

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC
DEVELOPMENT**

)	OAH No. 08-0245-TOB
)	Agency No. 0500-08-009
)	
)	OAH No. 08-0313-TOB
In the Matters of:)	Agency No. 0500-08-026
)	
HOLIDAY ALASKA, INC.)	OAH No. 08-0314-TOB
d/b/a Holiday,)	Agency No. 0500-08-028
)	
Respondent.)	OAH No. 08-0420-TOB
_____)	Agency No. 0500-08-010

ORDER ON DISCOVERY MOTIONS

After Holiday Alaska served five production requests and one interrogatory on the Division of Corporations, Business and Professional Licensing on July 18, 2008, the division moved on August 13 for a protective order. The motion argued that Holiday’s facial due process challenge to AS 43.70.075 and its Open Meetings Act challenge to the same statute were meritless on their face and that therefore discovery in connection with those defenses should not be permitted.

At a status conference on August 14, the parties partly settled the discovery dispute. The division agreed to make a partial response to Request for Production (RFP) 3 and a more or less complete response to RFP 4. The need for further responses, if any, was to be discussed between counsel and, if necessary, addressed formally at the time set for dispositive motions, September 15. Holiday was permitted to defer its opposition to the motion for protective order until that date.

On August 22, the division made its interim responses. The following week, Holiday asked the division for a further response on RFP 3 only. After some discussion between counsel, the division declined to do so on the basis that it would require one day of an investigator’s time to assemble the requested materials.

Holiday filed no opposition to the motion for protective order on September 15, but it did file a motion for to compel addressed to RFP 3 alone on September 26. The division opposed the motion to compel on the basis of untimeliness and on the merits.

The original motion for protective order addressed only two of Holiday's broad defenses—the facial constitutional challenge and the Open Meetings Act contention. It ignored Holiday's third broad defense, an equal protection challenge to the application of AS 43.70.075 in the particular circumstances of these cases. RFP 3 is related only to the equal protection defense. The motion to compel turns likewise on the equal protection defense, and so the two motions talk past one another. In the meantime, while the discovery motions have been pending, OAH has ruled on the summary adjudication motion, determining that the due process and Open Meetings defenses cannot be entertained but finding that the equal protection defense can be, at least to the point of assembling a factual record for later judicial review.

In this somewhat muddled procedural situation, where the original motion for protective order ostensibly covered RFP 3 but did not actually address its underpinnings, it seems unduly harsh to bar Holiday's motion to compel on the ground that it should have been filed 11 days earlier in the form of an opposition to the motion for protective order. Accordingly, the motion to compel will be entertained. At the same time, the division's motion for protective order—which is unopposed—will be granted in all respects not superseded by the later discussion and briefing on RFP 3.

Turning to the merits of the motion to compel regarding RFP 3, the division has opposed the motion essentially on the ground that Holiday does not have evidence to support its equal protection defense. RFP 3 is an effort to see if there is such evidence, and, as narrowed in Mr. Treptow's letter of August 27, it appears to be a reasonably well-focused and not particularly burdensome means to that end. That is an appropriate use of discovery.

Nothing herein should be construed as a determination that the equal protection defense is legally viable. That issue has not yet been addressed in this litigation.

IT IS ORDERED that:

(1) The division's August 13, 2008 motion for protective order is granted with respect to Holiday's Interrogatory 1 and Requests for Production 1, 2, 4, and 5. No further response is required to those discovery requests.

(2) Holiday's motion to compel with respect to Request for Production 3, as narrowed in the letter of John Treptow to Cynthia Drinkwater dated August 27, 2008, is granted. The division shall produce the requested forms by October 24, 2008.

DATED this 13th day of October, 2008.

By: Signed
Christopher M. Kennedy
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 13th day of October, 2008, a true and correct copy of this document was emailed to the following: John A. Treptow, counsel for Holiday Alaska, Inc.; and Cynthia Drinkwater, Assistant Attorney General.

By: Signed
Linda Schwass/Kim DeMoss

[This document has been modified to conform to the technical standards for publication.]