



COMMONWEALTH OF PENNSYLVANIA
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September 2, 2014

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor (filing room)
PO Box 3265
Harrisburg, Pennsylvania 17105-3265

Re: Commonwealth of Pennsylvania and the Office of Consumer Advocate v. IDT Energy, Inc.

Dear Secretary Chiavetta:

Enclosed please find the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion of IDT Energy, Inc. to Compel Joint Complainants' Response to IDT Interrogatory Set II-1 and II-4. Copies of this document have been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact my office.

Sincerely,

A handwritten signature in black ink, appearing to read "John M. Abel".

John M. Abel
Senior Deputy Attorney General

Enclosures

cc: Honorable Elizabeth H. Barnes (with enclosures)
Honorable Joel H. Cheskis (with enclosures)
Certificate of Service (with enclosures)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427657
v.	:	
	:	
IDT ENERGY, INC.	:	
Respondent	:	

ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA
AND THE OFFICE OF CONSUMER ADVOCATE
TO THE MOTION OF IDT ENERGY, INC.
TO COMPEL JOINT COMPLAINANTS' RESPONSE
TO IDT INTERROGATORIES SET II-1 and II-4

Pursuant to 52 Pa. Code § 5.342, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (Attorney General) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively Joint Complainants) provide the following Answer to the Motion of IDT Energy, Inc. (IDT or the Company) to compel Joint Complainants' response to IDT Interrogatory Set II-1 and II-4. For the reasons set forth below, the Company's Motion should be denied.

I. INTRODUCTION

On August 4, 2014, IDT served Interrogatories and Requests for Production of Documents Set II on the Joint Complainants. IDT's Interrogatories Set I consists of ten Interrogatories and one Request for Production. Joint Complainants communicated their objections to IDT on August 7, 2014. Joint Complainants and counsel for IDT further discussed the objections on August 12, 2014, but no resolution was reached. On August 14, 2014, Joint Complainants submitted written objections to IDT Interrogatories Set II-1 and Set II-4 pursuant to 52 Pa. Code § 5.342(e). On August 25, 2014, IDT filed a Motion to Compel Joint Complainants' Response to IDT Interrogatories Set II-1 and Set II-4 pursuant to 52 Pa. Code § 5.342(g). Joint Complainants submit this Answer to IDT's Motion to Compel.

In proceedings before the Public Utility Commission (Commission), a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). Section 5.321 outlines the scope of discovery as follows:

- (c) *Scope.* Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c).

Further, Section 5.361 of the Pennsylvania Code specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
 - (1) Is sought in bad faith.
 - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
 - (3) Relates to a matter which is privileged.
 - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a).

IDT's Interrogatory Set II-1 states:

Referencing paragraph 15 of the Complaint, please provide a breakout of the approximately 3000 contacts from customers regarding variable rates, listing the names of all EGSs that were identified by customers by name, and the number of customers that referenced each EGS.

IDT's Interrogatory Set II-4 states:

Referencing paragraph 18 of the Complaint, please provide a breakout of the approximately 7,503 consumer complaints related to variable rates charged by EGSs, listing the names of all EGSs that were identified by customers by name, and the number of complaints against each EGS.

As discussed below, Joint Complainants assert that IDT Interrogatories Set II-1 and II-4 seek information that is not permitted because they will not lead to relevant information or admissible evidence regarding the allegations against IDT; they are beyond the scope of permissible discovery because they seek attorney work product; they are protected by the investigative privilege; and they are protected by the deliberative process privilege.

The information regarding the names of all EGSs that were identified by customers by name and the number of customers that referenced each EGS will not lead to relevant information or admissible evidence regarding the allegations against IDT in the Joint Complaint.

The information regarding the total number of customer contacts received by the OCA and the total number of consumer complaints received by the Attorney General in the Joint Complaint was provided to show the percentage of total customer contacts and consumer complaints specific to IDT in relationship to contacts and complaints received.

