

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF: )

) DOCKET NO. TSCA-05-2009-0004

Kathryn Y. Lewis-Campbell )  
Springfield, Ohio )

RECEIVED  
SEP 25 2009

Respondent )  
\_\_\_\_\_ )

REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY

**COMPLAINANT'S REPLY TO RESPONDENT'S BRIEF IN  
OPPOSITION TO COMPLAINANT'S MOTION  
FOR PRODUCTION OF INFORMATION**

On September 21, 2009, Respondent submitted Respondent's Brief in Opposition to Complainant's Motion for Production of Information ("the Response"). Complainant submits this reply, addressing Respondent's assertions and argument.

**WAS COMPLAINANT MISLEADING THE PRESIDING OFFICER?**

In the Response, Respondent states "Complainant is clearly trying to mislead this court as to what financial information was submitted to Complainant[,] the "frivolous motion is another attempt by the Complainant to further harass the Complainant (sic)," and that "Complainant lied to this court when he represented in his motion that on May 26 he only received Respondent's 2007 tax return." The Response, at 1-2.

As Respondent acknowledges in the Response, she submitted 2005, 2006 and 2008 tax returns to Complainant on May 26, 2009, and, at a later date, submitted her tax return for 2007. The Response, at 2. Complainant does not assert in the Motion that Respondent did not submit the 2005, 2006, and 2008 tax returns. In his haste to file the Motion, given the proximity of the

upcoming hearing date, counsel for Complainant mistakenly referenced Respondent's later submission of her 2007 tax returns as being received on May 26, 2009; requested signed 2008 income tax returns; and neglected to acknowledge receipt of the 2005, 2006, and 2008 tax returns. That this was a mistake as opposed to an attempt to deceive is supported by several facts of record:

- (1) In her pre-hearing exchange, filed on June 16, 2009, Complainant acknowledges that "Respondent has provided her income tax returns" in response to Complainant's April 28, 2009, request for financial information, which asked for "the last three years of [her] income tax returns." See Pre-Hearing Exchange of the Administrator's Delegated Complainant, at 2, and Attachment I.
- (2) In Respondent's Prehearing Information Exchange, submitted on June 18, 2009, to the Presiding Officer, Region 5 Hearing Clerk, and Complainant, Respondent included her individual income tax returns for 2005, 2006, 2007 and 2008.

It should be obvious that Complainant was not attempting to deceive the Presiding Office in the Motion, filed on September 17, 2009, by implying that Respondent had not submitted her 2005, 2006, and 2008 tax returns, when Complainant earlier had acknowledged, in her pre-hearing exchange filed on June 16, 2009, that Respondent had submitted those tax returns. Further support for this conclusion is the fact that it is a matter of record that Respondent submitted those income tax returns to both the Presiding Officer and Complainant in Respondent's pre-hearing exchange. Counsel for Complainant apologizes for any inconvenience or distress occurring to anyone as a consequence of his error.

**HAS COMPLAINANT BEEN HARASSING RESPONDENT OR IS THE FURTHER PRODUCTION OF INFORMATION NECESSARY?**

Respondent asserts that Complainant is "continuously harassing her on this frivolous case." Respondent does not deny selling a house to Donald Freeman as alleged, nor does she

claim to have provided Mr. Freeman the information concerning lead-paint hazards in the house which the law required her to provide him. On the face of it this action is not frivolous.

On the record in this action, Complainant from the beginning has been very active in attempting to determine Respondent's financial circumstances so as to take those circumstances into account in determining an appropriate amount of penalty to propose for the violation, in accordance with instructions in the Administrator's published decision in In Re New Waterbury Ltd., 5 E.A.D. 529 (1994). As set out in the Motion, Complainant informed Respondent in the Complaint, filed on February 9, 2009, that if she intended to raise a claim of "inability to pay" she would need to raise the issue in her answer to the Complaint, and submit financial information. And was therein informed that, if her financial information so warranted, the proposed penalty amount would be reduced appropriately. When Respondent failed to raise that issue in her Answer, Complainant sought a directed finding that she had waived that claim, tempering that request by informing Respondent that if she would file a motion to amend her answer raising that issue, Complainant would have no objection to Respondent's motion. Respondent did so amend her answer, without objection from Complainant, and, six days later, Complainant began her attempts to secure financial information from Respondent so as to evaluate her "ability to pay" a penalty amount.

It is the obligation of parties to a lawsuit to prepare their cases, evaluating the strengths or weaknesses in their cases in consideration of relevant and probative evidence to be presented at any hearing, so as to know when the evidence warrants going to a hearing and when the evidence warrants settlement of the matter, or other action. As noted in the Motion, based upon information thus far received there is evidence that a "substantial reduction in the penalty amount

proposed may be appropriate in this matter,” the Motion, at 2, but that additional information is needed for verification so as to enable a sound determination to be made as to Respondent’s financial condition.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d), provides that agency decisionmaking must be supported “by and in accordance with the reliable, probative, and substantial evidence.” Complainant’s attempts to obtain financial information from Respondent are no more than attempts to assure that decisionmaking in this matter, including findings on Respondent’s “ability to pay,” are based upon reliable, probative and substantial evidence.” “Legal memoranda and oral argument are not evidence[.]” Estrella v. Brandt, 682 F.2d 814, at 819-20 (9<sup>th</sup> Cir. 1982).<sup>1</sup>

In the Response, Respondent objects to the production of pay stubs for 2009. She raises no specific objection to providing a completed and signed Request for Transcript of Tax Return (IRS Form 4506-T), which has been provided her with the Motion. Nor does she object to providing copies of bank statements for any bank account she has, or had, in 2009. In the interest

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<sup>1</sup>In the Response, Respondent, by counsel, asserts that she “is disabled and works daily in extreme pain in her back and legs[,]” and that “she must work seven (7) days a week in order to provide for her grandchildren and herself[.]” In her pre-hearing exchange, though Respondent states that she will testify at hearing, she does not state that she will testify to these facts. Respondent’s Prehearing Information Exchange, at 1-2. In support of her “ability to pay” claim, she cites only her income tax returns. As with financial information, Complainant is in need of other evidence relating to assertions made by Respondent, prior to hearing, so as to adjust the proposed penalty to an amount consistent with the actual evidence, or to take other action with regard to the enforcement matter. As noted, attorney statements are not evidence. The facts asserted by Respondent’s counsel in the Response may very well affect Complainant’s position in the case, but assertions of counsel on behalf of a client must be verified. For that purpose, Complainant would welcome an affidavit from Respondent stating that the facts identified in this footnote are true and correct, and specifically requests that the Presiding Officer order Respondent to submit such an affidavit if she intends to prove at hearing the facts that she has here alleged.

of moving this matter along to resolution, and minimizing her time involved, Complainant will withdraw her request that Respondent be ordered to submit any pay stubs.

Finally, Complainant would note that in requesting financial information from Respondent, Complainant herself instructed Respondent on the need to make a claim of confidentiality should she want her financial information to be treated as confidential. Attachment A. Both in her submission of financial information to Complainant and in the submission of her pre-hearing exchange, Respondent made no claim of confidentiality. Nonetheless, Complainant has handled Respondent's financial information as confidential. Moreover, shortly after her receipt of Respondent's financial statement and Supplemental Prehearing Exchange, which was submitted on July 27, 2009, counsel for Complainant contacted counsel for Respondent and again provided notice to Respondent of her opportunity to claim confidentiality on these submissions of information. Attachment B. On June 30, 2009, Respondent filed notice of her claim of confidentiality for financial information she submitted. This is not a record of Complainant "continuously harassing" Respondent. It is a record of enforcement staff attempting to obtain relevant and probative evidence that Respondent intends to present at hearing, so as to evaluate that evidence and adjust Complainant's enforcement posture in this action, if warranted by the evidence.

### CONCLUSION

For the above reasons, Complainant asks that an order be entered directing that Respondent submit the following:

- (a) a completed and signed Request for Transcript of Tax Return (IRS Form 4506-T);

- (b) copies of bank statements for all bank accounts of Lewis-Campbell from January 2009 to the present;
- (c) an affidavit of Respondent setting forth any disability or other similar factor which she believes should be taken into account prior to any finding being made in this matter as to her liability or appropriate penalty amount.

Respectfully submitted,



Richard R. Wagner  
Senior Attorney and Counsel for the  
Administrator's Delegated Complainant



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

July 30, 2009

Cassandra Collier-Williams, Esq.  
Law Offices of Cassandra Collier-Williams, LLC  
2103 St. Clair Avenue, 2<sup>nd</sup> Floor  
Cleveland, Ohio 44114

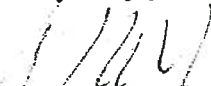
RE: Kathryn Y. Lewis Campbell  
TSCA-05-2009-0004

Dear Ms. Collier-Williams:

This is to memorialize our conversation this morning. If your client intends to make a claim of confidentiality regarding the income tax returns submitted to the Regional Hearing Clerk in her Prehearing Information Exchange, on June 18, 2009, and the Statement of Financial Affairs-Individuals, likewise submitted in her Supplemental Prehearing Information Exchange, on July 27, 2009, you must file notice of such a claim with the Regional Hearing Clerk immediately. Both the Presiding Officer and myself must be served with this notice.

If you have any further questions, please do not hesitate to call me, at (312) 886-7947.

Very truly yours,

  
Richard R. Wagner  
Senior Attorney

Attachment A

**Result Summary**

<b>Job Number</b>	7660	<b>Submitted</b>	7/30/2009 10:44:55 AM
<b>Subject</b>		<b>Recipients</b>	1
<b>Total Pages</b>	2	<b>Successful</b>	1

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**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**OFFICE OF REGIONAL COUNSEL  
REGION 5**

**FACSIMILE TRANSMITTAL FORM**

Date: 30 July 2009

Fax Recipient: Cassandra Collier - in Charge, EPA

Dept./Agency: \_\_\_\_\_

Fax Number: (216) 621-9020

Fax Sender: Richard Ingwers

Dept./Agency: \_\_\_\_\_

Telephone: (216) 621-7217

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**CERTIFICATE OF SERVICE**

I hereby certify that today I filed the original of the **Complainant's Reply to Respondent's Brief in Opposition to Complainant's Motion for Production of Information** in the office of the Regional Hearing Clerk (R-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604, with this Certificate of Service.

I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran  
Office of the Administrative Law Judges  
U.S. Environmental Protection Agency  
Ariel Rios Building, Mailcode: 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

I further certify that I then caused true and correct copies of the filed document to be sent to the following, by mail:

Cassandra Collier-Williams, Esq.  
P.O. Box 94062  
Cleveland, Ohio 44101

September 25, 2009



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