FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 29, 1992

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	: : :	MASTER DOCKET NO. 91-1

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY: The Commission

In this consolidated civil penalty and review proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(Mine Act), the Commission, on November 13, 1991, granted petitions for interlocutory review filed by the Secretary of Labor ("Secretary") and operators represented by the law firm of Jackson & Kelly ("contestants"). The proceeding before the administrative law judge arises from a dispute between the Secretary and approximately 500 operators alleged to have altered respirable dust samples. On April 4, 1991, the Mine Safety and Health Administration (MSHA) issued approximately 4,700 citations charging such alterations. The operators contested the validity of the citations. The judge issued a prehearing order which, inter alia, required the Secretary to compile a list of documents in her possession that may be relevant, including an itemized list of documents the Secretary claims to be privileged or otherwise nondiscoverable. In response thereto, the Secretary produced a Generic and Privileged Document List (Document List) which, in its amended form (September 25, 1991), contains a listing and description of 449 documents, including 67 documents the Secretary claims are privileged.

After receiving a series of discovery related motions from the parties, the judge issued three orders,[1] which required the Secretary to produce eight documents notwithstanding her claims of privilege and upheld the Secretary's privilege claims as to 52 documents. The Secretary filed a motion seeking the judge's certification of this case for Commission interlocutory review. The judge denied the motion. On October 21, 1991, the Secretary filed the instant petition for interlocutory review insofar as she is ordered to produce six of the eight documents.

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[1] The pertinent orders of the judge are dated: September 13, 1991, 13 FMSHRC 1573 (Order 1); September 27, 1991, 13 FMSHRC 1611 (Order 2); and October 7, 1991, 13 FMSHRC 1750 (Order 3).

Thereafter, contestants filed a petition seeking interlocutory review of the same three orders, asserting that the judge erred in upholding the Secretary's privilege claims as to 52 documents.

On November 13, 1991, the Commission granted both petitions for interlocutory review.

I. Secretary's Petition

The Secretary challenges the judge's rulings on two grounds: (1) that he erred in rejecting the Secretary's claim of deliberative process privilege, and, (2) that he erred in failing to rule on her claim of work product privilege.

A. Deliberative Process Privilege

In Order 1, the judge set forth a brief general explanation and description of the deliberative process privilege. The judge then specifically evaluated documents claimed by the Secretary to be within the deliberative process privilege, including each of the five documents presently claimed to be privileged (Nos. 3, 365, 366, 367, and 401). The judge determined that each of the five documents was privileged as part of the deliberative process of the agency.

In Order 2, the judge ordered the Secretary to disclose a number of privileged documents including the five in issue. In reaching his conclusion, the judge stated:

> Documents for which claims of 'executive privilege' or attorney work product privilege are upheld may nevertheless be ordered produced if necessary to the opposite party's case. In such a case, I must consider whether 'need for access to the documents, or any part of the documents, for purposes of this litigation must be overridden by some higher requirement of confidentiality.' (citations omitted.)

Order 2 at 4.

The judge also cited the Commission's decision in the case of Secretary of Labor/Logan v. Bright Coal Company, Inc., 6 FMSHRC 2520 (1984), noting that in considering whether documents protected by the "informer's privilege" should be ordered disclosed, the Commission placed the burden on the party seeking disclosure, requiring a showing that the information sought be essential to a fair determination of the case; that consideration should be given to whether the Secretary is in sole control of the material sought, and whether the party seeking disclosure has other avenues available to it to obtain the material.

In applying the foregoing, the judge concluded as to each of the five documents that "the material sought is, for the most part, in the sole

possession of the Secretary, and the operators do not have other means of obtaining it or its equivalent." Id. at 4, 5.

The judge also set out four guidelines by which he would determine whether "to order disclosure of privileged documents." Id. at 5. Only guideline three is pertinent here:

> Other documents for which the claim of executive privilege was upheld will be ordered disclosed to the extent that they are factual and deal with matters which are completed rather than those still pending.

The judge then considered each document separately, applying the aforementioned guideline and concluded as to Document 3 (and others not in issue):

> These documents were held privileged as part of the deliberative process. However, they appear to be factual in nature although in draft form. They are exclusively in the Secretary's control, and are clearly relevant and important, indeed are close to the core issue of this case. Since the final report has been prepared, these documents relate to a completed matter. I hold that their disclosure is essential to a fair determination of this case and this overrides the Secretary's interest in confidentiality. Id.
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> Documents 365, 366, 367
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> These documents do contain deliberations and opinions, but they precede the Report on sample filter abnormalities (Document No. 2), and therefore are related to a completed rather than a pending matter. Id.
>
> Document 401
>
> This is a draft of study PHTC prepared prior to the report identified as Document No. 1. For the reasons given in my discussion of Documents 365, 366 and 367, this document will be ordered disclosed. Id.

Accordingly, the five documents in issue were ordered disclosed. The Secretary filed a motion seeking reconsideration of Order 2. The Secretary also submitted the subject documents for in camera inspection.

The judge granted the motion for reconsideration, reviewed the documents in camera and issued Order 3, wherein he again ordered the disclosure of the five documents in issue.

The Secretary disputes the judge's determination to compel disclosure on

two grounds.

1. that the judge misapplied the law when he ordered disclosure of all documents that relate to a completed matter, erroneously assuming that the deliberative process privilege expires once the reports were completed.

2. that the judge erred in not requiring contestants to make a specific factual showing demonstrating that disclosure of the documents is essential to their defense. She asserts that in fact no such need exists because the operators have been provided with the final reports; they will have an opportunity to depose the Secretary's experts regarding the basis for their conclusions; and they will have the opportunity to cross-examine the experts at trial.

Contestants assert that the documents played no role in the development of agency policy, rules or regulations and that therefore the deliberative process privilege does not apply to the documents in issue. Contestants also argue that even if privileged, once incorporated by reference into the relevant report, the communications lose the privilege and are subject to discovery.

