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U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street, Suit8 900
Cincinnati, Ohio 45202

In the Matter of

COMMONWEALTH OF KENTUCKY
CABINET

Complainant

v.

UNITED STATES DEPARTMENT
OF Labor

Respondent

Date: June 29, 1994

Case No. 93-JTP-4

ORDER REGARDING MOTIONS TO COMPEL

This claim arises under the Job Training Partnership Act (JTPA), *29* U.S.C. §§ 1501-1781, and its implementing regulations, which are contained in 20 C.F.R. Part 626 et seq. Both parties to the dispute have objected to the sufficiency of certain discovery responses made by the opposing party, and, as a result, there are presently before me Motions to Compel filed by each party. After fully considering the requests and *responses* of each party, together with the motions and their supporting memoranda, I hereby make the following rulings with respect to each of the motions:

I. The Grant Officer's Motion to Compel:

On July 29, 1993 the Grant Officer filed a Motion to Compel requesting that the Complainant, Commonwealth of Kentucky Cabinet (hereinafter "Grantee") be ordered to respond to certain discovery requests. The Grantee filed a Response to the Motion with this office on August 19, 1993. Subsequently, the Grant Officer filed a Response to the Grantee's Response on August 30, 1993. Each of the issues raised in the Grant Officer's Motion will be dealt with in turn.

Before proceeding to the specific issues, a word on the scope of discovery is in order. The regulation concerning the scope of discovery provides:

> [T]he parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. ...
>
> It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

29 C.F.R. § 18.14. *See also* Fed. R. Civ. P. 26(b)(l). The regulations adopt the broad federal definition *of* relevancy, providing:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

29 C.F.R. § 18.401. See also Fed, R. Evid. 401. The Advisory Committee purposely adopted a lenient standard, reasoning that "a brick is not a wall", and that "...[I]t is not to be supposed that every witness *can* make a home run." Fed. R. Evid. 401, Advisory Committee Notes. The Supreme Court has noted that "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact *in issue* . . . ." New Jersey v. T.L.O., 469 U.S. 325, 345 (1985).

In the context of discovery, the Court has emphasized that under the notice-pleading system adopted by the Federal Rules of Civil Procedure, discovery serves to define and clarify the issues. To this end, the word *'relevant", as used in the discovery context, is even more broadly construed, and discovery is not limited to the issues raised by the pleadings, or even to the merits of the case. See Oppenheimer Fund, 437 U.S. 340, 351 (1978) ("'[R]elevant'. . . has been construed broadly to include any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case . . . ."). It is against this background, then, that I consider the Grantee's relevancy objections.

The regulations provide that where a Motion to compel discovery is filed, the administrative law judge may; in his or her discretion, exercise the same control over discovery as though a Motion for a protective order had been filed. 29 C.F.R. §§ 18.15, 18.21. A party resisting discovery bears the burden of showing the necessity of a protective order. Such a showing requires "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." General Dynamics v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973). Generalized complaints of undue burden are unavailing, as the objecting party "must show specifically how each interrogatory is not relevant or how each question is overly broad, burdensome *or* oppressive." Josephs v. Harris Corp., 677 F.2d 985, 991-92 (3d. Cir. 1982).

A. Request for Admissions Number Three:

The Grant Officer's Request Number 3 seeks an admission that, during the negotiation of the subject contract, Toyota requested that the contract contain no mention of the JTPA. The Grantee objected to the statement on the grounds that it is irrelevant.

The instant dispute centers around the issue of whether JTPA funds were improperly used to fund the Toyota contract. If the negotiations leading up to the contract have any bearing on that issue, or could lead to other matter which has any bearing on that issue or any other issue which could be raised in this matter, then they are sufficiently relevant to be discoverable. The understanding of the parties to the contract as to how or whether JTPA funds were to be used clearly bears on, and could lead to further evidence which bears on, the issue of whether the use of JTPA funds in the Toyota project was proper. Therefore, the Grantee's objection as to Request Number 3 is overruled.

B. Request for Admission Number Four:

Request Number 4 was identical to Number 3, with the exception that the word "insisted" was substituted for the word "requested." The Grantee objected on the grounds of relevancy, and that the term "insisted" is vague and ambiguous. For the same reasons expressed with regard to number 3, the Grantee's contention of irrelevance is without merit. In addition, the term "insisted" is neither vague nor ambiguous'. The Grantee's objections as to Request Number 4 are overruled.

