

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Sept 24, 1998

In the Matter of
R.J. REYNOLDS TOBACCO COMPANY,
a corporation.

DOCKET NO. 9285

ORDER RE PRIVILEGE LOG

Respondent moves, without citing new law or facts, to reconsider the order denying respondent's motion to compel a more complete privilege log. Complaint counsel object, arguing that this issue has been decided in previous rulings.

Documents in complaint counsel's files¹ are subject to Rule 3.38A. Commission Rule 3.38A states, in part:

Any person withholding material responsive to a subpoena . . . shall assert a claim of privilege [and submit] a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.²

¹ Other offices of the Commission, being third persons to this litigation, and not parties, need not be specific in describing items withheld for privilege. Champion Spark Plug Company, Docket No. 9141, Order re Access to Documents, pp. 4-5 (December 16, 1980) (JPT No. 140); Flowers Industries, Inc., Docket No. 9148, Order Quashing Subpoena at note 3, page 2 (September 11, 1981) (JPT No. 150); Outdoor World Corp., Docket No. 9229, Order Quashing Subpoena (November 3, 1989) (JPT No. 141).

² The Federal Rules of Civil Procedure also cover this issue. Rule 26(b)(5) of the Federal Rules of Civil Procedure states that:

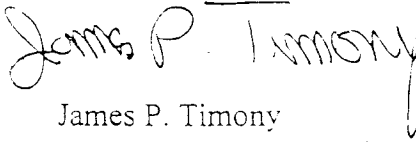
When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party . . . shall describe the nature of the documents . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Rule 45(d)(2) of the Federal Rules of Civil Procedure states that:

(continued...)

Complaint counsel must comply with Rule 3.38A, by providing information sufficient to identify each item responsive to a subpoena duces tecum, in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege. The administrative law judge retains the discretion to ease the requirements for privilege logs if a literal application of the rule would be unduly burdensome or if the administrative law judge's experience indicates that a description of a category of items (e.g., staff memos to the Commission recommending issuance of a complaint) is sufficient. Rule 3.42(c). Further, respondent was not able to explain how a more detailed privilege log would assist it in determining whether the privileges claimed were applicable to documents withheld. Burden of Producing Privilege Log, Michael C. Silverberg, 215 N.Y.L.J. 2, 3 (May 9, 1996). The privilege log submitted by complaint counsel, attached hereto, complies with Rule 3.38A.³

Having considered respondent Reynolds' motion for reconsideration or certification of my September 4, 1998 order denying Reynolds' "Motion to Compel the Production of a Complete Privilege Log" dated August 24, 1998, and complaint counsel's opposition thereto dated September 21, 1998, it is hereby ORDERED that respondent's motion for reconsideration is DENIED. Further, there is no basis for certification of this issue to the Commission for decision pursuant to the requirements of Rule 3.23(b). This issue does not involve a controlling question of law or policy as to which there is substantial ground for difference of opinion; an immediate appeal from the ruling will not materially advance the ultimate termination of the litigation; such an appeal might delay the imminent trial date; and subsequent review will afford an adequate remedy. Moreover, given my previous rulings, Reynolds' motion for review is untimely under Rule 3.23(b).


James P. Timony
Administrative Law Judge

Dated: September 24, 1998

2(...continued)

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

³ In the event that the categories of items withheld were unfamiliar to the administrative law judge or that respondent was able to explain how more detail would assist it in determining whether the privileges claimed were applicable to items withheld, without revealing information itself privileged, those items could be produced in camera to the administrative law judge for determination of the privilege. None of the items described on the privilege log requires such treatment.

ATTACHMENT A: PRIVILEGE LOG

AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE
BCP Staff and BCP Management	Commission	Memoranda recommending that the Commission issue a complaint against R.J. Reynolds Tobacco Co. alleging that the Joe Camel campaign was unfair	Deliberative process privilege; work product privilege
BCP Staff and BCP Management	Commission or individual Commissioners	Memoranda and other internal documents concerning the recommendation to issue a complaint	Deliberative process privilege; work product privilege
BE Staff and BE management	Commission or individual Commissioners	Memoranda and other internal documents concerning the recommendation to issue a complaint	Deliberative process privilege; work product privilege; non-testifying expert
GC Staff and GC management.	Commission or individual Commissioners	Memoranda and other internal documents concerning the recommendation to issue a complaint.	Deliberative process privilege; work product privilege.
BCP Staff	BCP Management	Memoranda, draft memoranda and other internal documents regarding the Joe Camel campaign and/or youth smoking or other issues concerning the recommendation to issue a complaint	Deliberative process privilege; work product privilege

AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE
BE Staff	BE Management	Memoranda, draft memoranda and other internal documents regarding the Joe Camel campaign and/or youth smoking or other issues concerning the recommendation to issue a complaint	Deliberative process privilege; work product privilege
GC Staff	GC Management	Memoranda, draft memoranda and other internal documents regarding the Joe Camel campaign and/or youth smoking or other issues concerning the recommendation to issue a complaint	Deliberative privilege; work product privilege.
Commission Attorneys and/or Other Commission Staff	Commission Attorneys and/or Other Commission Staff	Internal documents, including memoranda, notes, e-mail communications and facsimiles, regarding the Joe Camel matter or issues raised therein	Deliberative process privilege; work product privilege
Commission Attorneys and/or Other Commission Staff	None	Personal internal documents, including memoranda, notes, articles, or other writings regarding the Joe Camel matter or issues raised therein	Deliberative process privilege; work product privilege
Commission Attorneys	Commission Attorneys and/or Other Commission Staff	Notes, correspondence, e-mail communications, facsimiles, summaries or other documents concerning conferences, meetings or other discussions with experts regarding the Joe Camel matter or issues raised therein	Work product privilege; non-testifying expert

AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE
Commission Attorneys	None	Notes, summaries or other documents concerning conferences, meetings or other discussions with experts regarding the Joe Camel matter or issues raised therein	Work product privilege; non-testifying expert
Law Enforcement Agencies	Federal Trade Commission and/or staff of the FTC	Official requests under §§ 6(f) and 21(b) of the FTC Act seeking access to non-public information in connection with official law enforcement matters	Law enforcement privilege; work product privilege
Commission Attorneys and/or Other Commission Staff	Law Enforcement Agencies	Correspondence, notes or other writings prepared pursuant to or in connection with official requests under §§ 6(f) and 21(b) of the FTC Act seeking access to non-public information in connection with official law enforcement matters	Law enforcement privilege; deliberative process privilege and work product privilege
Commission Attorneys and/or Other Commission Staff	Commission Attorneys and/or Other Commission Staff	Memoranda, notes or other writings prepared pursuant to or in connection with official requests under §§ 6(f) and 21(b) of the FTC Act seeking access to non-public information in connection with official law enforcement matters	Law enforcement privilege; deliberative process privilege and work product privilege

AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE
Commission Attorneys and/or Other Commission Staff	Commission Attorneys and/or Other Commission Staff	Memoranda, notes or other writings prepared pursuant to or in connection with official requests from Members or Committees of Congress under § 6(f) and 21(b) of the FTC Act seeking access to non-public information in connection with official law enforcement matters	Deliberative process privilege
Experts	Commission Attorneys and/or Other Commission Staff	Resumes, correspondence, e-mail communications, facsimiles, articles, analyses, summaries or other writings concerning the Joe Camel matter or issues raised therein	Non-testifying expert; work product privilege
Commission Attorneys and/or Other Commission Staff	Experts	Correspondence, e-mail communications, facsimiles or other documents or writings concerning the Joe Camel matter or issues raised therein	Work product privilege; non-testifying expert