competitiontribunal
south africa

THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR053Aug10/DSC063May17

In the application of:

Goodyear South Africa (Pty) Ltd	**Applicant**
The Competition Commission	**Respondent**

And

Case No: CR053Aug10/DSC056May17

In the application of:

Continental Tyres South Africa (Pty) Ltd	**Applicant**
The Competition Commission	**Respondent**

In *re* the complaint referral between:

The Competition Commission	**Applicant**
Apollo Tyres South Africa (Pty) Ltd	**First Respondent**
Goodyear South Africa (Pty) Ltd	**Second Respondent**
Continental South Africa (Pty) Ltd	**Third Respondent**
Bridgestone South Africa (Pty) Ltd	**Fourth Respondent**
South African Tyre Manufacturers Conference (Pty) Ltd	**Fifth Respondent**

Panel	:	Yasmin Carrim (Presiding Member) Mondo Mazwai (Tribunal Member) Andreas Wessels (Tribunal Member)
Heard on	:	13 June 2017
Order issued on	:	13 October 2017
Reasons issued on	:	13 October 2017

DECISION AND ORDER

Introduction

[1] The Competition Tribunal of South Africa ("the Tribunal") heard two applications brought by Goodyear South Africa (Pty) Ltd ("Goodyear") and Continental Tyres South Africa (Pty) Ltd ("Continental"). The purpose of Goodyear's application was to compel the Competition Commission ("the Commission") to make 'further and better discovery' in relation to documents that formed part of the Commission's record.[1] Continental's application was to compel the Commission to produce certain documents forming part of the Commission's record.

[2] The Commission resists handing over these documents on the basis that they are protected from disclosure by litigation privilege and under Commission rule 14(1)(d) and (e).

[3] The history of this matter is rather voluminous and complex, going as far back as 2006. For the sake of brevity we deal with only the facts relevant to these applications.

Background

[4] The initial complaint was submitted to the Commission on 2 October 2006 by Mr Parsons ("the Parsons complaint") wherein he alleged that the tyre manufacturers simultaneously announced price increases by using sales tactics, marketing structures and pricing techniques to disguise their price fixing. This led

[1] Goodyear's application is slightly wider than that of Continental and it also requests that we order the Commission to identify with a greater degree of particularity the nature of the documents.

to the Commission conducting a search and seizure on the premises of Apollo Tyres South Africa (Pty) Ltd ("Apollo"), Bridgestone South Africa (Pty) Ltd ("Bridgestone") and the South African Tyre Manufacturers' Conference (Pty) Ltd ("SATMC") on 4 April 2008 ("dawn raid").

[5] A year later, on 24 April 2009, the Commission initiated its own complaint ("Commission's complaint") against the respondents. Following the Commission's complaint, Bridgestone filed a marker application on 11 September 2009 and subsequently filed its leniency application in terms of the Commission's Corporate Leniency Policy ("CLP") on 16 October 2009. Eventually, the Commission filed its complaint referral against the respondents to this Tribunal on 31 August 2010. The Commission has since settled with Apollo.[2]

[6] Over the last few years, Goodyear, Continental and SATMC have brought a number of interlocutory applications against the Commission. For ease of convenience we have summarised the number and type of interlocutories as well as the type of documents handed over by the Commission to the applicants in Annexure A attached hereto. The first of these related to access to the Commission's record under High Court rule 35(12) and Commission rule 15 with emphasis on the CLP application and the documents seized during the dawn raid. The second of these related to the Apollo documents seized by the Commission. During this period the Commission handed over the CLP application and annexures thereto.

[7] At a pre-hearing held on 8 December 2016 the Commission agreed to hand over its confidential record to Goodyear, Continental and SATMC's legal representatives, on the furnishing of confidentiality undertakings.

[8] On 1 February 2017, the Commission duly handed over the confidential version of its record in a number of memory sticks to be made available for collection at

[2] Apollo entered into a settlement agreement with the Commission which was made an order of this Tribunal in December 2011.

its offices. The record was exceptionally voluminous. For ease of reference the Commission attached an index to the record.

[9] Upon inspection of the attached index, it was ascertained by Goodyear and Continental that a number of items were omitted from the index. On its face, the index lists items 1, 2 and 3 and then curiously skips to item 23, and then again skips to item 93. Furthermore, a number of pages within the record were blank except for status descriptions of the documents be it "Restricted and/or Privileged", "Internal Document", or "Erroneously Included".

[10] Goodyear and Continental requested copies of the missing items. In April 2017, the Commission engaged with the representatives of Goodyear and Continental, to discuss how the Commission could remedy Goodyear and Continental's request for the missing items. The Commission then provided Goodyear and Continental with a schedule, titled 'Schedule 1' in an effort to justify the exclusion of certain documents from the confidential record.

[11] After various interactions between the parties a revised version of Schedule 1 was furnished by the Commission to Continental and Goodyear. On 17 May 2017, a further revised Schedule 1 (dated 16 May 2017) was provided by the Commission.

[12] At the hearing of the applications the revised schedule was further redacted and the only documents remaining in dispute were those listed in Annexure B attached hereto.

[13] The Commission has, to date handed over a large number of documents to the respondents, which include the CLP application, the annexures thereto, and the documents it seized during the dawn raid on Bridgestone, SATMC and Apollo.

The Applications

[14] Goodyear and Continental persist with their request for two broad categories of documents.

[15] The first category relates to correspondence. Under this category is the correspondence between the Commission and Bridgestone who is the leniency applicant in the main matter pending before the Tribunal, and correspondence between the Commission and Parsons Transport (Pty) Ltd ("Parsons") who is the Complainant in the main matter pending before the Tribunal.

[16] The second category of documents comprises of the transcripts of all the interviews the Commission conducted in the course of its investigation. A unique issue in this category, which we deal with separately is the transcript of the interview conducted by the Commission with Mr Shaun Wustmann, a Bridgestone employee who was a deponent to the leniency application ("the Wustmann transcript"). The Wustmann transcript which we discuss in detail further on was handed over inadvertently to Continental's attorneys.

[17] The Commission's response to the requests by Goodyear and Continental is that it has handed over all the relevant and necessary documents and refuses to hand over those listed in Annexure B because they are restricted under Commission rule 14(1)(d) or (e) or subject to common law litigation privilege. In relation to the Wustmann transcript the Commission persisted with its claim and required Continental to destroy all copies of the transcript in its possession.