C. Request for Admission Number Five:

Request Number 5 states: "Toyota refused to consider the project in Kentucky as part of a JTPA program and insisted on hiring only the most qualified individuals for its new automotive plant." The Grantee objected on the grounds of relevance and that the terms "refused to consider" and "insisted" are vague and ambiguous. The JTPA's purpose is to assist untrained and under-trained individuals in obtaining jobs, and Toyota's willingness to employ and train such individuals has relevance to the issue of whether the Grantee properly used JTPA funds. Again, I find no vagueness or ambiguity in the terms of the request. The Grantee's objections as to Request Number 5 are overruled.

D. Request for Admission Numbers Nineteen and Twenty:

Request Numbers 19 and 20 seek admissions that JTPA eligible and similarly situated non-JTPA eligible workers at Toyota and Budd received identical training. Again the Grantee objected on the grounds the requests are vague, ambiguous, and irrelevant. The

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[1] The Advisory Committee's notes to the 1993 amendments to the Federal Rules of Civil Procedure caution that "[i]nterrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request. . . ." Fed. R. Civ. P. 37 advisory committee's note.

Grantee's relevance objection is based upon its contention that §141(b) of the JTPA participants be trained differently from other employees. Whether or not the JTPA requires different training for participants, the training given could have some bearing on the issue of whether JTPA funds were properly used to fund the Toyota project.

The Grantee's objections that the requests *are* vague and ambiguous due to the use of the phrase "similarly situated individuals" are also without merit. The Grant Officer noted in his response, and I agree that, simply understood, the phrase "similarly situated" refers to individuals being trained for identical or similar jobs. The Grantee's objections as to Request Numbers 19 and 20 are overruled.

E. Request for Admission Numbers Twenty-Six and Twenty-Eight:

Request Numbers 26 and 28 seek admissions that Toyota and Budd were reimbursed through an internal accounting transaction in the offices of the Grantee. The Grantee objected on the grounds of relevance. The method of reimbursement employed by the Grantee could have some bearing on the issue of whether a qualifying program was in place, or at the very least, could lead to other evidence concerning that issue. Therefore, it is sufficiently relevant to be discoverable, and the Grantee's objection as to Request Numbers 26 and 28 is overruled.

F. Request for Admission Numbers Thirty-One and Thirty-Two:

Request Numbers 31 and 32 seek admissions that the training costs for JTPA eligible individuals at Toyota and Budd were identical to those for similarly situated non-JTPA eligible individuals. The Grantee objects to the requests as being vague, ambiguous and irrelevant. The Grantee notes that Section 141(g) provides that payments for on-the-job training are deemed to be compensation for extraordinary training expenses. To obtain discovery, however, the Grant Officer need not prove that the Grantee violated Section 141(g). The training costs of the JTPA eligible employees as compared to non-JTPA eligible employees could have some bearing on whether JTPA funds were properly used for the projects in question. Therefore, information regarding such costs is discoverable. For the reasons expressed in relation to Request Numbers 19 and 20, the phrase "similarly situated" is neither vague nor ambiguous. The Grantee's objections as to Request Numbers 31 and 32 are overruled.

G. Interrogatory Number 5(a),(c) and (d):

Interrogatory Number 5, in various parts, seeks information concerning-the System Design Contractor ("SDC") employed by the Grantee. Specifically, it seeks information concerning the SDC's

expertise and program, and whether the same SDC worked on an unrelated JTPA project in Indiana. The Grantee objects to three subparts of the interrogatory as being irrelevant.

The question of which costs of the project were properly chargeable to JTPA funds is central to this dispute. The reasonableness of the costs charged by the SDC could become an issue in this case, or at the very least, could have some bearing on the question of whether JTPA funds were properly used. Therefore, discovery may be had concerning the issue. The Grantee's objection as to Interrogatory 5 (a), (c) and (d) is overruled.

