BEFORE THE
MARYLAND DEPARTMENT OF TRANSPORTATION
BOARD OF CONTRACT APPEALS

Appeal of OHIO VALLEY CONSTRUCTION CO., INC.	)	Docket No. MDOT 1015
Under MTA Contract No. NW-06-08	)	

April 10, 1981

Executive Privilege - General — The doctrine of executive privilege is recognized as part of Maryland law and is applicable to the executive branch of State government. This privilege protects essentially two classes of documents and communications: (1) State and military secrets, and (2) the deliberative and mental processes of decision-makers.

Executive Privilege - General — The doctrine of executive privilege is applicable to the Board's proceedings.

Executive Privilege - Intra-Agency Documents — Although an intra-agency document or communication pertaining to the deliberative or mental processes of an agency decision-maker is protected by the executive privilege, such protection is not absolute. Where a need for an intra-agency document outweighs the need for confidentiality and the purposes and policies which underly the privilege, disclosure may be ordered.

Executive Privilege - Factual versus Deliberative Matters — If an intra-agency memorandum contains purely factual material which can be segregated from the deliberative content, such facts are not considered privileged and must be disclosed.

OPINION BY CHAIRMAN BAKER

This appeal involves the proper measure of an equitable adjustment for additional work involving certain storage track facilities. Appellant requests $939,578.74 for this work while the Mass Transit Administration (MTA) has unilaterally adjusted the contract by $774,503. The parties also are in dispute as to the time extension due Appellant as a result of the changed work.

In preparing to litigate these issues, the parties have been engaged in discovery proceedings for some time. Although a number of disputes have arisen with regard to the obligation of each party to furnish certain documents on discovery, only one document is presently being withheld. This document is a position paper dated January 3, 1980, prepared for the Mass Transit Administrator by Messrs. Murray Weiner and G. T. Brayman. Respondent alleges that this document is an intra-agency opinion, protected from disclosure by the executive privilege. Appellant contends that this claim of privilege has not been asserted properly and, even if it had, is inappropriate to the particular document in dispute. Further Appellant asks that the Board direct Respondent to submit the document for in camera review in order to determine the propriety of the privilege.

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Because of the importance of this issue in the conduct of discovery proceedings in this and other cases that come before us, we have decided to issue this published interlocutory order.

DISCUSSION

I. Executive Privilege

Rule 14 of the Board's Rules of Procedure provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the appeal." (See COMAR 11.06.01.14.) This rule is similar to discovery rules contained in both the Maryland and Federal Rules of Procedure and enables a party to ascertain what evidence his opponent proposes to bring forward, avoiding trial by surprise. (See MRP Rule 400, FRP Rule 26.) At the same time, however, the preceding rules recognize that strong public policy may weigh against the disclosure of certain information and thus provide an exclusion for privileged matter.

The doctrine of executive privilege is recognized as part of Maryland law and is applicable to the executive branch of State government for the same reasons as it has been found applicable to the executive branch of the Federal government. Hamilton v. Verdow, 287 Md. 544, 414 A.2d 914 (1980). This privilege protects essentially two classes of documents and communications: (1) state and military secrets, and (2) the deliberative and mental processes of decision-makers. It is within this latter class that certain intra-agency memoranda are protected from disclosure.

The public policy considerations against the disclosure of certain intra-agency documents were expressed by the Maryland Court of Appeals as follows:

> "The necessity for some protection from disclosure clearly extends to confidential advisory and deliberative communications between officials and those who assist them in formulating and deciding upon future governmental action. A fundamental part of the decisional process is the analysis of different options and alternatives. Advisory communications, from a subordinate to a governmental officer, which examine and analyze these choices, are often essential to this process. The making of candid communications by the subordinate may well be hampered if their contents are expected to become public knowledge." Hamilton v. Verdow, 414 A.2d at 922.
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> "As important as are these [preceding] considerations, the cases, analyzed critically, demonstrate that the immunity of intra-governmental opinions and deliberations also rests upon another policy of equal vitality and scope. The judiciary, the courts declare, is not authorized 'to probe the mental processes' of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others — results demanded by exigencies of the most

> imperative character. No judge could tolerate an inquisition into the elements comprising his decision — indeed, '[s]uch an examination of a judge would be destructive of judicial responsibility' — and by the same token 'the integrity of the administrative process must be equally respected.'" Hamilton v. Verdow, supra, 414 A.2d at 924 citing Carl Zeiss Stifting v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966).

