

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

Docket No. 9374

_____)
In the Matter of)
)
Louisiana Real Estate Appraisers Board,)
Respondent)
_____)

**RESPONDENT LOUISIANA REAL ESTATE APPRAISERS BOARD'S
EXPEDITED MOTION FOR IN CAMERA REVIEW**

Pursuant to Federal Trade Commission Rules of Practices 16 C.F.R. § 3.22 and 16 C.F.R. § 3.38, Respondent Louisiana Real Estate Appraisers Board (“LREAB” or “Board”) respectfully moves for judicial *in camera* review of the eight withheld documents listed in Complaint Counsel’s February 1, 2018 amended privilege log.

As set forth in the attached memorandum, *in camera* review of the eight documents is warranted. The descriptions of the documents on the amended privilege log indicate that the documents are relevant to issues in the case, including LREAB’s defenses. Complaint Counsel cannot claim the informant’s privilege for any of these documents, in that there is no reasonable apprehension of retaliation in light of the Protective Order and State and federal supervision over the Board; { [REDACTED] [REDACTED] }. Complaint Counsel’s assertions of an applicable general law enforcement privilege and work product privilege are without merit. As fully detailed in the attached Statement of Conference Pursuant to Paragraph 4 of the Scheduling Order, LREAB has strived to work with Complaint Counsel to reach a viable solution. { [REDACTED] [REDACTED] }, Respondent promptly filed this motion. *See*

Scheduling Order at p. 6, ¶ 10 (“deadline for the motion to compel shall be within 5 days of reaching an impasse.”).

A proposed order is attached requesting: (1) an in camera review of the eight documents, and (2) if review in camera review is granted, an indication from the Court whether any claimed privilege applies and an order requiring Complaint Counsel to either produce redacted or unredacted versions of each document.

Dated: March 6, 2018

Respectfully submitted,

/s/ W. Stephen Cannon

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Louisiana Real Estate Appraisers Board*

UNITED STATES OF AMERICA
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In the Matter of)
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Louisiana Real Estate Appraisers Board,)
Respondent)
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[PROPOSED] ORDER

Upon consideration of Respondent Louisiana Real Estate Appraisers Board’s Expedited Motion for In Camera Review, it is hereby

ORDERED, that Complaint Counsel shall provide the Court by 4:00 p.m. on the second business day following the date of this Order, for in camera review, all eight documents listed in Complaint Counsel’s February 1, 2018 amended privilege log, and

ORDERED, that upon that review, the Court shall make a ruling if any claimed privilege applies to the eight documents and will require Complaint Counsel to produce either a redacted or unredacted version of each document.

D. Michael Chappell
Chief Administrative Law Judge

Date: _____, 2018

**STATEMENT OF CONFERENCE
PURSUANT TO PARAGRAPH 4 OF THE SCHEDULING ORDER**

Below provides details of communications and meet and confers between the Louisiana Real Estate Appraisers Board's counsel ("Board's counsel") and Complaint Counsel concerning the Board's Expedited Motion for In Camera Review.

On December 11, 2017, Complaint Counsel produced an initial privilege log { [REDACTED]

[REDACTED] }. Ex. 1. { [REDACTED]

[REDACTED]

[REDACTED]."} Ex. 2. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]."} Ex. 3.

{ [REDACTED]

[REDACTED]

[REDACTED]."} Ex. 4. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].} Ex. 5. { [REDACTED]

[REDACTED]

[REDACTED]"} Ex. 6. { [REDACTED]

[REDACTED]

[REDACTED]"} *Id.* { [REDACTED]

[REDACTED].} *Id.* (attaching Ex. 5) { [REDACTED]

[REDACTED]

[REDACTED].} The following day, on February 1, Complaint Counsel produced the amended privilege log changing numerous claims of privilege, removing a claim of deliberative process privilege, and adding the “law enforcement privilege” to seven of the eight entries. Ex. 7. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].} Ex. 8.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].} Ex. 9. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].} *Id.* { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].”} Ex. 10.

{ [REDACTED]

[REDACTED]

[REDACTED].} *Id.* { [REDACTED]

[REDACTED].} *Id.* { [REDACTED]

[REDACTED].} *Id.* (the email also attached Exs. 1, 3, and 5). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]."} Ex. 11.

Dated: March 6, 2018

Respectfully Submitted,

/s/ James J. Kovacs
James J. Kovacs

**CONFIDENTIAL EXHIBITS 3
THROUGH 11 REDACTED
IN THEIR ENTIRETY**

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____)	
In the Matter of)	
)	
Louisiana Real Estate Appraisers Board,)	Docket No. 9374
Respondent)	
_____)	

MEMORANDUM IN SUPPORT OF RESPONDENT LOUISIANA REAL ESTATE APPRAISERS BOARD’S EXPEDITED MOTION FOR *IN CAMERA* REVIEW

Respondent Louisiana Real Estate Appraisers Board (“LREAB” or “Board”) request that the Court issue an order for an *in camera* review of the eight documents listed in Complaint Counsel’s February 1, 2018 amended privilege log.

INTRODUCTION

LREAB asks the Court to review *in camera* Complaint Counsel’s claims of privilege over eight documents in its privilege log, for a determination of their production to the Board’s counsel. After filing its complaint on May 30, 2017, Complaint Counsel made its first production concerning Part 2 investigational files on June 30, 2017. Complaint Counsel made subsequent productions from its Part 2 investigational files on July 14 and then again on December 14. Following several requests by LREAB counsel for a privilege log, on December 11, Complaint Counsel submitted its initial privilege log asserting privilege over eight documents under the “Informant’s Privilege.” Ex. A.

As fully detailed in the Statement of Conference Pursuant to Paragraph 4 of the Scheduling Order, the Board’s counsel sought to reach an amicable solution with Complaint Counsel concerning the eight allegedly-privileged documents. During those discussions, on February 1, 2018, Complaint Counsel provided an amended privilege log, removing certain

privilege claims and adding the “law enforcement privilege” to seven of the eight withheld documents. Ex. B. { [REDACTED]

[REDACTED]. }

In opposing Respondent’s right for an *in camera* review of the eight documents, Complaint Counsel takes the untenable position that documents { [REDACTED] [REDACTED] [REDACTED] } as part of the Part 2 proceedings fall under the informant’s privilege or the law enforcement privilege.¹ Neither privilege applies. Withholding relevant documents produced by third parties disadvantages the Board in its attempts to defend itself from Complaint Counsel’s allegations. As set forth below, the motion should be granted.

ARGUMENT

As indicated in Complaint Counsel’s amended privilege log, the description of the documents, { [REDACTED] [REDACTED] }, demonstrates that the withheld documents are highly relevant to Complaint Counsel’s allegations that the Board’s conduct in promulgating and enforcing Dodd-Frank and the State of Louisiana’s customary and reasonable fee mandates amounts to price fixing. These eight documents and communications, provided by third parties to Complaint Counsel, cannot be claimed to fall under any privilege asserted by Complaint Counsel. However, to the extent the Court determines that Complaint Counsel has asserted a viable privilege, redaction of the

¹ Complaint Counsel’s amended privilege log also claims work product privilege over two documents. Ex. B. The work product doctrine “protects against the disclosure of an attorney’s mental processes and legal opinions.” *In re Aetna Inc. Sec. Litig.*, 1999 WL 354527, at *3 (E.D. Pa. May 26, 1999). [REDACTED]

[REDACTED] } As a result, the work product privilege cannot be applied to documents produced by third parties to Complaint Counsel.

the informant if such documents are “relevant and helpful to the defense of an accused.” *Id.* at 60-61.

The informant’s privilege cannot apply to these eight documents because there can be no reasonable fear of retaliation by LREAB. *First*, production of documents by third parties is subject to the protective order issued in this case and, if marked confidential, can only be reviewed by Complaint Counsel and the Board’s outside counsel. As a result, production of these eight documents to the Board’s counsel cannot possibly lead to retaliation by the Board. *Second*, LREAB is a government agency whose enforcement powers are actively supervised by the State. An independent Administrative Law Judge of the Louisiana Division of Administrative Law (“DAL”) must give prior approval to the initiation of an administrative complaint, based on sufficiency of the evidence and promotion of State policy, and all formal or informal settlements, dismissals, resolutions, or enforcement actions. *See* DAL agreement with LREAB, Ex. D Section 5. These supervisory requirements ensure that any enforcement measures are based upon sound policies and demonstrable evidence, and therefore cannot be retaliatory. *Third*, LREAB’s enforcement actions are subject to federal review by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council (“ASC”). The ASC supervises and monitors the Board’s enforcements over appraisers and AMCs and requires well-documented investigations. 82 Fed. Reg. 43,966, 43,980 (Sept. 20, 2017) (defining well-documented as preparing complaint files and complaint logs, including providing the ASC an “understanding of the steps taken throughout the complaint, investigation, and adjudicatory process.”). Therefore, given the requirements of the Protective Order, and State and federal oversight over the Board’s investigations, any concern for retaliation is unmerited.

Assuming *arguendo* that the informant's privilege could apply, the limited privilege should give way to the Board's need for these documents to defend itself against Complaint Counsel's allegations. { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].} Complaint Counsel's withholding these documents thus could hamper the Board's ability to defend against Complaint Counsel's allegations.

B. Law Enforcement Privilege Cannot Apply to the Eight Documents.

On February 1, 2018, Complaint Counsel amended its privilege log to include a claim of law enforcement privilege over seven of the eight documents. Ex. B. The law enforcement privilege protects government documents concerning an ongoing investigation by an enforcement agency. *See F.T.C. v. Liberty Supply Co.*, 2016 WL 4272706, at *5 (E.D. Tex. Aug. 15, 2016); *see also Lykken v. Brady*, 2008 WL 2077937, at *5 (D.S.D. May 14, 2008) (noting that the privilege is "limited") (citations omitted). A claim of law enforcement privilege "must be asserted by the head of the agency claiming the privilege after he or she has personally reviewed the material and submitted 'precise and certain reasons for preserving' the confidentiality of the communications." *Torres v. Kuzniasz*, 936 F. Supp. 1201 (D.N.J. Aug 20, 1996) (quoting *United States v. O'Neill*, 619 F.2d 222, 226 (3d Cir. 1980)); *see also F.T.C. v. AMG Servs. Inc.*, 291 F.R.D. 544, 559 (D. Nev. May 24, 2013) (Federal Trade Commission successfully claimed law enforcement privilege *after* the Acting Director of the Bureau of Consumer Protection attached a declaration indicating the reasons for the Commission's claims of law enforcement privilege). As

Complaint Counsel has failed to provide an affidavit or declaration concerning its assertion of the law enforcement privilege by any director of the Commission, the privilege has not properly been invoked.

Moreover, none of the documents produced by third parties to Complaint Counsel can appropriately be protected under the law enforcement privilege. In *AMG Services Inc.*, the Federal Trade Commission successfully claimed law enforcement privilege over “email chains between the FTC and other agencies” and “handwritten notes taken by FTC attorneys during telephone conversations with other law enforcement agencies” concerning ongoing investigations. 291 F.R.D. at 559. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. }

C. The Expedited Motion for *In Camera* Review is Timely.

Per the July 6, 2017 Scheduling Order issued in this case, the Board must move the Court within five days of reaching an impasse with Complaint Counsel concerning discovery disputes. On March 2, 2018, the Board’s counsel was put on notice of the impasse with Complaint Counsel concerning this motion for *in camera* review of the documents listed in its amended privilege log. This filing on March 6, 2018 is within the deadline issued by the Court. Any assertion that the parties were at an impasse prior to March 2, 2018 concerning this motion ignores the Board’s counsel’s good faith efforts to resolve these issues without the Court’s intervention. *See* Statement of Conference Pursuant to Paragraph 4 of the Scheduling Order.

D. Expedited Treatment is Warranted

The parties are currently engaged in ongoing deposition with numerous third parties, { [REDACTED] }. To the extent the Court determines, after an *in camera* review, that the documents should be produced to the Board's counsel, those documents could be used in upcoming depositions. Therefore, the Board respectfully requests that the Court order Complaint Counsel to respond to this motion by March 9, 2018.

CONCLUSION

For the foregoing reasons, LREAB respectfully requests the Court grant an order for an *in camera* review of the documents listed in Complaint Counsel's amended privilege log.

Dated: March 6, 2018

Respectfully submitted,

/s/ W. Stephen Cannon

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*Counsel for Respondent,
Louisiana Real Estate Appraisers Board*

**Confidential Exhibits A
through C Redacted in
Their Entirety**

Exhibit D

**MEMORANDUM OF UNDERSTANDING
LOUISIANA REAL ESTATE APPRAISERS BOARD AND
DIVISION OF ADMINISTRATIVE LAW**

1. PURPOSE

This Memorandum of Understanding (MOU) between the Louisiana Real Estate Appraisers Board (LREAB), and the Division of Administrative Law (DAL) sets forth the agreement of the parties with respect to conducting reviews of settlements with Appraisal Management Companies (AMC), and reviews of proposed actions, administrative complaints, and enforcement actions, against AMCs.

2. AUTHORITY

The DAL is authorized to provide administrative law judges on a contractual basis to any governmental entity not covered by the DAL Act, and to conduct administrative hearings for such entity. LSA-R.S. 49:999.1. This MOU is further authorized by Executive Order JB 17-16.

3. CONTACTS

The contact for the LREAB is:
Arlene C. Edwards
Attorney for the Real Estate Appraisal
Board
9247 Bluebonnet Blvd. Ste. C
Baton Rouge, Louisiana 70810-2972
Voice 225-709-9000
edwards@demlawoffice.com

The contact for the DAL is:
Lindsey K. Hunter
General Counsel
Division of Administrative Law
P.O. Box 44033
Baton Rouge, Louisiana 70802
Voice 225-219-9984
lhunter@adminlaw.state.la.us

4. DUTIES AND RESPONSIBILITIES OF THE LREAB

Prior to finalization of a settlement agreement with, or the filing of an administrative complaint against, an AMC, regarding compliance with the customary and reasonable requirements of La. R.S. 37:3415.15(A), the LREAB will transmit its proposed action and the record thereof to the DAL. The record shall include a written statement by the LREAB supporting its decision, and any material information or records obtained by the LREAB, for the DAL to consider when determining whether to approve, reject, or modify the action proposed by LREAB.

5. DUTIES AND RESPONSIBILITIES OF THE DAL

Within thirty (30) days of submission of LREAB's proposed action and the record thereof, the DAL will electronically submit its written decision to LREAB. The date of the submission shall be the date it is received at the DAL through electronic submission. The DAL'S written determination will approve, reject or modify the LREAB's proposed action, and may remand the proceeding to the LREAB with instructions or to obtain additional evidence for the record on review.

- (a) The DAL shall review each request by the LREAB to initiate an administrative complaint against an AMC, and shall determine (i) whether the evidence presented is sufficient to show a likelihood that the AMC has not complied with the customary and reasonable requirements of La. R.S. 37:3415.15(A), and (ii) whether the proposed enforcement action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals.
- (b) The DAL shall review each proposed settlement agreement, dismissal, or informal resolution of any DAL-approved enforcement action and determine whether the proposed enforcement action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such appraisals are customary and reasonable in accordance with La. R.S. 37:3415.15(A).
- (c) The DAL shall review the entirety of the hearing record and evidence of each enforcement proceeding conducted by the LREAB, the written proposed determination by the LREAB as to whether one or more violations by an AMC of La. R.S. 37:3415.15(A) and rules promulgated thereunder have occurred, and any proposed remedy with respect to any such violation. The DAL shall conduct this review according to the standards set forth in La. R.S. 49:964(G) whereby:
 - (i) all questions of law and statutory and regulatory interpretations shall be determined by the DAL in accordance with Section 964(G)(1)-(4) without deference to the LREAB determinations;
 - (ii) the proposed remedy should be reviewed by the DAL in accordance with Section 964(G)(5), in light of the underlying policies of the State of Louisiana and the determination by the DAL of the findings of fact; and,
 - (iii) all findings of fact shall be determined by the DAL in accordance with Section 964(G)(6), giving deference to the LREAB's determination of credibility issues.

6. **ELECTRONIC FILE TRANSFER**

The LREAB and the DAL will transmit documents via the DAL's electronic file transfer system. The DAL will provide, implement, and maintain the electronic file transfer system for the receipt and docketing of the LREAB review matters, and for transmitting case files, determinations, and other related documents.

7. **RECORDS**

The LREAB shall retain records in accordance with its records retention policy, and acknowledges that the DAL will retain records in accordance with its records retention policy.

8. **PAYMENT**

The LREAB will pay the DAL for providing the services specified in this MOU according to the DAL's Billed Services Methodology and the Statewide Cost Allocation Program, or SWCAP. The DAL will bill LREAB for its allocated annual costs at the beginning of the first quarter of each fiscal year. Service invoices will be sent quarterly and are payable upon receipt.

In the event there is an agreement to withdraw a proposed LREAB action from the DAL's consideration prior to issuing and transmitting the determination, LREAB will be responsible for payment of any services provided from the time of submission until the completion of the withdrawal.

The billing address and contact is:

**Louisiana Board of Real Estate Appraisers
Bruce Unangst, Executive Director
Post Office Box 14785
Baton Rouge, Louisiana 70890-4785**

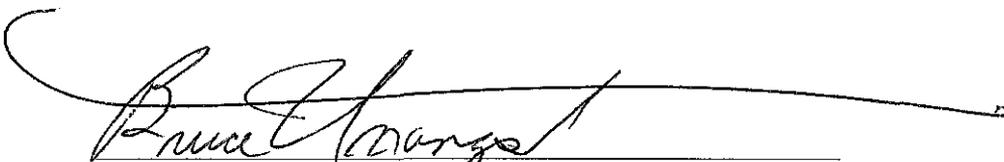
9. EFFECTIVE DATE, TERMINATION, AND AMENDMENT OF MOU:

Effective Date - The term of this agreement shall be from July 1, 2017 through June 30, 2019. This agreement shall renew automatically for an additional two (2) year term, and shall continue to renew thereafter on each successive two-year anniversary of that date for an additional two-year term. Upon written request of either party within six (6) months prior to the expiration of the then-current term of the agreement, the parties shall negotiate revised terms for the renewed agreement term.

Termination – This agreement may be terminated by either party upon (thirty) days written notice by one party to another, or as provided by applicable state or federal law.

Amendments - This agreement may be modified, in writing, as agreed upon by the parties, at any time.

APPROVALS:



**Bruce Unangst, Executive Director
Louisiana Board of Real Estate Appraisers**



**Emalie A. Boyce, Director
Division of Administrative Law**

Notice of Electronic Service

I hereby certify that on March 09, 2018, I filed an electronic copy of the foregoing Respondent Louisiana Real Estate Appraisers Board's Expedited Motion for In Camera Review_PUBLIC, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
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Washington, DC, 20580

Donald Clark
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I hereby certify that on March 09, 2018, I served via E-Service an electronic copy of the foregoing Respondent Louisiana Real Estate Appraisers Board's Expedited Motion for In Camera Review_PUBLIC, upon:

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