H. Interrogatory Numbers Six and Seven:

Interrogatory Numbers 6 and 7 request information and the identification of documents concerning oversight and monitoring done by the Grantee of the assessment process. The Grantee objects on the grounds of relevance. The JTPA places upon grantees the responsibility of ensuring that JTPA grant funds are properly spent by subgrantees. Therefore, the sufficiency of the Grantee's monitoring could become an issue in this dispute. Any information which could bear on that issue is relevant and discoverable. The Grantee's objection as to Interrogatories 6 and 7 is overruled.

I. Interrogatory Number 12(a):

Interrogatory Number 12(a) asks the Grantee to identify all documents discussing when and how the JTPA eligibility determination was to be made. The Grantee objects on the grounds of relevance and that the identification of such documents would be unduly burdensome. Since the JTPA requires grantees to perform monitoring and oversight functions, information concerning the manner and timing of the eligibility determination is clearly relevant and discoverable.

As to the second objection, the Grantee offered to provide documents concerning the eligibility determination of all 15,575 applicants to the Grant Officer for inspection. The interrogatory, as written, seems more general, however, and requests the identification of documents concerning the eligibility determination process itself, rather than its application to each potential employee. Identification of such documents would not be unduly burdensome. To that extent, the Grantee's objections to Interrogatory Number 12(a) are overruled.

If the Grant Officer does seek information concerning the eligibility determination as to each potential employee, the Grantee's objection of undue burden has merit. To the extent the Grant Officer seeks such information, the Grantee need only provide the Grant Officer with access to the documents for inspection at such reasonable times as agreed upon by the parties.

J. Interrogatory Number 13(b):

Interrogatory Number 13(b) requests information, either through percentages or specific numbers, as to when the eligibility determinations were made. The Grantee again offered to provide individual records for inspection, but objected to the request otherwise as being vague and ambiguous. While the interrogatory could have been more clearly worded, it is not so unclear as to be vague or ambiguous. It asks for a statement, either in percentages or in raw numbers, of the stage at which the eligibility determinations were made concerning the applicants. The Grantee may have some leeway in defining "stages", but its response, at a minimum, should classify percentages in relation to (1) hiring; (2) training; and (3) the reimbursement to Toyota of assessment costs. To this extent, the Grantee's objections to Interrogatory 13(b) are overruled.

If the Grant Officer seeks information as to when each individual eligibility determination was made, it will be sufficient for the Grantee to simply provide the Grant Officer with the appropriate documents for inspection at such reasonable times as agreed upon by the parties.

K. Interrogatory Numbers 23(a) and (c) and 35(a) and (c):

Interrogatory Number 23(a) and (c) requests a description of the monitoring and oversight of individual on-the-job training placements done by the Grantee, and the identification of documents concerning such oversight. Interrogatory Number 35 makes similar requests regarding the Grantee's monitoring of such placements at Budd. The Grantee objects on the grounds of relevance and that the identification of such documents would be unduly burdensome.

As to relevance, since the JTPA places certain monitoring and oversight obligations upon grantees, the oversight provided may be an issue in this case. Evidence concerning the oversight could also reasonably be expected to lead to additional evidence concerning other issues. As a result, the information is relevant and discoverable.

The identification of documents addressing how the overall process of monitoring and oversight was to be conducted would not be unduly burdensome. To that extent, the Grantee's objections as to Interrogatories 23(a) and (c) and 35(a) and (c) are overruled. If the Grant Officer seeks information as to the monitoring performed as to each individual placement, the Grantee need only provide the appropriate records for inspection at such reasonable times as agreed upon by the parties.

L. Interrogatory Numbers 24 (a) and (b) and 36(a) and (b):

Interrogatory 24(a) and (b) requests a description of the ways in which JTPA eligible individuals were trained differently than non-JTPA eligible individuals, and a description of what, if any, extraordinary costs were incurred in training the JTPA eligible individuals. The Grantee objects to both parts as being vague, ambiguous and irrelevant. For the same reasons as expressed with regard to Request for Admissions Numbers 19 and 20, and 31 and 32, these interrogatories are neither vague, ambiguous nor irrelevant. The Grantee's objections as to Interrogatories 24(a) and (b) and 36(a) and (b) are overruled.

