UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	§	
	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO. H-05-01768**
	§	
KROGER TEXAS LP,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before the Court are Defendant's Motion to Compel (Doc. # 17) and Plaintiff's Motion to Amend Scheduling Order (Doc. # 21). As set forth below, Defendant's motion is **GRANTED**, and Plaintiff's motion is **GRANTED IN PART** and **DENIED IN PART**.

I. EEO-1 Reports and the Deliberative Process Privilege

Defendant Kroger Texas L.P. ("Kroger") has moved the Court to compel the disclosure of two portions of an eighteen-page report relating to the employment practices of Kroger and other companies. Specifically, Kroger has requested the disclosure of an EEO-1 Comparison Report containing data for 276 companies in the same industry as Kroger, and of EEO-1 Detailed Reports for six of these companies. Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), asserts that these reports are protected from disclosure by the deliberative process privilege, and that they are not subject to disclosure under EEOC Compliance Manual section 83.7(a).

The Fifth Circuit has recognized the existence of a deliberative process privilege to protect the opinions, recommendations, and deliberations of a governmental agency. *See, e.g.*, *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881-82 (5th Cir. 1981) (articulating a non-

statutory, "official privilege" for documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated"); *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38 (5th Cir. 1982) (discussing a deliberative process privilege drawn from the disclosure exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" of 5 U.S.C. § 552(b)(5)). The deliberative process privilege, however, is not without limits. While the privilege protects documents that are indicative of an agency's deliberative process, it does not protect factual information. *Branch*, 638 F.2d at 882; *Skelton*, 678 F.2d at 38. Documents "consisting only of compiled factual material . . . [are] generally available for discovery by private parties in litigation with the Government." *Pac. Molasses Co. v. N.L.R.B.*, 577 F.2d 1172, 1183 (5th Cir. 1978) (also noting the "different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other").

Having reviewed both the EEO-1 Comparative Report and the EEO-1 Detailed Reports *in camera*, the Court finds that both sets of documents are comprised of factual data that are unprotected by the deliberative process privilege. The EEO-1 Comparative Report is a list showing the number of workers employed by each of 276 companies in Harris County, Texas, in the same industry as Kroger. The report does not contain any analysis, opinions, or recommendations, either of the EEOC investigator who compiled the data, or of any other member of the agency. Similarly, the EEO-1 Detailed Reports consist of statistics on the gender and race of the workers employed by each of six particular companies, without any analysis or opinion. At a hearing before the Court, the EEOC argued that the reports reflect the deliberative process of the EEOC investigator who compiled the data, as she decided what values to use in

the reports (e.g., the geographic location from which to collect data). This falls far short of the showing necessary to invoke the deliberative process privilege. An agency necessarily chooses what data to collect and how to arrange the data for every report it creates, and such basic choices do not change the factual nature of the data that a report contains. The Court is concerned by the EEOC's far-reaching invocation of the deliberative process privilege for materials that are exclusively factual. The Commission's position seems antithetical to its purpose of fostering awareness of lawful and unlawful employment practices. Because the EEO-1 reports fall squarely within the category of unprotected factual material, the deliberative process privilege does not apply.

Additionally, the EEOC contends that its Compliance Manual counsels against disclosure of the EEO-1 reports. The EEOC's submitted excerpt from the manual does state that "[i]f reports for employers which are not respondents have been included in the file for comparative purposes, remove them before disclosure." EEOC Compliance Manual § 83.7(a).[1] This practice, however, is contrary to the policies of open discovery and disclosure embodied in the Federal Rules of Civil Procedure and federal regulations. *See, e.g.*, *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) (recognizing the "liberal spirit" of the federal discovery rules). In fact, federal regulations require the EEOC to make available "certain tabulations of aggregate industry, area, and other statistics derived from the Commission's reporting programs," provided that the identity of individuals or entities is not revealed. 29 C.F.R. § 1610.18(a).

