OFFICE OF ADMINISTRATIVE LAW JUDGES
U.S. DEPARTMENT OF LABOR
WASHINGTON, D.C. 20001

In the Matter of

U.S. DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES, Prosecuting Party, v. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, Respondent.	)	Case No. 2002-CCP-1

In the Matter of

U.S. DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES, Prosecuting Party, v. CALIFORNIA APPRENTICESHIP COUNCIL, Respondent.	)	Case No. 2003-CCP-1

REPLY BRIEF IN SUPPORT OF PROSECUTING PARTY'S MOTION TO COMPEL

Introduction

Having produced 15,000 pages of documents on May 1, 2003 without specifying which documents responded to which discovery requests or where the responsive documents were located, Respondent CDIR now blames Prosecuting Party OATELS for failing to realize that

documents responsive to two of OATELS' requests (Interrogatories 4 and 18) were not included in this unindexed mass of documents. See Responding Party CDIR's Response to Prosecuting Party OATELS' Motion To Compel ("CDIR's Response to OATELS' Motion To Compel") (July 7, 2003) at 8, 11-12. CDIR claims that had OATELS held a final conference with CDIR before moving to compel on June 16, CDIR would have told OATELS that the excluded documents were omitted because OATELS' San Francisco inspection agent did not ask to review or copy them. See id. at 2, 11.[1] CDIR contends that OATELS' motion is frivolous because the state agency asserts that it properly identified the documents produced on May 1, is now making the documents responsive to Interrogatories 4 and 18 available for copying, and properly asserted all objections and privileges made in its March 18 responses to OATELS' discovery requests. See id. at 2-4. Respondent CAC also asserts that a pre-motion conference would have revealed that the state commission has nothing to produce, thereby obviating many of OATELS' claims against CAC. See CAC's Response to OATELS' Motion To Compel (July 8, 2003) at 2.

As explained more fully below, CDIR's and CAC's contentions do not withstand scrutiny. Contrary to CDIR's assertion, OATELS' motion to compel is not the result of a failure to seek further non-required pre-motion conferences but of CDIR's much earlier failure, at the May 1 production, to disclose properly which responsive documents the state agency was producing and

[1] Although there is no pre-motion conference requirement under the Office of Administrative Law Judges ("OALJ") rules, which govern this proceeding, see 29 C.F.R., Part 18, OATELS' counsel did confer with CDIR's counsel on March 27, 2003 in an attempt to secure more sufficient responses to OATELS' requests. During late March and early April, OATELS' counsel had at least two other conversations with CDIR's counsel to try to clarify and resolve the disputed issues. OATELS also submitted a twenty-four-page explanation of the insufficiency of CDIR's responses to the state agency's counsel on April 7. See letter from Stephen Jones, Esq., OATELS' counsel, to John Rea, Esq., CDIR's counsel (Apr. 7, 2003) ("OATELS' Request for Clarification'"), OATELS' Motion To Compel (June 16, 2003), App. A. After reviewing CDIR's reply to this explanation and the state agency's May 1 document production, OATELS concluded that further attempts at informal resolution of the pending motion, including additional pre-motion conferences, would be futile.

which it was leaving out. CDIR's belated disclosure, made only as a result of OATELS' motion seven weeks after production, that the documents responsive to Interrogatories 4 and 18 had been omitted does not moot the motion because CDIR has still not properly identified its May 1 production, has given no assurance that it will properly identify and explain the omitted documents that it is about to produce, and has not produced the materials it withheld under improperly asserted privileges.

Similarly, to the extent that CAC's present claim that it has nothing to produce is relevant and true, the state commission was required to make that disclosure in its April 14 responses to OATELS' discovery requests, when CAC asserted merely hypothetical objections and privileges without telling OATELS that the state commission was not withholding any responsive documents thereunder. See CAC's Responses to OATELS' First Set of Interrogatories ("CAC's Responses to OATELS' Interrogatories") (Apr. 14, 2003), OATELS' Motion To Compel, App. C; CAC's Responses to OATELS' First Set of Request for Production of Documents ("CAC's Responses to OATELS' Production Requests") (Apr. 14, 2003), OATELS' Motion To Compel, App. D.[2] In fact, CAC appears to be saying only that CDIR, not the state commission, is the custodian of CAC's documents, leaving open the question whether CDIR has any responsive CAC items within the scope of CAC's asserted objections and privileges. CAC's belated disclosure also does not resolve the dispute over the requested CAC items that have still not been produced, see infra, pp. 7, 16-19.