M. Interrogatory Numbers Twenty-Seven and Thirty-One:

Interrogatory Numbers 27 and 31 seek information regarding the hiring criteria used by Toyota and Budd. Specifically, they ask whether JTPA eligibility was taken into account in the hiring decision, and for the identification of documents discussing how and whether JTPA eligibility was to be taken into account by Toyota and/or Budd. The Grantee objects to the interrogatories as being irrelevant.

Information concerning whether Toyota used, or was instructed to use, JTPA eligibility as a factor in its hiring decision could certainly bear on the issue, or lead to additional evidence on the issue of whether the use of JTPA funds in the project was appropriate. Therefore, such information is discoverable, and the Grantee's objection as to Interrogatories 27 and 31 are overruled.

II. The Grantee's Motion to Compel:

On September 3, 1993 there was filed with this office a Motion to Compel by the Grantee, seeking an order compelling the Grant Officer to respond to certain of its Interrogatories and Document Production Requests. The Grant Officer filed a Memorandum in Opposition to the Grantee's Motion to Compel on January 18, 1994. Subsequently, the Cabinet filed a Reply to the Grant Officer's Memorandum in Opposition on January 31, 1994. I have fully considered the positions of the parties, and will deal with each objection and claim of privilege in turn.

A. Interrogatory Numbers 22(a), (b) and (c) and 23(a), (b) and (c):

Interrogatory Numbers 22 and 23 ask the Grant Officer to describe any communication conducted between the Grant Officer and the public, the news media, and non-Department of Labor (DOL) federal employees, respectively, concerning the Toyota Project and the Budd Project, respectively. The Grant Officer objects to the interrogatories as being irrelevant. As with the Grant Officer's Motion to Compel, the same broad standard of relevancy applies to

discovery requests by the Grantee. See 29 C.F.R. § 18.14. The Grantee is entitled to discovery concerning any matter which bears on, or which could reasonably lead to other matter which could bear on, any issue which is or may be in the case. Conversations the Grant Officer had with others concerning the projects could reasonably have some bearing on the issues in this case, and could also reasonably be expected to lead to other evidence.

The Grant Officer's Memorandum in Opposition also raised the objection that the interrogatory is overbroad, an objection which was not made in the original response. The Grantee argues that by failing to raise the overbreadth objection initially, the Grant Officer cannot challenge the interrogatory on that ground now. Under the 1993 amendments to the Federal Rules of Civil Procedure ("Federal Rules"), it is clear that all grounds for objection not raised in the initial response are considered waived.[2] The procedural regulations governing these proceedings, however, have not yet been amended to track the language of the revised Federal Rule. See 29 C.F.R. § 18.18. In any event, I find that the Grant Officer's contention of overbreadth to be without merit. It is ludicrous to contend that because the Grant Officer may not be able to remember every such conversation, he is excused from describing any such conversation. The Grant Officer has a duty to make good faith efforts to describe any such conversations which are remembered, and in addition, to search for any memoranda summarizing any such conversation.

I note that the Grant Officer partially responded to this interrogatory in his Memorandum in Opposition. To the extent that he possesses additional information responsive to the interrogatory, he is directed to respond. The Grant Officer's objection to Interrogatory 22 is overruled.

B. Interrogatory Number Twenty-Four:

Interrogatory Number 24 requests the identification of any document describing or referring to the communications described in Interrogatory Numbers 22 and 23. The Grant Officer objects on the ground of relevance. Just as the communications themselves are sufficiently relevant to be discoverable, documents referring to such communications are relevant. I note that the Grant Officer states that he is "not aware" of any such documents in his Memorandum in Opposition. Such a conclusory assertion is insuffi-

[2] As amended, the rule provides, in relevant part that "[a]ll grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." Fed. R. Civ. P. 33(b)(5) (eff. December 1, 1993).

cient to fulfill the Grant Officer's discovery responsibilities. Efforts should be made to identify such documents, and, at the very least, such efforts should be briefly described in the Grant Officer's response. The Grant Officer's objection to Interrogatory 24 is overruled.

c. Interrogatory Number Twenty-Five:

Interrogatory Number 25 requests other DOL audit reports and determinations discussing the propriety of using JTPA funds for the recruitment, assessment, selection and training of workers. The Grant officer objects that the interrogatory is irrelevant, overbroad and unduly burdensome. Initially, I note that documents concerning how the relevant JTPA sections are to be interpreted certainly could have some relevance to the issue of whether the Grantee's use of JTPA funds violated the JTPA in this case.