The Court has reviewed the EEOC's proposed redactions of identifying information from both its EEO-1 Comparative Report and Detailed Reports, and finds that removing the names,

[1] The Court has found another version of EEOC Compliance Manual § 83.7(a), which pertains to photocopying requests. While it is not clear which version is most current, to the extent that any provision of the EEOC Compliance Manual counsels against redacted disclosure of factual information, this practice conflicts with federal discovery policy and regulations.

locations, and identifying numbers of the other companies is sufficient to prevent their identities from being disclosed. While confidentiality is an important concern, the EEOC has not shown how redacting these particular records would be any less effective here than in other cases. It is difficult to imagine a case in which there would not be at least some risk that the identity of an entity referred to in a report might be guessed despite the redaction of the entity's name and address. Such a generalized risk, without a particular showing of why redaction would be ineffective here, is insufficient to bar the disclosure of the reports. Though the disclosure of statistical data relating to other entities may be contrary to EEOC practice, the production of the redacted EEO-1 reports in this case is unprotected by any privilege and necessary for compliance with federal regulations and policies of broad discovery. Accordingly, the EEOC is **ORDERED** to produce the EEO-1 Comparative Report and EEO-1 Detailed Reports, in redacted form, to Kroger by Friday, March 17, 2006.

II. Settlement Documents and the Conciliation Privilege

Kroger has also moved the Court to compel the disclosure of documents relating to settlement, including two letters from Intervenors Yolanda Washington and Subrena Tarver's attorney to the EEOC investigator, and one page of handwritten notes made by the EEOC investigator regarding conciliation of the charges against Kroger.[2] The EEOC contends that these documents are protected by a conciliation privilege attaching to documents that reflect the EEOC's efforts to settle charges of unlawful employment practice.

Title VII provides that the EEOC shall attempt to eliminate unlawful employment practices through informal settlement and conciliation measures, and that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its

[2] The letters from Intervenors' attorney, which were sent on different dates, are identical in substance, except for what appears to be a typographical error in the first letter as to one of the settlement offer amounts.

officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b). [3] While materials relating to conciliation efforts may not be disclosed to the *public*, however, the Fifth Circuit has held that section 2000e-5(b) does not prevent the EEOC's disclosure of such materials to the *parties* to the agency proceeding. *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123, 126 (5th Cir. 1988) (citing the Supreme Court's holding in *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 598 (1981), that section 2000e-5(b)'s prohibition against making charges of unlawful employment practices public did not preclude disclosure of the charges to the charging parties). Similarly, the Fifth Circuit has found that section 2000e-5(b)'s admonition against disclosing conciliation efforts to the public "does not by its terms extend to employers," and that "even the prescription for EEOC discreetness respecting its informal mediation efforts does not preclude release of the identities of complainants or of the complaints themselves to the *parties*; rather, only release of such information *by the Commission or its employees* to the *public* is proscribed." *Whitaker v. Carney*, 778 F.2d 216, 221-22 (5th Cir. 1985).

The EEOC cites an earlier Fifth Circuit case, *Branch v. Phillips Petroleum Co.*, as holding that the EEOC cannot disclose anything said or done during the conciliation process, even to the parties. 638 F.2d 873, 881 (5th Cir. 1981). In *Branch*, the court did find that the district court's ordered disclosure of settlement proposals was in error. *Id.* However, the court in *Branch* based its holding on the particular concern that "the prospect of disclosure or possible *admission into evidence* of proposals made during conciliation efforts would tend to inhibit the

[3] Federal regulations similarly provide that:

> Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

29 C.F.R. § 1601.26(a).

kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII." *Id.* (emphasis added). The Fifth Circuit later distinguished this as limited to preventing the disclosure of conciliation materials for use at trial, though not preventing their disclosure to the parties for other purposes:

> [Plaintiff] is correct that the section does not prevent *disclosure* by the EEOC of material to the parties to the agency proceeding. . . . The issue in this case, however, is not governed by the part of the section that prohibits disclosure to the public; it is governed by the part of the section that prohibits any use of the material in 'subsequent proceedings.' We interpreted this latter part in *Branch v. Phillips Petroleum Co*. . . . In *Branch* we denied the plaintiff's request to discover EEOC conciliation material for *use* in a Title VII action against the employer, in part because section [2000e-5(b)] prohibits the use of such material in later litigation.

