UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
PIEDMONT HEALTH ALLIANCE, INC., a corporation,	)	Docket No. 9314
and	)	
PETER H. BRADSHAW, M.D., S. ANDREWS DEEKENS, M.D., DANIEL C. DILLON, M.D., SANFORD D. GUTTLER, M.D., DAVID L. HARVEY, M.D., JOHN W. KESSEL, M.D., A. GREGORY ROSENFELD, M.D., JAMES R. THOMPSON, M.D., ROBERT A. YAPUNDICH, M.D., and WILLIAM LEE YOUNG III, M.D., individually.	)	

ORDER DENYING RESPONDENT PIEDMONT HEALTH ALLIANCE'S MOTION TO LIMIT OR QUASH SUBPOENA *DUCES TECUM* TO ORLIKOFF & ASSOCIATES

I.

On February 13, 2004, Respondent Piedmont Health Alliance ("PHA") filed a motion to limit or quash the subpoena *duces tecum* ("Subpoena") issued to Orlikoff & Associates, Inc., a non-party to this proceeding. The Subpoena was issued by Complaint Counsel on January 30, 2004 to Orlikoff & Associates, Inc., consultants to PHA, and demands that Orlikoff & Associates produce a letter that it received from PHA, dated March 12, 2001 ("March 12 letter"). Respondent contends that the March 12 letter contains privileged communications between PHA and its attorneys.

Complaint Counsel filed its opposition on February 23, 2004. Complaint Counsel asserts that PHA waived privilege by disclosing the information at issue to James Orlikoff ("Orlikoff"), a third party, and that PHA waived privilege by inadvertently disclosing the March 12 letter to

the Federal Trade Commission ("FTC"). Complaint Counsel relies, in part, on the declaration of James Orlikoff, President of Orlikoff & Associates, Inc. ("Orlikoff Decl.").

On February 26, 2004, Respondent filed a motion for leave to file a reply and on the same date filed its reply. In its reply, Respondent supports its argument that there was no waiver of privilege by disclosure to Orlikoff based, in part, on a declaration of Sharon Alvis. Respondent also addresses Complaint Counsel's argument regarding waiver by inadvertent disclosure to the FTC.

On March 1, 2004, Complaint Counsel filed an opposition to PHA's motion for leave to file a reply, objecting that the reply exceeded the page limit established in the Scheduling Order and that the reply included new evidence in the form of the Alvis declaration.

On March 2, 2004, PHA filed an amended reply in compliance with the page limits established in the Scheduling Order.

Respondent's motion for leave to file a reply is GRANTED.

For the reasons set forth below, Respondent's motion to limit or quash subpoena *duces tecum* to Orlikoff is DENIED.

II.

Respondent contends that the information at issue in the March 12 letter is entitled to protection under the attorney-client privilege. Respondent further asserts that the attorney-client privilege was not waived by disclosing this document to Orlikoff based on his work with PHA. Respondent alleges that PHA maintained the confidentiality of the information by limiting its disclosure to Orlikoff, a consultant who (a) needed to know the confidential information contained in the letter to fulfill his duties with PHA; (b) worked closely with PHA staff and Board members to formulate a framework for a new strategic plan; and (c) was given the information with the understanding that Orlikoff would maintain its confidentiality. On these grounds, Respondent asserts the privilege was not waived and moves to limit the Subpoena to exclude the March 12 letter.

Complaint Counsel does not dispute that the content of the March 12 letter is privileged. Complaint Counsel contends, rather, that PHA waived any privilege by disclosing the March 12 letter to Orlikoff without ensuring confidentiality. Complaint Counsel attached a declaration from Orlikoff, in which Orlikoff indicates that the extent of his work for PHA, totaling no more than eighteen hours, was to prepare for and facilitate one-day retreats held for PHA Board members in April 2000 and March 2001. Orlikoff Decl. ¶¶ 5, 6, 8-11, 13. In the declaration, Orlikoff states: "I had no understanding that any part of these documents or communications were to be kept confidential, and I do not believe that I ever told anyone that I would keep the materials and information confidential." Orlikoff Decl. ¶ 16. Complaint Counsel also argues

that the March 12 letter, in which PHA's CEO summarizes issues facing the organization, was not marked confidential and there was no request in the March 12 letter that any information therein be kept confidential.

III.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the attorney-client privilege is to facilitate full and frank disclosure between attorneys and clients. *Id.* The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The "party claiming the privilege carries the burden of demonstrating that: (1) the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived." *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996). The "burden is on the party opposing discovery to show that the attorney-client privilege applies, and mere conclusory statements will not suffice to meet that burden." *Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 139 (N.D. Ill. 1993); *see also United States v. White*, 950 F.2d 426, 430-31 (7th Cir. 1991); *Alexander v. FBI*, 192 F.R.D. 42, 45 (D.D.C. 2000).

"It is vital to a claim of privilege that the communication have been made and maintained in confidence." *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). When privileged communications are disclosed to employees or consultants, the applicable standard is whether the documents containing the privileged communications were distributed on a need to know basis or to employees that were authorized to speak or act for the company. *FTC v. GlaxoSmithKline*, 294 F.3d 141, 147 (D.C. Cir. 2002) (quotes omitted). In *Glaxo*, the D.C. Circuit explained that the "[c]ompany's burden is to show that it limited dissemination of the documents in keeping with their asserted confidentiality." *Id.* In upholding the privilege claims, the court found that GlaxoSmithKline's consultants were "bound . . . by a separate understanding, to keep confidential the contents of the documents." *Id.*

Respondent has not demonstrated that the confidentiality of the information at issue in the March 12 letter was maintained. Orlikoff's statement that he "had no understanding that any part of these documents or communications were to be kept confidential" confirms that the confidentiality of the communications was not effectively communicated to Orlikoff. *See* Orlikoff Decl. ¶ 16. In addition, the March 12 letter was not marked confidential when it was prepared and there was no request within the letter that any information therein be kept confidential. March 12 letter. Respondent has not demonstrated that, under the *Glaxo* standard, Orlikoff had a need to know the substance of the privileged communication from counsel. Respondent also has not demonstrated that sufficient protections were in place to avoid waiver of the attorney-client privilege when the information in the March 12 letter was disclosed to Orlikoff.

Because the motion to limit or quash is decided on the ground of waiver by disclosure to a third party, the issue of inadvertent disclosure need not be reached.

IV.

Both Respondent and Complaint Counsel filed pleadings improperly labeled "*in camera.*" A pleading shall not be labeled "*in camera*" unless it contains material that is subject to an *in camera* order. 16 C.F.R. § 3.45(a). Material is not "subject to an *in camera* order" unless a motion has been filed seeking *in camera* treatment for material to be offered into evidence at the trial in this matter and an order has been issued granting *in camera* treatment for such evidence. Pursuant to Rule 3.22(a) of the Commission's Rules of Practice, if a party includes in a filing information that is subject to confidentiality protections pursuant to a protective order, the party shall file two versions of the motion, a complete version, marked "Subject to Protective Order," and an expurgated version, marked "Public Record." 16 C.F.R. §§ 3.22(b); 3.45(b). All future motions should be filed in conformance with these rules.

For the reasons set forth above, Respondent's motion to limit or quash the subpoena *duces tecum* to Orlikoff is DENIED. This ruling does not constitute a finding that the information at issue is relevant, material, or dispositive of any issue in this case.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: March 16, 2004