The Public Utility Code and the Commission's regulations require compliance thereto by each Electric Generation Supplier (EGS) licensed to conduct business in Pennsylvania. See e.g. 66 Pa. C.S. Ch. 28; 52 Pa. Code Ch. 54 and 111. Moreover, the Commission's regulations state that a licensed EGS is responsible for any fraudulent, deceptive or other unlawful marketing acts by its employees, agents and representatives. See e.g. 52 Pa. Code § 54.43(f) (emphasis added). As such, the disclosure of the names of other EGSs and the number of contacts and complaints against each EGS other than IDT cannot lead to relevant information or admissible evidence regarding the specific allegations of violations in the Joint Complaint against IDT.

Moreover, the information that IDT seeks is attorney work product, which is beyond the permissible scope of discovery. Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. IDT is asking the Joint Complainants to disclose the names of all EGSs identified by customer contacts and consumer complaints broken down by EGS name and number of customer contacts and consumer complaints that referenced each EGS. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when

attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the Defendant access to such privileged information, would allow them to “. . . gain insight into the agency's legal and factual research and reasoning, enabling [him] to litigate 'on wits borrowed from the adversary. Worse yet, [he] could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled.” Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983)(J. Brennan concurring). Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office. 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4th 216, 219 (Com. Pl. 1991). Thus, IDT Interrogatories Set II-1 and II-4 constitute attorney work product.

IDT Interrogatories Set II-1 and II-4 seek information that is not permitted because it is protected by the investigative privilege. The Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See E.g., In re Buchanan, 583 Pa. 620, 880 A.2d 568 (2005). See also, Commonwealth V. Kauffman, 413 Pa. Super. 527, 605 A.2d 1243, 1247 (1992) (holds that this privilege “requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery

of relevant materials in possession of the government”). The investigative privilege has been defined as “the government’s privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest.” Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1993). See also U.S. v. Lang, 766 F.Supp. 389 (D.Md.1991) (Court found that one party is seeking notes integral to the continuing investigation of another party and of a possible civil enforcement action; moreover, such selective note-taking can provide clues as to the focus of the on-going investigation and thus are not discoverable).

IDT Interrogatory Set II-1 is protected by the investigative privilege. The OCA statute states: “it shall be [the Consumer Advocate’s] duty, in carrying out the responsibilities under this act, to ... initiat[e] proceedings if in his judgment such may be necessary” 71 P.S. Sec. 309-4(a). Further, subpart (b) states that “[t]he Consumer Advocate may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not ... to initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceedings on the interest of consumers.”

The customer contacts that the OCA received about other EGSs is protected information gathered solely for the purpose of allowing the Acting Consumer Advocate to exercise her statutory authority to determine whether or not to initiate proceedings in the interest of consumers. Disclosure of such information would be contrary to the public interest, because it would prevent the free flow of information to the OCA, inhibiting the OCA’s ability to gain the necessary information that is required in order to determine whether to initiate proceedings in the interest of the public.

Additionally, IDT Set II-4 is protected by the investigative privilege. The Attorney General is vested with the authority to bring an action “in the name of the Commonwealth” when she deems it to be “in the public interest” against “any person” engaging in any method, act or practice declared unlawful by the Consumer Protection Law. 73 P.S. § 201-4. Further, the Bureau of Consumer Protection has the duty to investigate fraud, misrepresentation and deception in the sale of consumer goods and services. 71 P.S. § 307-2.

The names of all EGSs that were identified by customers and the number of complaints against each EGS other than IDT that the Joint Complainants received is not solely factual data related to IDT’s case. IDT is seeking an evaluative summary because this is information that would have been included in the overall strategic and tactical approach in the preparation of filing suit against IDT; thus, this information is protected from discovery under the investigative privilege.

