

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12064

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 5, 2005

In the Matter of	:	
	:	ORDER GRANTING MOTION FOR
GREGORY M. DEARLOVE, CPA	:	AN ITEMIZED PRIVILEGE LOG
	:	
	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on September 30, 2005. The hearing is scheduled to begin on January 23, 2006.

On October 25, 2005, the Division of Enforcement (Division), in compliance with my Order of October 14, 2005, filed and served a privilege log. As permitted by Rule 230(c) of the Commission's Rules of Practice, the Division identified only categories of documents withheld from inspection and copying, and not the individual documents withheld. The Division provided Respondent Gregory M. Dearlove, CPA (Dearlove), with a revised privilege log on November 10, 2005. However, the Division did not file a copy of its revised privilege log with the Office of the Secretary.

Rule 230(c) grants a presiding Administrative Law Judge discretion to determine when a privilege log identifying documents by category is insufficient. By pleading dated November 21, 2005, Dearlove urges me to exercise that discretion here.¹ He claims that the Division has failed to provide sufficient information for him to determine whether the Division has properly invoked privilege with respect to certain categories of documents. Dearlove also seeks production of other categories of withheld documents on the grounds that the Division did not establish a basis for the specific privileges claimed. The Division has filed a memorandum of law in opposition to Dearlove's motion.

I grant Dearlove's motion for an itemized privilege log. I deny Dearlove's motion to require production of documents at this time. However, Dearlove may renew that motion after the Division has filed an itemized privilege log.

¹ Dearlove provided a copy of the Division's revised privilege log with his motion.

In its present form, the Division's original and revised privileges logs are of limited value. For example, the Division repeatedly claims privilege for such items as "attorney working sets of produced documents," "working copies of investigational testimony transcripts," and "attorney working sets" of Adelpia Communications Corporation's publicly available Forms 10-Q and 10-K. If clean copies of the documents in question have already been made available to Dearlove, the fact that additional, marked-up copies of the same documents may exist is irrelevant and a claim of privilege for the marked-up copies is superfluous.

The Division's position with respect to the invocation of specific privileges is also troubling. The October 25 and November 10 privilege logs identify only three reasons for withholding documents: work product privilege, common interest privilege, and a confidential source exception to production. Dearlove's motion analyzed the case law applying the common interest privilege, and the Division's opposition made only a cursory effort to defend its invocation of that privilege. However, the Division then stated (emphasis added):

The documents withheld may also be protected from disclosure by other privileges, including the deliberative process privilege. The Division submits this opposition without prejudice to its right to assert such other privileges.

The case law does not support the Division's claim of a "right" to assert claims of privilege seriatim. See Maydak v. U.S. Dep't of Justice, 218 F.3d 760, 764-68 (D.C. Cir. 2000) ("We have plainly and repeatedly told the government that, as a general rule, it must assert all [Freedom of Information Act] exemptions at the same time. . . ."); Ray v. U.S. Dep't of Justice, 908 F.2d 1549, 1557 (11th Cir. 1990); Senate of the Commw. of Puerto Rico v. U.S. Dep't of Justice, 823 F.2d 574, 580-81 (D.C. Cir. 1987); Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1342 n.8 (D.C. Cir. 1984) ("[W]e [have been] emphatic in our rejection of the assertion of privileges piecemeal from time to time in the course of litigation.").

If the Division is asking me to exercise my discretion to permit it to assert additional privileges, it must file an appropriate motion, accompanied by an affidavit from its lead attorney. That affidavit must explain with particularity why the Division failed to invoke all applicable claims of privilege at the outset. The motion must address the concerns enunciated in Maydak, Ray, Senate, and Friedman. Dearlove may oppose any such motion, and I will rule on the matter before the Division files and serves its revised privilege log.

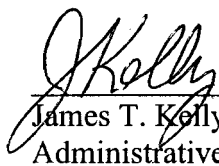
It is premature to consider Dearlove's request for the production of redacted documents at this time. Specifically, it is unclear if factual or otherwise nonexempt material can reasonably be separated from exempt material. That issue and others can be considered after the Division has filed and served a more detailed privilege log and invoked all applicable privileges.

IT IS ORDERED THAT the Division shall show cause, on or before December 8, 2005, why it should not be precluded from relying on privileges not previously identified. The Division's response to the show cause order shall be accompanied by the affidavit of its lead attorney, explaining with particularity why the Division failed to invoke all applicable claims of privilege at an earlier date. The Division's response to the show cause order shall also address the concerns set forth in Maydak, Ray, Senate, and Friedman. Finally, the Division's response to

the show cause order must identify each of the new privileges it expects to assert. If Dearlove intends to oppose the Division's motion, he must do so by December 13, 2005. If the Division intends to reply to Dearlove's opposition, it must do so by December 15, 2005.²

IT IS FURTHER ORDERED THAT, on or before December 19, 2005, the Division must file and serve a revised privilege log, itemizing each individual document withheld from inspection and copying. The individual documents shall be sequentially numbered, and shall be identified by author, addressee, title, date, length, subject matter, and claimed privilege(s). The Division shall also identify all persons outside the Division who are known to have received copies of the documents.

IT IS FURTHER ORDERED THAT Dearlove may renew his motion to compel the production of specific documents after the Division has submitted its itemized privilege log on December 19, 2005.


James T. Kelly
Administrative Law Judge

² Barring unforeseen circumstances, I will issue a ruling by December 16, 2005. If I am unable to do so, I will issue an Order postponing the due date of the revised privilege log.