of documents.

On May 8, 2012, Mr. Winick submitted a "revised" privilege log, listing 27 additional documents not previously identified or produced by the Respondent in response to discovery. Mr. Winick stated that these documents were found after he searched his archived electronic records, and asked Ms. Rudzinski and Mr. Guerrero to do the same. Mr. Winick provided copies of these documents for *in camera* review.

On May 9, 2012, I issued an Order finding that all but one of the additional documents on the Respondent's revised privilege log were not protected from disclosure by a privilege, and directing the Respondent to provide them to the Complainant.

On May 10, 2012, the Complainant's counsel took Mr. Winick's deposition in connection with his efforts to respond to her discovery requests. Subsequently, on May 16, 2012, the Complainant requested documents identified during Mr. Winick's deposition that were responsive to her requests, but which had not been produced. Specifically, the Complainant requested a copy of Ms. Rudzinski's hard file regarding her removal,[3] as well as the attachment identified on an email previously produced by the Respondent. The Complainant also requested documents reflecting communications between Mr. Winick or persons acting on his behalf, and current and former EPA employees regarding responses to her discovery requests.

By letter dated May 21, 2012, the Respondent produced a list of the documents that were in Ms. Rudzinski's hard file, and stated that the Complainant already possessed all of these documents, with the exception of "e-mail traffic related to the issue of Complainant's access to

[2] Rather than providing such a privilege log, a standard requirement in discovery, the Respondent, without providing any information that would specifically identify the documents, merely stated that any documents in response to certain requests were covered by a privilege.

[3] During her hearing testimony, Ms. Rudzinski referred several times to a file she kept in connection with the proceedings leading up to the Complainant's removal.

her government computer files" after she was placed on administrative leave. The Respondent stated that it did not regard this e-mail traffic as germane to the litigation. The Respondent claimed that the missing e-mail attachment had been previously identified at Number 59 on the November 1, 2011 Privilege Log, and that the Complainant either already had it, or it was never produced because the Complainant did not request it and my Orders did not address it.

The Respondent refused to produce any documents reflecting communications between Mr. Winick and others about the Respondent's response to the Complainant's discovery requests, claiming that they were covered by the attorney client and work product privileges.

By letter dated May 29, 2012 to the Respondent, the Complainant stated that even if she did have the documents contained in Ms. Rudzinski's hard file, she was still entitled to review the complete intact file as Ms. Rudzinski saw it, and was not required to take Mr. Winick's word that the documents she had were the same as the ones actually in Ms. Rudzinski's file. The Complainant also argued that communications about her computer access were relevant and discoverable, because they could provide evidence of retaliatory animus. Finally, the Complainant was not able to find a copy of the attachment to the e-mail listed at Number 90 on the Amended Privilege Log, or Number 59 on the November privilege log, and argued that these should be produced.

By letter dated June 1, 2012, the Respondent stated that it would not produce further documents to the Complainant absent a Court Order.

DISCUSSION

As a preliminary observation, I note that the discovery process in this claim has been marked by the persistent failure of Respondent's counsel to abide by even the most basic requirements for responding to discovery requests in the course of litigation.

For example, in responding to the Complainant's initial requests for discovery, Mr. Winick stated that the Respondent was withholding responsive documents on the grounds that they were covered by the attorney client, work product, or deliberative process privilege. As I have made abundantly clear throughout these proceedings, the determination of whether a particular document is protected from disclosure by a privilege is for the Court, not counsel. It is not sufficient for counsel to merely state that there are responsive documents that are protected by a privilege, and refuse to produce such responsive documents. Rather, counsel is required to specifically identify each responsive document, and articulate the basis for the assertion of a privilege (otherwise known as a privilege log).

Mr. Winick did not do so, and it was necessary for the Court to issue an Order directing the production of a privilege log. However, the privilege log that Mr. Winick subsequently provided was inadequate, as it did not articulate the basis for assertion of a privilege for any of the listed documents. It became necessary for the Complainant to again move for production of these documents, or for *in camera* review by the Court. Upon my review of these documents, I found that none of them were protected from disclosure by the attorney client or work product privilege, nor had Mr. Winick even articulated how these privileges applied to any of the specific

documents. I also found that Mr. Winick had not satisfied even the threshold requirements for assertion of the deliberative process privilege.

The discovery disputes appearing to have been resolved, this matter proceeded to hearing. However, on the fourth day of the hearing, during the testimony of Ms. Rudzinski, the deciding official charged with making a determination and preparing the final removal decision, it became obvious that Mr. Winick had not produced a draft of a final decision he exchanged with Ms. Rudzinski, which was clearly responsive to the Complainant's discovery requests, as well as my previous Orders. Mr. Winick acknowledged that he had not produced this document, but could provide no explanation for its non-production. Nor did he know where the document was. What was particularly troubling to the Court was that Mr. Winick seemed to believe that, since he had made no changes to this document, it was not relevant, and his failure to produce it was of little consequence. As I advised Mr. Winick at the hearing, that was not his call to make, and if there was a previous draft of this document, the Complainant was entitled to it, even if he was "confident" that he made no changes to it.

On adjournment of the hearing, Mr. Winick asked Mr. Guerrero and Ms. Rudzinski to search their e-mail archives, and he did so as well.[4] Despite the fact that the parameters of the request were limited to, *inter alia*, records dating from July 9, 2010, when the Complainant's removal was proposed, Mr. Winick came up with ***twenty seven*** additional e-mail communications, which had not been previously produced to the Complainant.[5] Mr. Winick's protestations to the contrary, I find that his belated discovery and production of these documents raises serious concerns about the adequacy of the Respondent's discovery responses, and demonstrates a disregard for the integrity of the litigation process, and Respondent's obligations to the Court.

Nor did Mr. Winick's subsequent deposition provide any further assurance that the Respondent has adequately complied with its obligations during discovery. For example, Mr. Winick could not recall if he asked persons to search their email archives for documents responsive to the Complainant's discovery requests. Indeed, although the EPA requires employees to preserve their email records in a central archive accessible for electronic discovery in litigation, Mr. Winick testified that at the time the original searches for responsive documents were undertaken, he did not know how these archives could be searched. Apparently, he did not take any steps to find out how to undertake such a search. Nor did Mr. Winick adequately search the records of persons who were no longer employed by EPA, if at all. Indeed, it appears that, having gathered documents in connection with the Complainant's previous MSPB proceeding, as well as her OSC complaint, Mr. Winick did not feel obligated to conduct any further searches in response to the Complainant's Department of Labor complaint.[6]

---

[4] Mr. Winick's deposition reflects that in addition to being limited to correspondence regarding the Complainant's proposed removal of July 9, 2010, the search was limited to communications between Mr. Guerrero and Ms. Rudzinski, and Ms. Rudzinski and Mr. Prince, Mr. White, and Ms. Lawrence. Mr. Guerrero and Ms. Rudzinski did not search for any communications with Mr. Dellinger. This limited search was further circumscribed to email communications, and not other records.

[5] Again, although the Respondent claimed that these documents were protected from disclosure by a privilege, counsel did not articulate the basis for the applicability of a privilege to any of these documents.

[6] Indeed, Mr. Winick persists in referring to the discovery process in this litigation as a "do-over," with issues identical to those raised in the MSPB proceeding.

The Complainant has pointed to numerous examples of Mr. Winick's limited or nonexistent search for responsive records. They include the records of Mr. Dellinger, the recipient of the alleged death threat. Mr. Winick stated that he had asked Mr. Dellinger to search for records regarding the Complainant's removal proceeding in connection with the MSPB hearing and OSC complaint, but could not remember if he did so in connection with this proceeding. Mr. Winick agreed that some of the discovery requests in this proceeding were different than her previous requests. I agree with the Complainant, that this limited search leaves open the possibility that there are records in connection with this proceeding that were not gathered in connection with the MSPB proceeding.

Ms. Lawrence was no longer employed by the EPA, and Mr. Winick stated that he asked her supervisor and Mr. White to search her records for those relevant to the Complainant's removal. He did not ask them to search for records in the email archives, and he is not sure what steps Mr. White took to search through Ms. Lawrence's records.[7]

With respect to Ms. Vickers, Mr. Winick asked her about her role in the removal process, and whether she had any documents, and concluded that her role was limited, and she had no relevant documents. At the time, Ms. Vickers was retired, and could not have searched her email records to verify that she had no responsive documents. Yet Mr. Winick did not search for any records that Ms. Vickers might have had about the Complainant's removal, much less her whistleblowing or disclosures.