Finally, the requested information in IDT Interrogatories Set II-1 and II-4 is protected from discovery pursuant to the deliberative process privilege. In a plurality opinion, the Pennsylvania Supreme Court recognized the existence of a deliberative process privilege that protects confidential deliberations of law, or policymaking that reflect opinions, recommendations or advice. Commonwealth v. Vartan, 557 Pa. 390, 402, 733 A.2d 1258 (Pa. 1999). In Commonwealth v. Vartan, the Court stated:

The deliberative process privilege benefits the public, not the officials who assert the privilege. The purpose for the privilege is to allow the free exchange of ideas and information within government agencies. The privilege recognizes that if governmental agencies were ‘forced to operate in a fishbowl, the frank exchange of ideas and information would cease and the quality of administrative decisions would consequently suffer’.

Vartan, 557 Pa. 390 at 400, citing FirstEaster Corp. v. Mainwaring, 305 U.S. App. D.C. 371, 21 F.3d 465, 468 (D.C. Cir. 1994).

Additionally, the Pennsylvania Supreme Court has recognized that many jurisdictions are concerned with insulating both administrative agency deliberative processes associated with litigation and deliberative processes generally. See LaValle v. Office of Gen. Counsel, 564 Pa. 482, 769 A.2d 449, 457 (Pa. 2001). In In re Thirty-Third Statewide Investigating Grand Jury, the Court stated:

Although the majority opinion by Mr. Justice Saylor in Lavalle did not specifically adopt a deliberative process privilege to support its holding in addition to the work product doctrine, it did recognize that many jurisdictions view the work product doctrine as a “subset of a broader group of principles concerned not merely with protecting deliberative processes associated with litigation, but with insulating administrative agency deliberative processes generally,” and “supported by policies concerned with facilitation of full and free communication and exchange of agency operations and practice.”

86 A.3d 204, FN 16 (Pa. 2014); LaValle, 769 A.2d at 457 (quoting Vartan, 557 Pa. 390, 733 A.2d 1258, 1264 (Pa. 1999)). Additionally, in Justice Cappy’s concurring opinion in LaValle, he stated that he would expressly adopt a deliberative process privilege to prevent a “deleterious effect on the candor necessary for an agency to arrive at reasoned decisions. Because of this chilling effect on the free exchange of ideas, the ultimate conclusions drawn by the agency would not be as well informed.” LaValle, 796 A. 2d at 501-02 (Cappy, C.J., concurring)

Thus, the Pennsylvania Supreme Court recognizes the benefits of and need for a deliberative process privilege and IDT’s Interrogatories Set II-1 and II-4 clearly ask for information that is protected under this privilege. As stated above, the consumer contacts that the OCA received about other EGSs is gathered for the purpose of allowing the Acting Consumer Advocate to exercise its statutory authority to determine whether or not to initiate proceedings in the interest of consumers. The consumer complaints that the Attorney General received about other EGSs is gathered for purposes of investigating fraud, misrepresentation and

deception. Disclosure of this information would prevent the frank exchange of ideas and information, and would be contrary to the public interest. Thus, the requested information is protected from disclosure pursuant to the deliberative process privilege.

II. ANSWER

The information sought by IDT about other EGSs will not lead to relevant information or admissible evidence regarding the allegations against IDT in the Joint Complaint.

1. Admitted.
- 2-4. The Joint Complaint is of record in this matter and speaks for itself.
5. Admitted only that the IDT discovery speaks for itself and the Joint Complainants deny any further characterizations in this paragraph.
6. It is admitted that Joint Complainants served objections to IDT Interrogatories Set II-1 and II-4.
7. IDT Interrogatory Set II-1 is of record in this matter and speaks for itself.
8. IDT Interrogatory Set II-4 is of record in this matter and speaks for itself.
- 9-10. Attachments to IDT's Motion to Compel are of record in this matter and speak for themselves.
11. Joint Complainant's written objections, attached to IDT's Motion to Compel, are of record in this matter and speak for themselves.
12. Denied. By way of further answer, Joint Complainants incorporate the below paragraphs herein.
13. This paragraph states a conclusion of law to which no response is required. By way of further answer, the Joint Complainants assert that while discovery is broad in Pennsylvania, parties are not entitled to engage in "fishing expeditions." Land v. State Farm Mut. Ins. Co., 410 Pa. Super. 579, 585, 600 A.2d 605, 608 (1991). As explained below, the numbers of complaints