Contestants urge that the judge was correct in balancing the needs of the parties and concluding that contestants' need overcame the Secretary's interests. The documents related to fundamental issues in the case -- how the government defines an abnormal white center (AWC) and how the government determines whether to cite an operator for an AWC. As such, they claim disclosure is essential to contestants' defense. Contestants also urge that the Secretary's argument that contestants' need has not been demonstrated fails to recognize that the judge has made an in camera inspection and "was able to see for himself the obvious materiality and relevance of these documents to the primary issues in the case and to determine that these documents were necessary to the development of contestants' defense." Response Br. at 20.

1. Disposition of Issues

Inasmuch as application of the deliberative process privilege is an issue of first impression for the Commission, a brief historical perspective may be noted.

In setting forth the reasoning supporting his dissent in Nixon v. Sirica, 487 F.2d 700 (1973), Circuit Court of Appeals Judge Wilkey, inter alia, traced the origins of the privilege of confidentiality, or executive privilege, terms which refer to what is presently described as the government's deliberative process privilege:

> The oldest source of Executive Branch privilege, the common sense-common law privilege of confidentiality, existed long before the Constitution of 1789, and might be deemed an inherent power of any government ... Historically, apart from and prior to the Constitution, the privilege against disclosure to the

> public ... arises from the undisputed privilege that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves privately and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

Id. at 763, 764.

The Freedom of Information of Act, 5 U.S.C. § 552 (1970)("FOIA") represents the codification of "this age old, common sense-common law privilege." Id. at 765. The FOIA was enacted "to assure the American public that necessary access to Governmental information, and to prohibit the abuse of so-called 'Executive privilege'" Id. at 766. However, the FOIA contains categories of documents or information that are exempt from disclosure, which represents a Congressional determination that "if the material sought falls within one of these seven exemptions, the public interest in maintaining confidentiality outweighs the public interest in the right to know Governmental affairs." Id. at 766.

In construing the pertinent FOIA Exemption 5[2], the Supreme Court stated:

> That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear (citations omitted) ... The cases uniformly rest the privilege on the policy of protecting the 'decision making process of government agencies' (citation omitted), and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' (citations omitted).

NLRB v. Sears Roebuck & Co., 421 U.S. 132, 150 (1975).

The Court went on to endorse the Senate Report (citation omitted) in concluding that "'frank discussion of legal or policy matters' in writing

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[2] 5 U.S.C. § 552 reads in part:

> "(a) Each agency shall make available to the public information as follows: ..."
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> "(b) This section does not apply to matters that are ..."
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> "(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

might be inhibited if the discussions were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result." Id. See also Kaiser Aluminum & Chemical Corp. v. U.S., 157 F. Supp. 939, 946 (1958).

The breadth of the privilege is described by the court in Jordan v. U.S. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978):

> This privilege protects the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated' (citations omitted). The privilege attaches to inter-and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.

Id. at 772.

The test for a proper claim to the privilege was described:

> the document must be 'pre-decisional.' The privilege protects only communications between subordinates and supervisors that are actually antecedent to the adoption of an agency policy.... The communication must be 'deliberative,' that is, it must actually be related to the process by which policies are formulated.

Id. at 774.

Contrasted against this construction, contestants argue that the documents in issue, drafts and comments regarding drafts of reports, are outside of the zone of the privilege, although at the same time they concede that the reports, i.e., the two documents that evolved from the disputed documents, "may arguably have been the subject of deliberation by the agency." Response Brief at 16.

It is difficult to embrace the proposed parsing of conduct advocated by contestants. The description of the documents offered by the Secretary, and the conclusions drawn by the judge after his in camera review of the documents, seem to confirm that the documents were deliberative and fall within the zone of the privilege. In concluding that contestants' need for the documents outweighs the Secretary's interest in keeping them confidential, the judge reasoned that fairness to the contestants "demands that they be apprised not only of the final report, but also the deliberations, Government suggestions, changes and revisions that led to the final report." Order 3 at 3.

In National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114 (9th Cir. 1988), the court was presented with a similar attempt by a plaintiff

to narrow the zone of communication that might qualify under Exemption 5 of the FOIA. Plaintiff argued that "'to qualify under Exemption 5, the documents must not only be predecisional and deliberative, but [must] also contain non-binding and advisory recommendations regarding law or policy: opinions or recommendations regarding facts or consequences of facts [are] not ... exempt.'" Id. at 1117. The court rejected this attempt to parse the privilege beyond the bright lines set by the Supreme Court. Citing E.P.A. Agency v. Mink, 410 U.S. 73 (1973), the court noted that the Supreme Court "has recognized a distinction only between 'materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on others.'" Id. at 1118.

Thus, contestants' assertions that the disputed documents "are not part of the decision making process" but merely "part of the factual predicate for the decision to issue citations" should be rejected. Response Brief at 16. Accordingly, we reject contestants' argument that the disputed documents fall outside the zone of the privilege, and affirm the judge's conclusion that the documents are deliberative.

a. Did the judge err in ruling that documents relating to completed matters falls outside the privilege?

As previously described, in his second Order, the judge set out an additional guideline for determining the applicability of the deliberative process privilege to documents, based on their factual content and their dealing with completed rather than pending matters. Order 2 at 5. The judge supplied no authority for this guideline.

We interpret the guideline to include two independent bases on which disclosure would be ordered: (1) if the documents were factual; or (2) if the documents related to completed matters. The judge's ruling regarding documents 365, 366, 367 demonstrates this construction. In applying the guideline, the judge found the documents to contain "deliberations and opinions," not facts. However, they were ordered disclosed because they were related to a completed, rather than a pending matter.

Factual documents are not at issue here. The case law is clear: purely factual material that does not expose an agency's decision making process does not come within the ambit of the privilege. Exxon v. Doe, 585 F. Supp. 690, 698 (D.C. 1983).

