

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3408/ December 16, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16729

In the Matter of

MILLER ENERGY RESOURCES, INC.,
PAUL W. BOYD, CPA,
DAVID M. HALL, and
CARLTON W. VOGT, III, CPA

ORDER

On October 30, 2015, Respondent Carlton W. Vogt, III, submitted a request to subpoena the Securities and Exchange Commission's Division of Corporation Finance for certain documents. After the Division of Enforcement and the Commission's Office of the General Counsel (OGC) opposed the request and asserted claims of privilege, I held a telephonic prehearing conference on November 19, 2015. Following the conference, I directed Enforcement or OGC to "submit a privilege log and declaration, or similar evidence, sufficient to invoke the privileges on which they seek to rely." *Miller Energy Res., Inc.*, Admin. Proc. Rulings Release No. 3335, 2015 SEC LEXIS 4799 (Nov. 20, 2015).

OGC responded with a seven-page declaration prepared by H. Roger Schwall. Mr. Schwall is an assistant director in Corporation Finance. He states that he has reviewed documents that are responsive to Mr. Vogt's request. Mr. Schwall generally describes the documents and explains why he believes their disclosure would be inimical to Corporation Finance's work. No privilege log accompanied the declaration.

Mr. Vogt faults this response as being too general. He argues that OGC should be required to submit a privilege log or present the documents for *in camera* review. In part, I agree. In order to resolve the claims of privilege raised by Enforcement and OGC, I need more than the generalities that have been submitted.

Discussion

A Respondent may ask that an administrative law judge issue a subpoena requiring the production of documents. 17 C.F.R. § 201.232(a). If it appears that a subpoena "may be unreasonable, oppressive, excessive in scope, or unduly burdensome," an administrative law judge may require the party requesting the subpoena to show that the information sought is

relevant and that the scope of what is sought is reasonable. 17 C.F.R. § 201.232(b). An administrative law judge is required to quash any subpoena that “would be unreasonable, oppressive[,] or unduly burdensome.” 17 C.F.R. § 201.232(e)(2).

Enforcement may withhold a document that:

is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this rule, or is otherwise attorney work product and will not be offered in evidence.

17 C.F.R. § 201.230(b)(1)(ii). This rule codifies the work-product privilege addressed in *Hickman v. Taylor*, 329 U.S. 495 (1947), and in Federal Rule of Civil Procedure 26(b). *See* Rules of Practice, 60 Fed. Reg. 32,738, 32,762 (June 23, 1995) (to be codified at 17 C.F.R. pts. 200-03, 209, 228-30, 232, 240, 250, 260, 270, 275). A party seeking to invoke a privilege to prevent the disclosure of documents bears the burden of demonstrating that the privilege applies.

Mr. Vogt requests the following from Corporation Finance:

All documents concerning . . . Corporation Finance’s . . . review of and comment upon the Forms 10-K and 10K/A filed by Miller Petroleum, Inc. (“Miller”) for the fiscal year ended April 30, 2010 (the “10-Ks”), including but not limited to: (a) all documents in [Corporation Finance’s] file number 001-34732 relating to the 10-Ks; (b) all documents relating to (i) Miller’s valuation of the Alaska Assets (as that term is used in [Corporation Finance’s] comment letters, see April 14, 2011 Comment Letter at 3), (ii) any reports of Ralph E. Davis Associates, Inc. concerning the oil and natural gas reserves included in the Alaska Assets, and (iii) any reports of Beecher Carlson Associates concerning the fixed assets included in the Alaska Assets; and (c) all documents reflecting any communications between [Corporation Finance], Miller, the . . . Enforcement Division or any other third party relating to those topics.

Letter at 3.

Enforcement and OGC claim that three privileges protect from disclosure the documents Mr. Vogt seeks. They primarily rely on deliberative process privilege but also invoke the attorney-client privilege and the work-product privilege.

The attorney-client privilege argument relates to subcategory (c). *See* OGC Opp. at 6. Enforcement and OGC argue that the Division’s action memorandum and advice Enforcement received in preparation of the action memorandum are covered by the attorney-client privilege. *Id.* Assuming Mr. Vogt seeks the action memorandum, I agree that it is protected from

disclosure by “multiple . . . privileges.” *David F. Bandimere*, Securities Act of 1933 Release No. 9972, 2015 SEC LEXIS 4472, at *93-94 & n.140 (Oct. 29, 2015).

In theory, it is possible that the attorney-client privilege protects discussions between Enforcement counsel and Corporation Finance personnel to the extent those discussions related to Enforcement’s preparation of its action memorandum. *See* OGC Opp. at 6. But neither Enforcement nor OGC has identified which documents might fit under this theory. Instead, Mr. Schwall explains that documents reflecting communication between Corporation Finance and Enforcement fall into two categories: (1) consultations “in which Enforcement sought technical advice and consulted . . . in regard to issues raised during the investigation”; and (2) communications related to Enforcement’s preparation of its action memorandum. Schwall Decl. at 2-3. Because Corporation Finance and its personnel are not clients of Enforcement, only the latter category could potentially fit within the asserted privilege. Because I do not know which documents fall in which category, however, I am not in a position to determine that the attorney-client privilege protects more than Enforcement’s action memorandum.