[18] The Commission's primary argument was that all the documents in dispute were subject to the common law principle of litigation privilege because the Commission's role of investigating cartels or prohibited practices could only result in either one of two outcomes namely a referral to the Tribunal or a non-referral. In assessing whether a document generated by the Commission in the course of its investigation was subject to litigation privilege due regard had to be given not only to the nature of the document but also to the role of the Commission. The fact that the Commission is an investigative body charged with investigating contraventions of the Act, it was likely that the Commission would be contemplating litigation from the outset. All that was required at the relevant time was whether there was a "prospect or expectation of litigation". Hence in relation to complaints it could be argued that litigation privilege came into existence as early as when a complaint was initiated or at the very least, on the

facts of this case, at the time of the dawn raid. Furthermore litigation privilege could be inferred from the nature of a document or an activity. For example the Commission's internal notes or transcripts of interviews with potential witnesses would be the type of documents that should enjoy privilege. Likewise the documents seized by the Commission in a dawn raid conducted under its evidence gathering functions.

[19] Mr Berger on behalf of the Commission argued that unlike in *ArcelorMittal*[3], in this case the Commission had clearly contemplated litigation from the date of initiation of its complaint because in that statement it had already contemplated that the conduct of the respondents at that time "*...may amount to a contravention of sections 4(1)(a) and/or 4(1)(b)*" of the Act.[4] He submitted further that litigation was certainly contemplated by the Commission at the time of the dawn raid and when the Bridgestone marker and/or CLP application was filed.

[20] He nevertheless relied on rule 14(1)(d) and (e) as an additional justification against disclosure.

[21] Goodyear and Continental challenge this claim. Placing reliance on *ArcelorMittal*, they argued that the Commission has not set out sufficient details and facts in its affidavits to justify its claim of litigation privilege. Furthermore, Continental argued that the Commission has not identified with sufficient particularity the nature of the documents for it to assess whether they are to be subject to litigation privilege (e.g. the correspondence with the Complainant, Parsons). In relation to the Wustmann transcript Goodyear submitted that the Commission had through error waived any privilege it might have enjoyed over it. A related argument put up by Continental was that the Commission had already discovered some documents which fell into the correspondence category and there was no justification for it to withhold the rest.

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[3] *Competition Commission v ArcelorMittal South Africa Ltd and others 2013 (5) SA 538 (SCA).*
[4] Competition Act 89 of 1998 as amended.

[22] We deal with the requests in *seriatim* but consider first the applicable legal principles.

Relevant law

Litigation privilege

[23] Litigation privilege consists of two components, one of legal professional privilege and, two, the privilege that attaches to communications between a client and his attorney for purposes of obtaining and giving legal advice. Of relevance to the current matter before us is the one in relation to a litigant or his legal advisor and third parties, if such communications are made for purposes of pending or contemplated litigation.

[24] The requirement for litigation privilege has two elements, one whether the document in question was brought into existence for purposes of a litigant's submission to a legal advisor for legal advice, and, two, whether litigation was pending or contemplated as likely at the time when such document was made.

[25] This Tribunal, the Competition Appeal Court ("CAC") and the Supreme Court of Appeal ("SCA") have already had the opportunity to consider the attachment of litigation privilege to CLP applications in cartel matters.

[26] In the recent case of *ArcelorMittal*,[5] the SCA set out the requirements for documents to be covered by litigation privilege. Firstly the documents must have been obtained for the purpose of submitting them to a legal advisor for legal advice; secondly litigation must be pending or contemplated as likely. In order to determine this question the court must have regard to the factual circumstances surrounding the document in question. Thus the enquiry is a factual enquiry and the person claiming privilege must set out these circumstances in its papers.[6]

[5] *Supra* at footnote 4.
[6] Ibid at paragraph 28.

[27] In the recent decision of *WBHO*[7] the Tribunal held that the annexures that formed part of the CLP application were also subject to litigation privilege.

Rule 14(1)(d)

[28] The Commission clarified during argument that it relies on Commission rules 14(1)(d)(i) and (ii). The relevant provisions of the rule are –

"Restricted information

(14) (1) For the purpose of this Part, the following five classes of information are restricted:

(d) A document -

(i) *that contains -*

(aa) an internal communication between officials of the Competition Commission, or between one or more such officials and their advisors;

(bb) an opinion, advice, report or recommendation obtained or prepared by or for the Competition Commission;

(cc) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed on the Commission by law; or

[7] *WBHO Construction Limited vs the Competition Commission; case number; CR162Oct15/AR187Dec16.*

(ii) *the disclosure of which could reasonably be expected to frustrate the deliberative process of the Competition Commission by inhibiting the candid -*

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion or deliberation;"

[29] The Tribunal has previously considered the ambit of rule 14(1)(d).

[30] In *Netcare*[8] an application was brought by the merging parties to compel the Commission to hand over notes taken during interviews held by its investigators with third parties, as part of its investigation of the merger. The Commission claimed the documents were restricted under rule 14(1)(d) and (e), because of the nature of the documents, and could not be handed over simply because the investigation had been concluded. In that case the Tribunal rejected the applicant's argument that documents referred to in rule 14(1)(d) and (e) have the same standing as those in sub-rule (c) i.e. they are restricted only in relation to the time they were sought, rather than their very nature. When considering whether the application could be sustained under rule 14(1)(d) and (e), the Tribunal concluded that a document might be restricted because of the contents of the document, or because of the status of the document at the time when it was obtained. Under rule 14(1)(d), documents such as the Commission's internal investigation had to remain confidential, regardless of the stage of the investigation and even after the conclusion thereof, so as not to compromise candid and open deliberations within the Commission.