Although the second of these policies reflects the constitutional separation of powers between the judiciary and the executive branch, the principle should be no less applicable to board proceedings. This conclusion was convincingly reasoned by the Armed Services Board of Contract Appeals as follows:

> "Although this Board is technically in a different posture from the courts because we are part of the same Executive Branch whose intra-agency opinions and decision-making process are involved, nevertheless we regard the philosophy underlying the executive privilege established by the courts as equally applicable in our proceedings. Since we function as an independent, quasi-judicial tribunal in essentially the same manner as the courts, and since our proceedings establish the factual record on which appeals from our decisions to the courts are based, the same considerations of public policy expressed by the courts...apply with equal force here." Ingalls Shipbuilding Division, Litton Systems, Inc., ASBCA No. 17717, 73-2 BCA 10,205 at page 48,098.

Once an intra-agency document or communication is found to pertain to the deliberative or mental process of an agency decision-maker, the executive privilege protecting against its disclosure is not absolute. Hamilton v. Verdow, supra. 414 A.2d at 925. The courts traditionally have utilized a balancing test, weighing the need for confidentiality against the litigant's need for disclosure and the impact of nondisclosure upon the fair administration of justice. Further where the intra-agency memorandum contains purely factual material which can be segregated from the deliberative content, such facts are not considered privileged and must be disclosed.

The crucial elements in any claim of executive privilege therefore concern whether the vital flow of advisory information would be impaired if a particular type of document were disclosed and further, whether the disclosure of that document would expose the deliberative process of an agency decision-maker. The following cases illustrate how other forums have applied these principles to intra-agency documents of the type in dispute here:

1. Kaiser Aluminum & Chemical Corporation v. U.S., 157 F.Supp. 939 (Ct. Cl. 1958)

> Kaiser charged that the Federal government breached the "most favored purchaser" clause of its contract for the sale of a war plant by giving a competitor better terms and conditions than it had received. On discovery, Kaiser sought a memorandum written by a special assistant to the War Assets Liquidator who was responsible for the sale of surplus property. The duties of this assistant

"...were confined to recommendations and advice on program policy. He played no part in the operative events involved in this case and had no relations or discussions with plaintiff or its competitor. His use by the Liquidator on the matters here in question was in the nature of a confidential assistant."

The Court of Claims therefore refused to order disclosure of this document ruling that it would lay bare the discussion and methods of reasoning of public officials. However the Court did indicate that if the special assistant had played a role in the operative events "...e.g., determination of costs or values, representations to Kaiser or Reynolds or survey of the plants, a different situation might exist." 157 F.Supp. at 944.

2. Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977)

This action concerned a Freedom of Information Act (FOIA) request made by Mead Data seeking disclosure of several categories of documents dealing with a computerized legal research system obtained by the Air Force under a licensing agreement with West Publishing Co. While the executive privilege was not at issue here, the Court's discussion of the FOIA exemption for intra-agency memorandum provides a reasonable analogy.[1]

Among other documents, Mead Data sought a number of memoranda written to a decision-maker, pertaining to the negotiations between the Air Force and West Publishing Company prior to the award of the licensing contract. These documents were of two types: (1) documents reflecting discussions among Air Force personnel regarding West's negotiations, current offers and suggested positions to be taken in the negotiations, and (2) a summary of the various offers and counter-offers made during negotiations as to the use of copyrighted material belonging to West. As to the first type document, the Court ruled that both the recommendation of a course of action and a summary of the negotiation recommendations and opinions constituted the raw material from which the decision to contract with the West Co. was made. This information was exempt from disclosure because it would have revealed

"...the Air Force's internal self-evaluation of its contract negotiations, including a discussion of the merits of past efforts, alternatives currently available, and recommendations as to future strategy."

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[1]In FOIA cases the Government has the burden of proving why a document should not be disclosed. Where the executive privilege is asserted however, it is the party seeking the document who has the burden of showing need. This distinction is not a factor in our consideration here.

As to the second type document however this was found to be reportorial in nature and did not expose the deliberative process.