The Grant Officer's contention that the only issue in the hearing before the undersigned Administrative Law Judge is the propriety of the Grant Officer's Final Determination is not without some merit, however. The purpose of the hearing before an administrative law judge is to determine whether the Grant Officer's Final Determination disallowing certain of Kentucky's expenditures on the Toyota Project should be upheld. Audit determinations in unrelated cases are of very limited relevance to this case.

It is true that where disparate treatment of similarly situated parties is shown, an agency must provide a rational basis for its decision. Contractors Transport Corp. v. United States, 537 F.2d 1160, 1162 (4th Cir. 1976). If such a reasoned analysis is provided, however, an agency is entitled to change its policy. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied 403 U.S. 923 (1971) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . . ". In addition, the possible factual variations between unrelated JTPA programs are numerous. More generally, while the Administrative Procedure Act ("APA") provides for review of actions alleged to be arbitrary and capricious, such review is not available until final agency action has been taken. 5 U.S.C. §§ 704, 706. The regulations provide that the Secretary's decision[3]

[3]The JTPA provides that the parties have twenty days after the receipt of the administrative law judge's decision to file exceptions with the Secretary. 29 U.S.C. § 1576(b). If no such exceptions are filed, the administrative law judge's decision constitutes final action by the Secretary. Id.

constitutes final agency action. 20 C.F.R. § 636.11. Therefore, a challenge to the agency action before the Secretary has rendered a final decision would be premature.

The only relevance unrelated audit determinations would have to this case would be as evidence of how various provisions of the JTPA and its implementing regulations should be interpreted. In light of the broad definition of relevance, however, such information is sufficiently relevant to be discoverable.

The Grant Officer's objections of overbreadth and undue burden are more difficult. In support of his objection, the Grant Officer stated in his Response that DOL's documents are not indexed by subject matter with respect to the information requested; that the office of the Inspector General (OIG) has issued approximately 1500 JTPA audits, and the Employment and Training Administration (ETA) has issued approximately 400 final determinations disallowing costs; that each file constitutes some 300 pages; and that the files in question are located in regional offices around the country. The Grant Officer also notes that virtually every audit and final determination with JTPA Sections 141(a) and (b) and 20 C.F.R. § 629.37(a), all of which are broad, general provisions. The Grantee responded that less burdensome steps could be taken, such as circulating a memorandum to the regional offices asking for the identification of relevant audit reports, or reviewing just the "Executive Summary" portion of each audit report.

Initially, I note that discovery, by its very nature, is somewhat burdensome. In addition, it is improper for a party which oversees vast numbers of documents to fail to maintain an adequate indexing system, then to claim undue burden when asked to review its records. To allow such a tactic to succeed would frustrate the purposes of discovery as envisioned by the Rules; See, e.g., Kozlowski v. Sears, Roebuck and Co., 73 F.R.D. 73, 76 (D. Mass. 1976). I do find merit in the Grant Officer's contention that nearly every audit deals to some extent with the broad provisions cited by the Grantee in its interrogatory. After considering both parties' arguments, I find that it would be reasonable to require the Grant Officer to take the steps requested by the Grantee, in part. To that end, the Grant Officer shall circulate a memorandum to the relevant regional offices requesting that the "Executive Summary" portions of JTPA audits be reviewed to identify audits discussing the propriety of using JTPA funds for recruitment, assessment and selection of workers, or for on-the-job training. To the extent that the relevant files have been archived, the Grant Officer shall examine all such files to which he has access. The Grant Officer's objection to Interrogatory 25 is sustained in part and overruled in part. The Grant Officer is directed to respond to the interrogatory as modified herein.

D. Interroaatorv Number Twenty-Six:

Interrogatory 26 seeks the identification of any document, other than the documents referred to in Interrogatory 25, which states DOL's interpretation of JTPA Sections 141(a) and (b) or 20 C.F.R. § 629.37(a), or which states DOL's position concerning the propriety of using JTPA funds for the recruitment, assessment or selection of *workers,* The Grant Officer objects on the grounds of irrelevance, overbreadth, and undue burden. For the reasons expressed above in relation to Interrogatory 25, the Grant Officer's relevancy objection is without merit.