[2] CAC also created the impression that it could produce documents by saying in its responses that the minutes of its meetings and its title 8, section 212.2(g) rule-making file would be produced. See CAC's Responses to OATELS' Interrogatories at 3-4, 9-10, OATELS' Motion To Compel, App. C. If CAC meant only that it would ask CDIR to produce these documents, but that CAC could not produce any documents itself, the state commission should have said so in its responses and not waited until after OATELS moved to compel to make this disclosure. The rule-making file has still not been produced after three months.

In the first place, had CDIR properly disclosed, on May 1, which requested items it was producing and which it was leaving out, OATELS would not have had to wait seven weeks to learn about the omitted documents. The contingent possibility that OATELS might later request a non-required "last chance" conference before moving to compel did not relieve CDIR of its obligation to disclose at production exactly which requested items it was producing and precisely where they could be found. Had CDIR done so, OATELS would have immediately requested the omitted items.

Contrary to its assertion, CDIR did not properly identify the items it produced on May 1. In its March 18, 2003 responses to OATELS' discovery requests, CDIR said that it would later produce or make available for copying materials responsive to eight interrogatories (Interrogatories 2, 4-6, 8-9, 18 and 20) and all 32 requests for production. See Responding Party CDIR's Answers and Objections to Prosecuting Party's First Set of Interrogatories and Request for Production of Documents ("CDIR's Responses to OATELS' Discovery Requests") (Mar. 18, 2003) at 5, 7, 9, 11-12, 18, 20, OATELS' Motion To Compel, App. E. Although CDIR seems to have included some of this material in the several hundred pages of documents produced in its March 18 responses, the state agency did not label or identify this material by request number, and therefore OATELS cannot be certain which requests this material is designed to answer. OATELS surmises that CDIR's March 18 responses included documents responsive to three of the above interrogatories (numbers 6, 8 and 9).[3] Thus, when CDIR produced its 15,000 pages of documents on May 1, there were up to 37 pending requests (five interrogatories and 32 production requests) to which this material was potentially responsive. OATELS could not tell

[3] CDIR's March 18 responses also included a few documents that appear to be responsive to Interrogatory 4, but the vast majority of the responsive documents thereto, the responsive program files, were offered for later inspection and copying.

which documents were responsive to which requests, where these responses were located, or even whether the responses to Interrogatories 4 and 18 were included, because CDIR did not specify request numbers, or indicate which requests the production answered and which ones it did not address.

Even now, after OATELS has repeatedly asked for identification of responsive documents in the 15,000 pages by request number and Bates-stamped page number, CDIR has declined to provide this information. CDIR has offered instead only a broad-brush topical schema of six categories, corresponding to the six boxes the stage agency produced, with each category embracing thousands of pages. See CDIR's Response to OATELS' Motion To Compel at 7-8. This sweeping organizational scheme is insufficiently specific for OATELS to determine which documents, or categories of documents, are responsive to which requests and precisely where the responsive documents are located.

Secondly, far from mooting OATELS' motion to compel, CDIR's impending production of many thousands of pages of program files in response to Interrogatories 4 and 18 accentuates the need for compelled proper identification and explanation of responsive documents. Unless CDIR provides the requested summaries explaining the disposition of rejected and long-pending applications and specifies, by Bates-stamped page number, where the summarized processed applications are located, the produced materials will be unintelligible and unusable. So far, CDIR has refused to give any assurance that the state agency will identify and locate the responsive applications and explain how they were disposed. Without this essential identification of requested materials and explanation of CDIR's application notations and processing, CDIR's production will simply be a dump of many thousands of pages of useless material improperly substituted for responsive answers to OATELS' interrogatories.

Thirdly, CDIR's contention that it properly listed its claimed objections and privileges, and cannot further refine these claims until OATELS clarifies the scope of its requests, see CDIR's Response to OATELS' Motion To Compel at 3, is without merit. CDIR misconceives the requirements for asserting objections and privileges. As explained in OATELS' motion to compel, the discovery rules require that the respondent state specific, detailed grounds for claimed objections and privileges in its responses. See OATELS' Motion To Compel at 3-5. CDIR cannot rely on any subsequent informal resolution process to cure the conclusory assertions of objections and privileges in the state agency's responses because the rules state that failure to state specific grounds for these assertions results in waiver. See id. at 3-6. CDIR asserts that it would have been impossible or unduly burdensome to assert privileges for specific documents until OATELS clarified its allegedly overbroad and unclear requests. See CDIR's Response to OATELS' Motion To Compel at 12. CDIR improperly reverses the burdens here. It was CDIR's burden, in its objections, to state specifically how a request was overbroad or unclear, not OATEL's burden to clarify a request in response to an objection that had not been specifically justified.

