



HALL FAMILY TRUSTS

182 IBLA 188

Decided May 3, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

HALL FAMILY TRUSTS

IBLA 2012-45

Decided May 3, 2012

Motion to compel the Bureau of Land Management to serve copies of certain documents on appellants. WYW-179096.

Motion denied; protective order issued.

1. Administrative Procedure: Administrative Record--Board of Land Appeals--Evidence: Generally

Submission of privileged or confidential documents to the Board under 43 C.F.R. § 4.31 intends that those documents will be used by the Board as evidence. However, BLM may provide such documents not for an evidentiary purpose, but as a matter of common practice because departmental records are not immune from review by the Secretary or the Board acting on the Secretary's behalf. Where BLM submits documents it claims are privileged as attorney-client communications or attorney work product, in the absence of a § 4.31 request, the Board will not consider or rely on those documents in reviewing the appealed decision, and such submission does not waive the privilege.

APPEARANCES: Kim D. Cannon, Esq., Sheridan, Wyoming, for appellants; Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Counsel for appellants, Dean W. Hall Mineral Trust and Dean W. Hall Irrevocable Trust (Hall Family Trusts), has moved the Board to compel the Bureau of Land Management (BLM) to serve copies of certain documents (specifically, part 3 of the Administrative Record (AR)) on appellants. For the following reasons, the Board denies that motion and grants a protective order for those documents *sua sponte*.

The Board recognizes the common-law privileges of attorney-client communications and attorney work-product. *Wyoming Outdoor Council*, 169 IBLA 223, 226 (2006). These privileges operate separately from 43 C.F.R. § 4.31, which allows parties to submit confidential evidentiary information to the Board and either protect it from public disclosure or protect it from both public disclosure and disclosure to the other parties. 43 C.F.R. §§ 4.31(a), (d). Appellants interpret § 4.31 to be the sole method by which privileged documents can be submitted to the Board. Appellants' March 15, 2012, Motion (Motion to Compel) at 7-11. Appellants also argue that BLM affirmatively waived any claim of privilege to part 3 of the AR when it submitted part 3 to the Board without a request for confidential status under § 4.31. Motion to Compel at 10.

The Board rejects appellants' interpretation of § 4.31 as fundamentally undermining the recognized common-law privileges available to parties that practice before the Board. Confidentiality under § 4.31 is not merely a matter of "privilege," but a matter of exemption "by law from public disclosure." *Id.* § 4.31(a). Certain of those exemptions, such as the exemption for trade secrets obtained from a person, may not simply be waived by BLM. *See* 5 U.S.C. § 552(b)(4) (2006). Thus, if BLM were to submit confidential trade secrets to the Board, but failed to file a request for confidentiality under § 4.31, the Board would not be obliged by § 4.31(e) to make the information publicly available, regardless of BLM's "blatant disregard" for § 4.31 procedure. *See* Motion to Compel at 11. Although 43 C.F.R. § 4.31(e) provides that an "appeals board *may* assume that there is no objection to public disclosure of the document in its entirety" if the document is not submitted in accordance with the regulation, it does not *obligate* the Board to disclose it. The provisions of § 4.31 provide a framework for orderly handling of evidentiary information, not a series of pitfalls that might require, upon any misstep, that either an agency or the Board disclose confidential information without regard to Federal law.

[1] The intended use of documents determines the manner in which they are submitted to the Board. Submission under § 4.31 intends that "privileged or confidential information" will be used by the Board "as evidence." 53 Fed. Reg. 49658 (December 9, 1988). A party *may*, under § 4.31, submit privileged documents or documents not subject to disclosure under, *inter alia*, the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006). *Wyoming Outdoor Council*, 169 IBLA at 226-27 n.4. However, as in the instant case, BLM may provide such documents not for an evidentiary purpose, but as a matter of common practice because departmental records are not immune from review by the Secretary or the Board acting on the Secretary's behalf. *See id.* Where BLM submits documents *not* under § 4.31, but nevertheless claims they are privileged as attorney-client communications or attorney work product, the Board will not consider or rely on those documents in reviewing

the appealed decision.¹ In any case, BLM's failure to submit a § 4.31 request along with privileged materials does not waive the privilege because a party is not *required* to comply with § 4.31 to assert a common-law privilege with respect to non-evidentiary documents.

Even where BLM sent attorney-client communications directly to an appellant, the Board has held that an inadvertent disclosure did not waive BLM's attorney-client privilege. *Wyoming Outdoor Council*, 169 IBLA at 225, 228. In the instant case, BLM segregated certain documents in a labeled folder and submitted them to the Board. There is no need for BLM to "remedy the error by removing the documents" from the record, because BLM made no disclosure, either intentionally or unintentionally, by submitting documents as it did. *See* Motion to Compel at 7.

The only remaining matter is whether BLM has provided a sufficient description of the documents to assert their privileged status in light of appellants' challenge. Counsel for BLM further described these documents as "14 documents" that are e-mails between BLM and its attorneys and "an attorney-prepared legal memorandum attached to those e-mails." BLM's Opposition to Motion Requesting Production of Privileged Documents at 1-2. Counsel for BLM correctly points out that the lack of a privilege log is rarely if ever challenged in appeals before the Board. However, if necessary, the Board would entertain a motion from appellants, based on good cause, to compel production of a more elaborate privilege log by BLM.

In light of the foregoing analysis, appellants' Motion to Compel is denied and the Board grants a protective order for part 3 of the administrative record *sua sponte*, prohibiting its disclosure on the basis of BLM's asserted attorney-client communication and attorney work-product privileges.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge

¹ Under 43 C.F.R. § 4.24(a)(4), the Board may not base a decision "upon any record, statement, file, or similar document which is not open to inspection by the parties to the hearing or appeal, except for documents or other evidence received or reviewed pursuant to § 4.31(d)."