In an apparent attempt to support the judge's conclusion regarding completed matters, contestants cite Sears, 421 U.S. 132:

> [I]f an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be
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> withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Id. at 161.

Many courts, in applying the Sears holding, have construed the court's limitation narrowly:

> If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process.... But such disclosure of the internal workings of the agency is exactly what the law forbids (citations omitted).

Lead Industries Association Inc., v. OSHA et al., 610 F.2d 70, 86 (2nd Cir. 1979).

We conclude that the disputed guideline adopted and relied upon by the judge in Order 2 restricts the applicability of the deliberative process privilege more than was contemplated by the Supreme Court. Accordingly, we conclude that the guideline is legally unsupported. The judge incorrectly concluded that documents dealing with completed matters automatically fall outside the privilege. Furthermore, there is no finding by the judge that the disputed documents have been expressly incorporated into the final report.

b. What is the effect of the judge's error?

Although in Order 2 the judge applied the wrong standard by relying upon the above-referenced guideline in ruling, that disclosure was required because the documents "deal with matters which are completed rather than those still pending," we conclude that this error was harmless.

After the issuance of Order 2, the Secretary filed a motion for reconsideration, wherein, inter alia, she challenged the judge's guideline. The Secretary cited several cases supporting her contention that the privilege for predecisional agency deliberation continues to exist notwithstanding the fact that the documents relate to a matter that has been completed. Motion at 3-4.

The judge granted the motion, and for the first time viewed the disputed documents in camera. He then issued Order 3. Although the judge did not refer to the Secretary's challenge to his guideline, he did not repeat the disputed guideline in his order, nor did he indicate any reliance upon it. In Order 3, the judge provided a precise, detailed basis for his determination. The judge again concluded that the documents are within the scope of the privilege but, he determined that, when balanced between the Secretary's need for confidentiality and the contestants' need for a fair defense, the Secretary's need must give way. In viewing the judge's reasoning on this issue, we conclude that he ultimately supported his order to disclose, not on the disputed guideline of Order 2 but, rather, by properly applying the balancing test adopted by the Commission in Bright, supra. Specifically, in the case at bar, the judge found that:

> Contestants have asserted that the documents in question directly relate to the central issue of this case, that they are exclusively in the possession of the Government, and that they consist of largely factual material. The Secretary has not denied the first two assertions.
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> The litigation before the Commission involves the Government's charge that the mine operators tampered with respirable coal mine dust samples. This contention is based in part on the study and report prepared by West Virginia University. I conclude that fairness to the operators (and in the Commission's interest in fairly deciding these cases) demands that they be apprised not only of the final report, but also of the deliberations, Government suggestions, changes and revisions that led to the final report. I do not believe that the disclosure of the documents will compromise government policy deliberations. The operators' need for the documents outweighs the Secretary's interest in keeping them confidential.

Order 3 at 1-3.

The Secretary further argues that contestants should have been required to make a specific showing demonstrating that disclosure is essential to their defense. This point is effectively moot. The judge has viewed the disputed documents and has concluded that they are essential to contestants' defense.

Accordingly, we conclude that the judge properly acted within his discretion,[3] and therefore we affirm his order requiring disclosure of the documents, notwithstanding the Secretary's assertion of its deliberative process privilege.

B. Work Product Privilege

The Secretary has sought interlocutory review of the judge's orders requiring production of six documents (Nos. 3, 365, 366, 367, 401 and 424) on grounds that the documents are protected from disclosure by the work product privilege.[4]

As previously noted, the judge issued three orders relevant to this proceeding. Order 1 contains no indication that the judge considered whether the documents in issue fell within the work product privilege. After setting forth relevant case law regarding each of the privileges asserted by the

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[3] See Part II B, slip op. at 17, regarding generally the judge's discretion and the Commission's standard of review.

[4] In her brief to the Commission the Secretary concedes that she inadvertently failed to assert the work product privilege as to Document No. 3. Brief at 4.

Secretary, the judge individually referenced and evaluated a large number of documents, including those in issue. As to each of the documents individually evaluated, the judge provided a brief description, and a ruling regarding the asserted privilege(s). Notwithstanding the Secretary's assertion of the work product privilege as to the documents in issue, Order 1 contains no comment or ruling on the work product privilege. In that order, however, the judge concluded that each of the six documents was protected from disclosure by virtue of the deliberative process privilege.

Order 2 contains the judge's reversal of his previous decision regarding the application of the deliberative process privilege as to the six documents in issue. However, once again he did not rule on the work product privilege.

Order 3 contains the judge's reconsideration and affirmance of his ruling in Order 2 to compel disclosure of the documents previously determined to be protected by the deliberative process privilege. Again, there is no comment or ruling regarding the Secretary's asserted work product privilege.

The Secretary argues that the judge's failure to rule on her claim of work product privilege is "an abuse of discretion and grounds for a Commission order in the nature of mandamus directing the ALJ to decide the Secretary's claims." Brief at 16. The Secretary also sets forth an extensive analysis of the merits of the claimed privilege.

Contestants argue that the Secretary waived her right to assert the work product privilege. They argue that the Secretary failed to raise the work product privilege issue in her motion for reconsideration filed after the judge issued Order 2 compelling disclosure of the documents.

Contestants argue that, when viewed as a whole, the judge's three orders effectively constitute a ruling on all the privileges but "if the judge decided that the other claimed privileges did not apply to protect the document from production, he simply did not note the application of that privilege." Response Brief at 29.

Contestants further argue that the analysis made by the judge regarding the deliberative process privilege was the same analysis required for the work product privilege and that therefore his failure to expressly deal with the work product privilege was harmless. Id. at 25.

Finally, contestants also argue that the privilege does not apply to the documents in issue.