Furthermore, CDIR makes the unwarranted assumption that OATELS' waiver argument would require justification of the asserted privileges for every potentially privileged document. See CDIR's Response to OATELS' Motion To Compel at 12. On the contrary, the discovery rules require only that the initial justification of the privilege include a description of the nature of the privileged materials that is sufficient to enable the other parties to assess the applicability of the privilege. See OATELS' Motion To Compel at 4 (citing applicable authorities). CDIR could have met this requirement by describing categories of documents and explaining why the

asserted privileges applied to them. But CDIR waived its asserted privileges by providing no justification for them at all.

Finally, CAC's assertion that OATELS' failure to request a pre-motion conference denied the state commission the opportunity to disclose that it had nothing to produce is without merit. CAC not only had the opportunity, but the obligation, to make this disclosure, if true, at a much earlier stage: when it responded to OATELS' discovery requests on April 14. It is not acceptable for a respondent coyly to decline to reveal responsive information unless and until the interrogator requests a conference that is not required under the governing rules.

Moreover, CAC's claim that it has nothing to produce is true only in the sense that CDIR is the custodian of CAC's documents and would be responsible for production of responsive CAC documents. There is, however, responsive CAC information that has either not yet been produced, or whose location in produced materials has not been sufficiently specified: all CAC administrative decisions responsive to Interrogatories 4 and 18; the requested summaries of these decisions; and CAC's rule-making file for title 8, section 212.2(g) of the California Code of Regulations, which CAC acknowledged is responsive to Interrogatory 17. See CAC's Responses to OATELS' Interrogatories at 9, OATELS' Motion To Compel, App. C.[4] It makes no difference to OATELS whether CAC or CDIR produces this material, but the existence of this unproduced responsive CAC material demonstrates that there are still live issues about CAC documents here.

[4] CAC's response to Interrogatory 17 said that the the rule-making file would be produced on request. Since the file is within the scope of Interrogatory 17, however, the interrogatory has already made that request, and no further request is necessary. The file is now three months' overdue and must be produced forthwith.

ARGUMENT

I. OATELS' Motion To Compel Did not Result From a Failure To Seek Further Non-Required Pre-Motion Conferences but from CDIR's and CAC's Much Earlier and Continuing Failures To Make Required Disclosures, Properly Identify Produced Materials, and Validly Assert Privileges.

The Office Of Administrative Law Judges ("OALJ") practice and procedure rules, which govern this proceeding, provide that the Federal Rules of Civil Procedure apply "in any situation not provided for or controlled by [the OALJ] rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1(a). Although Federal Rule of Civil Procedure 37(a)(2) requires a party to confer with the party failing to make discovery before moving to compel, the OALJ provision for a motion to compel, § 18.21, which is controlling here, contains no such requirement. Thus, OATELS was not required to request a conference with CDIR and CAC before filing the pending motion.

Nevertheless, OATELS' counsel did hold a pre-motion conference with CDIR's counsel on March 27, 2003 in an attempt to secure more sufficient responses to OATELS' requests. During late March and early April, OATELS' counsel had at least two other conversations with CDIR's counsel to try to clarify and resolve the disputed issues. OATELS also submitted a detailed explanation of the insufficiency of CDIR's responses to the state agency's counsel on April 7. After reviewing CDIR's April 17 reply to this explanation, see letter from Fred Lonsdale, Esq., CDIR's Counsel, to Mr. Jones (Apr. 17, 2003) ("CDIR's Reply to OATELS' Explanation"), OATELS' Motion To Compel, App. B, and the state agency's May 1 document

production, OATELS concluded that further attempts at informal resolution of the pending motion, including additional pre-motion conferences, would be futile.[5]

OATELS also served a copy of its detailed April 7 explanation on CAC. OATELS had previously given CAC the same requests OATELS had submitted to CDIR, and hoped that the explanation would enable CAC to provide responsive answers to the federal agency's requests. Instead, CAC's April 14 responses did not take account of OATELS' informal April 7 explanation, and were so conclusory and devoid of content that OATELS reasonably concluded that further attempts at informal resolution, including conferences, would be fruitless.

CDIR and CAC both claim that OATELS' motion arises from the federal agency's failure to seek pre-motion conferences with the respondents on the eve of the motion. CDIR asserts that such a "last chance" conference would have avoided the motion by permitting the state agency to reveal that the documents responsive to Interrogatories 4 and 18 were not in CDIR's May 1 document production. See CDIR's Response to OATELS' Motion To Compel at 2, 11. CAC also asserts that a "last chance" pre-motion conference would have resolved many of OATELS' objections to CAC's discovery responses by allowing the state commission to disclose that it had nothing to produce. See CAC's Response to OATELS' Motion To Compel at 2.[6]

As explained below, however, CDIR's and CAC's claims are without merit. Both respondents not only had the opportunity, but the obligation, to make the above disclosures long before the eve of the motion. Furthermore, nothing that could have been said at any "last

[5] CDIR's Response to OATELS' Motion To Compel acknowledges that the March 27 conference was held and that the parties made other attempts at informal resolution of the disputed issues. See id. at 4, 13-14.

[6] As noted above, there is no requirement of a "first chance," let alone a "last chance," pre-motion conference under the governing OALJ rules. Thus, a party's decision to seek a "last chance" pre-motion conference here is purely discretionary.

chance" pre-motion conferences was likely to have resolved the pending motion because, contrary to CDIR's and CAC's assertions, the motion reflects not misunderstandings but the parties' deep-seated and continuing legal disagreements over what constitutes proper production and identification of materials, appropriate use of the "business records" option, and valid assertion of privileges.

For this very reason, the post-motion conference between OATELS and CDIR did not succeed, even after CDIR made its disclosure, because legal issues still exist about whether the materials CDIR produced on May 1 were sufficiently identified, what identification and explanation of requested program applications are required in response to Interrogatories 4 and 18, and whether CDIR has waived its asserted privileges. Similarly, CAC's post-motion disclosure that the state commission had nothing to produce did not resolve OATELS' claims against CAC because legal issues remain about the sufficiency of the respondents' specification of the location of the requested summaries of CAC decisions in the CAC meeting minutes. OATELS reasonably decided not to seek "last chance" pre-motion conferences with CDIR and CAC because OATELS realized that the parties would not be able to resolve these legal issues themselves. See Letter from Mr. Jones to Mr. Lonsdale, (July 2, 2003), CDIR's Response to OATELS' Motion To Compel, Lonsdale's Declaration, Ex. 5.[7]

Contrary to CDIR's contention, the absence of a "last chance" pre-motion conference did not deny the state agency the opportunity to disclose that it had omitted the documents responsive to Interrogatories 4 and 18 from its May 1 production because CDIR could, and should, have made the disclosure then. CDIR says that it omitted these requested materials

[7] By contrast, as noted on page 12, note 8 infra, where OATELS believes that the parties can resolve disputes themselves, it will continue to seek information through additional discovery and informal resolution.

because an "OATELS attorney" did not ask to review or copy them during the pre-production document inspection on CDIR's premises. See CDIR's Response to OATELS' Motion To Compel at 10-11.

The attorney in question, Christopher Wilkinson, Esq., is not an OATELS attorney, but a lawyer in the U.S. Department of Labor's San Francisco Regional Solicitor's Office who agreed to serve as OATELS' document inspection agent. Mr. Wilkinson had no authority to modify or rescind OATELS' discovery requests, but even if CDIR believed that he had, CDIR was still bound to inform OATELS, by discovery request, exactly what the state agency was producing and what it was leaving out, and precisely where the responsive materials to each request could be found. Had CDIR done so, OATELS would have requested the omitted materials immediately and would not have had to wait seven weeks for CDIR's belated disclosure, a disclosure that was made only as a result of OATELS' motion to compel. As noted above, however, this disclosure does not moot OATELS' pending claims against CDIR because the legal issues identified above, and briefed in the arguments below, remain unresolved.

Similarly, the fact that OATELS did not seek a "last chance" pre-motion conference with CAC did not deprive it of the opportunity to make the disclosure that the state commission should have made in its April 14 responses: that CAC had nothing to produce and was asserting purely hypothetical objections and privileges that have no application to OATELS' discovery requests. Had CAC made that required disclosure then, OATELS would not have had to wait almost three months to get that information through the pending motion to compel. Like CDIR's disclosure, however, CAC's revelation does not moot OATELS' pending claims against the state commission because there are unresolved legal disputes about CDIR's and CAC's use of the "business records" option to produce summaries of CAC's decisions. Furthermore, CAC has still

not made it clear whether CDIR, the custodian of CAC's documents, has responsive CAC materials within the scope of CAC's asserted objections and privileges, even though CAC now says that it does not have any such materials itself.

Thus, "last chance" pre-motion conferences would not have avoided the pending motion and the belated disclosures that the motion evoked have not mooted this controversy. The intervention of the ALJ is now necessary to resolve continuing legal disagreements between the parties on what constitutes sufficient production and identification of documents, proper use of the "business records" option and valid assertion of privileges.

II. CDIR Has Insufficiently Identified Its May 1, 2003 Document Production and Must Be Compelled To Identify Responsive Documents by Request Number and Bates-Stamped Page Number.