Olitsky, 842 F.2d at 126 (emphasis added). Accordingly, although materials relating to the conciliation process are not admissible evidence and cannot be used at trial, they are discoverable by the parties to a lawsuit.

The EEOC also cites two other Fifth Circuit cases, which it claims are in accord with *Branch*'s prohibition against the disclosure of conciliation materials. These cases are distinguishable from the discovery request at issue here. In *Olitsky v. Spencer Gifts, Inc.* ("*Olitsky II*"), the court again dealt with the admission of evidence at trial and found that a letter contained no reference to conciliation efforts so as to render it inadmissible. 964 F.2d 1471, 1477 (5th Cir. 1992). In *Lindsey v. Prive Corp.*, the court found that the trial court had not erred by refusing to admit at trial a letter allegedly involving settlement positions. 161 F.3d 886, 894-95 (5th Cir. 1998). Both of these cases, like *Branch*, pertain to the *admission* of conciliation materials into evidence at trial, and not to their mere *disclosure* to parties in discovery.

The Court therefore finds that Kroger is entitled to the disclosure of the conciliation letter from the Intervenors' attorney to the EEOC investigator, and to the EEOC investigator's

handwritten notes regarding conciliation of the charges against Kroger. The EEOC is **ORDERED** to produce these documents to Kroger by Friday, March 17, 2006. Kroger is admonished that it may not attempt to admit these documents into evidence for use at trial.

III. Extension of Time

Finally, the EEOC has requested an extension of all deadlines in the case by ninety days, asserting that it needs additional time to review the approximately 7,000 employment applications disclosed by Kroger in response to the EEOC's discovery requests. The EEOC contends that because Kroger discarded its applications for January through April, 2004, it needs to conduct an analysis of applications from a longer time period than it had originally intended. The EEOC also points out that the deposition of Kroger's hiring official was set for only ten days prior to the March 14, 2006 due date for the EEOC's expert report, which would not give its expert enough time to consider the deposition testimony as part of his analyses.

The Court agrees that a thirty-day extension of the deadlines for expert reports is warranted, to allow the experts to include relevant deposition testimony in their analyses and reports. A corresponding, two-week extension of the discovery deadline is also reasonable. However, while the EEOC may be faced with numerous documents to evaluate, this does not warrant extending all of the deadlines in this case by ninety days. Previously, at a scheduling conference before the Court on September 2, 2005, the EEOC argued that a fifteen-month discovery period was needed to allow it to analyze two years of employment applications from Kroger. The Court disagreed, and gave the parties an August 14, 2006 trial date. Thereafter, the parties entered a proposed scheduling order with a discovery deadline of May 31, 2006. The EEOC has not provided a satisfactory explanation for why it then waited to serve Kroger with its first request for production of documents until December 16, 2005, over three months after the

Court declined to grant the extended discovery period that the EEOC had requested. The EEOC also appears to have contemplated the need to analyze two years of employment applications at the time when the discovery deadline was set in September 2005. The voluminous nature of these employment applications should not have been a surprise to the EEOC. Kroger is entitled to a timely resolution of the charges against it, and a ninety-day extension of all dates, including the trial date, is not warranted.

Accordingly, the deadlines are extended as follows:

Deadline for Plaintiff's and Intervenors' Expert Reports	April 14, 2006
Deadline for Defendant's Expert Report	May 14, 2006
Discovery Completion Date	June 16, 2006

IT IS SO ORDERED.

SIGNED this 13th day of March, 2006.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT.