

**ORDER DENYING AGENCY'S MOTION TO RECONSIDER DISCOVERY ORDER
AND GRANTING APPELLANT'S REQUEST FOR SUBPOENA DUCES TECUM TO A NON-PARTY**

IN THE MATTER OF THE APPEAL OF:

DANIEL STECKMAN, Appellant,

vs.

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

The Agency and Appellant have both filed motions addressed to the July 21, 2015 order compelling production of documents regarding Appellant's termination.

1. Agency's Motion to Reconsider Discovery Order

The Agency seeks reconsideration of the July 21, 2015 order compelling the Agency to produce "(a)ll records involving this case, including without limitation, interviews and records of the Office of Independent Monitor, including notes, recordings, emails, and correspondence relating to DSD IAB # 2014-0152." The Agency had objected to the request by claiming all responsive documents were protected by the deliberative process privilege under the authority of D.R.M.C. § 2-376(c), which states that "all information learned by (the monitor's office) during the exercise of their duties shall be protected by the deliberative process privilege." Appellant responded to the motion by arguing that the Agency must produce the responsive documents within its possession, or submit a Vaughn index identifying the specific documents protected by the privilege. The motion for reconsideration argues that OIM documents cannot be produced because they are in the possession of the OIM, not the Denver Sheriff's Department.

The deliberative process privilege is "intended to protect the governmental decision-making process, its consultative functions and the quality of its decisions." City of Colorado Springs v. White, 967 P.2d 1042, 1047 (Colo. 1998). "The privilege is not automatic", and does not arise merely from the fact that a document is in the government's possession. Id., 1050. The key question is whether disclosure would discourage predecisional deliberative discussion within an agency. Thus, the privilege does not shield factual data at all. The burden is on the government to establish that the material is in fact covered by the privilege, and that cannot be met by "conclusory and generalized allegations."

Appellant was terminated after a process that included the Sheriff's Department, Conduct Review Office, Department of Safety and the Office of Independent Monitor. The Agency relied on the facts and allegations made during that process in rendering the decision under de novo review in this appeal. Appellant's discovery request therefore seeks information that may assist him in challenging the termination. Appellant has demonstrated that the requested documents are discoverable on disputed issues in this appeal. The Agency's motion for reconsideration has not presented any new information about the responsive documents in its possession that would justify a blanket claim of privilege for "all records involving this case."

Next, the Agency claims that ordering the production of documents held by the OIM violates CSR § 19-45(B). However, under the ordinary rules governing discovery, a party must produce all responsive documents within its possession, custody or control, including those over which it has the right to request from other parties. This rule simplifies discovery, saves time and controls costs. See C.R.C.P. 34(a)(1); Michael v. John Hancock Mut. Life Ins. Co., 334 P.2d 1090 (Colo. 1959); 4 Moore's Federal Practice, Second Edition, 34.17, p. 2470.

2. Appellant's Motion for Subpoena Duce Tecum

In response to the Agency's motion for reconsideration, Appellant moved for a subpoena duces tecum for the Office of Independent Monitor under CSR § 19-45 B. The Agency cites § 19-45(B) as the appropriate means for obtaining relevant documents from non-parties. The motion is timely and supported by good cause, and is therefore granted.

Order

Based on the foregoing findings and conclusions, it is ordered as follows:

1. The Agency's motion for reconsideration of the discovery order is denied. The documents shall be furnished to Appellant's counsel by **August 6, 2015**. In the alternative, the Agency shall file a Vaughn index identifying all documents, the reasons for the claim of privilege, and an affidavit describing the nature and extent of the harm that would be caused by disclosure. White, supra, 1053.

2. Appellant's motion for issuance on a subpoena duces tecum for the Independent Monitor's Office is granted. The subpoena is included with this order.

DONE July 31, 2015.



Valerie McNaughton
Career Service Hearing Officer