

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 05-168

Disclosure of Witness Identifying Information in Matters Before the Occupational Safety and Health Review Commission

QUESTIONS

1. Is an employer's attorney entitled to an un-redacted witness statement in contested cases before the Occupational Safety and Health Review Commission ("Commission") pursuant to proper discovery requests?
2. If question 1 is answered affirmatively, is there any need to have either a protective order or a signed certification from the requesting attorney limiting the use or dissemination of those witness statements?
3. If question 2 is answered in the affirmative, is a signed certification such as the following sufficient?

I certify that I will not use the witness statements provided to me in an un-redacted form on behalf of my client for any purpose other than defending my client against the Complaint (Docket # _____) filed with the TOSHA Review Commission. I further certify that I will not disclose these witness statements provided to me on behalf of my client to any other person, entity, institution, or organization.

4. If such information is subpoenaed in another proceeding, what should the Department's response be?

OPINIONS

1. Yes. An employer's attorney is entitled to un-redacted witness statements in contested cases before the Commission pursuant to proper discovery requests.
2. Yes. A protective order is recommended to afford the protection from public disclosure intended by Tenn. Code Ann. § 50-3-302(d) making the information confidential with respect to the Public Records Act (Tennessee Code Annotated, Title 10, Chapter 7).

3. No. The certification (above) is insufficient because it will not provide the reliable and expedient protection of a protective order.

4. If unredacted witnesses' statements are requested through a subpoena in another proceeding, a motion to quash should be filed asserting that the requested information is confidential pursuant to Tenn. Code Ann. § 50-3-302(d).

ANALYSIS

1. In 1972, the General Assembly created the Commission, which is composed of three members who serve three-year terms. Tenn. Code Ann. § 50-3-801(a). The Commission's function is "to review citations issued under § 50-3-307 and monetary penalties assessed under §§ 50-3-402 - 50-3-408." Tenn. Code Ann. § 50-3-802(a). To fulfill its functions, the Commission may conduct hearings, may subpoena witnesses, may administer oaths, and may compel persons to produce documentary evidence. Tenn. Code Ann. § 50-3-803(a) & (d).

In contested cases before the Commission, parties may conduct discovery following the Tennessee Rules of Civil Procedure. Tenn. Comp. R. & Regs. §§ 0800-4-1; 1360-4-1-.11(1). Under the Tennessee Rules of Civil Procedure, "[p]arties may obtain discovery of *any matter*, not privileged, which is relevant . . . *including . . . identity and location of persons* having knowledge of any discoverable matter." Tenn. R. Civ. P. 26.02 (emphasis supplied). Discoverable matters are not limited to matters of public record. *Id.* Permissible discovery includes location and identity of witnesses. *Id.*

However, Tenn. Code Ann. § 50-3-302(d) states:

The name, job title and other information that may be used to identify a witness who is interviewed during the course of an investigation *shall be considered confidential* and shall not be a public record pursuant to title 10, chapter 7.

The Public Records Act, Tenn. Code Ann. §§ 10-7-501, *et seq.*, governs disclosure of public records. Therefore, Tenn. Code Ann. § 50-3-302(d) exempts a witness' identifying information from disclosure under the Public Records Act and makes such information confidential with respect to the Act. *Id.*

Under § 50-3-302(d) witness identifying information is not discoverable. On the other hand, the same information is discoverable under the Tennessee Rules of Civil Procedure. To the extent that any conflict exists between Tennessee statutes and the Tennessee Rules of Civil Procedure, it will be harmonized or otherwise resolved in favor of the Rules. *Mid-South Pavers, Inc. v. Arnco Const., Inc.*, 771 S.W.2d 420, 422 (Tenn. Ct. App. 1989); Tenn. Code Ann. § 16-3-406 (nullifying laws in conflict with Tennessee Rules of Civil Procedure). Therefore, while such information is

confidential under the Act, it remains discoverable pursuant to the Tennessee Rules of Civil Procedure and the Commission's rules (harmonizing these conflicting provisions).

2. Because such witness identifying information is confidential under 50-3-302(d), it should be released only pursuant to a proper discovery request *and* a protective order designed to protect the confidentiality of such information. Hence, the Department should apply for a protective order designed to protect the confidential information.

3. A signed certification provided in the example of Question 3 is insufficient to protect confidential information of the kind protected by Tenn. Code Ann. § 50-3-302(d). Such a certification is not readily enforceable as would be an order of the court. Court orders are expeditiously enforceable by contempt. Tenn. Code Ann. § 16-1-103. Therefore, a protective order is recommended to protect confidential information.

4. Finally, you also have asked if TOSHA received a subpoena for unredacted witness statements in a "collateral legal proceeding," whether the proper course of action would be to file a motion to quash citing the confidentiality of the statements. We agree that would be the proper course of action, as the information requested is confidential pursuant to statute. If confidential information is subpoenaed, its confidentiality must be protected by a Motion to Quash citing the source of the confidentiality. Tenn. Code Ann. § 50-3-302(d).

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

WARREN A. JASPER
Assistant Attorney General

Requested by:

Commissioner James G. Neeley
Department of Labor and Workforce Development
8th Floor, Andrew Johnson Tower
710 James Robertson Parkway
Nashville, TN 37243-0655