On January 17, 2003, OATELS served 24 interrogatories and 32 document production requests on CDIR, instructing the state agency to serve all responses on the federal agency's counsel within thirty days. Six months later, CDIR has still not produced all of the requested materials. Nor has CDIR ever identified which of the documents it has submitted are responsive to which of OATELS' 56 requests and where each responsive document (or category of documents) begins and ends by Bates-stamped page number. OATELS now asks the ALJ to order CDIR to supply this identification for the state agency's May 1 production of nearly 15,000 pages of documents.[8]

In its response to OATELS' motion to compel, CDIR argues that its manner of production of these documents was proper under Federal Rule of Civil Procedure 34(b), which permits a

[8] OATELS also regards CDIR's responses to the federal agency's interrogatories as insufficient. Having received what it considered to be inadequate clarifications of these responses from CDIR at the parties' March 27, 2003 pre-motion conference and in the state agency's April 17 response to OATELS' request for clarification, OATELS is preparing another round of discovery to obtain more sufficient responses.

party to produce documents as they are kept in the usual course of business. See CDIR's Response to OATELS' Motion To Compel at 6-9. CDIR also contends that the documents were sufficiently organized by type of document, see id. at 6-9, even though CDIR provided no specification of responsive documents by request number or Bates-stamped page number. As explained below, neither argument has merit.

First, excluding Interrogatories 4 and 18, which CDIR now says were not addressed in its May 1 production, the state agency explicitly invoked the "business records" option of Federal Rule of Civil Procedure 33(d) in lieu of an answer to at least two pending requests (Interrogatories 2 and 20), and also appears to have proposed to produce supplemental material when available in response to another (Interrogatory 5). See CDIR's Responses to OATELS' Discovery Requests at 5, 9, 20, OATELS' Motion To Compel, App. E. Thus, with regard to at least these three pending requests, CDIR's May 1 production was governed by the "business records" option of Rule 33(d).[9] That option is available only where the burden of deriving the answer is the same for both parties, and the respondent's specification of the records from which the answer may be ascertained is in sufficient detail to permit the interrogating party to locate and to identify these records as readily as the respondent can. Fed. R. Civ. P. 33(d); see also OATELS' Motion To Compel at 9-11 (discussing Rule 33(d) and applicable authorities).

The courts have interpreted the Rule 33(d) "business records" option as requiring specification of the page or paragraphs that are responsive to the interrogatory. See OATELS' Motion To Compel at 10 (citing authorities). "Production of mass business records and broad

[9] Because of CDIR's failure to identify the produced documents by request number, OATELS cannot tell how many of these requests the state agency's production was intended to answer, or whether the production was meant to address any of the 32 pending production requests. CDIR's Response to OATELS' Motion To Compel now identifies Interrogatory 20, see id. at 8, but does not specify any other requests addressed in the state agency's May 1 production.

references to pertinent files are insufficient." DCA Inc. v. Resorts Int'l Inc., No. CIV.A.88-6644, 1989 WL 138846, at *7 (E.D. Pa. Nov. 15, 1989). Under the "business records" option, the respondent must specifically identify which records are responsive to which requests and specifically identify where the answers can be found within the documents produced. See id., 1989 WL 138846, at *7, *9.

By not identifying the documents responsive to each request or labeling, indexing, or citing the Bates-stamped page numbers of the portions of these documents responsive to each request, CDIR has failed to meet this specificity requirement. CDIR's failure is also demonstrated by the more general point that, quite apart from being insufficient to permit OATELS to find responsive materials as easily as CDIR could, CDIR's specification was not even sufficient to permit OATELS to determine which requests the produced documents were intended to answer, or whether those documents even addressed Interrogatories 4 and 18.[10]

Secondly, CDIR's organization of the documents was not specific enough for OATELS to determine which documents, or categories of documents, were responsive to which requests and precisely where the responsive portions of the documents were located. The documents were packed in six boxes, organized by type of document, with no reference to request numbers. Box 1 contained about 3,900 pages of minutes of CAC quarterly meetings from 1989 to 2002. Box 2

[10] Even if none of the documents in CDIR's May 1 production were intended to be responsive to the above three interrogatories in which the state agency invoked the "business records" option (Interrogatories 2, 20, and, arguably, 5), the Rule 33(d) specificity requirement still applies to all documents produced under Rule 34(b) (i.e., some or all of the 34 pending production requests) because that rule incorporates the procedural requirements of Rule 33. See Fed. R. Civ. P. 34, Advisory Committee Notes, 1970 Amendment, Subdiv. (b) ("The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34 as well."). Thus, even if CDIR properly produced its documents as they were kept in the usual course of business, the state agency was still required to identify which documents were responsive to which requests and specify precisely where the responsive portions of the applicable documents could be found.

held about 2,800 pages of CAC members' folders, including minutes of CAC quarterly, special and committee meetings from 1996 through 2002. There appeared to be at least some overlap between the minutes in Box 1 and Box 2, and the Box 2 minutes were in rough, but not always uniform, chronological order.

Box 3 consisted of about 2,100 pages, including more CAC member folders and CAC meeting minutes from 1995 to 2002, and about several hundred to a thousand pages of miscellaneous documents that followed no particular pattern: CDIR reports, updates, bulletins, lists of programs and apprenticeable occupations, miscellaneous program files, litigation documents, memos and letters from the California Attorney General's Office, CAC annual reports, etc. Boxes 4-6, containing a total of about 6,000 pages, each started with a separate litigation file, but, in fact, the three litigation files, for the PHCC, ACTA, and IRCC cases, were mixed up, with portions of two of the files found in at least two boxes and no file running straight through from beginning to end.

From this motley group of documents, it was impossible for OATELS to determine which documents were responsive to which requests, or where the relevant portions of the responsive documents were located. Indeed, it was not even possible for OATELS to tell which of the pending 37 requests the material was supposed to answer. Nor could OATELS ascertain whether any of the produced documents were responsive to Interrogatories 4 and 18, since there appeared to be about 150 pages of program files in the production, but it was not evident why they were produced. None of the produced material by itself, without proper identification, relation to the request it answered, or explanation of how it was responsive, amounted to a readily intelligible answer to any OATELS request.

For these reasons, OATELS asks the ALJ to order CDIR to identify which documents or categories of documents in its May 1, 2003 production are responsive to which OATELS' discovery requests and to specify where the responsive portions of each applicable document, or category of documents, begin and end by Bates-stamped page numbers. OATELS also asks the ALJ to order CDIR to say which of the 37 pending OATELS requests (Interrogatories 2, 4-5, 18, and 20 and Requests for Production 1-32) are not addressed by the state agency's May 1 production and when CDIR will produce the materials responsive to these outstanding requests.

III. CDIR and, Where Applicable, CAC Must Be Compelled Properly to Produce, Identify and/or Summarize the Documents Responsive to Interrogatories 4 and 18.

OATELS' motion to compel asked the ALJ to order CDIR to identify and produce, by request number and, where applicable, Bates-stamped page numbers, the following documents responsive to Interrogatories 4 and 18:

(1) all program applications since 1995 that have been either formally rejected or pending for at least two years (Interrogatory 4);

(2) all program applications in the building and construction trades since 1995, on which existing programs submitted comments (Interrogatory 18);

(3) summaries of the disposition of the applications responsive to (1) and (2), keyed to the Bates-stamped page numbers of the applications summarized;

(4) all CAC decisions on all appeals of DAS decisions to CAC since 1995 rejecting program applications (Interrogatory 4);

(5) all CAC decisions on all appeals to CAC of DAS decisions issued since 1995 on program applications in the building and construction trades, on which existing programs submitted comments (Interrogatory 18); and

(6) summaries of the status or disposition of all of the appeals responsive to (4) and (5). See OATELS' Motion To Compel at 13, 15-16.

CDIR maintains that there is no longer an issue about Interrogatories 4 and 18 because the state agency has made the responsive program files available to an OATELS agent for inspection and copying. See CDIR's Response to OATELS' Motion To Compel at 3, 11-12. Contrary to CDIR's assertion, there is a compelling need for the ALJ to order CDIR to provide the requested identification and summaries so that OATELS can find and understand the responsive material. OATELS understands that CDIR will produce about 5,000 to 10,000 pages of program files. CDIR has not agreed to identify the responsive applications by request number and Bates-stamped page number or provide the requested summaries, and has never provided such identification and explanation in its past productions. Unless the ALJ intervenes, there is every reason to believe that CDIR's new production will be just as incomprehensible and unusable as its May 1 production.

As explained in OATELS' motion to compel, the requested summaries of the dispositions of the responsive applications are necessary so that OATELS can understand how CDIR handled these applications and why. See OATELS' Motion To Compel at 11-12. Based on its review of the few program applications CDIR produced on May 1 and the internal reports the state agency produced earlier, OATELS is concerned that it may not be able to understand CDIR's internal notations and operating procedures and may therefore find the processed applications unintelligible. Without specific identification and explanation of the responsive applications, by response number and Bates-stamped page number, CDIR's production will simply be a dump of many thousands of pages of useless material improperly substituted for responsive answers to OATELS' interrogatories. Ordering CDIR to provide all the materials in categories (1)-(3) above

will ensure that OATELS can find the responsive applications and understand how they were processed.

