



Issue Date: 14 August 2019

CASE NO.: 2017-OFC-00006

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

ORACLE AMERICA, INC.,
Defendant.

ORDER TO SUBMIT PRIVILEGE LOG

On June 19, 2019, Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”) filed a Motion to Compel Oracle’s Compensation Analyses. Defendant Oracle America, Inc. (“Oracle”) filed an Opposition to OFCCP’s Motion to Compel Oracle’s Compensation Analyses on July 3, 2019.¹ The motion concerns the production of documents. *See* 41 C.F.R. § 60-30.10(a); *see also* Fed. R. Civ. P. 34. OFCCP seeks compensation analyses that it contends are required of federal contractors. It maintains that Oracle has such analyses and, as part of its argument, contends that the analyses were prepared to comply with a regulatory requirement and so cannot be privileged. Oracle acknowledges the existence of responsive documents, but responds that they are privileged because they were prepared at the direction of counsel, not to satisfy any regulatory requirement.

A party may withhold documents subject to a claim of privilege.

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents communications or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5)(A). The party asserting the privilege “bear[s] the burden of showing that the privilege exists and applies.” *Heathman v. United States Dist. Court for Cent. Dist.*, 503 F.2d 1032, 1033 (9th Cir. 1974). Boilerplate objections and blanket claims of privilege are insufficient. Failure to provide a proper assertion of a privilege, for instance via a privilege log, in a timely manner can in certain circumstances lead to waiver of the privilege. *See BNSF v. United States Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005).

¹ OFCCP filed a permitted reply brief on July 12, 2019.

Two privilege logs have been submitted. On October 26, 2017, Oracle produced a 74 page, 649 line privilege log. On May 22, 2019, Oracle produced a “categorical” privilege log claiming privilege over 1) “Evaluations of Oracles [sic] compensation system related to HQCA employees conducted at the direction of counsel” dated between September 2013 and November 2016; and 2) “Communications with or at the direction of counsel regarding evaluations of Oracle’s compensation system related to HQCA employees conducted at the direction of counsel” dated between August 2013 and November 2016. OFCCP argues that Oracle has waived the privilege by producing untimely and inadequate privilege logs that prevent evaluation of the privilege claimed. Oracle disagrees, maintaining that the privilege logs and declarations submitted are adequate to claim the privilege.

OFCCP’s argument that the privilege has been waived is without merit. As discussed in the June 10, 2019, order, OFCCP made broad claims of privilege without producing a privilege log or its equivalent. The June 10, 2019, order did not conclude that OFCCP had waived its privileges by failure to properly assert them. Deeming that an overly “harsh” sanction, it instead directed OFCCP to re-do its discovery redactions based on the guidance provided and to produce a privilege log or equivalent in so doing. Both OFCCP and Oracle are sophisticated parties represented to by teams of attorneys. There is no good reason to treat them differently in this regard. So even if Oracle’s claims of privilege were untimely or inadequate, the result here would be an order directing Oracle to produce a compliant privilege log or equivalent.

The question, then, is whether the claim of privilege is inadequate. The October 2017 privilege log does not make plain which relevant responsive documents are being withheld due to claims of privilege. It does not appear to cover the documents at issue in this motion, or if it does, the relevant background hasn’t been provided that would allow me to assess the claims. The May 2019 categorical privilege log is more on point, but it does not specify the documents involved with any particularity.

Privilege logs generally identify the attorney and client involved, the nature of the document, the persons who sent and received the document, the date of the document, and some information on the subject matter of the document. *See, e.g., In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). Oracle’s categorical privilege log does not do this, but some courts have permitted the use of these sorts of logs in some circumstances. *SEC v. Thrasher*, for instance, observed that courts have some discretion to allow less detailed disclosure and that this would be appropriate where detailed disclosure would reveal the information subject to the privilege or where preparation of a detailed list would be unduly burdensome and the additional information would not be of material benefit in determining whether the privilege is properly claimed. No. 92 Civ. 9687 (JFK), 1996 U.S. Dist. LEXIS 3327, at *2-3 (S.D.N.Y. Mar. 20, 1996); *see also Mfrs. Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-cv-853-L, 2014 U.S. Dist. LEXIS 77522 (N.D. Tex. June 6, 2014).

A document-by-document log is the “traditional format” for making a claim of privilege, but not a “rigid and inflexible” requirement and in some circumstances “other solutions” will be appropriate. *Imperial Corp. of Am. v. Shields*, 174 F.R.D. 475, 478 (S.D. Cal. 1997). So where a categorical log covering documents that are ordinarily privileged establishes the claim, a detailed log is not necessary. *See Games2U, Inc. v. Game Truck Licensing, LLC*, No. MC-13-00053-PHX-GMS, 2013 U.S. Dist. LEXIS 114907, at *18-19. In *Thrasher*, the party asserting the privilege was ordered to provide only the time period of the documents, a listing of the individuals who sent or received the documents, and representations by counsel as to the basis for the privilege. 1996 U.S. Dist. LEXIS 3327, at * 5; *see also Caliper Techs. Corp. v. Molecular Devices Corp.*, 213 F.R.D. 555, 563 (N.D. Cal. 2003).

But the categorical approach is the exception, not an invitation to make blanket claims of privilege when a document-by-document log is practicable and would be informative. *See PostX Corp. v.*

Secure Data Motion, No. C 02-04483 SI, 2004 U.S. Dist. LEXIS 24869, at *4-6 (S.D. Cal. June 9, 2004). Even where the number of documents involved might be large, more detail is required when necessary to allow a court to evaluate the claim. *See Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P / No. C01-1351 TEH, 2008 U.S. Dist. LEXIS 111652, at *23-27 (E.D. Cal. July 8, 2008).

Here, a more detailed listing of the responsive documents subject to a claim or privilege would not divulge the allegedly privileged material. A document-by-document catalogue would reveal that, in fact, Oracle and its attorneys were communicating about compensation analyses. But that much is already known and the substance of the communications or advice involved could not be discerned from a mere list. Oracle has not argued otherwise. This is also not a case where it would be overly burdensome for Oracle to produce a more detailed privilege log as to the responsive documents at issue in this motion. There are no indications that the number of documents is so large that it would consume unwarranted resources to list them with more particularity.

Moreover, I find that a more detailed privilege log would assist in the determination of whether or not the privileges are properly claimed. Categorical logs are found sufficient when the category is facially privileged. Initially that might appear to hold here, except that the interplay of the regulatory requirements raises serious questions as to why the analyses were being completed, which could have implications for whether or not the documents are privileged. In assessing the claim of privilege in this instance, some judgment must be made as to the purpose of the documents in question. This is hotly disputed in the motion. A better understanding of the volume and timing of the communications could assist in resolving the dispute.

Hence, I find Oracle's categorical privilege log to be insufficient as to the responsive documents at issue. I do not reach any conclusions as to whether or not the privilege was properly claimed or whether it may have been otherwise waived. In addition, as was the case with OFCCP's assertions of privilege, I do not find the privilege waived due to the insufficiently detailed claim. Rather, Oracle is ordered to produce a more detailed document-by-document privilege log addressing the documents that are at issue in the pending motion. Oracle must file that privilege log within 14 days of the date of this order. No further briefing on the motion is permitted by either party. After receipt and review of the privilege log, OFCCP's motion will be decided.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge