

DISCOVERY ORDER UPON IN CAMERA REVIEW

IN THE MATTER OF THE APPEAL OF:

CHERYL MOORE-ARABALO, Appellant,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency.

Appellant moved for discovery of documents from Internal Affairs investigations of herself and three other employees, in this appeal of her termination, which she claims was motivated by retaliation and whistleblower claims. The Agency objected to the release of the IAB files pertaining to the other three employees.

On May 11, 2012, upon motion by the Agency, an Order on Redaction of Discovery issued, directing the Agency to retrieve the twelve CDs the Agency submitted to the Hearing Office for in camera review, to review and redact personally identifiable information from the Internal Affairs investigation documents of Appellant and three other employees. After redacting personally identifiable information, the Agency was to produce the redacted copies of all twelve CDs and a written list of redacted information as to each CD to the Hearing Office. On May 17, 2012, the Agency submitted the redacted CDs and a privilege log of all redacted information. For each redaction, the Agency identified the page number(s), the type of document, and the reason for the redaction, citing either personal information covered by the protective order or deliberative process. The propriety of each redaction is as follows:

1. Redactions pursuant to protective order:

- | | |
|---------------|--|
| Denver 00037 | On these financial documents, the Agency redacted the account number, consistent with the protective order. However, Captain Silver Gutierrez' address is still on the document, and needs to be redacted. |
| Denver 000160 | On this Certificate of Service, the Agency redacted Captain Gutierrez' incorrect home address, consistent with the protective order. |
| Denver 000245 | On this Certificate of Service, the Agency redacted Captain Gutierrez' correct home address, consistent with the protective order. |
| Denver 000317 | On this email, the Agency redacted Captain Gutierrez' correct and incorrect home addresses, consistent with the protective order. |
| Denver 00342 | On this email, the Agency redacted Denver Sheriff Foundation an executive board member's telephone number, consistent with the protective order. |

Denver 000411 On this Certificate of Service, the Agency redacted Deputy Sheriff Carla Tatum's home address, consistent with the protective order.

Denver 000419 On the Certificate of Service, the Agency redacted Deputy Sheriff Carla Tatum's home address, consistent with the protective order.

2. Redactions under asserted deliberative process privilege:

The Agency asserts the deliberative process privilege with respect to eight documents contained on the CD. The deliberative process privilege only protects material that is both pre-decisional (generated before the adoption of an agency policy or decision) and deliberative (reflective of the give-and-take of the consultative process). *City of Colorado Springs v. White*, 967 P.2d 1042, 1051 (Colo. 1998). Material that is pre-decisional usually retains its protection even after a decision is made, however, because an agency's final decision is not protected under the privilege, pre-decisional material can lose its protected status if the decision maker incorporates the material by reference, or expressly adopts it in the final decision. *Id.* at 1052. Protected material must also be deliberative, which is distinguished as advisory materials, that are evaluative, and truly reflect the deliberative processes of an agency, as opposed to purely factual, investigative material. *Id.* The deliberative process privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency. *Id.* at 1053.

The initial burden of proof falls upon the government entity asserting the deliberative process privilege, which cannot be met by conclusory and generalized allegations of privilege. *Id.* at 1053. The assertion should be made in the form of a *Vaughn* index, which requires a specific and detailed description of each document claimed to be privileged, including each document's author, recipient, subject matter, an explanation of why the document qualifies for the privilege, and why disclosure of each document would be harmful. Finally, the agency should distinguish between those portions of the document that may be disclosed (such as purely factual data) and those that are allegedly privileged. *Id.*

The deliberative process privilege is a qualified privilege, that may be overcome upon a showing that the discoverant's interests in disclosure of the materials is greater than the government's interests in their confidentiality. *Id.* at 1054. The determination of need is based on the relevance of the evidence, whether there is reason to believe the documents may shed light on government misconduct, whether the information sought is available from other sources and can be obtained without compromising the government's deliberative process, and the importance of the material to the discoverant's case. *Id.*

Denver 000300-304 On these emails, the Agency asserts the deliberative process privilege on behalf of the Office of the Independent Monitor. Upon review of the emails, the deliberative process privilege cannot be asserted because: (1) the emails are factual, not deliberative, in nature; (2) a large portion of the emails are incorporated into the Agency's final disciplinary decision, Captain Gutierrez' suspension letter, pages 000262-277.