1. Did the judge fail to rule on the Secretary's asserted claim of work product privilege?

Not only did the judge fail to expressly rule on the work product privilege in his three orders, but contrary to the arguments of contestants, he did not effectively rule on that privilege. The judge's description of the documents and his consequential findings and conclusions deal with the deliberative process privilege. The judge's analysis lacks discussion specifically pertaining to the work product privilege and fails to apply the

guideline he set forth regarding the work product privilege:

> Documents for which the claim of work product privilege was upheld will be ordered disclosed to the extent they are factual and do not include mental impression, conclusions, opinions or legal theories.

Order 2 at 5. The judge's orders did not discuss whether the documents contained legal theories or mental impressions -- elements that are clearly unique to the work product privilege.

Contestants, however, would have the Commission conclude that, since the deliberative process privilege and the work product privilege contain overlapping elements, and since the analysis regarding contestants' need for the documents is essentially the same as that underlying consideration of the deliberative process privilege, we should view the judge's disposition regarding the deliberative process privilege as dispositive of the work product privilege. To do so however, would ignore the consideration that because the work product privilege exists for unique reasons, a different result might obtain. Consequently, a separate analysis is required.

In Secretary of Labor v. Asarco, Inc., 12 FMSHRC 2548 (1990) the Commission recently ruled in a similar situation, wherein the Secretary urged multiple privileges for a particular document, and the judge failed to rule on all of the asserted privileges. The Commission was invited by the Secretary in that case, to draw an inference from the judge's failure to directly rule on a particular privilege. The Commission resisted then, as it does now:

> The Secretary maintains that the judge's failure to rule indicates that he determined that the subject statements should not be provided. We cannot make this assumption on the existing record, and remand this issue to the judge for his reconsideration in accordance with this decision and Bright.

12 FMSHRC at 2557.

Accordingly, we conclude that the judge did not expressly rule on the work product privilege and that the judge's analysis of the deliberative process privilege cannot be construed to dispose of the work product privilege issue.

2. Did the Secretary waive her right to the privilege?

Contestants properly note that, after issuance of Order 2, wherein the judge ordered disclosure of the documents based upon his rejection of the Secretary's deliberative process privilege claim, the Secretary filed a motion for reconsideration that did not mention the judge's failure to address the asserted work product privilege.

To evaluate the effect of this action by the Secretary, it is important to view the motion in context. The judge's initial response (Order 1) to the

Secretary's privilege assertions was positive. Although the Secretary had advanced multiple bases for nondisclosure, the judge, relying upon only one of those bases, granted the Secretary the ruling she sought. Thus the documents in issue were protected from disclosure by virtue of the judge's conclusion that the deliberative process privilege obtained.

In Order 2, the judge reversed himself and concluded that, although the documents were privileged as deliberative, that privilege must fall away if the documents related to a completed matter. The judge did not rule on the work product privilege. The Secretary promptly responded with a motion for reconsideration. She challenged the basis of the judge's ruling regarding the deliberative process privilege and submitted the documents for an in camera inspection. The motion contained no mention of the work product privilege, nor is there any indication that the Secretary intended to abandon her earlier asserted claim of work product privilege. Indeed, it would have been premature to seek reconsideration of a ruling that had not yet been rendered. Accordingly, we find contestants' waiver argument to be unpersuasive.

Also unpersuasive is contestants' attempt to draw support from the Commission's ruling in Wilmot Mining Co., 9 FMSHRC 684 (1987). In that civil penalty proceeding the judge directed the parties to explore settlement. Notwithstanding a proposed settlement agreeable to the parties, the judge conducted a hearing and offered no explanation for his apparent rejection of the settlement offer. Wilmot argued to the Commission that the settlement offer was improperly rejected. The Commission noted that:

> Wilmot apparently never objected to the judge's procedure in going forward with the hearing. It did not object at the hearing or argue this point to him in its post-hearing brief. Failure to object in a timely manner to an alleged procedural error ordinarily waives the right to complain of the error on appeal....

Id. at 686.

In the instant case, the Secretary has acted timely. She has been ordered to disclose documents for which she has claimed several privileges but the judge has ordered disclosure without ruling on one of the privileges asserted. The Secretary is under no obligation, under the Commission's rules, to re-assert the claim of privilege before seeking interlocutory review of the judge's failure to rule on the claim.

Accordingly, we conclude that the judge failed to rule on the Secretary's claim of work product privilege and we therefore remand this matter to the judge.

II. Contestants' Petition

Contestants seek interlocutory review of the same three orders of the judge insofar as they uphold the Secretary's claim of privilege as to fifty-two documents.[5]

Contestants rest their challenge on four grounds: (1) the Secretary's assertion of the privileges was improperly invoked and should not have been allowed; (2) the judge failed to require the Secretary to furnish sufficient factual material in support of her claimed privileges; (3) the judge failed to properly apply the claimed privileges to the documents in issue; (4) the judge's orders prevent meaningful review because they lack sufficient factual detail and analysis.

A. Issues

1. Was the Secretary's assertion of the privileges properly invoked?

The Secretary's assertion of various privileges is contained in the Document List dated June 21, 1991.[6] The descriptions of the documents and the bases for the claimed privileges contained therein are further augmented in the Secretary's opposition to motion to compel discovery,[7] and in two affidavits dated August 30, 1991.[8]

The affidavits were filed in response to the judge's order to the Secretary (August 22, 1991) requiring that she reply to contestants' contention "that privileges must be formally asserted by the agency head after personal consideration of the documents for which privilege is claimed." Order 1 at 1-2.

The first affidavit, from the Deputy Assistant Secretary for Mine Safety and Health of the Department of Labor, states that he is authorized to act on behalf of the agency in enforcement matters and that he has reviewed the documents for purposes of determining whether to assert a governmental privilege. The affiant then formally asserts four specific privileges (deliberative, investigative, attorney-client, and work product) to

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[5] Although contestants reference fifty-one documents, the Secretary states she assumes contestants inadvertently omitted one additional document, placing fifty-two documents in issue. See Response Brief at 8, fn. 8.

[6] A copy of the amended list dated September 25, 1991 has been furnished to the Commission. See Appendix to Secretary's Response Brief, Exhibit 1.

