

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

MALERIE MEYERS,

Intervenor,

vs.

Case No. 3:04-cv-978-J-16MMH

JAX INNS, INC., d/b/a Spindrifter Hotel,

Defendant.

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ORDER

THIS CAUSE is before the Court on Defendant's Motion for In Camera Inspection, to Compel Production of Documents, and for Attorney's Fees and Costs (Doc. No. 35; Motion) filed on September 13, 2005. Plaintiff opposes the Motion. See Plaintiff's Response in Opposition to Defendant's Motion for In Camera Inspection, to Compel Production of Documents, and for Attorney's Fees and Costs (Doc. No. 38; Response).

In the Motion, Defendant requests that the Court conduct an in camera review of documents Plaintiff withheld from production on the basis of a privilege and compel production of any document wrongfully withheld. See Motion at 3, 8-11. Defendant also seeks an order permitting it to re-depose a representative of Plaintiff, Investigator Mack, with regard to certain documents that were belatedly produced. See id at 3, 10-11. Finally, Defendant seeks an award of attorney's fees and costs. See id at 3, 11. Upon review of the Motion, this Court issued an Order (Doc. No. 36) on September 15, 2005 taking the Motion

under advisement, limiting Plaintiffs response time to September 22, 2005, and, to expedite any in camera review of the documents listed in the privilege log if warranted, requiring Plaintiff to provide the Court with those documents no later than September 22, 2005. See Order at 2.¹ The Motion is now ripe for review.

On March 7, 2005, Plaintiff provided Defendant a log of all documents withheld from production with applicable privileges identified. See Response Exh. 1. Defendant claims that during the deposition of Investigator Mack, on July 17, 2005, Defendant first learned that certain documents, specifically the Investigator's Notes, listed in the log as privileged under governmental deliberative process, contained "solely factual information." See Motion at 1-2.² Thus, on July 29, 2005, out of concern that Plaintiff improperly asserted the governmental deliberative process privilege, Defendant asked Plaintiff to file a joint motion requesting the Court perform an in camera inspection of the entire log. See Motion at 7. Plaintiff replied on August 10, 2005 that it would not agree to a complete in camera inspection of the log but would be willing to discuss specific objections to any document in the log. See Response at 4. Additionally, while still maintaining that the Investigator's Notes were properly withheld, Plaintiff attached them to the letter along with a revised log. See id.

¹ Although Plaintiff's Response complied with the Order, they failed to include a signed declaration with the documents so the Court entered another Order directing them to do so. See Doc. No. 40. Plaintiff complied with this Order on September 27, 2005. See Doc. No. 41.

² Plaintiff appears to argue that Defendant is tardy in alleging Plaintiff's claims of governmental deliberative process privilege are unfounded. See Response at 3. The Court finds this argument unpersuasive as it was not until the deposition of Investigator Mack that an issue arose concerning the applicability of the withheld documents. Until that time, Defendant properly accepted the assertions of privilege made by Plaintiff.

Notwithstanding, Defendant continued to be concerned about the remaining withheld documents, and on September 12th and 13th, 2005 the parties discussed this issue but were unable to come to a resolution. See id. at 4. Thereafter, Defendant filed this Motion on September 22, 2005.

Plaintiff opposes all of the relief requested in the Motion. See Response. Preliminarily, Plaintiff contends that Defendant failed to comply with the applicable procedures under the Local Rules, United States District Court, Middle District of Florida (Local Rule(s)) and the Federal Rules of Civil Procedure (Rule(s)) before filing the Motion. See id. at 6-8. Additionally, Plaintiff argues that Defendant has not asserted an adequate factual basis to warrant an in camera review by the Court of any documents withheld from production. See id. at 4-6. The Court will consider Plaintiff's procedural contentions before addressing the substantive objection to the relief requested.

Plaintiff first argues that Defendant filed the Motion without complying with applicable procedures. See Response at 6-7. Pursuant to Rule 37, a motion to compel must contain a statement that the movant has "attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." 28 U.S.C. § 37(a)(2). Local Rule 3.01(g) also provides that parties must make a good faith attempt to resolve any issue before filing a motion with the Court. The undersigned finds based upon the specific circumstances before the Court in this matter, that the July 29, 2005 letter and the two conversations regarding this dispute constitute a sufficient good faith attempt to resolve the issue. Accordingly, the Motion is properly before the Court.