The attorney work-product privilege shields from disclosure documents that “were prepared ‘in anticipation of litigation.’” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991) (quoting Fed. R. Civ. P. 26(b)(3)). “Fact” work product must be distinguished from “opinion” work product. While the former may be produced on a showing of “substantial need . . . and an undue hardship in acquiring the information any other way,” the latter “is virtually undiscoverable.” *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997).

Aside from discussing general principles related to the work-product doctrine, neither Enforcement nor OGC has much to say about the application of the doctrine to Mr. Vogt’s request. While I might be prepared to agree that the doctrine applies to documents created once Enforcement’s investigation began, *see Safecard Servs.*, 926 F.2d at 1202-03, neither Enforcement nor OGC has attempted to explain when the investigation began or which documents in Corporation Finance’s files were created after that date and in relation to the investigation. Perhaps the privilege would apply to all communications because Enforcement would only communicate with Corporation Finance with respect to this matter if litigation were contemplated. But neither Enforcement nor OGC—the entities with the burden of proof—claim this is the case.

The arguments raised by Enforcement and OGC thus largely rest on the deliberative process privilege. This privilege “allows the government to withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff’d*, 384 F.2d 979 (D.C. Cir. 1967)). The privilege exists to “allow[] government officials freedom to debate alternative approaches in private.” *Id.* For documents to fall under the privilege, they “must be predecisional and . . . deliberative.” *Id.* The privilege does not extend to “purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.” *EPA v. Mink*, 410 U.S. 73, 91 (1973); *see Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1228 (10th Cir. 2007). On

the other hand, if factual material is not segregable from deliberative material—if disclosure of the putatively factual material would “expose the deliberative process”—the factual material may be withheld. *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 13 (D.C. Cir.), *cert. denied*, 135 S. Ct. 356 (2014). In determining whether the privilege applies, I may rely on a declaration if it is “‘relatively detailed’ . . . nonconclusory[,] and . . . submitted in good faith.” *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981) (quoting *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978)).

Mr. Schwall’s declaration confirms that there is a good deal of factual information contained Corporation Finance’s files. For example, he states that certain:

reports typically contain a background section describing facts the staff thought relevant to the filing under review, as well as a description of the issues to be examined. Further, these reports contain descriptions of areas in which the staff believes the filing under review may not have complied with, or needs to be modified to improve its compliance with, applicable laws, rules and regulations.

Schwall Decl. at 3. But with respect to segregability, he merely states that “[t]he selection of facts to include in an examination report is an integral part of [Corporation Finance’s] review process, and it is not reasonably possible to segregate out these facts without revealing the nature of the review process itself.” *Id.* at 7. This statement does not qualify as “‘relatively detailed’ and nonconclusory,” *Goland*, 607 F.2d at 352, sufficient to support the claim of privilege.

The decision whether to review documents *in camera* is discretionary. *See Meeropol v. Meese*, 790 F.2d 942, 958 (D.C. Cir. 1986). Normally, an agency should first be given a chance to establish a privilege through declarations or testimony. *Dickstein Shapiro LLP v. Dept. of Defense*, 730 F. Supp. 2d 7, 10 (D.D.C. 2010) (relying on *Mink*, 410 U.S. at 93). Because OGC and Enforcement have been given a chance to establish their claims through declarations, the documents Mr. Vogt seeks must be submitted for *in camera* review, subject to the below procedure. *Cf. Trentadue*, 501 F.3d at 1230 (“Whether a portion of a document is deliberative is an objective question, and it is the duty of courts to answer that question.”).

By December 30, 2015, Enforcement or OGC shall provide Vogt, and email to my office at alj@sec.gov, a privilege log that includes for each withheld document the date of the document, the author and recipient, the type of document, and the privileged claimed. It must note whether the documents are privileged in whole or in part, the nature of the privilege asserted, and whether the documents can be redacted. The log may outline documents by category rather than itemize each document; however, it must be sufficiently clear what documents are contained within a category and blanket assertions will not suffice.

By January 4, 2016, Enforcement or OGC and Vogt shall confer and strive in good faith to come to a mutually agreeable solution with regards to the subpoena request. Such discussions should include whether it is feasible to narrow the scope of the subpoena request and whether to narrow the scope of documents in dispute. If the subpoena is ultimately issued, Vogt should be

aware that I will not postpone the hearing on the basis that he has received too many documents to review, as postponements are generally disfavored in Commission proceedings. *See* 17 C.F.R. § 201.161(b).

By January 7, 2016, documents still subject to dispute shall be submitted for *in camera* review. In light of the fact that the hearing is scheduled to begin February 1, 2016, this compressed schedule is necessary.

For the *in camera* review process: With respect to documents in subcategory (c) and the attorney-client and work-product privileges, documents from Corporation Finance's files should be accompanied by an explanation for why the privilege should apply to a particular document. Alternatively, OGC or Enforcement may explain when the investigation began and why the work-product privilege should apply to groups of documents in subcategory (c).

With respect to the deliberative process privilege, facts that can be segregated from opinions or judgments must be disclosed. *Mink*, 410 U.S. at 91. Factual statements believed not to be segregable must be identified and be accompanied by an explanation for the assertion that they are not segregable.

If the number of documents in question is sufficiently large to justify *in camera* review by sampling, the parties should confer at their earliest convenience as to the sampling method. If the parties agree, documents may be produced for review in the agreed manner. If the parties cannot agree, they should promptly notify my office of the nature of their disagreement and I will decide which method to employ.

James E. Grimes
Administrative Law Judge