[7] Id., Exhibit 2.

[8] Id., Exhibit 3.

specifically enumerated documents, setting forth the bases for each claim of privilege. The affiant also determines not to assert a privilege as to certain documents.[9]

The second affidavit is from a Supervisory Industrial Hygienist for MSHA authorized by the agency to serve "as an agent of more than one federal grand jury investigating allegations of the alteration of the weight of coal dust samples ... in accordance with Rule 6(e) of the Federal Rules of Criminal Procedure."[10]

In ruling on the Secretary's assertion of the privileges in Order 1, the judge traced the relevant case law, including Commission precedent and concluded:

> the claim of executive privilege invoked here by a high level official of the Department of Labor who has direct responsibility for the matters involved after personal consideration of the documents, is sufficient formal claim of privilege when coupled with the Secretary's offer to submit the documents (except those for which grand jury immunity is claimed) for in camera inspection.

Order 1 at 5.

Contestants argue that the invocation of the claim of privilege must be made by the Secretary of Labor or by a high ranking subordinate who has been formally delegated the task, and who has been furnished with guidelines on the use of the privilege. Because Secretary Lynn Martin has not herself invoked the privilege, nor formally delegated that task, contestants argue that the judge erred in accepting "a substitute procedure that does not meet the requirements of the law." Brief at 17.

The Secretary argues that she properly invoked the claims of privilege and, in doing so through the use of two affidavits, exceeded the requirements under Commission precedent.

Disposition

The analysis of the judge demonstrates that he properly recognized and understood the basis for the requirement that executive privilege be invoked by "a responsible government official" and not merely by trial counsel. Order 1 at 5. He recognized that privilege claims should be narrowly construed and not lightly claimed. Case law seems to reflect a concern that the claim of government privilege not be left merely to trial counsel, whose judgment might

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[9] Id. at A-105.

[10] Id. at A-106.

be "affected by their interest in the outcome of the case."[11] In this case, a high ranking official of the agency formally invoked the privilege and, contrary to contestants' assertion, did not "merely restate Secretary's Counsel's privilege assertions."[12] Brief at 15. The affidavit of the Deputy Assistant Secretary contains a listing of documents that he determined were not privileged. As such, the underlying rationale for formal invocation of the privilege is essentially satisfied.

The judge entertained contestants' argument and concluded that the quality of the invocation in this case was sufficient to afford contestants the protection required. In doing so, the judge also relied upon the Commission's holding in Bright, 6 FMSHRC 2520, which essentially recognized that, although authority exists requiring a formal claim of privilege by the department head in order to invoke the informant's privilege, most cases do not address whether the privilege was formally raised. The judge concluded that "to require that she (the Secretary) personally consider all the documents in these cases and invoke privileges such as are claimed in this administrative proceeding is ... neither practical nor necessary." Order 1 at 5. We agree, and therefore affirm the judge's ruling.

Administrative Law Judge's Dispositions as to Contestants' Issues 2, 3, and 4

After receiving and reviewing the Secretary's document list and the two affidavits described above, the judge, in Order 1, referenced appropriate procedural law and case law regarding discovery and privilege in general, and then set forth the pertinent case law and the principles derived therefrom regarding each of the specific privileges claimed by the Secretary. The judge then ruled on the asserted claims of privilege, referring to each document separately. As a result 50 documents were protected from disclosure, i.e., privileged, four documents were ordered disclosed, and 14 documents were ordered to be produced for an in camera inspection.[13]

In Order 2, the judge completed his in camera inspection of the 14 documents ordered to be submitted to him and also inspected in camera, two additional documents submitted by the Secretary with her motion to reconsider the order to disclose. Additionally, the judge reconsidered his previous ruling granting claimed privileges with respect to 11 documents. To those documents the judge applied a series of guidelines by which he re-evaluated whether production was necessary, notwithstanding the existence of a

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[11] Pierson v. U.S., 428 F. Supp. 384, 395 (1977); See also Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133, 138 (E.D. Wisc. 1972).

[12] Additionally, as contestants themselves have shown this is a high profile litigation in which Secretary of Labor Lynn Martin has been personally involved. See Brief Exhibit B at 8; Brief Exhibit A at 19-20; PIR at 12-13.

[13] Parts of one document were ordered to be produced and the remainder presented for in camera inspection.

privilege. This process resulted in 49 documents being protected from disclosure, i.e., privileged, and 18 documents being ordered disclosed.[14]

In Order 3, the judge issued orders in response to contestants' motion to compel and the Secretary's motion for reconsideration. The judge also accepted for in camera review nine additional documents tendered by the Secretary. This process resulted in three documents being protected from disclosure, i.e., privileged, and eight documents being ordered disclosed.

In all, the judge examined, in camera, 25 of the 67 documents claimed to be privileged.

2. Did the judge fail to require sufficient factual material in support of the Secretary's claimed privilege?

Contestants argue that the Secretary has not been required to furnish sufficient factual data to support her assertion of privilege; that a detailed description of each document, along with a detailed justification for the claim of privilege is required; that the Secretary "must be required to submit a 'Vaughn' index in order for the judge to determine whether the documents are ... privileged."[15] Brief at 12.

The Secretary argues that the judge has been presented with more than a sufficient basis for his rulings on privilege. She rejects contestants' demand for a Vaughn index arguing that courts have required such an indexing in FOIA cases where the court is confronted with masses of documents, "unrelated to any specific claims, with which the court is unfamiliar." Response brief at 32. By contrast, the judge in the instant case is intimately familiar with the litigation and able to place the documents in issue in proper context. The Secretary claims the requirement to create such an index would yield no new information to contestants. Moreover, because the Secretary has offered to provide the documents to the judge for in camera inspection, any question he may have regarding the application of a privilege can easily be resolved. Id. at 34.