As to overbreadth and undue burden, the Grant Officer states that ETA frequently receives letters from states asking for interpretations of the JTPA, and that thousands of documents concerning the requests exist. The documents relating to the requests are arranged in files by date, and are not indexed by subject matter. The Grantee responds that the Grant Officer should be required to attempt to locate responsive documents, or in the alternative, that the Grantee be allowed to search the files for responsive documents.

As the documents are indexed by date, I find that it would be reasonable for the Grant Officer to search for responsive documents for the two year period prior to the Final Determination at issue here. As with Interrogatory 25, it is likely that nearly every such document would refer to the broad provisions of JTPA Sections 141(a) *or* (b) or 20 C.F.R. § 629.37(a). Therefore, the search shall be limited to documents which state the DOL's position concerning the propriety of using JTPA funds for the recruitment, assessment or selection of workers for on-the-job training. The Grant Officer's objections are sustained in part and overruled in part. The Grant Officer is directed to respond to the interrogatory as modified herein.

E. Interrogatory Number Twenty-Nine:

Interrogatory Number 29 asks for a description of any communications Donald Kulick of ETA had with any person(s) regarding the Toyota Project, and the identification of any document referring to such communications. The Grant Officer's Response identified, among other items, four responsive documents consisting of memoranda concerning the Toyota Project to and from Mr. Kulick. He refused to turn over the documents, however, claiming deliberative process privilege.

The so-called deliberative process privilege, which has been incorporated into the Freedom of Information Act' ("FOIA"), protects

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'See 5 U.S.C. § 552(b)(5).

from disclosure internal agency communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971). Purely factual material is not protected, but factual material may be protected if it is inextricably intertwined with deliberative processes. Id. The purpose of the privilege, as elaborated in the legislative history of the FOIA, is to encourage the frank discussion among agency personnel of legal and policy issues. S. Rep. No. 813, 89th Cong., 1st Sess. g (1965); See also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

To fall within the privilege, the materials must be both predecisional and deliberative. EPA v. Mink, 410 U.S. 73, 88 (1973); Wolfe v. Dep't of Health and Human Services, 839 F.2d 768, 774 (D.C. Cir. 1988). As explained in the declarations of Carolyn Golding[5] and Charles Masten[6], only the ETA, through the Grant Officer, has the power to disallow JTPA costs, and the OIG's audit reports are merely recommendations for the Grant Officer's Final Determination. The Grant Officer/s Final Determination in this case was issued on September 22, 1992 (Pre-Hearing Exchange of complainant, Exhibit 7). Therefore, each of the four documents at issue in relation to Interrogatory 29 are predecisional.

The documents must also be deliberative, reflecting the "give-and-take of the consultative process." Coastal States Gas Corp. v. Dep't of Energy 617 F.2d 854, 866 (D.C. Cir. 1980). The Grant officer's Response identifies four documents by author, date, and in the broadest terms, subject.' It is impossible to tell, from the cursory description given, whether the documents contain "advice, recommendations, opinions and other material reflecting deliberative .. . processes." See Soucie, supra, 448 F.2d at 1077.

The Federal Rules of Civil Procedure were amended in 1993 to further address claims of privilege. Rule 26(b)(5) now provides:

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[5]Ms. Golding is the Deputy Assistant Secretary for the ETA within the Department of Labor.

[6]Mr. Masten is the Inspector General of the Department of Labor.

'Some documents are also described by their addressee. In general, the descriptions provided for these documents, and also for the documents in the Grand Officer's Privilege Log, are very similar to those rejected in Coastal States by the District of Columbia Circuit as "patently inadequate." Coastal States Gaw Corp., supra, 617 F.2d at 866.

> **Claims of Privilege or Protection of Trial Materials.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged ... the party shall make the claim expressly and describe the nature of the documents, communications, or other things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege ....

Fed.R.Civ. P. 26(b)(5) (eff. Dec. 1, 1993). The purpose of the amendment was to reduce the need for burdensome in camera inspections by the court. See Fed. R. Civ. P. 26 advisory committee's note; See also Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973).

