



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

ORDER REQUIRING RESPONDENT  
TO PROVIDE REVISED PRIVILEGE LOG: November 5, 2020

CBCA 6683, 6761, 6762, 6827, 6828, 6829, 6830, 6831, 6833,  
6834, 6835, 6836, 6837, 6839, 6918, 6919, 6920, 6921, 6922

4K GLOBAL-ACC JOINT VENTURE, LLC,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Karl Dix, Jr., Lochlin B. Samples, and Jonathan R. Mayo of Smith, Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

José Otero and Joshua L. Caplan, Office of the Solicitor, Department of Labor, Washington, DC; and Willow Eden Fort, Office of the Solicitor, Department of Labor, Nashville, TN, counsel for Respondent.

**LESTER**, Board Judge.

ORDER

Pending before the Board is a motion to compel that appellant, 4K Global-ACC Joint Venture, LLC (4KG-ACC), filed on September 29, 2020. Among numerous issues raised in that motion, 4KG-ACC complains that respondent, the Department of Labor (DOL), has asserted privilege over almost 1300 documents responsive to 4KG-ACC's discovery requests, but that DOL's privilege log does not adequately support its privilege claims.

4KG-ACC complains that DOL “provided no detail in any of its privilege log descriptions” for the documents withheld. It asks the Board to “[s]trike the DOL’s privilege log, as it is overbroad, inadequate, and not in compliance with established requirements,” and to “[o]rder the production of all documents being withheld by DOL as privileged or subject to deliberative process privilege.” This order addresses only the privilege log challenge in 4KG-ACC’s motion to compel, and we will address the other issues raised in 4KG-ACC’s motion to compel, as well as other discovery disputes that are being raised in these appeals, following further discussion with and briefing from the parties.

The Board’s rules do not expressly address privilege claims, except for acknowledging in Board Rule 9(d)(1) that, in fact, the Board may find good cause in appropriate cases to treat certain material as privileged. *See* 48 CFR 6101.9(d)(1) (2019). Our rules provide, though, that “the Board may apply principles of the Federal Rules of Civil Procedure [(FRCP)] to resolve issues not covered by these rules.” *Id.* 6101.1(c). FRCP 26(b)(5)(A) identifies the manner in which a party is expected to invoke 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). We apply FRCP 26(b) in evaluating privilege claims raised before the Board. *See, e.g., Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 14-1 BCA ¶ 35,788; *LFH, LLC v. General Services Administration*, CBCA 395, et al., 08-2 BCA ¶ 33,915; *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,641.

Typically, a party seeking to withhold documents from production under claims of privilege will do so by providing a privilege log to the opposing side, as DOL has done here. Although the discovery rules do not require “a monolithic form of privilege logs,” *SecurityPoint Holdings, Inc. v. United States*, No. 11-268C, 2019 WL 1751194, at \*2 (Fed. Cl. Apr. 2, 2019), the party invoking privilege generally needs to provide in the log “a description of the type of document (e.g., an opinion letter, a request for an opinion letter), its topic, date, the writer and recipient, and an explanation as to why the matter is deemed to be privileged (which privilege was being invoked and on what grounds).” *Yankee Atomic Electric Co. v. United States*, 54 Fed. Cl. 306, 309 (2002). Further, “the description of each document and its contents must be sufficiently detailed to allow the [tribunal] to determine

whether the elements of [the claimed] privilege . . . have been established,” *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 475 (E.D. Pa. 2005), although “the party invoking the privilege need not reveal so much about the contents of a communication as to compromise the privilege.” *Yankee Atomic*, 54 Fed. Cl. at 309; see *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 446-47 (2007) (“[F]or each of the documents for which Defendant seeks to invoke the privilege, [the Government] must set forth objective facts to establish that the requirements set forth above for asserting the privilege are met.”). “Document descriptions in a privilege log must contain more than boilerplate assertions that the documents in question contain” information protected by the privilege being invoked. *Testwuide v. United States*, No. 01-201L, 2006 WL 5625760, at \*4 (Fed. Cl. Aug. 7, 2006). “Other required information, such as the relationship between the individuals listed in the log and the litigating parties, the maintenance of confidentiality and the reasons for any disclosures of the document to individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony” if the privilege claim is challenged. *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993).

Although the log that DOL has provided to 4KG-ACC meets some of the necessary requirements, it is facially deficient in other ways. The log appropriately identifies the file type of each document at issue, a bates number range for each document, each document’s date, its author(s) in most instances, recipient(s) (including those copied on the document) in most instances, the custodian in whose files the document was found, and the privilege(s) being asserted over the document. Nevertheless, in the “Subject” column of its log, DOL provides only generic statements, such as “Attorney-client email correspondence,” “RE: Request for Final Contracting Officer’s Decision,” “FW: Army Corps documents,” “Cover letter.doc,” and “RE: Revised Pay Apps.” As an example of the limited scope of DOL’s descriptions, for a document over which DOL is invoking the attorney-client privilege, the deliberative process privilege, and protection as attorney work product, the only justification that the log contains is “FW: Signed Agreement.” Nowhere in the log does DOL show why the privilege applies to the document or provide sufficient descriptions to allow 4KG-ACC or the Board to evaluate the validity of the privilege claim. Because DOL, as the party invoking privilege, has the burden to support each of its privilege claims, *B.G.W. Ltd. Partnership v. General Services Administration*, GSBCA 10501, 93-1 BCA ¶ 25,244 (1992), it must provide such information. We agree with 4KG-ACC that DOL’s current log is woefully inadequate to satisfy that requirement.

4KG-ACC also complains that, for some entries (although a review of the log shows it to be a small percentage of the entries), DOL has not identified any author and, in a few instances, any recipients of the document being claimed as privileged. “[P]arties should

disclose on their privilege logs the authors of a document, if known,” as well as recipients, “as a matter of course.” *Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 499 (2009). To the extent that the party invoking privilege cannot identify the specific author, it must at least “describe the content of the documents such that [the opposing party] and [this tribunal] may better assess the applicability of the privilege,” *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516, 523 (E.D. Pa. 1996), and it may be difficult to establish the elements of certain privileges, like the attorney-client privilege, if the party claiming privilege cannot establish the document’s author and recipients. *See, e.g., Siler v. Environmental Protection Agency*, 908 F.3d 1291, 1297-98 (Fed. Cir. 2018); *Pacific Gas & Electric Co. v. United States*, 69 Fed. Cl. 784, 813 (2006). We recognize that the advisory committee notes to FRCP 26(b)(5) suggest that “[d]etails concerning time, persons, general subject matter, etc. . . . may be unduly burdensome when voluminous documents are claimed to be privileged or protected,” but the party invoking privilege in such circumstances still must provide the tribunal with sufficient information to determine that privilege has been properly invoked. *McCulloch*, 168 F.R.D. at 523 & n.10. DOL has failed to do so.

4KG-ACC insists that, because DOL’s privilege log as currently written does not adequately support DOL’s privilege claims, we should require DOL immediately to produce all documents on its privilege log. We find it more appropriate in these circumstances to provide DOL an opportunity to review each of its privilege claims and provide a revised log that corrects the current log’s deficiencies, rather than to make the initial failure to create a perfect privilege log the first time out a game of “gotcha.” *See Eden Isle Marina*, 89 Fed. Cl. at 499 (providing an opportunity for correction of a deficient privilege log); *AAB Joint Venture*, 75 Fed. Cl. at 447 (same). Although 4KG-ACC also questions whether the deliberative process and many of the attorney-client privileges being claimed could ever apply in the circumstances of the project at issue here, we defer considering those arguments until DOL has provided a more fulsome privilege log that identifies the basis of its privilege claims.

### Decision

On or before **December 11, 2020**, DOL shall provide 4KG-ACC with a revised privilege log that corrects the deficiencies noted above.

Harold D. Lester, Jr.  
HAROLD D. LESTER, JR.  
Board Judge