Mr. Winick did not recall if he asked other officials, including James Michael and Barry Breen, to search their records for responsive documents, or that he asked them to search their email archives.

This conclusion regarding the inadequacy of the Respondent's discovery response is bolstered by Mr. Winick's convoluted explanation of how he conducted the search that led to the discovery of the twenty seven additional documents. At the time the hearing was suspended, Mr. Winick was directed to try to obtain the missing draft, as well as any transmittal memoranda, and "anything else that you can identify that you made the judgment call not to produce" before his deposition. The purpose of this instruction was to facilitate Mr. Winick's deposition; it was not a comprehensive "order" regarding the production of additional documents, which was something that was anticipated after Mr. Winick's deposition, when the scope of any failure to produce discovery would hopefully be clearer.

Based on his confidence that he had collected and produced the "universe" of non-privileged records responsive to the Complainant's discovery requests, Mr. Winick determined that only those records that would be considered privileged needed to be searched again. Mr. Winick further circumscribed his search to documents created after the issuance of the Notice of Proposed Removal, relying on the "comprehensive" document search done in response to the OSC August 31, 2010 information request. Because other than Ms. Rudzinski, "almost no one with operational, as opposed to legal advisory responsibilities, played any role in the removal

[7] That there may be relevant documents in Ms. Lawrence's email archive is demonstrated by the fact that, as the Complainant has advised, Ms. Canty-Letsome, a union representative who testified at the hearing, subsequently searched her email archives and found the email she sent to Ms. Lawrence with the list of the Complainant's potential witnesses. This email was not produced by the Respondent in response to discovery requests.

process after the issuance of the NPR," Mr. Winick further circumscribed his search to communications between Ms. Rudzinski and her legal advisors, himself and Mr. Guerrero, and himself and Mr. Guerrero.

Yet, even having whittled down the scope of his most recent search, Mr. Winick discovered ***twenty seven*** additional documents that had not been produced or identified in response to discovery requests and the Court's Orders. Not only was Mr. Winick's search far from "comprehensive," the discovery of these twenty seven additional documents seriously erodes the "confidence" the Court has in Mr. Winick's search of the records that are outside the narrow scope of his most recent search.

What has become painfully obvious is that Mr. Winick has taken minimal, if any, steps to ensure that documents responsive to the Complainant's discovery requests *in this matter* were identified, preserved, and in fact provided to the Complainant. Indeed, as noted above, Mr. Winick has taken it on himself to narrow the scope of his most recent search to communications between persons involved in the Complainant's removal process, when in fact, the scope of the issues involved in this proceeding, not to mention the scope of the Complainant's discovery requests, is much broader. Thus, for example, the fact that, "with respect to Complainant's removal, there exist no documents that reflect any communications between those individuals [Stanislaus, Perciasepe, Jackson] and anyone involved in Complainant's removal process," is completely beside the point. Respondent's Opposition at 10. The fact that a particular person did not have a role in the Complainant's removal does not lead to the conclusion that they cannot have any documents that bear on the issues raised in this claim.

It is apparent that Mr. Winick believes the records he produced to the OSC in response to its request, as well as whatever records he produced to the Complainant in connection with the MSPB proceeding, are synonymous with the Complainant's requests in this proceeding, and that he was not required to produce or even search for anything further.

At this point, I have absolutely no confidence in the integrity of the Respondent's response to the Complainant's discovery requests, or its compliance with my Orders directing production of documents. I will not require the Complainant to keep returning to the Court to try to enforce the Respondent's compliance with discovery requirements. Rather, in an effort to bring some closure to the discovery process, so that this matter may be resolved sometime in the next decade, I am directing the Respondent to provide the following documents directly to the Court.

In this regard, I find that communications between Agency counsel and Agency employees regarding the production of documents or information in response to the Complainant's discovery requests are not protected from disclosure by any privilege, including the work product and attorney client privilege. Once again, the Respondent has not produced a privilege log identifying any of the specific documents, or articulating how a privilege applies to any of them. There is no suggestion that these documents would reveal confidential communications for the purpose of obtaining legal advice. Nor is it germane that these documents may have been prepared in anticipation of or during litigation, as such documents or communications would not reveal the mental impressions, conclusions, or legal theories, or litigation strategies, of the attorneys.

More importantly, the Respondent, by its failure to comply with the rules of discovery, as well as this Court's orders, has placed the issue of its compliance squarely before this Court, and cannot now hide behind the assertion of privilege to prevent further inquiry into its actions.

The Respondent will produce the documents discussed below to the Court. If the Respondent claims that any of the documents are protected from disclosure by a privilege, they must be identified on a privilege log, and Respondent must articulate the basis for assertion of a privilege for each document. I will review any such documents *in camera*, and make a determination as to whether a privilege is properly invoked. I will then turn over all non-privileged documents to the Complainant.

Search of E-Mails, Archived and Otherwise

The Respondent shall conduct a thorough search for **all** e-mail communications responsive to the Complainant's discovery requests, for the persons on the list below. Such communications shall include those dealing with the Respondent's response to the Complainant's discovery requests in this proceeding. Nor may the Respondent unilaterally narrow the scope of the search, for example, to "privileged" documents, or to documents dealing with the removal process.[8]

James Michael
Robert Dellinger
Suzanne Rudzinski
Barry Breen
Matthew Stanislaus
Bob Perciasepe
Roy Prince
Lisa Jackson
Maria Vickers
Paul Winick
Justina Fugh
Wendy Lawrence
Gregory Helms
Kenneth White
Melissa Kaps
Ross Elliott
Steve Hoffman
Matthew Straus
Steven Silverman
David Bussard
William Schenborn
Michael Shapiro

[8] Despite my numerous statements to the contrary, the Respondent persists in its stubborn claim that the only relevant information or documents comes from Mr. Dellinger and Ms. Rudzinski, because they were the only persons who played a decision making role in the removal process. Respondent's Opposition at 7.

Charlotte Mooney

Suzanne Rudzinski File

The Respondent shall produce a copy of the complete and intact file maintained by Ms. Rudzinski regarding the Complainant, including the e-mail traffic related to the issue of the Complainant's access to her government computer files after she was placed on administrative leave. I agree with the Complainant, that this e-mail traffic has the potential to include evidence relevant to the issues of bias and retaliation. I also agree that the Complainant is entitled to view the intact file upon which Ms. Rudzinski relied; she is not required to take Mr. Winick's word that certain documents already provided to her were in Ms. Rudzinski's file.

Attachment to December 14, 2010 email from Ms. Rudzinski to Mr. Guerrero, "oral summary.docx"

The Complainant has requested this attachment to an email that was listed at Number 90 on the Amended Privilege Log. Mr. Winick responded that the Respondent had already produced it in response to my Order. Or, they never produced it because the Complainant did not ask for it in her challenges to the Respondent's discovery responses, and my Order did not address it. Regardless of which response the Respondent wishes to rely on, the Respondent is obligated to produce this document.

I note that this document is an attachment to an email communication that clearly falls within the scope of the Complainant's discovery requests, as well as the Court's Order to compel. There can be no serious challenge to its relevance. I have already determined that the email itself is not protected by a privilege, and the Respondent has not even attempted to argue that the attachment is protected from disclosure by any privilege. The Respondent's response is bizarre - the Respondent argues that the document itself, the draft oral summary document listed as an attachment on the email, is "identified" on the Respondent's November 1, 2011 privilege log, and there is no order "concerning the production of documents on which the Agency had claimed a privilege with which EPA did not comply" (Respondent's Opposition at 15-16). Thus, reasons the Respondent, because I did not explicitly order it to produce the attachment as well as the email itself, this document need not be produced, and it has fulfilled its discovery obligations with respect to this document.