3. Did the judge fail to properly apply the claimed privileges to the documents the Secretary has refused to disclose?

Contestants broadly challenge all conclusions of privilege made by the judge, claiming in general that he did not properly apply the tests required to sustain each privilege. Contestants separately describe the scope of each of the five privileges at issue and assert particular errors of the judge.

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[14] Portions of two of the documents were excepted from the disclosure order.

[15] In Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), a case brought pursuant to the FOIA, the court ordered that the agency furnish an index containing an itemization of the documents with a correlated indication of its asserted justification for each claimed privilege.

In defending the judge's ruling, the Secretary separately analyzes the scope of each privilege and responds to each of the asserted charges of judicial error.

4. Did the judge's orders prevent meaningful review because assertedly they lack sufficient factual detail and analysis?

Contestants charge that the judge failed to sufficiently explain the bases for his rulings, thereby precluding meaningful review and running afoul of Commission precedent that the judge must "clearly articulate the basis for his conclusion" set forth in Asarco, 12 FMSHRC 2548, Brief at 6-7.

The Secretary defends the adequacy of the judge's orders by tracing each order and describing the manner by which the judge evaluated, analyzed, and explained his rulings as to each individual document. The Secretary contends that the judge complied with Commission Procedural Rule 55(d), 29 C.F.R. § 2700.55(d)(infra).

B. Disposition of Issues

Contestants' issues 2, 3, and 4 address the discretion to be accorded the judge in discovery proceedings. The Commission's standard of review is determined by our procedural rules and relevant court precedent.

Discovery before the Commission is regulated by Commission Procedural Rule 55, 29 C.F.R. 2700.55.[16] The scope of discovery permitted is specified in Rule 55(c):

> Parties may obtain discovery of any relevant matter not privileged, that is admissible evidence or appears reasonably calculated to lead to the discovery of admissible evidence.[17]

In reviewing a judge's rulings under the above-cited rule, the Commission described its standard of review as follows:

> [T]he Commission cannot merely substitute its judgment for that of the administrative law judge ... The Commission is required however, to determine whether the judge correctly interpreted the law or abused his

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[16] Rule 1(b), 29 C.F.R. 2700.1(b) also pertains: "On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provision of the Federal Rules of Civil Procedure as appropriate."

[17] The documents in issue are apparently relevant inasmuch as the Secretary listed the documents in the Generic and Privileged Document List in response to the judge's order to include all relevant documents. Furthermore the Secretary has not argued to the contrary.

> discretion and whether substantial evidence supports his factual findings.

12 FMSHRC at 2555 (citations omitted). That case was one in which the Commission was reviewing the discovery rulings of the judge after entry of a final order of dismissal based on the Secretary's refusal to comply with the judge's order to produce documents claimed to be privileged.

In similar cases (after entry of a final order), courts have recognized "the broad discretion the discovery rules vest in the trial court"[18] and have expressed a standard of review that is even more limited:

> A district court has very wide discretion in handling pretrial discovery and we are most unlikely to fault its judgment unless, in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case.

Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1979)(citations omitted). Indeed our Commission Procedural Rule 55(d) also grants broad discretion to the judge:

> Discovery limited by Judge. Upon application by a party or by the person from whom discovery is sought or upon his own motion, a judge may, for good cause shown, make any order limiting discovery to prevent undue delay or to protect a party or person from annoyance, oppression, or undue burden or expense.

(Emphasis supplied).

Thus, when analyzing the manner, content, and effect of a judge's discovery rulings, the judge, by rule, is authorized to exercise wide discretion in discovery matters, and the Commission by precedent is disinclined to substitute its judgment for that of the judge unless error or abuse of discretion has occurred.

Further support for the application of this standard of review, or one that accords the judge even wider discretion, is drawn from the fact that the Commission is not reviewing a final order of the judge. Notwithstanding the rule that discovery orders are usually not appealable,[19] we have accepted contestants' (and the Secretary's) representations that the matters raised in

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[18] 8C. Wright & A. Miller, Federal Practice and Procedure § 2006 at 35.

[19] See 8C Wright & A. Miller, Federal Practice and Procedure § 2006 at 29 (1970); 9 Moore's Federal Practice § 110.13[2] at 132 (2d ed. 1991). However, our decision to grant the petitions is grounded in the recognition that this is an unprecedented litigation of enormous impact and concern to all parties that raises complex procedural and substantive issues of first impression.

the petitions involve controlling questions of law, the review of which "may materially advance the final disposition of the proceedings."[20] In determining whether to grant review of pretrial discovery orders on an interlocutory basis, courts have recognized and erected a high threshold of review.

> [I]n the absence of a certification ... or of a showing of 'persistent disregard of the Rules of Civil Procedure' (citation omitted), or of 'a manifest abuse of discretion' (citation omitted), on the part of the district court, no jurisdictional basis exists for interlocutory review of pretrial discovery orders of the type here presented.[21]

Xerox Corp. v. SCM Corp., 534 F.2d 1031, (2nd Cir. 1976). Accordingly, in this case, the discretion accorded the judge under the Commission's procedural rules is broadly construed.

Did the judge rely upon sufficient factual material in ruling on the privilege? (Issue 2)

This is a matter that is squarely within the discretion of the judge and will not be disturbed unless a clear abuse of discretion is demonstrated. On the facts presented in this case, contestants have failed to demonstrate judicial abuse.

After reviewing the Secretary's document list and the two affidavits invoking the privilege claims, and after applying the appropriate legal principles, the judge agreed to protect 50 of the 67 documents claimed to be privileged. As to the protected documents he stated, "I conclude that her [the Secretary] description of these documents, while somewhat cryptic and lacking in detail, is sufficient for me to determine that the documents fit the privilege asserted." Order 1 at 9. He then proceeded, item by item, to rule on each document in this group. At the same time, apparently concluding that he was provided an insufficient amount of information supporting certain claims of privilege, the judge ordered the production of 14 documents for his in camera inspection. He also rejected four claims of privilege. Id. at 16-17. As previously noted, before the issuance of his third order, the judge had actually inspected 25 of the 67 documents claimed to be privileged. Thus it is clear that when the judge determined more was needed to support a privilege claim he acted, ordering production of the documents for his in camera inspection, and the Secretary complied.

Indeed, the record demonstrates that the Secretary has consistently offered to make the documents available for in camera inspection, "in the

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[20] See Commission Procedural Rule 74, 29 C.F.R. 2700.74(a).

[21] The contestants did not request nor did the judge issue a certification for interlocutory review. The Secretary however did file a motion seeking certification. The judge denied the motion.

event that the Judge is unable from the document description provided by the Secretary to determine the validity of the privilege asserted, the Secretary agrees with Kentucky Carbon that an in camera inspection of any such privileged document is appropriate."[22]

Thus, availability of access to the disputed documents and the sound reasons contained in the Secretary's response brief,[23] provide strong support for a rejection of contestants' demand for a so-called "Vaughn index." In Vaughn, 484 F.2d 820, the circuit court was reviewing the district court's summary judgment in favor of the Civil Service Commission, which had denied a FOIA request claiming that certain exemptions to disclosure obtained. Noting that the Supreme Court, in the seminal FOIA case, Mink, 410 U.S. 73 "made it clear that it was not always necessary for a court to conduct an in camera examination" (Vaughn supra, at 824, fn. 16), the Vaughn court proceeded to put its gloss on the approach to be taken by trial courts in determining whether documents fit within FOIA exemptions. However, the indexing required by the court was based upon an entirely different type of litigation than the case at bar. In Vaughn, a law professor, engaged in research on the Civil Service Commission, sought disclosure of reports, running into "many hundreds of pages" which were not related to any litigation or claim the professor had with the Commission. The court observed:

> This lack of knowledge by the party seeing (sic) disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible.

Id. at 824-825.

Thus, the circumstances underlying the court's determination are unique to FOIA litigation and not present in the case at bar. The "dispute resolution" typically employed is an in camera inspection. "Where the ALJ had questions about particular documents he reviewed them, resulting in inspection of approximately a quarter of the documents ruled privileged." Response Brief at 34.

Accordingly, we conclude that the judge's reliance upon the record information was well within his discretion and that contestants have failed to demonstrate any abuse, or any reason why the judge should have compelled a "Vaughn index." We also note that the record discloses the existence of no

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[22] Secretary's opposition to motion to compel discovery, August 9, 1991 at 1. Except, the Secretary refused to furnish document 406 which she maintained was prohibited from disclosure under Rule 6(e), Fed. R. Crim. P.

[23] Id. at 9-11, 31-35.

motion or any other attempt by contestants, subsequent to the issuance of the judge's orders, to cause the judge to require more information or receive additional documents for an in camera inspection.[24]

Did the judge properly apply the privileges? (Issue 3)

The judge has set forth an accurate description of the legal elements underlying each of the privileges.[25] While contestants' complaint is that the Secretary provided, and the judge relied upon, too little information to support the asserted privileges, contestants also support their challenge by listing specific documents and coupling them with specific alleged errors. The Secretary's defense generally provides sufficient basis for sustaining the judge.[26] In other instances the charges of contestants are not well founded. [27]

Deliberative process privilege. In their challenge, contestants assert that six of the 11 documents protected pursuant to this privilege refer to communications occurring after a policy had been settled upon, and therefore fail to meet the first prong of the test, that documents be "pre-decisional." The Secretary's rebuttal indicates that four of the documents relate to the issuance of civil citations and were pre-decisional with respect to that decision. Response Brief at 22. As to the remaining two documents, they "discuss options for how to improve MSHA's dust sampling program in the future, and remain pre-decisional because these policy decisions have not yet

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[24] Contestants' July 21, 1991 motion to compel discovery contains an alternative request for in camera inspection.

[25] With the exception of the guideline imposed regarding the deliberative process privilege that was the focus of the Secretary's challenge in her petition for interlocutory review.

[26] Except as noted by the Secretary, document no. 17 "held to be protected by the attorney-client privilege, should have been protected instead as work product, which the Secretary also claimed." Response Brief at 25, fn 19.

[27] With respect to their challenge to document no. 203, contestants note that the judge protected the document notwithstanding the Secretary's failure to assert the privilege on the "Secretary's repository list." Brief at 19, fn 14. However, in her October 4, 1991, motion for reconsideration, the Secretary expressly asserted three privileges, including the deliberative process privilege.

In support of their challenge to the work product privilege contestants assert that "many of the documents held to fall within this privilege, were not generated by the Secretary's counsel and, in fact, were undated with unknown authors." Brief at 26. Contestants support the statement with reference to 13 particular documents. Examination of the record discloses that of the 13 referenced documents, six were both undated and unsigned and of those, three were prepared for the U.S. Attorney's criminal investigation and the remaining three were computer printouts. Of the seven documents that were dated, three were both dated and signed.

been made." Id. at 22-23. The Secretary also indicates that a third deliberative process occurred relating to matters to be referred for criminal action.

Contestants charge that eight of the 11 documents failed to meet the second prong of the deliberative process privilege test, i.e., they were not "deliberative." The Secretary defends, stating all 11 documents" contain opinions, recommendations, discussion points, options and other deliberative materials." Id. at 23. She indicates that some of the documents were prepared by the Assistant Secretary for the Secretary; some were in draft form and others were handwritten notes. She notes that the judge has inspected four of the documents in issue.