[31] In *Astral*[9], the Commission resisted handing over documents which consisted mainly of handwritten notes of interviews conducted by the Commission with third parties, its investigation report, internal notes and memoranda. The Tribunal held

[8] *Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd, case no; 68/LM/Aug06.*
[9] *Astral Operations Ltd & Other vs The Competition Commission of South Africa; case number; 74/CR/Jun08.*

that the Commission was not required to hand these over, on the grounds that unrestricted access to its investigation notes by the merging parties, would have a negative impact on its investigations.[10] In that case the Tribunal also held that in instances where the Commission calls witnesses and produces witness statements (as is the case in the current matter), which will be cross-examined by the respondents at trial, then this weakens the party's case of being granted access to the documents.[11] Furthermore the restriction placed by rule 14(1)(d) on a respondent's access to certain documents is not unfair, because it is informed by a sensible need to preserve the integrity and effectiveness of the Commission's investigative process.[12] While the Tribunal's decision related to sub-rule 14(1)(d)(i)(aa) and (bb)(cc), the underlying rationale for the rule would apply equally to all the sub-rules.

[32] In *Computicket*[13] the Tribunal, in its analysis of rule 14(1)(d) held that the legislature foresaw that there might be other classes of documents falling outside the Commission's internal documents which if disclosed might have the same end result of frustrating the deliberative process of the Commission. It held further that there is no need for the Commission to set out any facts other than allege its reliance on rule 14(1)(d).

[33] In *Telkom*[14] the Tribunal held that the sub-rules in rule 14(1)(d) constitute self-standing categories under which the Commission can claim protection from disclosure. If a document does not fall within the sub-rules of rule 14(1)(d)(i) or (ii), then the Commission is still entitled to claim it as restricted under sub-rule (iii) provided it falls within the description in that sub-rule.[15] The Tribunal held further that if any party states under oath that it has disclosed all non-privileged evidence in its possession, an opposing party cannot go behind it on a fishing trip without a basis for doing so.[16]

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[10] See paragraphs 32-34 of Netcare decision.
[11] See paragraph 33.
[12] See paragraph 40.
[13] *Computicket (Pty) Ltd vs The Competition Commission; case number: 20/CR/Apr10.*
[14] *Competition Commission vs Telkom SA Ltd, case number: 73/CR/Oct09.*
[15] See paragraph 32.
[16] See paragraph 37.

Interaction between rule 14(1)(d) and litigation privilege

[34] During argument the Commission had advanced the proposition that the *rationale* for rule 14(1)(d) is similar to that of litigation privilege in that it sought to protect documents from disclosure so as to promote the candid exchange of conversations or discussions between parties thereto.

[35] However there is a subtle but significant difference between documents that are subject to the common law litigation privilege and those that may be protected under rule 14(1)(d)(i) and (ii).

[36] For litigation privilege to subsist, the purpose for which the document was produced or procured must have been in contemplation of litigation. There is much debate in the jurisprudence as to the meaning of the words "contemplation of litigation".

[37] For a document to be protected under Commission rule 14(1)(d) there is no requirement that it be produced or procured in contemplation of litigation. Thus we see in rule 14(1)(d)(i)(cc) a document that contains an account of a consultation, discussion or deliberation that has occurred including but not limited to minutes of a meeting for the "*purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance or duty conferred or imposed on the Commission by law*". In rule 14(1)(d)(ii) the documents listed in the two sub-rules are protected if disclosure "*could reasonably be expected to frustrate the deliberative processes of the Commission by inhibiting the candid*" communications of an opinion, advice or report or recommendation or conduct of a consultation, discussion or deliberation.

[38] While there is a significant overlap of *objective or rationale* in the two concepts namely to promote candid discussions/communications/ consultations between parties through a grant of protection against disclosure there is at the same time an essential difference. The primary objective of rule 14(1)(d)(ii) is to protect "*the deliberative processes of the Commission*". The primary purpose of litigation

privilege is to protect communications between parties produced or procured in *contemplation of litigation*. It might be that the same document may enjoy protection under both rules 14(1)(d)(i) and (ii) and litigation privilege but the test in rule 14(1)(d) does not require that the document in question must be in contemplation of litigation at the time it is generated or procured.

[39] It would appear that rule 14(1) has been specifically promulgated to provide a far wider net of protection than what would ordinarily be available to the Commission under the common law principle of litigation privilege. Rule 14(1) recognises that the Commission, a public body, tasked with the responsibility of enforcing the Competition Act would require that its processes, documents and consultations be restricted from disclosure, either for a limited period of time (as in 14(1)(c)) or because of the nature of the communication/document/discussion as provided in rule 14(1)(d). The rule has been designed with the *sui generis* nature of the Commission in mind. It recognises that the Commission has an investigative and enforcement role in two broad areas, namely mergers and prohibited practices (see rule 14(1)(c)(i) and (ii)). It also recognises that the Commission is a multi-divisional public institution which would require its officials not only to communicate with third parties but also with each other not only in relation to its enforcement work but also in relation to any policy or discussion ancillary to it or related to its functions. Hence a range of categories of documents are entitled to be restricted information if they fall within the ambit of rule 14(1)(d).

[40] The underlying rationale of rule 14(1)(d) is obvious. The Commission's deliberative process is multi-faceted and not merely a linear progression from initiation through to referral. Its search for evidence would involve questions, research, interviews, discussions and its officials would be engaged in constant evaluation through discussions and further enquiries. One can expect that during the Commission's investigative period it would be required to make decisions or "deliberate" on a myriad of issues at different times. Such decisions would not only involve internal communications between officials of the Commission, but may include documents procured by or with third party involvement. Hence the rule, in order to ensure that officials engaging in these dynamic processes are

not constrained in their interactions by fear of premature disclosure, provides protection to their communications.

[41] The protection afforded by rule 14(1)(d) is not however absolute and can in certain circumstances be lifted by this Tribunal in terms of Commission rule 15.

[42] The proper approach in this enquiry then would be to assess whether the documents in dispute fall within the protection afforded either by rule 14(1)(d)(i), (ii) or litigation privilege. It is entirely possible of course that the same document might enjoy protection under both, but it would suffice that a document meets the requirements of one of these grounds.

Our Analysis

[43] We now turn our attention to the three categories of documents, leaving the issue of the Wustmann transcript for last.

[44] The SCA in *ArcelorMittal* has made it clear that the litigation privilege enquiry is fact bound. In that case the court placed reliance on the answering affidavits filed by the Commission. The court supported the approach that it is not possible to judge whether privilege is validly claimed if the context is not provided. A party is required to set this out in its papers and the granting of privilege is not there merely for the asking.

[45] Much emphasis was placed by the applicants during argument on the fact that the Commission ought to have justified its case for litigation privilege on affidavit, as required by *ArcelorMittal*, and it had failed in this regard.

[46] However, in *Arcelormittal* while the SCA's enquiry in that case was focused on the Commission's answering affidavit, the court did not limit itself only to the Commission's papers, but also had regard to the nature of the CLP application.

46.1. *"[28] The inquiry into whether litigation privilege attaches to the leniency application is fact-bound. In this case that inquiry must focus on the facts set out in the Commission's answering affidavits in response to the respondents' discovery*

applications. The Commission says that the CLP is founded upon an expectation of litigation. The commencement of discussions with a leniency applicant is always with a view to instituting prosecutions against cartelists. And the grant of immunity flows from the process. Put simply the grant of immunity, to secure the cooperation of a cartelist, is inseparable from the litigation process itself. This much is clear from the Tribunal's characterisation of the purpose of the CLP in the Pioneer Foods case:"

[47] To suggest that *ArcelorMittal* must be interpreted to require that all the circumstances surrounding the claim of litigation privilege must be inferred only from the Commission's papers, and not the totality of relevant facts presented, would be incorrect in law[17] and would amount to elevating form over substance. The relevant facts of this case, as we show below, differ markedly from those in *ArcelorMittal*.

[48] What then are the facts of this case which provide context and are relevant for purposes of our determination?

[49] The description provided by the Commission in relation to the requests made by Continental and Goodyear can be found at paragraph 5 in its answering affidavit to Continental and paragraph 5 in its answering affidavit to Goodyear. Save for the name of the applicant, the paragraphs are identical and read as follows:

49.1. *"The documents that have not been discovered, and are subject of the Continental [Goodyear] application are protected from disclosure to Continental [Goodyear] by litigation privilege and under rule 14(1)(d) and rule 14(e) of the rules of the Commission. Both the correspondence a'nd the transcripts to which Continental [Goodyear] seeks access were obtained for the purpose of pending or anticipated litigation against the respondent parties to the referral".*[18]

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[17] *See Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984) wherein the court held that where factual disputes arise, relief can be granted by a court if such relief is justified by the facts stated by the respondent, together with the admitted facts in the applicant's affidavits. Also see Gold Fields Limited v Harmony Gold Mining Company Limited; case number; 86/FN/Oct04; American Natural Soda Ash Corp & Another v Botswana Ash (Pty) Ltd & Others; case number; 64CAC/AUG/06; Faber v Nazerian (2012/42735) [2013] ZAGPJHC 65 (15 April 2013).*

[18] Paragraph 5 in answering affidavit to Continental and paragraph 5 in answering affidavit to Goodyear.

[50] This is a blanket claim over all the documents with no distinction made between the categories of correspondence and transcripts or within the category itself.

[51] The Commission however does provide further details in other parts of the affidavits. The Commission explains (in paragraph 16[19] and paragraph 34[20]) that it has attached a schedule to its answering affidavits marked "NS2" which sets out the basis upon which it has refused to discover the documents sought.

[52] Much of the background to the disputes around documents is reflected in the founding and replying affidavits and annexures filed by Goodyear and Continental. The annexures contain the timetable agreed by the parties in relation to the conduct of the matter (record page 284-286), the Commission's full index to the record,[21] previous versions of schedule 1,[22] correspondence between the parties confirming their continuous engagement over the record including delivery thereof and the missing items.[23]

[53] The facts surrounding the Commission's initiation of the complaint were not pleaded and the relevant documents were not attached to the papers to assist us in making an assessment whether litigation was contemplated at that time as argued by Mr Berger.

[54] However we know from record page 455, in a letter written by the attorneys on behalf of Goodyear, that the Commission had seized documents from Bridgestone, Apollo and SATMC in a dawn raid and that Bridgestone had filed an application for leniency.

[55] The seizure of documents from Bridgestone, Apollo and SATMC took place during the Commission's dawn raid executed on 4 April 2008. The Commission's powers to search and seize are provided for in sections 46, 47 and 48 of the Act. The essential provisions can be summarised as follows. The Commission may

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[19] Answering affidavit to Continental.
[20] Answering affidavit to Goodyear.
[21] Record pages 91-158.
[22] Record pages 163 and 166.
[23] Record pages17-34.

embark on a search only under the authority of a warrant issued by the High Court, regional magistrate or magistrate. A warrant can be issued by a judge or magistrate if in the view of that adjudicator there are reasonable grounds to believe that a prohibited practice has taken place or likely to take place on the premises,[24] or anything connected with an investigation is in the possession of a person on those premises. The Commission may utilise the assistance of police officers. The objective of a dawn raid is to obtain and secure evidence of contraventions, which the Commission has reason to believe existed and/or required preservation.

[56] In *ArcelorMittal* it was held that the inescapable conclusion inherent in the process of a CLP application is the contemplation of litigation. The court held further that the purpose of the document is not to be ascertained by reference to its author, but rather by reference to the person or authority under whose direction it was produced or brought into existence. It is therefore the intention of the person who procured the document, not the intention of the author, which is relevant for ascertaining the document's purpose.

[57] When the Commission decided to conduct the dawn raid, and obtained a warrant from a judge or magistrate, the reasonable inference to draw is that it contemplated litigation at the time. Were it otherwise, the Commission would not have embarked on such an extensive and resource intensive exercise, sanctioned by a high court warrant and with the assistance of its legal advisors and/or police officers. The fact that the Commission might subsequently elect, in its discretion, not to pursue litigation against one or all of the firms subjected to a dawn raid does not undermine such inference.

[58] Thus in this case the dawn raid is a clear indication that the Commission, after an initial period of investigation following on from Parson's complaint, had contemplated litigation against the respondents.

[59] Annexure NS2 provided by the Commission also assists us in establishing the following critical facts: there was a marker application by Bridgestone dated 11

[24] For example a meeting of cartelists.

September 2009 (items 150-153) and Bridgestone had filed a CLP application which has already been handed over to the applicants (comments under items 150-153).

[60] The marker application by Bridgestone and its subsequent filing of the CLP application would present another relatively clear event when litigation was likely. From this, the inference can be drawn that the documents related to those and any produced or procured by the Commission thereafter would be privileged.