Furthermore, neither CDIR nor CAC has properly identified or produced the responsive CAC decisions or the requested summaries thereof (categories (4)-(6) above). Instead, both respondents have simply said that OATELS can find summaries of the CAC decisions as easily as the respondents can in the CAC meeting minutes that CDIR produced on May 1. CDIR's Response to OATELS' Motion To Compel at 11; CAC's Response to OATELS' Motion To Compel at 3-4. Those minutes consist of 3,800 pages of minutes of CAC quarterly meetings, and perhaps a few thousand more pages of minutes of CAC special and committee meetings. With the exception of one summary, attached as an exhibit to CAC's Response to OATELS' Motion To Compel, see id., Ex. B, neither CDIR nor CAC has specified the Bates-stamped page numbers where the responsive summaries may be found. Thus, the two respondents have not specified the location of these summaries with sufficient precision to warrant use of the "business records" option.

In response to this contention, CAC asserts that CDIR's production of the CAC minutes is sufficient to enable OATELS to find the summaries of CAC decisions as easily as the Commission can. CAC's Response to OATELS' Motion To Compel at 3. CAC claims, for example, that OATELS can find the summary of CAC's ACTA decision "simply by turning to the second page of the minutes (DAS 1008) of CAC's October, 2002 meeting." Ibid. CAC overlooks the fact, however, that CDIR did not index the CAC minutes (or any other portion of its 15,000 page production) and therefore OATELS cannot "simply turn" to a particular page of the minutes for any meeting, even if OATELS knew that responsive material was located there, unless a Bates-stamped page number is given. Unlike CAC, which apparently was able to find

its own ACTA case summary with ease, OATELS would have to wade through thousands of pages of minutes to find the responsive materials, a task that the courts have regarded as an abuse of the "business records" option. See OATELS' Motion To Compel at 10 (citing authorities).

For these reasons, OATELS asks the ALJ to order CDIR to identify and produce, by request number and, where applicable, Bates-stamped page numbers, all the documents responsive to categories (1)-(5) above. OATELS also asks the ALJ to compel CAC to identify, by request number, all the summaries responsive to category (6) above, and specify, by precise Bates-stamped page numbers, where these summaries may be found in CDIR's May 1 document production.

IV. CDIR and CAC Have Waived Their Asserted Objections and Privileges and Must Be Compelled To Produce All Materials Withheld Thereunder.

As discussed in OATELS' motion to compel, the discovery rules require respondents to state specific grounds in their responses for any asserted objections or privileges on penalty of waiver. See OATELS' Motion To Compel at 3-5 (discussing applicable authorities). As explained below, CDIR and CAC did not comply with these requirements and therefore the two respondents must be compelled to produce all materials withheld under their asserted objections and privileges.

In its responses to OATELS' interrogatories, CDIR asserted five privileges a total of thirty-five times without stating any justifications and made ninety-three conclusory, or unsupported, assertions of nine objections. See CDIR's Responses to OATELS' Discovery

Requests, OATELS' Motion To Compel, App. E.[11] CDIR did not disclose, however, whether it was actually withholding any information on the basis of these asserted privileges and objections. In response to OATELS' request for clarification and subsequent motion to compel, CDIR revealed that it was not withholding any information on the basis of the objections and was withholding privileged information only under the attorney-client and/or attorney work-product privileges. See CDIR's Reply to OATELS' Explanation at 3, OATELS' Motion To Compel, App. B; CDIR's Response to OATELS' Motion To Compel at 12.[12]

Similarly, CAC's discovery responses did not say whether CAC was actually withholding any information on the basis of objections or privileges, and the responses simply asserted, without any justification, that each of 56 OATELS' requests sought information protected by the attorney-client, attorney work-product and official information privileges. CAC's Responses to OATELS' Interrogatories at 1-2, OATELS' Motion To Compel, App. C; CAC's Responses to OATELS' Production Requests at 1-2, OATELS' Motion To Compel, App. D. CAC's responses also made multiple unsupported objections alleging vagueness and ambiguity, but again did not disclose whether the state commission was actually withholding information on the basis of these objections. In its response to OATELS' motion to compel, however, CAC revealed that it had no responsive documents to produce. CAC's Response to OATELS' Motion To Compel at 2.

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[11] The following privileges were asserted the specified number of times: deliberative process (9), official information (8), attorney-client (6), attorney work-product (6) and legislator's privilege (6). The following objections were asserted with the indicated frequency: overbroad (18), vague (17), ambiguous (17), compound (17), irrelevant (12), assumes facts not in evidence (6), argumentative (3), violates privacy rights (2) and convoluted (1). See CDIR's Responses to OATELS' Discovery Requests, OATELS' Motion To Compel, App. E.