3. Ingalls Shipbuilding Division, Litton Systems, Inc., ASBCA 17717, 73-2 BCA ¶10,205

This appeal concerned Ingalls' entitlement to a substantial equitable adjustment under a contract for construction of three nuclear submarines. Ingalls sought production of a number of documents including a Technical Advisory Report (TAR) prepared by the contracting officer's staff, analyzing its claim which had been earlier submitted. This report was the work product of technicians, auditors and counsel. The Government refused to produce the document based, in part, on the executive privilege. The Board noted that the TAR was important to Ingalls' trial preparation in that it might contain admissions of fact by Government officials which could corroborate Ingalls' own evidence, or which might be used to impeach Government witnesses. While recognizing the executive privilege, the Board ruled as follows:

> ,to the extent that the TAR contains severable factual matter, including first-hand factual statements or opinions as to facts by experts, identification of persons with first-hand knowledge of facts, and the 63 attached exhibits which are concededly factual, it is not protected by executive privilege and must be disclosed. Furthermore, to the extent that the TAR contains advisory opinions on matters of fact, as distinguished from matters of policy formulation, a claim of executive privilege would not appear to be well founded."

A second discovery request ruled upon by the Board involved congressional testimony of Admiral Hyman Rickover wherein he alleged that Ingalls' claim was overstated. The Board ordered the Government to admit or deny that the testimony was given and provide any backup data which Admiral Rickover's staff prepared to the extent that it did not contain advisory opinions on legal or policy matters. Again, opinions as to the factual reasonableness of Ingalls' claim were not protected.

II. In Camera Inspection of Disputed Document

In camera inspection by a court, or in this instance by this Board, represents a limited intrusion upon the executive privilege and should only be ordered where a showing of necessity is made. Hamilton v. Verdow, supra, 414 A.2d at 926-27. This showing must be strong enough to outweigh the policies favoring nondisclosure. Where this showing is sufficient however, in camera inspection is an appropriate means of determining the propriety of the privilege and segregating non-privileged material.

III. Assertion of the Privilege

In United States v. American Telephone & Telegraph Company, 86 F.R.D. 603 (D.D.C. 1979), the District Court for the District of Columbia set forth clear guidelines with regard to the proper assertion of a formal claim of privilege:

> "All the cases sustaining government privilege appear to require an assertion of the claim by some responsible officer other than the Government's attorneys. The requirement that a responsible officer assert the claim is surely not to substantiate the legal basis of the claim, for that is a question of law. Rather, the Purpose is to assure that the privilege, which in any event is waivable, is not lightly claimed. Hence, the requirement is that the claim be made by someone in a position of sufficient authority and responsibility to weigh prudently the competing considerations of making evidence available in litigation and protecting important government interests. The decision involves policy, not simple law, and therefore is more than a Government lawyer's decision.[2] At the same time, the decision is a matter of importance and not merely routine categorization of documents, and therefore should be made by a policy-maker who can be assumed to have the larger public interest in mind."

The proper assertion of privilege and the detail required in the policymaker's affidavit to a court or a board becomes critical where a formal claim of privilege is involved. Under these circumstances, the Government declines to produce the disputed document for in camera inspection and the court or board must rely on the affidavit of the policy-maker for the information pertinent to its decision concerning the privilege. Accordingly, the affidavit asserting a formal claim must explicitly establish the basis for privilege and provide the board or court sufficient facts with which to rule. United States v. American Telephone & Telegraph Co., supra, 86 F.R.D. 603 at 605.

In the instant appeal, Appellant contends that the Mass Transit Administrator, Mr. L. A. Kimball, lacks sufficient objectivity to weigh the public interest involved in asserting the executive privilege. Appellant asserts that the Secretary of Transportation should therefore be required to file an affidavit. While it is true that Mr. Kimball was the procurement officer for this contract and wrote the final decision which is the subject matter of this appeal, the Board finds that he is nevertheless capable of weighing the competing considerations of making evidence available and protecting

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[2] In Ingalls Shipbuilding Division, Litton Systems, Inc., supra, the Armed Services Board of Contract Appeals permitted counsel to assert the executive privilege. We are unable to find any other reported case in accord.

important government interests.[3] To hold otherwise would create confusion for those State agencies which are not part of a cabinet level department or where the Governor or his cabinet members must assert the privilege in litigation in which they are involved. In each instance, however, the policy-maker who asserts the privilege still must satisfy the Board or a court that the elements comprising the appropriate invocation of the claim exist.