received by the Attorney General and contacts received by the OCA related to variable rates charged by EGSs other than IDT is in no way germane to the issues posed in this case. IDT's Interrogatories Set II-1 and II-4 amount to nothing more than a fishing expedition into the complaints and contacts received by the Joint Complainants of EGSs other than IDT that are not the subjects of this specific cause of action.

14. Denied. By way of further answer, Joint Complainants assert that the requested information about other EGSs will not lead to relevant information or admissible evidence regarding the allegations against IDT in the Joint Complaint. Information regarding the operations of other suppliers is not relevant to this proceeding. As explained in Joint Complainant's written objections, the allegations in the Joint Complaint are specific to IDT's billing and marketing practices in Pennsylvania. The Public Utility Code and the Commission's regulations require compliance thereto by each EGS licensed to conduct business in Pennsylvania. See e.g. 66 Pa. C.S. Ch. 28; 52 Pa. Code Ch. 54 and 111. The Commission's regulations further require compliance with the Consumer Protection Law, 73 P.S. § 201-1, *et seq.* and hold each EGS liable for improper conduct of its employees, agents and representatives. See e.g. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). As such, the disclosure of the names of other EGSs and the numbers of complaints against other EGSs cannot lead to relevant information or admissible evidence regarding the allegations in the Joint Complaint against IDT. IDT's request is completely collateral in nature and seeks information of no consequence to the instant matter. IDT seeks to obtain information that is outside the scope of discovery. See 52 Pa. Code § 5.321(c). Thus, IDT seeks to obtain information that is outside the scope of discovery. See 52 Pa. Code § 5.321(c).

15. Joint Complainants deny that the amount of additional information requested and the data referenced in the Joint Complaint are relevant to IDT's Motion to Compel. Joint Complainants assert that, regardless of the amount of information IDT is seeking, the requested information is outside the scope of discovery, as explained above. Furthermore, Joint Complainants note that the information regarding the total number of customer contacts received by the OCA in the Joint Complaint was provided to show the percentage of total customer contacts specific to IDT in relationship to the contacts received. Again, the allegations in the Joint Complaint are specific to IDT's billing and marketing practices in Pennsylvania. Thus, information regarding the practices of other EGSs is not relevant in this proceeding.

16. The Joint Complaint is of record in this matter and it speaks for itself. Therefore the balance of this paragraph is denied.

17-18. Joint Complainants deny that information regarding other EGSs is relevant in this proceeding. Joint Complainants incorporate paragraphs 14-15 herein.

19. IDT Interrogatories Set II-1 and II-4 are of record in this proceeding and speak for themselves.

20-26. Denied. By way of further answer, Joint Complainants assert that the "pattern and practice" theory goes to IDT's pattern and practice, not the pattern and practice of any other EGS. As such, only IDT's patterns and practices are relevant in this proceeding. Joint Complainants incorporate paragraphs 14-15 herein.

IDT Interrogatories Set II-1 and II-4 are beyond the scope of permissible discovery because they seek attorney work product.

27. Denied. By way of further answer, Joint Complainants assert that the information that IDT seeks is attorney work product, which is beyond the permissible scope of discovery.

Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3, which codifies the attorney work product privilege and states as follows:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. (Emphasis added). IDT is asking Joint Complainants to disclose the names of all EGSs identified by customers by name and number. Work done by Joint Complainants' attorneys or at an attorney's direction as it related to other EGSs by way of summary or otherwise clearly falls within the scope of the attorney work product privilege.