[61] A further fact to be considered in this matrix is that which we alluded to earlier. The respondents have been engaging with the Commission over a period of seven years and have engaged in many battles over documents and validity of the referral. Ongoing written engagements with the Commission took place over these documents as evidenced by the correspondence annexed to the papers filed in these applications but also by the various iterations of schedule 1. In addition the Commission avers in its affidavits that it had previously met with the applicants in their engagements over the index. In those meetings the Commission had provided an explanation and its reasons why it refused to discover these documents. The applicants have not refuted this. Hence by the time these applications were heard the applicants were aware of the background facts relevant to the Commission's claims such as the dawn raid and the CLP application. They also had knowledge of the categories of documents that the Commission wished to claim as privileged or restricted and also the reasons therefore.

[62] We now turn to consider each category below.

Correspondence with Complainant

[63] The schedule "NS2" attached to the Commission's answering affidavits consists of four columns which list the number of the document, a short description, its status and a column for comments. It is here that we find the Commission's explanations.

[64] In relation to the correspondence between the Commission and Parsons the following can be found :

No.	Description	Status	Comments
342-356	Correspondence between the Commission and the Complainant and his legal representative.	Restricted and/or privileged	
358-359, 361-373	Correspondence between the Commission and the Complainant and his legal representative.	Restricted and/or privileged	

[65] The column on the extreme right entitled "Comments" is left blank. Hence we are able to discern by reading the Commission's answering affidavit together with the schedule that in the Commission's view these documents are restricted or privileged.

[66] The brevity of description notwithstanding, the nature of the documents has been made patently clear. This is correspondence between the Commission and the Complainant and his legal representative. One can infer that in these types of communications the parties would be exchanging further details about and in connection with the complaint. Predictably the Commission would have asked and required any number of questions from the Complainant and/or his legal representative about the nature of his business, the industry dynamics and details about the alleged anti-competitive conduct and there would be a continuum of communications back and forth. These are documents of the type that would be generated in the course of the Commission's investigation process and would in our view fall within the category contemplated in rule 14(1)(d)(ii).

[67] There are two possible sub-rules which may be relevant.

[68] Rule 14(1)(d)(i)(cc) provides that a document that contains an account of a consultation, discussion or deliberation that has occurred including but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take

a decision in the exercise of a power or performance of a duty conferred or imposed on the Commission by law.

[69] Sub-rule (i)(cc) presents somewhat of a quandary. On an ordinary meaning, the words "minutes of a meeting" and "for the purpose of assisting to formulate a policy" suggest that it would apply to internal documents generated by the Commission in relation to the formulation of policies. Yet the words "or take a decision in the exercise of or performance of a duty conferred or imposed on the Commission by law" suggests that the sub-rule could apply to the performance of any function of the Commission under the Act which can be found in section 21 and any others that may be imposed on it by law. The former interpretation could be supported by the context in which (cc) is found - it follows immediately on two sub-rules which deal with documents generated by the Commission itself. Sub-rule (aa) deals with internal communications between officials of the Commission and (bb) deals with an opinion, advice, report, or recommendation obtained or prepared by the Commission.

[70] Rule 14(1)(d) (ii)(bb) provides that a document is restricted information if –

70.1. *"A document – (ii) the disclosure of which could reasonably be expected to frustrate the deliberative process of the Competition Commission by inhibiting the candid (bb) conduct of a consultation, discussion or deliberation."*

[71] The rule does not apply to the internal communications between officials of the Commission (that is already provided for in (i)(aa)) nor does it require that the Commission should have generated the document. Hence it could apply to consultations involving third parties and to documents that the Commission may have generated itself or obtained through other means. Sub-rule (bb) however provides the ambit of the rule – it is not just any document that is restricted but one whose disclosure could reasonably be expected to frustrate the "deliberative process of the Commission by inhibiting the candid conduct of a consultation, discussion or deliberation".

[72] Thus at the level of principle, the rule seeks to enhance the candid exchange of views between participants in a consultation or discussion, by protecting documents that may be relevant to that consultation or discussion or deliberation.

[73] The deliberative process of the Commission does not consist of one singular linear process from start to finish. As we said earlier, the Commission's process does not consist of one decision from initiation to referral. It consists of many decisions made along the way where it might be required to evaluate issues, assess evidence, decide whether or not to follow a particular direction in its investigation, to narrow its ambit, to expand its scope or make any other type of decision related to the performance of its functions.

[74] Goodyear argued that the Commission had not provided sufficient particularity such as dates about the documents in this category in order for them to assess whether the claims were justified. But that is not the test. The test is whether on the facts of this case the explanation provided by the Commission is sufficient, objectively speaking, to satisfy the Tribunal that its claims are justified.

[75] Although the Commission has not provided further particularity of dates, in our view given the *nature* of these communications in the context of the facts of this case, the documents undoubtedly fall within the category contemplated within rule 14(1)(d)(ii) and are to be considered as restricted information within the meaning of that sub-rule.

[76] It might be that some of the correspondence in this category related to a period after the dawn raid (4 April 2008) or after the filing of the CLP application by Bridgestone (11 September 2009) and may therefore be subject to litigation privilege, but we do not have to decide this. It suffices that the documents are protected from disclosure by rule 14(1)(d)(ii).

Correspondence with the CLP applicant's legal representative

[77] We turn then to consider the second category of correspondence, namely that between the Commission and the CLP applicant's legal representative.

[78] In this category, NS2 provides us with a little more information –

No.	Description	Status	Comments
754-756 and 759-771	Correspondence between the Commission and CLP Applicant's legal representative regarding the CLP Application (16 and 23 April, and 20 May 2010), and statements of CLP Applicant's relevant employees and annexures to the statements.	Restricted and/or privileged	Redacted version already provided as part of CLP application to maintain privilege and confidentiality
757-758	Correspondence between the Commission and CLP Applicant's legal representative regarding conditional immunity agreement (May and June 2010).	Restricted and/or privileged	
780	Correspondence between the Commission and CLP Applicant's legal representative regarding CLP application and collusive conduct in the tyre industry (June 2010).	Restricted and/or privileged	

[79] In the description of the documents the Commission has provided both dates and the purpose of the document. Items 754 – 756 describe correspondence around the period 16 and 23 April and 20 May 2010 between the Commission and the CLP applicant's legal representatives *regarding the CLP application*.

[80] Thus the Commission has provided a fairly detailed description of the document (correspondence), has cited the parties to that document, specified the dates when the document was created and explained the purpose of those documents.

[81] On the face of it these documents would clearly fall within the category contemplated in rule 14(1)(d)(ii)(bb) and would be restricted information under that rule.

[82] The documents are also clearly related to the Bridgestone CLP application. The nature and purpose of a CLP application has already been considered by the SCA in *ArcelorMittal* and has been held to be privileged in the hands of the Commission.

[83] Continental and Goodyear do not dispute that the CLP application and documents related to the procurement or submission thereof would enjoy litigation privilege. They insist however that the Commission has not made out a case in its answering affidavits to enable them to assess whether the claim it makes is justified.

[84] Once again this argument is misplaced. The test is not whether Goodyear and Continental are satisfied that the Commission's claim is justified but whether on an *objective* basis, on the facts of this case, the Tribunal is satisfied that the documents are properly claimed to be subject to litigation privilege or restricted under rule 14(1)(d)(ii).

[85] The Commission has stated that the correspondence between it and the CLP's legal representative not only occurred in relation to the CLP application but also took place *after* the CLP application had been lodged. This explanation is contained in annexure "NS2", which is clearly incorporated into the answering affidavit in paragraphs 18[25] and 21.[26]

[86] In the description of the documents contained in annexure NS2 the Commission has provided both the date and the purpose of each document. Items 754 – 756 describe correspondence around the period 16 and 23 April and 20 May 2010

[25]Answering Affidavit of Continental.
[26] Answering Affidavit of Goodyear.

between the Commission and the CLP applicant's legal representatives *regarding the CLP application*. The description for items 757-758 is similar.

[87] We are able to surmise from this that the correspondence produced during May and June 2010 between the Commission and the CLP applicant's legal representative was in relation to the conditional immunity agreement. Item 780 produced sometime in June 2010 was also in relation to the CLP application.

[88] In our view the details provided in Annexure NS2, by the Commission, read in the context of the facts set out earlier, are sufficient to justify the inference that these documents are related to the CLP and therefore subject to litigation privilege.

[89] One further argument put up by Continental was that in light of the fact that the Commission had already under items 1373-1436 provided copies of some correspondence in this category it should also provide the others in the same category. Correspondence between the Commission and the CLP applicant's legal representative regarding the CLP application (16 October 2009, and 9 and 12 February 2010) and statements of CLP applicant's relevant employee and annexures to the statements had already been provided to the respondents by the Commission on 15 September 2015. The mere fact that the Commission had already discovered the CLP application or handed over some documents in the same category either through explicit or implied waiver through negligence or error does not mean that such waiver extends in all time to similar documents that may have been created before or after that date. To hold otherwise would render the protection provided by the principle of litigation privilege meaningless. The Commission does not have to explain why it elects <u>not to</u> waive its privilege over these documents. All it has to do is to justify its claim of privilege, which we have found to be satisfactorily done in this instance.

Transcripts

[90] The transcripts in dispute relate to all consultations held by the Commission in the course of its investigations with persons knowledgeable about the industry and included employees of the tyre manufacturers.

[91] The Commission has incorporated Schedule 1 as Annexure NS2 into its answering affidavit. On that schedule we find under items 554-584 references to these transcripts.

No.	Description	Status
554-557, 561-564 and 584	Transcripts of interview of Tony Burns, Dereck De Villiers, Graham Buchanan, Pierre Dreyer, Raymond Waldeck, Chantel Henriques, Kathy Roberts, Etienne Human, Carlo Raffanti, Jun Maeda (2009)	Restricted and/or privileged

[92] In the description column the Commission has provided sufficient details for the reader to gauge that the documents in question are transcripts of interviews held with the named individuals sometime during 2009. The status of the documents is marked restricted and/or privileged. The nature of the documents having been identified and the approximate date given, very little more is provided by the Commission. During the hearing however the Commission explained that some of these individuals[27] were the Commission's prospective witnesses.

[93] Further facts in relation to these documents were provided by Goodyear. [28]

[94] It appears that the Commission had addressed an email on 15 May 2017 to Goodyear's attorneys. In that email the Commission indicated that it was willing to waive its litigation privilege in favour of a respondent whose witnesses[29] had been interviewed. In other words, the Commission was willing to waive privilege in favour of Goodyear in respect of an interview held with a Goodyear employee or witnesses. However the Commission would retain its privilege in relation to any notes or summaries prepared by the Commission officials pertaining to those interviews, which notes the Commission considered restricted under rule 14(1). In relation to the transcripts of interviews held with other respondents' witness

[27] Burns, Waldeck and Wustmann.
[28] Paragraphs 14 and 29 of Goodyear's Founding Affidavit.
[29] The Commission refers to them as 'witnesses' but they were representatives or employees of the various respondents who were considered by the Commission to be potential witnesses.

interviews, the Commission offered to furnish the transcripts to them once it had obtained written confirmation from Continental or SATMC that they were prepared to waive confidentiality in relation to these transcripts. Thus the Commission was willing to waive privilege over these documents provided the other respondents agreed to waive confidentiality. The Commission then goes on to say that in respect of "*the transcripts of interviews held with the leniency applicant (Bridgestone) and Apollo (Dunlop), who settled with the Commission, we do not waive litigation privilege and we will not be providing you with these transcripts*".[30]

[95] From this email it can be inferred that the Commission had consented to the transcripts of the witnesses of Continental and SATMC to be made available to Goodyear (subject to confidentiality claims). At least that was the understanding of Goodyear. Goodyear accepts the fact that the Commission had no transcripts for the following witnesses: Mr Yasuhiro Ito, Mr Minori Kuroki, Mr Piet Swart and Mr Mike Hankinson.[31] According to Goodyear the only transcripts remaining in dispute were –

Witness	**Company**	**Date of interrogation**
Mr Jun Maeda	BFSA	11 September 2009
Mr Tony Burns	BFSA	25 May 2009
Ms Chantel Henriques	BFSA	22 May 2009
Mr Raymond Waldeck	BFSA	Unclear
Mr Julio Fava	BFSA	22 May 2009
Mr Shaun Wustmann	BFSA	2 March 2010
Mr Pierre Dreyer	Dunlop	5 May 2009
Ms Kathy Roberts	Dunlop	5 May 2009
Mr Carlos Raffanti	State Tender Board	Unclear

[96] Goodyear and Continental submitted that even if the transcripts related to certain employees of Bridgestone, they were summoned by the Commission prior to Bridgestone submitting its marker application. These employees engaged with the Commission in their capacity as employees of Bridgestone and not witnesses of the Commission. As such, these transcripts could not be covered by any type

[30] Goodyear Replying Affidavit paragraph 61. Record page 427, read with Goodyear Heads paragraph 52.
[31] Commission's answering Affidavit paragraph 43 record page 399.

of privilege. The other individuals were not Bridgestone employees and were summoned by the Commission under section 49A. Equally, they were not at that stage prospective witnesses and the transcripts ought to be handed over.

[97] The Commission argued that it had conducted these interviews in its evidence seeking role and pressed for a blanket privilege over these documents based on the fact that the initiation statement had already contemplated a likely contravention of section 4(1)(b). Alternatively, that regard must be had to the role of the Commission and for purposes of litigation privilege there is no lawful or rational basis for creating a distinction between documents created prior to referral and those created after the referral to the Tribunal.

[98] From the table above it is evident that the interview with Mr Jun Maeda took place on the same day when Bridgestone filed its marker application, and that the one with Mr Shaun Wustmann took place sometime after the CLP application was filed. At the time of the hearing it was not clear when the interview with Mr Carlos Raffanti was held.[32] The remaining interrogations were held prior to the filing of Bridgestone's CLP application.

[99] From the dates of the transcripts (excluding that of Mr Shaun Wustmann), it is clear that these interrogations took place sometime after the Commission had conducted the dawn raid on 4 April 2008 and a few months before the filing of the marker application on 11 September 2009.

[100] As we have discussed earlier the Commission's investigative activities are complex processes, made up of more than the sum of its various parts. It would be artificial indeed to place the individual components of the Commission's investigative process into silos and draw atomistic conclusions about them. It would be bizarre for instance to conclude that the Commission when it embarked on its dawn raid contemplated litigation, and then when it summoned individuals under section 49A (also a power conferred on it to exercise in its evidence-

[32] The Commission has agreed to hand over the documents supplied to it by Mr Carlos Raffanti but persists with its claim of privilege over the transcript.

gathering function) it didn't and then again when it procured the CLP application from Bridgestone it did.

[101] The most significant relevant fact here is that all of the interviews took place *after* the Commission had made the decision to invoke its invasive powers of search and seizure on 4 April 2008, a decision that could not have been made lightly and which had to be justified to a High Court. It is reasonable to infer that the Commission contemplated litigation during this period of time (and not only on that singular date of 4 April 2008) and the documents procured by it were subject to litigation privilege. Hence we find the transcripts to be privileged.

[102] Are the transcripts protected under rule 14(1)(d)? We have said that we do not necessarily have to conclude on this in light of our conclusion that the transcripts are subject to litigation privilege.

[103] Nevertheless it is important to note that the Commission's s49A interviews are a critical mechanism for the gathering of evidence and insights into a particular industry. The interviews are usually conducted by investigators assisted by the Commission's legal division. In order for the mechanism to be deployed effectively and for the Commission to utilise its resources gainfully, it is necessary that the officials of the Commission should not feel inhibited by the fear of disclosure to obtain, by lawful means, from third parties as much information as they could possibly garner. Likewise third parties who are summoned should feel assured that their discussions and revelations can be candid without fear of disclosure. The candid exchange of views between Commission officials and third parties is highly relevant to the quality of information that the Commission would require for the deliberative processes of the Commission. If the comfort of protection is not given to these consultations or discussions, third parties might feel constrained to such an extent that the interviews would amount to a waste of public resources. The Commission on the other hand would not be placed in a position to evaluate the evidence it has gathered to date or to make decisions about whether or not it should embark on further action.

[104] In our view these transcripts would also constitute documents contemplated in rule 14(1)(d)(ii)(bb) and would amount to restricted information.

Wustmann transcript

[105] The Wustmann transcript issue came about when Continental filed its replying affidavit. In that affidavit Continental disclosed that it was in possession of the Wustmann transcript. When Goodyear discovered that Continental had the Wustmann transcript in its possession, it submitted that it is also entitled to the transcript as the Commission has waived the litigation privilege it claims. Goodyear submitted that fairness required that it too be given access to the Wustmann transcript. Continental did not make any further submissions on this issue as it is common cause that Continental obtained the Wustmann transcript from Bridgestone's legal representatives.

[106] The Commission explained that it had conducted an interview with Wustmann after Bridgestone had filed its CLP application. The aim of the interview with Wustmann, was to clarify issues the Commission had relating to aspects of the CLP application and the transcript was accordingly privileged. The Commission had sent a copy of the transcript to Bridgestone's attorneys for an accuracy check.

[107] Thereafter the Commission had consented that Continental liaise directly with Bridgestone's attorneys, to access the confidential version of the redacted leniency documents. The Commission had provided an index to the leniency application and the Wustmann transcript was not listed as being part of those documents. Continental then submitted the requisite confidentiality undertakings to Bridgestone's attorneys who then provided Continental with a CD that contained a confidential version of the leniency application.

[108] Unbeknownst to the Commission, the CD also contained a copy of the Wustmann transcript and was handed over to Continental by the legal representatives of Bridgestone.

[109] It seems that the Commission has a practice of waiving its privilege over transcripts in limited ways. It usually sends transcripts of interviews to the interviewee's company or legal representatives for an accuracy check. In doing so it waives its privilege in favour of that recipient only.[33] It then at times also waives privilege over transcripts of interviewees in favour of other respondents, subject to confidentiality claims, as was offered to Goodyear in the email of 15 May 2017. It is unsurprising then, in the absence of the Commission making explicit claims of privilege over its transcripts, third parties might assume that the Commission has waived privilege over a particular transcript, more so when other statements by the same individual have already been handed over, as the case has been with this particular one.