RULING ON DISCOVERY REQUEST

This appeal has been taken from the April 29, 1980 final decision of the Mass Transit Administrator. Mr. Kimball found therein that the Resident Engineer had conducted negotiations and recommended the award of an equitable adjustment in the amount of $939,578.99 for certain changed work. This recommendation was reviewed thereafter by the MTA staff which concluded that "...an error had been made in allowing trackway excavation of the 50,000 cubic yards at a rate of $11.61 per cubic yard." The MTA staff instead determined that this item should be priced as follows:

Description	Quantity	Unit	Unit Price
Trackway Excavation	35,850	c.y.	$ 9.00
Spoil Material	14,000	c.y.	$ 6.50

This resulted in a revised MTA estimate of $774,503 for the trackway excavation. Thereafter, Change Order 004 was issued to Appellant offering to adjust the contract price by this $774,503 amount. Appellant rejected this offer and requested review by Mr. Kimball who subsequently concurred with the MTA staff position and issued Change Order 004 unilaterally.

The document in dispute is said by MTA counsel to have been "...prepared by MTA officials after Ohio Valley [Appellant] rejected Change Order No. 4 and was seeking the MTA Administrator's decision on its claim." It allegedly was considered by Mr. Kimball in preparing his final decision and is thus regarded by the MTA as an intra-agency advisory opinion pertaining to the deliberative process of the MTA Administrator.

Both Messrs. Weiner and Brayman who prepared the disputed document apparently played operative roles in the negotiations relating to the issuance of Change Order 004. Respondent concedes[4] that one or both may testify at the hearing in this appeal concerning the reasonableness of Appellant's trackway excavation costs. To the

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[3]Compare the instant appeal with United States v. Nixon, 418 U.S. 683, 41 L.Ed2d 1039, 94 Sup. Ct. 3090 (1974) where the Supreme Court recognized the right of President Nixon to assert the executive privilege as to conversations he had with members of his staff and committee for re-election, all of whom had been indicted in the Watergate coverup. President Nixon in fact, was an unindicted co-conspirator in this case. The privilege was not upheld however because the demonstrated, specific need for evidence outweighed the policy considerations of the privilege.

[4]During a prehearing conference on March 6, 1981, Respondent's counsel acknowledged that the persons who prepared the position paper may be witnesses at the hearing.

extent that the position paper memorializes Mr. Weiner and Mr. Brayman's contemporaneous analysis of Appellant's costs, it not only becomes a potentially valuable tool for cross-examination, but may provide corroborative evidence for Appellant's own position. Further since the determination of an equitable adjustment is primarily a factual issue and neither person who prepared the document is reputed to be an attorney, it appears likely that the position paper contains analysis, opinions and conclusions as to facts only.

Of further significance to the Board is the possible relationship between Mr. Kimball's final decision and the position paper prepared by Messrs. Weiner and Brayman. Mr. Kimball's final decision merely states that he concurs with the MTA staff and does not proceed to explain why. To the extent, if any, that Mr. Kimball has adopted both the reasoning and conclusions of his staff as stated in the position paper, this document may not be privileged. American Mail Line, Ltd. v. Galick, 411 F.2d 696, 703 (D.C. Cir. 1969); General Services Administration v. Benson, 415 F.2d 878, 881.

In the instant situation where the Mass Transit Administration apparently seeks to withhold the document from in camera review, it has a duty to establish, with clarity, the essential elements of the privilege. This it has not done. Mr. Kimball's affidavit states only that, after personal review of the document, he concurs in his counsel's conclusion that the disputed document is "...an advisory opinion, and part of the deliberative, decision-making process which falls within the scope of the privilege claimed." No mention is made by Mr. Kimball as to whether this advisory opinion pertains solely to legal or policy matters,[5] or was one of a number of recommendations which he considered prior to arriving at his final decision.

In view of the MTA's failure adequately to establish its formal claim of privilege and in view of Appellant's showing of relevance and need, Respondent is directed to submit the disputed document to the Board for in camera review within five (5) days of receipt of this decision. Respondent shall provide the Board with two copies of this document, one of which shall be marked to indicate those portions considered to be privileged. Respondent shall also provide the Board with an affidavit signed by Mr. Kimball indicating whether the reasoning and conclusions set forth in the disputed document constituted the MTA staff position which he referred to and concurred with in his final decision.

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[5]MTA's counsel informed the Board by letter dated March 13, 1981 that the document contained no factual data or analyses thereof. This determination, for purposes of asserting a formal privilege, should have been made by Mr. Kimball.