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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

TECHNICOLOR, INC. d/b/a VIDEO SERVICES, ET AL.,

Defendants.

CASE NO. CV 01-06791 GAF (RZx)

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL

This matter came before the Court on April 29, 2002 on the motion of Defendants to compel production of certain categories of documents. Plaintiff appeared through its counsel Elizabeth Esparza-Cervantes and Gregory L. McClinton. Defendants appeared through their counsel Sheryl L. Skibbe and Cory S. Hartsfield. The Court heard argument of counsel and took the matter under submission.

Defendants seek to compel production of certain allegedly privileged documents. Preliminarily, the Court notes that certain documents, consisting of unsigned affidavits which Plaintiff initially withheld, have been disclosed as attachments to a declaration filed by Plaintiff in connection with this motion. As the documents thus have been disclosed, there can be no argument for not turning them over, and Plaintiff concedes that they no longer are at issue. Thus, Plaintiff is ordered to make the unsigned affidavits

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available for inspection and copying, or provide copies if that has been the understanding of the parties as to the method of production.

The remaining documents at issue are those which were listed on a privilege log, consisting of the following: Log Nos. 4, 6, 21, 26, 27, 28, 29, 32, 33, 34, and 49-61. (At oral argument, counsel advised that documents responsive to Requests 50 and 51 since have been produced.) Many of these documents appear to be the sort which might be protected by the attorney-client privilege, or the work-product privilege, and Plaintiff argues that those privileges apply here. Defendants argue that the only privilege claimed was the "deliberative process" privilege.

As pertinent here, Plaintiff responded to each of the Requests for Production at issue with the following response :

> [T]he EEOC objects to the request to the extent that it calls for disclosure of attorney-client communications, attorney work product and/or disclosure of governmental deliberative process.

Joint Stipulation at 17-33. Shortly thereafter, the EEOC provided a privilege log. For the categories of documents at issue on this motion, the only privilege listed on the privilege log was the deliberative process privilege. Joint Stipulation at 8-9.

FED. R. CIV. P. 34 requires a party to respond to a request for production of documents by either stating that inspection will be permitted as requested, or stating an objection. Plaintiff argues that it has preserved the attorney-client and work-product privileges by asserting them in response to the requests. The Court does not agree.

Plaintiff did not assert those objections categorically; it asserted them conditionally — "to the extent" that requested documents were protected by one of three privileges, Plaintiff objected to their production. The Federal Rules contain no provision for the use of such conditional objections, and such objections, by themselves deprive the responses of any meaning. Will Plaintiff produce or not? Does Plaintiff have an objection

to a category or not? If Plaintiff does have an objection, what is it? *When* will Plaintiff decide if it does have an objection? None of these answers can be found by a listing of "to the extent that" objections. Such objections, in fact, imply that Plaintiff may not have reviewed the documents prior to objecting, clearly not in keeping with the rules.

Here, however, after submitting its responses Plaintiff then revealed "the extent" to which it asserted the privileges, when it submitted its log of documents which had been withheld, and the privileges protecting them. This submission complied with FED. R. CIV. P. 26(b)(5), which provides that "[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege . . . ." Thus, when Plaintiff provided its privilege log, Defendants then were able to view the descriptions of the documents withheld, compare those descriptions to the privileges asserted, and "assess the applicability of the privilege."

Plaintiff now argues that the documents at issue are protected by privileges originally not listed on the log. Such an interpretation of the rules would make both Rules 34 and 26(b)(5) have little meaning. If a propounding party cannot rely on the delineation of documents and privileges on the log, then it is left to guess at which privileges apply, and can have no basis for assessing whether to challenge the withholding. The more acceptable reading is that a party is bound by its specific claim of privilege, since Rule 26(b)(5) requires a party to make the assertion expressly, and does so for the specific purpose of having the opposing party rely on the assertion.

Plaintiff also argues, however, that at a meeting of counsel on January 8, 2002, the parties agreed that the privilege log could be amended to list the attorney-client and work-product privileges. The evidence on this point is in conflict, with Plaintiff's counsel stating that such an agreement was made and Defendants' counsel stating that it was not made. The Court finds it disturbing that competent counsel have such contrary

views as to what was agreed upon. The most that can be said is that such an agreement does not appear convincingly and the Court finds no documentation of it. The Court also notes that any such agreement would have been made as a matter of grace rather than of right, for by that time — more than two months after the log had been served — any privilege not asserted would have been waived. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992); *Safeco Ins. Co. v. Rawstrom*, 183 F.R.D. 668 (C.D. Cal. 1998). Accordingly, the Court finds no enforceable agreement that the Plaintiff could raise the attorney-client and work-product privileges after the fact.

Thus, the issue before the Court is whether the deliberative process privilege protects these documents[1]. The Court finds it does not. As of the filing and briefing of this motion, the privilege had not been claimed by the proper personnel. It had been asserted by counsel, but controlling authority requires that it be asserted by the department head, after actual personal consideration. *United States v. Reynolds*, 345 U.S. 1, 7 (1953); *see also Breed v. United States District Court*, 542 F.2d 1114, 1115 (9th Cir. 1976).

Late in the afternoon of April 26, 2002, the Friday before the Monday hearing, Plaintiff submitted the "Declaration of EEOC Chairperson." In that declaration, the chair of the EEOC declares that she has reviewed the documents and portions of documents described in an Exhibit to the Declaration, that they contain "predecisional analyses, recommendations, and conclusions of Commission investigatory and legal personnel," that disclosure of the documents would inhibit the free expression of opinions by EEOC employees, thereby impairing the EEOC's ability to enforce the statutes, and that

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[1] The Court excepts from this ruling documents covered by Category 49. At oral argument, the EEOC represented that, at the time it prepared the log, it had been unable to determine who had written those documents, but had just recently discovered they were written by one of its attorneys. The Court accepts the EEOC's representation, finding it preferable, in this one instance, to allow amendment to cure a pure mistake than to have had the EEOC assert the attorney-client privilege in the first place without knowing that it applied.

on behalf of the EEOC she claims the deliberative process privilege. The document is dated April 26, 2002, in Washington, D.C., the same date that it was filed in this Court.

The Declaration is, of course, late by any standard. It was not served with the Joint Stipulation, nor with the Supplemental Memorandum, nor did the EEOC even suggest it was coming or request leave to file it late. Counsel's oral explanation of the process which produced the declaration gives little comfort, to counsel who brought the motion, or the Court who considered it, who rely on the rules to formulate and assess the issues. Far more importantly, however, the explanation raises a substantial question about use of the privilege itself. It appears that, had Defendants not challenged the assertion of the privilege, the head of the department never would have seen the contested documents, notwithstanding that the privilege can be claimed *only* by the head of the department.

Despite the tardiness and troubling questions raised by the procedures, however, the Court will assume for the purposes of its ruling that the EEOC had claimed the privilege in time. Even if timely claimed, however, this is an uncomfortable fit for application of the privilege. Plaintiff, a governmental entity, brings an action on the basis of an investigation it conducted. The entire purpose of conducting the investigation was to determine if an action should be brought. The investigation was not conducted to make decisions about policies of the EEOC, either grand or small, such that shielding the information protects the ability of government personnel to discuss matters freely. *See Maricopa Audobon Society v. U.S. Forest Service*, 108 F.3d 1089, 1093 (9th Cir. 1997) (defining deliberative process privilege); *EEOC v. Citizens Bank and Trust of Maryland*, 117 F.R.D. 366 (D. Md. 1987).

In the abstract, the protection of investigative and similar sources, in the context of an anticipated lawsuit, may well be subject to the attorney-client or work-product privileges. Indeed, in descriptions of documents withheld, the EEOC chair consistently alludes to "mental processes" of investigators, or attorney's notes, or notes of discussions with attorneys. But the deliberative process privilege is a privilege separate

and distinct from the attorney-client or work-product privilege. It is one designed to allow government to function in the process of deliberating governmental policies and, by its requirement that it may be claimed only by the department head, to be used sparingly. The EEOC's use of the privilege would make it apply to every case the EEOC brings.

The Court accordingly finds that the deliberative process privilege does not apply here. Therefore the motion is granted. Plaintiff shall submit for inspection and copying (or provide copies, if that has been the understanding of the parties as to the method of production) the documents listed on its privilege log as Log Nos. 4, 6, 21, 26, 27, 28, 29, 32, 33, 34, and 52-61.

IT IS SO ORDERED.

DATED: April 29, 2002

RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE