BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	DOCKET NO.: OSHA 2020-6131
Complainant,	)	INSPECTION NO.: 318162112
	)	CSHO ID: M3155
-vs-	)	
	)	ORDER on RESPONDENT's MOTION
LENNAR CAROLINAS, LLC,	)	FOR LEAVE TO REQUEST
	)	PRODUCTION OF UNREDACTED
Respondent.	)	INSPECTION FILE

On December 13, 2021, the Respondent Lennar Carolinas, LLC ("Lennar") delivered to the OSH Review Commission a served copy of its Motion for Leave to Request Production of Unredacted Inspection File. On December 20, 2021, the Complainant submitted its response opposing the motion.

Lennar currently has six pending citations before this Commission, in summary:

File No.	Inspection Date	Where	Citation Date	Alleged Violation	proposed penalty
2019-6084	10/17/2018	Lot 2, Waxhaw NC	12/18/2018	1926.501(b)(13)(serious – fall protection)	$ 7,000
2019-6131	4/4/2019	Lots 10, 11, 103 Charlotte NC	5/2/2019	1926.501(b)(13) (serious – fall protection)	$ 7,000
2020-6219	6/17/2019	4030 Lily Pond, Waxhaw NC	9/10/2019	1926.501(b)(13) (serious – fall protection)	$ 7,000
2020-6241	7/24/2019	214 Glenvale, Apex NC	12/4/2019	1926.20(b)(2) (serious – freq. and reg. inspections)	$ 4,500
2020-6307	3/2/2020	Hadlow St, Fuquay-Varina NC	6/29/2020	1926.20(b)(2) (serious – freq. and reg. inspections)	$ 5,600
2020-6327	3/4/2020	2925 Thirlestane, Apex NC	8/18/2020	1904.40(a)(nonserious – OSHA log production	$ 900

In its defense to these citations, Lennar has variously denied the allegations, denied knowledge of the activities giving rise to the violation, and/or affirmatively asserted that it was the controlling employer and satisfied its duty of reasonable care to prevent/detect violations. In several cases Lennar has identified its management employee(s) on site and their contemporaneous

actions. With respect to its controlling employer defense, Lennar has identified the other involved employer(s) as well as the identity and activities of some of their workers, and compared the Complainant's treatment of those employers with its treatment of Lennar. For example, in this case Lennar identified two employees (Scott Pittman and Brenden Hutchins) who were present and interacted with its subcontractor's foreman (Jeff Smith of 84 Lumber), a county inspector, and the Complainant's compliance officer (Karl Burgette), as well as a second subcontractor (W.C. Jones Construction, Inc.). Lennar stated that W.C. Jones' crew had lanyards and fall protection harnesses in their truck and corrected the alleged fall protection violation while the compliance offer was present, and also described Mr. Smith's apology and explanation to the compliance officer that he had fall protection equipment on site and his crew put on the harnesses and tie off immediately. Lennar affirmatively stated that both subcontractors "took responsibility and control of their workers and promptly addressed the OSHA compliance officer's concerns." Lennar Position Statement at pp. 2-4 (7/9/19).

The Complainant admits in its response to Lennar's motion that it created and collected records documenting the evidence and findings of the case, and both parties admit that Complainant has provided Lennar with a redacted copy of the official inspection report. (Lennar Motion at p. 2, Complainant Response at p. 4, ¶ 18) The Complainant also admits that it has previously received Lennar's request for unredacted documents; on March 26, 2021, it provided Lennar with redacted copies of witness statements in each pending case; and on December 15, 2021, it advised Lennar that unredacted copies of witness statements would be provided 10 days prior to the scheduled enforcement hearing.

Neither party has provided copies of the redacted materials produced to Lennar and neither party has requested oral argument on Lennar's motion.

DISCUSSION

1. Does N.C.Gen.Stat. § 95-136(e) and -136(e1) Answer The Question?

Lennar variously describes its request as leave to seek disclosure of "the unredacted inspection file" (Lennar Motion p. 1), "the unredacted file," (*id*. p. 2, 3), "the names, addresses, content of interviews by compliance safety and health officers" (*id.* p. 2), and "the unredacted investigation file" (*id.* pp. 3, 4). The Complainant argues that it is not required to produce unredacted copies until ten days prior to a scheduled hearing, relying on the language of N.C.Gen.Stat. § 95-136(e1).

The Complainant is correct that North Carolina statute strictly circumscribes the information that the Complainant must share with a cited employer. Specifically, N.C.Gen.Stat. §§ 95-136(e) and -136(e1) exempt pending investigative and enforcement materials from North Carolina's Public Records law, and instead requires that the Complainant make available a redacted copy of its "official inspection *report"* to a cited employer, upon written request:

> (e) … Files and other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G..S. 132-6 while such investigations and

> proceedings are pending, except that, subject to the provisions of subsection (e1) of this section, an employer cited under the provisions of this Article is entitled to receive a copy of the ***official inspection report*** which is the basis for citations received by the employer following the issuance of citations.
>
> (e1) Upon the written request of and at the expense of the requesting party, ***official inspection reports*** of inspections conducted pursuant to this Article shall be available for release in accordance with the provisions contained in this subsection and subsection (e) of this section. The names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections or investigations conducted pursuant to this Article that would name or otherwise identify the witnesses or complainants, ***shall not be released*** to any employer or third party and ***shall be redacted*** from any copy of the ***official inspection report*** provided to the employer or third party. …

N.C.Gen.Stat. § 95-136(e), (e1) (emphases added).

Section 95-136(e1) goes on, however, to allow a cited employer to obtain unredacted information of a witness where the witness has consented in writing and, absent consent, unredacted copies of <u>relevant</u> witness statements 10 days prior to a scheduled hearing:

> … A witness or complainant may, however, sign a written release permitting the Commissioner to provide information specified in the release to any persons or entities designated in the release. … The Commissioner ***shall*** make available to the employer ***10 days*** *prior to a scheduled enforcement hearing* unredacted copies of: ***(i) the witness statements the Commissioner intends to use at the enforcement hearing, (ii) the statements of witnesses the Commissioner intends to call to testify, or (iii) the statements of witnesses whom the Commissioner does not intend to use that might support an employer's affirmative defense or otherwise exonerate the employer***; provided a written request for the statement or statements is received by the Commissioner no later than 12 days prior to the enforcement hearing. If the request for an unredacted copy of the witness statement or statements is received less than 12 days before hearing, the statement or statements shall be made available as soon as practicable. …

N.C.Gen.Stat. § 95-136(e1) (emphases added). This language is specific and mandatory as to the materials the Complainant must produce upon request of a cited employer. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the undersigned must give the statute its plain and definite meaning, without adding provisions or limitations not contained therein. *In re Banks*, 295 N.C. 236, 239 (1978). *See also McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp.*, 330 N.C. 602, 604 (1992) (where a statute's language is clear and unambiguous, judicial construction is unnecessary and its plain and definite meaning controls). Accordingly, based on the clear language of the statute, the Complainant must:

> (1) redact identifying witness/complainant information from its official inspection report except where the witness has consented to disclosure of the information in writing,

(2) produce the official inspection report with redactions protecting information the witness has not expressly released for disclosure, and

(3) produce unredacted copies of (i) witness statements it intends to use at hearing, (ii) statements of witnesses it intends to call at hearing, and (iii) witness statements that support Lennar's defenses or exonerates Lennar.

Stated another way, the Complainant is not required to produce (1) investigative file documents that are not part of the official inspection report,[1] (2) information of witnesses who did not expressly consent to disclosure, (3) an unredacted copy of the official inspection report,[2] or (4) unredacted copies of witness statements the Complainant does not intend to use at hearing or statements of witnesses it does not intend to call at hearing, unless the witness's testimony or statement support Lennar's defenses or exonerates Lennar.

The parties agree that the Complainant has already produced the official inspection report, and redacted copies of witness statements. The question remains as to the timing for Complainant's production of unredacted witness statements that fall within the parameters of N.C.Gen.Stat. § 95-136(e1)(i)-(iii).

As the Complainant points out, the statute is specific on this timeline: "10 days prior to a scheduled enforcement hearing," if the employer has requested them. The statutory language is precise and does not include any modifiers, such as "at least" or "not less than." This precision, coupled with the multiple mandates requiring removal of identifying witness information, and the substitution in bill negotiations of a ten-day requirement for the initial five-day proposal,[3] appears to reflect the General Assembly's intent that the information be provided on the tenth day before a scheduled hearing, and not earlier.[4] This interpretation is consistent with the Act's strong public

[1] The statute does not define "official inspection report," or specify what information must be included in it. However, the Complainant has indicated that the official inspection report is comprised of "certain records" collected and created by the compliance officer, "documenting the evidence and findings of the investigation." Complainant's Response, p. 2 ¶ 2.

[2] Because the relevant witness statements must be produced, an employer is not prejudiced by receiving a redacted official inspection report: with production of these witness statements, it nevertheless receives the information that will be used against it, as well as the information that may help it in its defenses.

[3] The initial version of the 1999 bill specified that neither the Review Board nor any court could order release of testimony or statements unless they were needed by the Complainant to enforce the Act, providing for a production deadline of only five days prior to hearing. S. 370, version 1 (3/15/99), available online at https://www.ncleg.gov/BillLookUp/1999/S370. The second version of the bill removed the language prohibiting the Review Board or any court from ordering production, and instead allowed the cited employer to receive a redacted inspection report, upon request, and access to unredacted copies of witness statements the Complainant would use, or of witnesses the Complainant would call at the enforcement hearing, ten days prior to a scheduled enforcement hearing. S. 370, version 2 (4/22/99). The third (and final) version of the bill added the language allowing the employer access to unredacted witness statements that were exculpatory or supported the employer's affirmative defenses. S. 370, version 3 (7/19/1999).

[4] Of course, when the tenth day before a scheduled hearing falls on a weekend or holiday, the required documents should be made available on the next preceding business day. So, for example, when a hearing

policy of protecting witnesses and complainants from obstructive or retaliatory acts by the cited employer, and is much more generous than other options, such as requiring production only after a witness has testified. *Cf. Keenan, Hopkins, Suder & Stowell Contrs., Inc. v. Dept. of Labor,* 851 Fed.Appx. 865, 867-68 (10th Cir. 2021)(OSH Review Commission has adopted Jencks Act approach of requiring production of witness statement only after witness has testified unless employer makes particularized showing of need for pre-hearing production sufficient to outweigh the strong public interest in protecting the confidentiality of government sources)(citing *Massman-Johnson (Luling)*, No. 76-1484, 1980 OSAHRC LEXIS 467 (1980)).

However, section 95-136(e1)'s ten-day requirement does not completely answer the question since the General Assembly has authorized the Review Commission to grant some discovery in pending cases, N.C.Gen.Stat. § 95-135(b), and the legislative history of the 1999 amendment reflects an intent to leave this authority in place. *See supra* fn. 3. Accordingly, the undersigned will consider Lennar's motion under the Review Commission's discovery rules.

2. May the Review Commission Nevertheless Order Earlier Production?

The purpose of the North Carolina Occupational Safety and Health Act is to protect the safety and health of workers who may be exposed to unsafe conditions in their workplace. Although discovery is authorized, formal discovery is generally denied in order to provide for expedited resolution and abatement of alleged violations. *Commissioner of Labor v. Georgia-Pacific Corp.*, OSHANC 95-3199 (8/15/96)(citing *Brooks v. Weeks Constr. Co.*, 3 NCOSHD 976 (RB Chair 1990)). Accordingly, the Review Commission has typically only permitted discovery where the novelty or complexity of the case required it. *Brooks v. Scandura, Inc.*, OSHANC 79-784, 2 NCOSHD 296 (3/25/80)(allowing formal discovery in complex noise case requiring experts); *Brooks v. United Parcel Service, Inc.*, OSHANC 92-2230, 5 NCOSHD 169 (8/20/92) (allowing discovery in case involving ergonomics where experts would be required).

Nevertheless, as Lennar correctly observed, prior to the 1999 amendment of § 95-136(e1), this Review Commission allowed discovery of witness identities, reasoning that the statute allowed anyone to use the names and statements of witnesses during enforcement proceedings, those names and statements could only be used if the Complainant first disclosed them; at that time there was no other means of obtaining this information; and discovery was permitted as part of the Review Commission's proceedings. *See, e.g., Commissioner of Labor v. Donohoe Constr. Co.*, OSHANC 93-2995 (3/22/96)(permitting discovery of investigative files and information of relevant witnesses, subject to protective order limiting disclosure and use of information); *Commissioner of Labor v. Sumter Builders, Inc.*, OSHANC 93-2820 (12/6/93) (allowing discovery of unredacted witness statements that the Commissioner has used or will use in enforcement proceedings, subject to protective order), *pet. for review and motion to stay denied* (12/9/94). However, both cases recognized that the party seeking discovery bore the burden of establishing the necessity of the information, and *Donohoe Constr.* expressly ruled that the employer was required to make a showing of "good cause necessity" sufficient to overcome the OSH Act's policy of anonymity for witnesses and complainants. *Donohoe Constr., supra* (citing N.C.Gen.Stat. §§95-136(a)(2)

is scheduled for February 1, 2022, the tenth day before hearing is Saturday, January 22, 2022, and the documents should be made available on Friday, January 21, 2022.

(Complainant authorized to question employees privately); § 95-136(d)(1)(witness/complainant's name shall not appear in any record published, released or made available), § 95-136(e), (e1) (witness/complainant names shall not be released to any employer or third party without consent); and *Commissioner of Labor v. United Parcel Service, Inc.*, OSHANC 92-2230, 5 NCOSHD 169, 171 (8/20/1992)("In no event shall the identity of employees of Respondent be provided to Respondent where the Act's policy of anonymity would be infringed.")) *Cf. aso Keenan, Hopkins, Suder & Stowell Contrs., Inc. v. Dept. of Labor*, *supra* (OSH is privileged to withhold from disclosure the identity of individuals who provided information to compliance officers); *In re Birdair*, OSHRC Docket No. 10-0838, 2011 OSAHRC LEXIS 42 (4/27/11))(OSH has long recognized privilege protecting identities of workers who provide information to compliance officers; this privilege extends to phone records that could disclose communications)).