[12] CDIR's Reply to OATELS' Explanation specified both privileges, but CDIR's Response to OATELS' Motion To Compel mentioned only the attorney-client privilege. As a result of these inconsistent claims, OATELS does not know whether CDIR is now withholding information under the attorney work-product privilege.

In essence, then, nearly all of the myriad objections and privileges CDIR and CAC asserted here were purely hypothetical or contingent, not having any application to OATELS' discovery requests. The courts have condemned this practice of asserting theoretical objections and privileges as "worthless," serving only to delay discovery. See, e.g., Starlight Int'l, Inc. v. Herlihy, 181 F.R.D. 494, 497 (D. Kan. 1998). Objections and privileges asserted in this way are invalid. See ibid.; see also OATELS' Motion To Compel at 5-6 (citing other authorities).

Sweeping away CDIR's and CAC's invalid hypothetical objections and privileges leaves only CDIR's unsupported assertions of the attorney-client and attorney work-product privileges, under which the state agency says it has withheld responsive information. However valid these privileges might otherwise be, CDIR has waived them here by not stating, in its responses, the specific justification required for each assertion of a privilege.[13]

In response to this waiver argument, CDIR makes two arguments. First, CDIR contends that, in the face of what it regarded as vague and ambiguous discovery requests, it was impossible to assert privileges for specific documents in its responses. See CDIR's Response to OATELS' Motion To Compel at 12. Secondly, CDIR maintains that, during the parties' subsequent attempts at informal resolution, it provided specific justifications for objections and privileges, such as the legislator's privilege. See id. at 13-14. As shown below, however, neither contention is responsive to OATELS' waiver argument.

CDIR's first argument essentially says that because it was impossible to justify withholding every potentially privileged document, the state agency was entitled to provide no initial justification for its asserted privileges and wait for OATELS to narrow its discovery

[13] CDIR also later declined to provide these justifications even after OATELS specifically requested them in its April 7, 20003 request for clarification. See OATELS' Motion To Compel at 4-5.

requests. CDIR misunderstands the discovery rules. First, those rules put the burden on the objector to justify specifically, in its responses, how a request is objectionable or why the material requested is privileged; the rules do not permit an objector to wait for the interrogator to answer an objection, or assertion of privilege, that has not been specifically justified. See In re Aircrash Disaster Near Roselawn, Indiana October 31, 1994, 172 F.R.D. 295, 306-07 (N.D. Ill. 1997); Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 593-94 (W.D.N.Y. 1996).

Secondly, the discovery rules require the party claiming the privilege to describe the nature of the things not produced in a way that will enable the other parties to assess the applicability of the privilege. See OATELS' Motion To Compel at 4 (citing applicable authorities). CDIR could have met this requirement, at least initially, by describing categories of documents and explaining why the asserted privileges applied to them. If the parties still disagreed about whether the privileges applied, CDIR could have subsequently provided the required privilege log. But CDIR waived its privileges by simply asserting them, and not giving OATELS any description of the withheld materials that would have enabled the federal agency to determine whether the privileges were being properly applied.

CDIR's second argument, that the state agency specifically justified its assertion of the legislator's privilege during informal resolution, is irrelevant. CDIR has not said that it is withholding any material under that privilege, but only under the attorney-client and attorney work-product privileges. Thus, any specific justification that CDIR provided for another privilege after the state agency had failed to state the required specific justifications for the attorney-client and attorney work-product privileges in its discovery responses would not preserve the latter privileges.

Finally, OATELS notes that, in response to OATELS' motion to compel, CAC now claims that it has no responsive documents to produce. That claim conflicts with CAC's offer, in the state commission's April 14, 2003 responses to OATELS' discovery requests, to produce minutes of CAC meetings and a CAC rule-making file. See CAC's Responses to OATELS' Interrogatories at 3-4, 9-10, OATELS' Motion To Compel, App. C. It may be, however, that CAC's April 14 offers of production were simply a loose way of saying that the state commission would ask CDIR, the custodian of CAC's records, to produce these items to OATELS. If so, and if CDIR is holding responsive items that fall within the scope of CAC's asserted privileges or objections, CAC must be ordered to identify these items by request number and CDIR must be ordered to produce them.

Accordingly, OATELS asks the ALJ to

(1) order CDIR to identify and produce, by request number, all responsive materials, including any CAC materials, it is withholding under privileges asserted by either respondent; and

(2) order CAC to specify whether any responsive CAC materials are being withheld by CDIR under any of the privileges or objections that the two respondents have asserted, and, if so, to identify these withheld materials by request number.

CONCLUSION

For these reasons, OATELS respectfully requests that the ALJ order CDIR and CAC, as

applicable, within ten days of the date of his order, to identify and/or produce, in the manner specified above, all items requested at the end of Arguments II, III and IV above.

Respectfully submitted,

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