Investigative process privilege. Although contestants argue that too little information was given to and received from the judge, the Secretary defends the judge's rulings, averring that 17 of the 19 documents so protected relate to ongoing criminal investigations and that the two remaining documents relate to a separate civil investigation.[28] As such, the judge apparently concluded that disclosure of the documents "would interfere with those enforcement proceedings."[29]

Attorney-client privilege. Again, all documents so protected are challenged en masse, with the complaint essentially being that the "judge decided this issue based solely upon whether the author and recipient of a particular document were in an attorney-client relationship" and that the judge "failed to consider the extent to which a waiver of any claim ... has occurred." Brief at 23-24. The Secretary states that all the documents except one "deal primarily with highly sensitive criminal matters." Response Brief at 25. She also explains that two separate attorney-client relationships exist, one between the Department of Justice (the attorney) and the Department of Labor (the client), concerning criminal matters; and the second between the Office of the Solicitor (attorney) and the Office of the Secretary and MSHA (the clients), and that all the documents so protected resulted from one of these relationships.

Regarding the allegation that the privileges may have been waived, the Secretary states "Contestants never argued to the ALJ that the Secretary waived any privilege, and, in fact, they still cite nothing in the record to support such a claim." Id. at 31.

Work product privilege. The judge protected 20 documents under this privilege. Contestants' challenge is essentially that too little information was provided to the judge who then ruled in a summary fashion making it impossible to determine if he properly applied the principles regarding the privilege. Brief at 25. The Secretary claims all 20 documents "were created

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[28] Three of the documents protected under the investigative process privilege (Nos. 154, 161, 375) were not so claimed by the Secretary, however they were inspected in camera by the judge.

[29] See Order 1 at 6.

in connection with the tampering allegations and dealt specifically with potential or actual criminal or civil litigation." Response Brief at 17. She observes that contestants did not challenge the basic fact that the documents were prepared "'in anticipation of litigation or for trial' by government attorneys or their agents within MSHA." Id. Two of the documents are the work product of the Department of Justice, relating to criminal matters. Six of the documents were prepared by attorneys in the Office of the Solicitor. All contain "opinions, legal theories, and/or discussions of future litigation plans and strategies." Id. at 18. The remaining 12 documents "were all prepared by MSHA employees in connection with the AWC criminal investigation." Id. Nine of the 12 were "'prepared at the direction of, and for the assistance of, the U.S. Attorney'" while the remaining three also relate to the criminal investigation. Id. at 18-19.

Each of the judge's orders details the legal elements required in balancing the interests of the parties following the determination that the qualified privileges, i.e., deliberative process, investigative process, or work product, were properly invoked and obtain. In those instances the judge applied the test set forth in the Commission's Bright decision. Order 1 at 8-9; Order 2 at 4-5; Order 3 at 1-3. The judge also properly recognized that the attorney-client privilege is an absolute privilege, which does not require a balancing analysis after a determination that the privilege is properly claimed.

After reviewing of the record,[30] including the judge's orders, the affidavits, the document list and the elaborations offered by the Secretary[31] we conclude that contestants have failed to establish judicial error or abuse of discretion with respect to the application of the four privileges. Accordingly, we affirm the judge's rulings on these matters.

Rule 6(e) of the Federal Rules of Criminal Procedure. Contestants' allege that the Secretary has failed to prove that the information in two folders (Nos. 11 & 12) of document 406 "is truly before a grand jury and that the disclosure of the information is prohibited by Rule 6(e)." Brief at 29. Contestants properly note that the judge has not protected these documents under this provision of the rules, but make this challenge because the Secretary has invoked the protection under this rule. Contestants also challenge the application of the rule since the documents are not within the possession of the grand jury. Id.

The Secretary responds that the documents claimed to be protected from disclosure under this rule are secret grand jury materials in the possession of MSHA's Robert Thaxton, an authorized grand jury agent, and that disclosure of the documents is absolutely prohibited under the rule. Moreover, the Secretary, citing Federal Rule of Criminal Procedure 6(e)(3)(D), states that

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[30] The documents in issue were not contained in the record before us and the Commission did not view any documents in camera.

[31] See Secretary's 8/9/91 opposition to motion to compel discovery and Secretary's 10/4/91 motion for reconsideration.

the prohibition against disclosure extends to the Commission and its judges because the rule authorizes the filing of a petition for disclosure only before a district court where the grand jury convened. Id. at 27.

Although the judge has not ruled on this matter, the Secretary continues to assert this basis for protection because the documents are presently protected only by the qualified work product privilege. Id. at 26. The judge declined to rule on this issue because he determined that the subject documents were privileged on other grounds. Order 1 at 8.

We conclude however, that the Secretary is entitled to a ruling on the issue and therefore remand the matter to the judge for such purpose.

Did the judge provide sufficient factual detail and analysis? (Issue 4)

The contestants originally argued that the orders fail to contain "findings of fact, conclusions of law and the reasons or basis for them." PIR at 3. The Secretary countered that those requirements refer only to final dispositions, and not to discovery orders. See 29 C.F.R. 2700.65(a). As noted above, Rule 55(d) pertains. As measured against that standard, contestants' challenge fails to establish any abuse of discretion. The judge carefully referenced the applicable case law, evaluated the documents item by item, applied the law and rendered his rulings. He examined 12 of the 52 documents in issue. Consequently, contestants' have failed to establish that the judge abused his discretion. Accordingly, we affirm the judge's rulings.

III. Conclusion

For the foregoing reasons, we hereby dissolve our order of November 13, 1991 staying the judge's order to produce certain documents, and we affirm the judge's order requiring the production of certain documents claimed to be protected by the deliberative process privilege. We also remand to the judge for his analysis and ruling on those documents claimed by the Secretary to be protected by the work product privilege.[32]

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[32] The related issue raised by the Secretary in her motion to supplement the record with expert witness list (January 30, 1992) is not before the Commission, and consideration of it would be premature since the judge has not ruled on the work product privilege issue. Therefore the motion is denied.

Further, we reject contestants' assertions of error; affirm the judge's rulings;[33] and expressly provide that our decision is without prejudice to contestants' right to file before the judge a motion for in camera inspection of any particular document. We also direct the judge to rule on the Secretary's assertion of Rule 6(e) of the Federal Rules of Criminal Procedure as a basis for nondisclosure.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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[33] Except as provided in fn. 26 supra.

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