The procedural regulations governing the instant proceedings have not yet been updated to reflect the change in the Federal Rules. 29 C.F.R. § 18.14. Nevertheless, case law has long recognized the ability of a court to order a more extensive description of documents withheld as privileged. See Vaughn, 484 F.2d at 828 (requiring government to ((justify in much less conclusory terms" its assertion of exemption); Mead Data Central, Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977) ("[W]hen an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply."); See also 29 C.F.R. § 18.29.

Therefore, the Grant Officer is instructed to prepare and submit to the undersigned, within thirty (30) days of the receipt of this Order, a more complete description of -the documents described in his Response to Interrogatory 29. The revised Federal Rule 26(b)(5), as set forth above, should be used as a guide in preparing such descriptions.

F. Document Production Request Number Two:

Document Production Request 2 seeks the production of all documents referring to or concerning the Toyota or Budd Projects. The Grant Officer objects to the Request on the grounds that it is irrelevant, overbroad, and unduly burdensome. For the reasons expressed above in relation to Interrogatories 22 and 23, I find that the requested documents are sufficiently relevant to be discoverable. The request is sufficiently tailored, asking for documents referring to the projects at issue, so as not to be overbroad. Finally, the Grant Officer's assertion that the request is unduly burdensome is likewise without merit. The Grant Officer cannot seriously. contend that the Grantee should be required to rely on the Grant Officer's "speculat[ion] that the bulk of the documents are in the Cabinet's possession." The Grant Officer has

a duty to undertake good faith efforts to produce responsive documents. The Grant Officer's objection to Document Production Request 2 is overruled.

G. Document Production Request Number Seven:

Document Production Request 7 seeks the production of all documents relied upon in preparing the audits and determinations. The only dispute concerns the Grant Officer's withholding of sixteen pages of "internal workpapers and audit report review sheets" claimed to be protected by the deliberative process privilege.

The Grant Officer submitted the declaration of Charles Masten, Inspector General of the Department of Labor, which describes these papers in some detail. The papers are part of an "internal workpaper review" by OIG staff, consisting of an internal review of the auditor's work papers. Based on the description, I find that the papers are of the type protected by the deliberative process privilege. Supra, Section II E.

This does not end the matter, however, because the deliberative process privilege is a qualified one. Even if the privilege applies, a litigant may obtain the materials if his or her need for the materials and the interest in accurate fact-finding outweigh the governments interest in non-disclosure. FTC v. Warner Communications, 742 F.2d 1156, 1161 (9th Cir. 1984) (setting out four-factor analysis). In this case, the requested materials are certainly relevant. However, the Grantee has access to both the draft and final audit reports, and can conduct its own critique of the audit. More importantly, if such the disclosure of such material were to be compelled, it would undoubtedly hinder frank and independent review of such audits. Therefore, I- find that the materials at issue are protected from disclosure. The Grant Officer's objection to Document Production Request 7 is sustained, and discovery of the materials shall not be had. 29 C.F.R. § 18.21(d).

H. The Grant Officer's Privileae Log:

Finally, the Grant Officer has withheld from discovery some thirty-six documents*, as listed in his "Privilege Log". The Grant Officer contends that all of the documents are protected by the deliberative process privilege, and that three of the documents are also protected by the attorney-client privilege.

*Seven documents claimed as privileged in the Grant Officer's original Response were released after further consideration by the Grant Officer at the time of filing of his Memorandum in Opposition.

As with the Grant Officer's response to Interrogatory 29, I am unable to determine from the descriptions provided whether or not the documents are covered by the privilege. Therefore, as with Interrogatory 29, there is a need for the Grant Officer to provide a more detailed description of each document withheld, together with an explanation of why the asserted privilege should apply.

Therefore, the Grant Officer is instructed to prepare and submit to the undersigned, within thirty (30) days of the receipt of this Order, a more complete description of the documents at issue which are listed on his Privilege Log. The revised Federal Rule 26(b)(5) , **as** set forth above, should be used as a guide in preparing such descriptions.

IT IS HEREBY ORDERED that the Motions to Compel filed by the Complainant, Commonwealth of Kentucky Cabinet, and the Respondent, United States Department of Labor, are each GRANTED IN PART, AND DENIED IN PART, as described herein. The parties shall continue and complete the discovery process in accordance with the findings made above.

DANIEL J. ROKETENETZ
Administrative Law Judge