Plaintiff next argues that Defendant did not comply with Local Rule 3.04. See Response at 7. This Local Rule provides: "Motions to compel discovery . . . shall (1) quote in full each interrogatory, question on deposition, request for admission or request for production to which the motion is addressed; (2) quote in full the objection and grounds therefor as stated by the opposing party" Local Rule 3.04(a). Although Defendant did not identify the request for production to which each of Plaintiff's allegedly privileged documents correspond, this failure is not fatal. The question before the Court is whether the documents are, in fact, protected by the privilege asserted by Plaintiff, not whether they are responsive to any particular request for production. Indeed, in listing the documents on the privilege log, Plaintiff acknowledged that they were responsive to at least one of Defendant's requests for production. The inclusion of the specific requests for production and Plaintiff's response to them would add little to the Court's analysis. Additionally, after review of the deposition of Investigator Mack and the letter dated July 29, 2005, the Court finds that Defendant is concerned with all of the Plaintiff's remaining assertions of governmental deliberative process privilege. No single document can be identified. Therefore, the Court is not persuaded that Defendant failed to comply with Local Rule 3.04(a) in filing this Motion.

Turning to the substance of the Motion, Defendant argues that an in camera review of the documents identified in the log is necessary to ensure Plaintiff's claims of governmental deliberative process privilege are appropriate. See id. at 8-10. Pursuant to Rule 26(b)(5)

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents . . . not produced . . . in a manner that, without

revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

28 U.S.C. § 26(b)(5). The Supreme Court “has long held the view that in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege.” Kerr v. United States Dist. Court for N. Dist. of Cal., 426 U.S. 394, 405-06 (1976). Moreover, where parties disagree as to claims of privilege the Court may order an in camera review. See United States v. Zolin, 491 U.S. 554, 568-69 (1989) (finding that the Supreme Court “has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for in camera inspection”), In re: Sealed Case (Medical Records), 381 F.3d 1205, 1218 (D.C. Cir. 2004) (remanding the case for the district court to determine privilege and recommending use of a privilege log and/or in camera review), Freiermuth v. PPG Indus., Inc., 218 F.R.D. 694, 696 (N.D. Ala. 2003) (finding in camera inspection of the document in question was appropriate because the Court was unable to “discern whether the asserted privileges applied”).

It appears from the Motion and Response that both parties believe the standard expressed in Zolin governs the determination of whether an in camera inspection of documents withheld by Plaintiff on the basis of privilege is warranted in this action. See Motion at 8, Response at 4. However, Zolin involved a determination of the applicability of the crime fraud exception justifying a review of documents otherwise properly withheld pursuant to the attorney-client privilege. See Zolin 491 U.S. at 571-572. Zolin instructs that in requesting a review of documents protected by the attorney-client privilege, a party must show an adequate factual basis that an “in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” Id. at 572. Here,

Defendant disputes the applicability of the governmental deliberative process privilege upon which Plaintiff relies. Thus, the issue is whether a privilege applies to the documents at all, not whether it can be overcome. Accordingly, the Court is not entirely persuaded that the Zolin standard applies to this matter. See Avery Dennison Corp. v. Four Pillars, 190 F.R.D. 1, 3 (D.D.C. 1999) (finding that the Zolin standard did not apply to the instant case because it “has nothing to do with the crime fraud exception”), Fed. Election Comm’n v. Christian Coal., 178 F.R.D. 61, 69 (E.D. Va. 1998) (limiting Zolin to cases involving the crime fraud exception), aff’d in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998), Parisi v. Rochester Cardiothoractic Assocs., 159 F.R.D. 406, 407 n.1 (W.D. N.Y. 1995) (concluding the Zolin threshold finding inapplicable because the instant case did not involve the crime fraud exception).

However, even assuming, arguendo, Zolin does apply to this case, the Court finds that Defendant has shown an adequate factual basis to establish that an in camera review is appropriate. First, in Investigator Mack’s deposition, he, the author of the notes at issue, unequivocally stated that the witness interview documents he prepared contained only facts given by the witness. See Motion Exh. 5 at 35. Nonetheless, Plaintiff continued to argue the interview documents were privileged. Id. at 35-36. Second, it appears Plaintiff only agreed to produce the witness interview documents after Defendant stated its intention to file a Motion to Compel Production requesting an in camera review of all documents withheld by Plaintiff on the basis of governmental privilege. See Motion Exhs. 6 and 7. Third, while Plaintiff did produce the witness interview documents, it still contends the documents are privileged. See Motion Exh. 7. However, after review of the investigator’s witness notes

(Motion Exh. 7 at 46-67) and the testimony of Investigator Mack, the Court finds these documents contain purely factual information and are not protected under any governmental deliberative process privilege. Based on the foregoing, the undersigned finds Defendant has shown an adequate factual basis for the Court to conduct an in camera review of the remaining documents withheld from production by Plaintiff pursuant to the governmental deliberative process privilege.³

The Court now must consider whether the documents withheld by Plaintiff on the basis of the deliberative process privilege are properly withheld from disclosure. The deliberative process privilege protects government documents “reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Moye, O’Brien, O’Rourke, Hogan, & Pickert v. Nat’l R.R. Passenger Corp., 376 F.3d 1270, 1277 (11th Cir. 2004) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). The United States Supreme Court has determined that for a document to be protected under the deliberative process privilege, that document must be both “predecisional” and “deliberative.” Department of Interior v. Klamath Water Users Protective Ass’n., 532 U.S. 1, 8, 121 S.Ct. 1060 (2001). A document is considered to be predecisional if it is prepared for the purpose of assisting an agency decision maker in making a decision and may include “recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer.” Moye, 376 F.3d at 1277. The privilege will not, however, extend to

³ Because Defendant only challenges Plaintiff’s claim of governmental deliberative process privilege, the Court will only review documents identified as being withheld under governmental deliberative process in the log.

documents which are peripheral to the decision or which are preliminary to the decision making process. See id. at 1277-78. In addition, the document must be deliberative, which means that a disclosure of the document would expose the decision making process of the agency such that it would undermine an agency's ability to freely and fully explore all aspects of the matter before it. See id. at 1278. The Eleventh Circuit has noted that the purpose of the deliberative process privilege "is to ensure that agencies are not forced to operate in a fishbowl." Id. (citing Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571, 573 (D.C. Cir. 1990)). Thus, materials reflecting the deliberative or policy making process are protected while factual data is not protected. See id. at 1278. Utilizing the parameters set forth above, the Court conducted an in camera review of the withheld documents. Having done so, the undersigned finds Plaintiff appropriately asserted the governmental deliberative process privilege as to the remaining documents withheld from production. Therefore, Defendant's request to compel production of documents will be denied.

In the Motion, Defendant also seeks leave to re-depose Investigator Mack with regard to any documents the Court might order Plaintiff to produce as well as the belatedly produced documents. See Motion at 3. Plaintiff responds by noting that it has already agreed to permit Defendant to re-depose Investigator Mack with regard to the belatedly produced documents. See Response at 1, 9. As explained supra, the Court has concluded that the remaining documents withheld by Plaintiff need not be produced. In light of the Court's ruling regarding the remaining withheld documents, Defendant's only basis for seeking to re-depose Investigator Mack is the belatedly produced documents. Plaintiff has

agreed to this request. Thus, Defendant's request to re-depose Investigator Mack will be granted, but only to the extent that Defendant will be permitted to re-depose Investigator Mack with regard to the belatedly produced documents as previously agreed by the parties. See Motion at 12 n.2. Otherwise, the motion to compel will be denied.

Finally, Defendant requests an award of attorney's fees and costs associated with preparing the Motion and taking the supplemental deposition of Investigator Mack. With regard to the request for fees and costs incurred in preparing the Motion, Rule 37 provides for sanctions if the motion to compel is granted. See 28 U.S.C. § 37(a)(4). Because Defendant's request to compel any further production of documents was denied, its request for attorney's fees and costs associated with preparing the Motion will be denied.⁴ The request for attorney's fees and costs associated with the supplemental deposition of Investigator Mack will be denied without prejudice, at this time, but may be renewed at the conclusion of this proceeding.

Accordingly, it is hereby **ORDERED**:

Defendant's Motion for In Camera Inspection, to Compel Production of Documents, and for Attorney's Fees and Costs (Doc. No. 35) is **GRANTED, in part, and DENIED, in part**.

1. Defendant's request for in camera inspection is **GRANTED**.

⁴ Although the Court is granting the Motion to the extent that Plaintiff will be permitted to re-depose Investigator Mack, the Court finds an award of fees and costs is not warranted as Plaintiff previously agreed to permit this deposition.

2. Defendant's request to compel production of documents is **DENIED**.
3. Defendant's request for a supplemental deposition of Investigator Mack is **GRANTED** to the extent that Defendant may re-depose Investigator Mack with regard to the belatedly produced documents and any issues raised by those documents.
4. Defendant's request for attorney's fees and costs associated with bringing Defendant's Motion for In Camera Inspection, to Compel Production of Documents, and for Attorney's Fees and Costs (Doc. No. 35) is **DENIED**.
5. Defendant's request for attorney's fees and costs associated with the supplemental deposition of Mr. Mack is **DENIED, without prejudice**.
6. In all other respects, the Motion is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida, this 14th day of October, 2005.


MARCIA MORALES HOWARD
United States Magistrate Judge

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Copies to:
Counsel of Record