[110] The Commission's loose arrangements over its privileged document have certainly contributed to this mix-up.[34] At the same time the attorneys of both Bridgestone and Continental ought to have exercised greater care when they dealt with the leniency documents. As indicated by the Commission, the Wustmann transcript was not listed on the index of the leniency application documents which had been sent to Continental.

[111] We find on a review of these facts that the Commission had not waived its privilege over the Wustmann transcript and the error was not that of the Commission but of Bridgestone's attorneys. However, at the same time Continental's attorneys have been in possession of the Wustmann transcript for almost two years since 30 September 2015. To now accede to the Commission's prayer that all copies be returned or torn up would amount to closing the barn door after the horse has bolted. The deed cannot be undone.

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[33] We accept that the Wustmann transcript was indeed subject to litigation privilege in the hands of the Commission. The interview was held after the CLP application was filed and the discussions pertained to aspects of the CLP application.
[34] See *ArcelorMittal* paragraph 33.

[112] In the circumstances, the principle of fairness dictates that if Continental's attorneys have had access to the transcript for almost two years – and have in all likelihood read it - all the other respondents' attorneys ought to be given a copy of the transcript, subject to confidentiality undertakings. In future, the Commission should exercise better control of its privileged documents and not leave this in the hands of the leniency applicant's attorneys, who clearly are not without blame in this matter.

Conclusion

[113] In light of the above analysis, we hereby dismiss both Goodyear and Continental's applications in relation to the three categories of documents namely correspondence between the Commission and Parsons Transport (Pty) Ltd ("Parsons") and Parson's legal representative, correspondence between the Commission and Bridgestone who is the leniency applicant in the main matter pending before the Tribunal, and the transcripts listed in paragraph 95 above (save for the Wustmann transcript). In relation to the Wustmann transcript the principle of fairness dictates that the Wustmann transcript must be handed over to all the remaining respondents' legal representatives.

ORDER

1. Goodyear's application under case number CR053Aug10/DSC063May17 is hereby dismissed save in relation to the Wustmann transcript.

2. Continental's application under case number CR053Aug10/DSC056May17 is hereby dismissed.

3. The Commission must hand over copies of the Wustmann transcript dated 2 March 2010 to the legal representatives of Goodyear and SATMC subject to the furnishing of appropriate confidentiality undertakings, within ten business days of this order.

4. To the extent that Continental's legal representatives have not provided a confidentiality undertaking in relation to the Wustmann transcript, such confidentiality undertaking must be provided within ten (10) business days of this order.

5. There is no order as to costs.

13 October 2017

Ms Yasmin Carrim **DATE**

Ms Mondo Mazwai and Mr Andreas Wessels concurring

Case Manager : Caroline Sserufusa

For Goodyear Tyres : A Gotz and N Lewis instructed by Judin Combrinck Inc.

For Continental Tyres : MJ Engelbrecht instructed by Bowmans

For the Commission : D Berger SC and S Kazee instructed by the State Attorney

ANNEXURE A

Interlocutory applications filed

2012

These two applications were filed in 2012, only heard in April 2016.

Goodyear brought in terms High Court Rule 35(12)

Continental brought in terms of High Court Rule 35(12)

- Both were requesting CLP application and attached documents as well as search and seizure documents.

Tribunal order issued on 25 May 2016

- Goodyear application dismissed
- Continental application partially granted in terms of items 6, 7, 9 and 10[35] of its schedule.

2016

17 and 19 July 2016 Commission's default judgement against Goodyear and Continental.

19 July 2016 Continental Application to compel, in relation to Apollo documents obtained under search and seizure. Commission handed over Apollo docs on 28 July 2016, thus nullifying application.

21 July 2016 (Answers filed in August 2016) Parsons' application.

2017

These are the applications that formed the subject matter of this decision.

Continental's access to Commission record (filed 02 May 2017)

[35]Items 6 and 7 referred to price lists, which Commission confirmed by way of an affidavit as per our order, that they do not have the pricelists. Items 9 and 10 were in relation to correspondence which formed part of search and seizure documents from SATMC. Commission submitted in the same affidavit that Continental and Goodyear already have the requested correspondence and that it was handed over on 17 July 2015, through cover emails.

Goodyear's better and further discovery of Commission's record (filed 22 May 2017)

Documents handed over

17 July 2015 correspondence from search and seizure documents of SATMC.

15 September 2015- CLP application and attached documents (includes correspondence), due to SCA Mittal judgement.

28 July 2016, Apollo documents of search and seizure-, (due to Group Five CAC judgement).

1 February 2017- correspondence between Commission and Parsons, as part of the Commission's record.

1 June 2017 Treasury documents- (Treasury waived confidentiality, undertakings signed).

ANNEXURE B: DISPUTED DOCUMENTS

Parties	Item No.	Description	Status
Continental & Goodyear	146-149	Email correspondence between the Commission and Bridgestone's legal representative on the leniency application (September 2009).	Restricted and/or privileged
	342-356	Correspondence between the Commission and the Complainant and his legal representative.	Restricted and/or privileged
	358-359, 361-373	Correspondence between the Commission and the Complainant and his legal representative.	Restricted and/or privileged
	554-557, 561-564 and 584	Transcripts of interview of Tony Burns, Dereck De Villiers, Graham Buchanan, Pierre Dreyer, Raymond Waldeck, Chantel Henriques, Kathy Roberts, Etienne Human, Carlo Raffanti, Jun Maeda (2009)	Restricted and/or privileged
Continental	754-756 and 759-771	Correspondence between the Commission and CLP Applicant's legal representative regarding the CLP Application (16 and 23 April, and 20 May 2010), and statements of CLP Applicant's relevant employees and annexures to the statements.	Restricted and/or privileged
Continental & Goodyear	757-758	Correspondence between the Commission and CLP Applicant's legal representative regarding conditional immunity agreement (May and June 2010).	Restricted and/or privileged
	780	Correspondence between the Commission and CLP Applicant's legal representative regarding CLP application and collusive conduct in the tyre industry (June 2010).	Restricted and/or privileged
	1437	Transcript of interview of Shaun Wustmann (Leniency Application of Bridgestone (2 March 2010).	Restricted and/or privileged
	1438-1440	Correspondence between Commission and CLP Applicant's legal representative regarding CLP application (October 2009).	Restricted and/or privileged