In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. See e.g. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow a defendant access to such privileged information would allow him to "gain insight into the agency's legal and factual research and reasoning, enabling [him] to litigate 'on wits borrowed from the adversary.'" Worse yet, [he] could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled." Sedat, 163 Pa. Commw. at 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983)(J. Brennan concurring). Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work

product, just as if the work had been done by the attorney in person or by an employee of his office.” 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4th 216, 219 (Com. Pl. 1991).

Work done by an attorney at the Attorney General’s office and an attorney for the OCA, or at that attorney’s direction as it related to other EGSs by way of summary or otherwise clearly falls within the scope of attorney work product privilege. The information received by the OCA was used by the Acting Consumer Advocate in carrying out her duties. The information received at the Attorney General’s office was received so the Attorney General could carry out her authority to investigate fraud, misrepresentation and deception and take action as the chief law officer of the Commonwealth.

28-29. This paragraph contains a conclusion of law to which no response is required. Joint Complainants assert, however, that IDT misses the point of Joint Complainants’ objection with its reference to Pa. R.C.P. 4003.3 in paragraphs 28 and 29. Joint Complainants are not arguing that the information obtained about other EGSs constitutes attorney work product privilege solely because it was “prepared in anticipation of litigation.” Instead, Joint Complainants assert that information regarding other EGSs constitute attorney “notes or summaries” that, as IDT even recognizes, constitutes attorney work product, which is beyond the permissible scope of discovery.

30. IDT Interrogatories Set II-1 and II-4 are of record in this proceeding and speak for themselves. By way of further answer, Joint Complainants assert that the information requested in those interrogatories do include the notes and summaries of Joint Complainants’ attorneys and representative employees of the attorneys regarding information provided to Joint Complainants by consumers.

31. This paragraph contains a conclusion of law to which no response is required. As stated above, however, Joint Complainants note that a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office." 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4th 216, 219 (Com. Pl. 1991). Thus, any information gathered by a representative employee at the direction of an attorney for Joint Complainant constitutes attorney work product that is to be treated as if the work had been done by the attorney himself.

32. Joint Complainants deny paragraph 32 to the extent that IDT claims that the requested information does not contain any notes, summaries, mental impressions, conclusions, or other protected materials that would prevent disclosure under 4003.3. Joint Complainants incorporate Paragraph 27 herein. Furthermore, Joint Complainants note that the lists of complaints and contacts being requested by IDT were compiled by Joint Complainants' attorneys and staff.

33-34. Paragraph 33 and 34 contains conclusions of law to which no response is required. By way of further answer, Joint Complainants incorporate paragraph 27 herein.

IDT Interrogatories Set II-1 and II-4 are beyond the scope of permissible discovery because they are protected by the investigative privilege.

35. Joint Complainants written objections are of record in this proceeding and speak for themselves.

36. To the extent that Paragraph 36 references Joint Complainants' written objections, Joint Complainants submit that their written objections, attached to IDT's Motion to Compel, are of record in this proceeding and speak for themselves. To the extent that Paragraph 36 references

specific cases, Joint Complainants submit that Paragraph 36 states conclusions of law to which no response is required.

By way of further response, Joint Complainants submit that IDT completely mischaracterizes Joint Complainants' written objections. IDT Interrogatories Set II-1 and II-4 are beyond the scope of permissible discovery because they are protected by the investigative privilege. As stated in Joint Complainants' written objections, the Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See e.g. In re Buchanan, 583 Pa. 620, 880 A.2d 568 (2005). See also Commonwealth v. Kauffman, 413 Pa. Super. 527, 605 A.2d 1243, 1247 (1992) (Held that this privilege "requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government"). The investigative privilege has been defined as "the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest." Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1993). See also U.S. v. Lang, 766 F.Supp. 389 (D.Md.1991) (Court found that one party is seeking notes integral to the continuing investigation of another party and of a possible civil enforcement action; moreover, such selective note-taking can provide clues as to the focus of the on-going investigation and thus are not discoverable).

The information requested by IDT in Interrogatory Set II-1 was aggregated by the OCA so that the Acting Consumer Advocate could carry out her duties. The OCA statute states: "it shall be [the Consumer Advocate's] duty, in carrying out the responsibilities under this act, to ... initiat[e] proceedings if in his judgment such may be necessary" 71 P.S. Sec. 309-4(a). Further, subpart (b) states that "[t]he Consumer Advocate may exercise discretion in determining

the interests of consumers which will be advocated in any particular proceeding and in determining whether or not ... to initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceedings on the interest of consumers.”

The consumer contacts that the OCA received about other EGSs is protected information gathered solely for the purpose of allowing the Acting Consumer Advocate to exercise her statutory authority to determine whether or not to initiate proceedings in the interest of consumers. Disclosure of such information would be contrary to the public interest, because it would prevent the free flow of information to the OCA, inhibiting the OCA’s ability to gain the necessary information that is required in order to determine whether to initiate proceedings in the interest of the public. Thus, the requested information is protected from discovery under the investigative privilege, and therefore, not discoverable.

Moreover, the disclosure of the information requested by IDT in IDT Interrogatory Set II-4 is contrary to public policy and raises the investigative privilege. IDT’s request is not solely factual data related to IDT’s case. IDT’s request seeks a protected evaluative summary because this is information that would have been included in the overall strategic and tactical approach in the preparation of filing suit against IDT or any other EGS. The Attorney General’s evaluation in bringing this case will be chilled by disclosing the information IDT seeks in this Interrogatory and would otherwise impair her role as the chief law enforcement officer as established by the Pennsylvania Constitution. Pa. Const. art. IV, § 4.1. Thus, the requested information is protected from discovery under the investigative privilege, and therefore, not discoverable.

37-39. Paragraphs 37-39 state conclusions of law to which no response is required. By way of further answer, Joint Complainants submit that while the law requires a balancing test, the

conclusions reached by courts in particular cases are all specific to the facts of those cases, and the information sought by IDT in this case is protected by the investigative privilege. Joint Complainants herein incorporate paragraph 36.

40. Denied. Joint Complainants incorporate paragraph 36 herein.

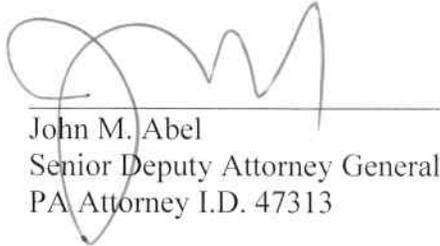
41-42. Joint Complainants deny that IDT's willingness to treat the information as "Confidential" or "Highly Confidential" is germane to whether or not the information is permissible discovery. For the Joint Complainants to simply sign a protective order, as IDT suggests, for the disclosure of the information that IDT seeks is contrary to the public interest. Moreover, Joint Complainants have established that IDT Interrogatories Set II-1 and II-4 seek information that is not permitted because it will not lead to relevant information or admissible evidence regarding the allegations against IDT; they are beyond the scope of permissible discovery because they seeks attorney work product; they are protected by the investigative privilege; and they are protected by the deliberative process privilege.

43. No response is required, as IDT's Motion to Compel is of record in this matter and speaks for itself.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, Joint Complainants respectfully request that IDT's Motion to Compel Joint Complainants' Response to IDT Interrogatories Set II-1 and II-4 be denied.

Respectfully submitted,



John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

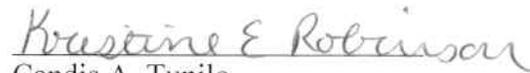
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Date: September 2, 2014



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Acting Consumer Advocate

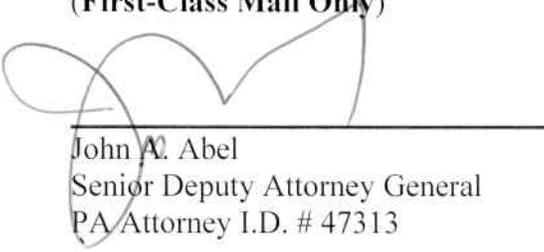
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