The Respondent's stubborn refusal to produce this document boils down to a childish claim that "no one told us to give it to you." Apparently, because I did not explicitly direct the Respondent to produce the attachments to the emails that I ordered produced, the Respondent feels that it is absolved of its obligation to produce documents responsive to the Complainant's discovery requests. This document, which I find to be clearly relevant and within the scope of the Complainant's discovery requests, should have been produced to the Claimant at the outset, regardless of whether the Court ordered its production, and regardless of whether it was identified by virtue of its status as an attachment on an email.

The Court should not have to order the Respondent to comply with its obligation to provide relevant documents clearly responsive to the Complainant's discovery requests and my Orders. In case it was not clear that my previous Orders directing production by the Respondent

encompassed attachments to emails, the Respondent is **ORDERED** to produce the "oral summary.docx" attachment to the December 14, 2010 email.

Certification

With respect to the searches conducted in response to this Order, the Respondent will provide a list of all persons who conducted the searches, the documents produced by these persons, and a signed declaration from each such person attesting to the search methods used, the sources searched, and that the documents produced represent all documents that would comply with the Complainant's requests for discovery.

CONCLUSION

It is unfortunate that it has been necessary for the Court to become so deeply involved in the discovery process in this proceeding. But I find that it is necessary to take these steps to ensure that, regardless of the ultimate outcome, the Complainant is able to pursue her claim armed with all of the relevant information and documents to which she is entitled, which after all is the purpose of discovery. It is not sufficient, as Mr. Winick argues, that the "Complainant has been given, for all intents and purposes, the entire universe of documents on which the respondent has raised a claim of privilege." Respondent's Opposition at 8.

The Respondent shall provide the information and documents set out above within thirty days from the date of this Order.[9] Thereafter, I will determine which, if any, of the documents provided are covered by a privilege, and I will confer with the parties about the resumption of the hearing, as well as a schedule for the submission of any motions.[10]

SO ORDERED.

Linda S. Chapman

LINDA S. CHAPMAN
Administrative Law Judge

[9] I agree with the Complainant that it is certainly possible that there are hard copy documents that have not been identified or produced in discovery. At this point, however, I am limiting my Order to email records, *including their attachments*, in the interests of concluding this matter in a reasonable time frame.

[10] The Complainant has indicated that she intends to submit a motion for a default judgment, based on the Respondent's failure to cooperate in discovery.

SERVICE SHEET

Case Name: **JENKINS_CATE_PHD_v_US_ENVIRONMENTAL_PRO_**

Case Number: **2011CAA00003**

Document Title: **ORDER GRANTING THE COMPLAINANT'S REQUEST TO COMPEL RESPONSES TO DISCOVERY**

I hereby certify that a copy of the above-referenced document was sent to the following this 11th day of July, 2012:

Brenda D. Williams

BRENDA D. WILLIAMS
LEGAL ASSISTANT

Cate Jenkins, Ph.D
3029 Mission Square Drive
FAIRFAX VA 22031
{Hard Copy - Regular Mail}

Paul Winick
Office of General Counsel
U. S. Enviornmental Protection Agency
Ariel Rios Building, North
1200 Pennsylvania Avenue, NW, Rm. 7454-D
WASHINGTON DC 20460
{Hard Copy - Regular Mail}

Paula Dinerstein, Esq
Public Employees for Environmental Responsibilit
2000 P Street, NW
Suite 240
WASHINGTON DC 20036
{Hard Copy - Regular Mail}

Regional Administrator
Region 3
U. S. Department of Labor, OSHA
The Curtis Center, Suite 740 West
170 S. Independence Mall West
PHILADELPHIA PA 19106-3309
{Hard Copy - Regular Mail}

Regional Solicitor
U. S. Department of Labor
The Curtis Center, Suite 630 East
170 S. Independence Mall West
PHILADELPHIA PA 19106-3306
{Hard Copy - Regular Mail}

Associate Solicitor
Division of Fair Labor Standards
U. S. Department of Labor
Room N-2716, FPB
200 Constitution Ave., N.W.
WASHINGTON DC 20210
{Hard Copy - Regular Mail}

Director
Office of the Whistleblower Protection Program
U S Department of Labor, OSHA
Room N 3112 FPB
200 CONSTITUTION AVE NW
WASHINGTON DC 20210
{Hard Copy - Regular Mail}