Accordingly, the party seeking discovery has the burden of showing good cause and a particularized need for the discovery sought sufficient to overcome the State policy of anonymity. *Donohoe Constr. Co., supra.* In order to satisfy this requirement, the employer must state facts showing that (1) the identities and statements are essential to the preparation of its case and (2) the employer is unable to get the information elsewhere. *Donohoe Constr., supra* (citing *Massman-Johnson (Luling)*, No. 76-1484, 1980 OSAHRC LEXIS 467 (RC 5/2/80), *appeal dismissed* 645 F.2d 67 (5th Cir. 1981)). This approach is consistent with that taken by federal OSH. *See, e.g.*, *In re Donald Braasch Constr. Inc.*, OSHRC Docket 94-2615, 1997 OSAHRC LEXIS 16 (3/3/97) (identity of individuals furnishing information to OSH compliance officers is privileged, and may only give way where employer demonstrates disclosure is essential to fair determination of case and that it cannot obtain the information through other means; mere assertion that information may be helpful to preparing a defense is insufficient); *In re Massman-Johnson (Luling)*, *supra*) (identity of witnesses is privileged and ALJ erred in ordering disclosure of witness statements prior to hearing); *In re Quality Stamping Prods.*, OSHRC Docket 78-235, 1979 OSAHRC LEXIS 479 (5/3/1979) (identity of witness is privileged and would not be provided where employer failed to show it needed the information to prove its factual assertions; more than a showing of relevancy was required).

With these authorities in mind, the undersigned must conclude that Lennar has not made the requisite showing.

First, Lennar has only made conclusionary statements that the identities of these witnesses are essential to its preparation of its case, and has not explained, or asserted any facts showing, why this is true. Additionally, Lennar's long delay in seeking leave for this discovery, together with its extensive knowledge of other involved employers and their employees (as set out in its Position Statements) suggests that early disclosure of the identity of these witnesses is not truly essential to Lennar's preparation.

Lennar gets closest to showing essentiality when it argues that it needs the information so that it can subpoena witnesses in time for the hearing. This argument loses steam, however, when one realizes that Lennar has not asserted that any of these unidentified individuals are necessary to its defense, how/why they are necessary, or that it actually intends to subpoena any of them. Moreover, the only relevant witnesses Lennar would want to subpoena (and the Complainant would not) would be those that support Lennar's affirmative defenses or exonerate Lennar, but

Lennar has not indicated that any of the redacted witness statements fall within that category. Even so, the inability to subpoena is not an insurmountable problem, and as a logistical matter could be worked out between the parties without the undersigned's intervention, with Lennar identifying to the Complainant which witnesses it would like subpoenaed (e.g., "Witnesses 2, 3, 6"), and the Complainant then issuing and attempting[5] to serve subpoenas upon those witnesses, at Lennar's expense.

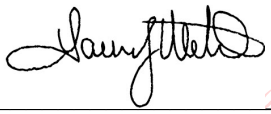
Second, Lennar has not indicated that it is unable to get the information elsewhere, or asserted any facts showing why that is so. Given Lennar's knowledge of the other employers in each case, and their contemporaneous activities (including retrieving gear and apologizing to the compliance officer), it seems unlikely to the undersigned that Lennar does not already know the identity of witnesses relevant to both the Complainant's case and Lennar's defenses. Lennar's delay in seeking this discovery also suggests that it already has the information it needs.

The undersigned appreciates the discomfort arising from receiving unredacted documents only ten days before hearing. However, in the absence of the requisite showing, and in light of the important policies protecting the disclosure of witness identities, the undersigned will not order production at variance with the specific language of N.C.Gen.Stat. § 95-136(e), (e1).

Finally, however, the undersigned is concerned with Lennar's statement that it is "unable to fully prepare for the hearing without the… content of interviews by the compliance safety and health officers…." Lennar's Motion p. 2. As the Complainant well knows, the statute only authorizes redaction of the names of witnesses, and "information within statements … that would name or otherwise identify the witnesses or complainants." Because the parties have not provided the redacted copies with their filings in this case, the undersigned cannot determine whether Lennar's argument relates to the statutorily-required redaction of identifying information, or a wholesale redaction of potentially important <u>non</u>-identifying information. Accordingly, the undersigned cannot make any ruling on this issue, but cautions the Complainant that if its staff have run amok with their redacting markers, the Complainant has a duty to <u>immediately</u> rectify the situation.

Based on the foregoing, Lennar's Motion for Leave to Request Production of Unredacted Inspection File is <u>denied</u>.

This the 7th day of January, 2022.



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Laura J. Wetsch, Hearing Examiner

[5] Service is not guaranteed, as these witnesses may have moved from the address previously provided to Complainant.