Denver 000311 On this email, the Agency asserts the deliberative process privilege on behalf of the Office of the Independent Monitor. However, the deliberative process privilege may be asserted only for the OIM's

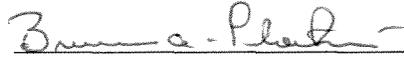
responsive email; and not for the entire email exchange.

- Denver 000315-316 On these emails, the Agency asserts the deliberative process privilege on behalf of the Office of the Independent Monitor. The email from the OIM clearly contains the OIM's evaluative and deliberative thought processes regarding Gutierrez' discipline, and it is "so inextricably intertwined" with any factual material that the "disclosure of any portion would inevitably reveal the government's deliberations." White, supra at 1052.
- Denver 000320 On this email, the Agency asserts the deliberative process privilege, but does not note on whose behalf. Upon review of the email, the privilege cannot be asserted because the email is factual in nature, and does not contain personal opinions or evaluative deliberation of any person in the Agency.
- Denver 000323 This is the same email as Denver 000320 above, and for the same reasons, the privilege may not be asserted.
- Denver 000427-433 On this Discipline Investigation Memorandum from Chief Diggins to Major Brown, the Agency generally asserts the deliberative process privilege. The privilege may not be asserted for portions that are recitations of factual, investigative information, and do not contain personal opinions that are deliberative or evaluative in nature. Further, the document is organized in such a manner that the privilege does not protect the factual information, since it is not so inextricably intertwined" with any deliberative sections of material that the "disclosure of any portion would inevitably reveal the government's deliberations." White, supra at 1052. The Agency must first distinguish between those portions of the document that may be disclosed, i.e. purely factual data, and those that are allegedly privileged, then resubmit which sections it seeks to redact as deliberative,
- Denver 000199-200 On this Recommendation of Discipline from Director Gary Wilson to Deputy Manager of Safety Ashley Kilroy, the Agency generally asserts the deliberative process privilege. The privilege cannot be asserted for this document, where the document contains recitations of factual, investigative information, and do not contain personal opinions that are deliberative or evaluative in nature. Further, almost all of the information included in the document is incorporated into the Agency's final disciplinary decision, Captain Gutierrez' suspension letter, pages 000262-277, for which there is no deliberative process privilege.
- Denver 000260-261 This Recommendation of Discipline from Director Gary Wilson to Deputy Manager of Safety Ashley Kilroy is identical to Denver 000199-200, above, except the date. The Agency generally asserts the deliberative process privilege. For the same reasons as above, the privilege may not be asserted for this document.

ORDER

The Agency is ordered to retrieve the CD and redact the documents noted above in compliance with the foregoing rulings pertaining to protected personal information and deliberative process privileges. The newly redacted documents must be re-submitted to the Hearing Office on a CD **by May 31, 2012**. After a subsequent in camera review for compliance with this Order, the CD will be disclosed to the Appellant on or before June 4, 2012.

DONE May 24, 2012.



Bruce Plotkin for
Valerie McNaughton
Career Service Hearing Officer

I certify that on May 24, 2012, I delivered a correct copy of this Order to the following:

| | |
|--|-------------|
| Ms. Cheryl Moore-Arabalo, arabaloc@yahoo.com | (via email) |
| Linda Lee, Esq., linda@leeforlaw.com | (via email) |
| City Attorney's Office at Dlefilng.litigation@denvergov.org | (via email) |
| Jennifer Jacobson, ACA, Jennifer.Jacobson@denvergov.org | (via email) |
| Robert Nespor, ACA, Robert.Nesport@denvergov.org | (via email) |
| Ms. Marinda Kincaid, HR., Marinda.Kincaid@denvergov.org | (via email) |

