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18 **UNITED STATES DISTRICT COURT**  
19 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
20 **EASTERN DIVISION**

21 LOG CABIN REPUBLICANS,

22 Plaintiff,

23 v.

24 UNITED STATES OF AMERICA AND  
25 ROBERT GATES, Secretary of Defense,

26 Defendants.

No. CV04-8425 VAP (Ex)

SUPPLEMENTAL  
MEMORANDUM REGARDING  
PLAINTIFF'S MOTION TO  
COMPEL THE PRODUCTION OF  
DOCUMENTS

27 Plaintiff has brought a facial challenge to the constitutionality of the federal  
28 statute, 10 U.S.C. § 654, and implementing regulations that comprise the military's  
policy on homosexual conduct (the "Policy"). On February 22, 2010, Plaintiff  
filed a Motion to Compel the Production of Documents. In its motion, Plaintiff  
urged the Court to compel the Government to produce documents that are

1 protected by the deliberative process privilege. Plaintiff also petitioned the Court  
2 to compel the Government to search for responsive documents outside of the  
3 Department of Defense (the “DoD”), the agency charged with administering the  
4 Policy. Because the Government has properly asserted the deliberate process  
5 privilege and reasonably limited its search for responsive documents to the DoD,  
6 Plaintiff’s motion to compel should be denied.

7 **I. The Government Has Properly Asserted the Deliberative Process**  
8 **Privilege**

9 **A. There Are Only Two Categories of Documents in Dispute**

10 In its portion of the Joint Stipulation, Plaintiff alleged that the Government  
11 improperly asserted the deliberative process privilege in response to over a dozen  
12 document requests. If Plaintiff had conferred with the Government before filing its  
13 motion, as required by the Local Rules, it would have learned that the Government  
14 is only asserting the deliberative process privilege over two categories of  
15 documents that are responsive to the document requests Plaintiff has identified:  
16 drafts and documents relating to the drafting of DoD issuances, and internal  
17 memoranda concerning reports issued by the Personnel Security Research and  
18 Education Center (“PERSEREC”).

19 **B. Both Categories Are Pre-decisional and Deliberative**

20 To be protected under the deliberative process privilege a document must be  
21 both pre-decisional and deliberative. *Lahr v. National Transp. Safety Bd.*, 569  
22 F.3d 964, 979 (9th Cir. 2009). “A ‘predecisional’ document is one prepared in  
23 order to assist an agency decision maker in arriving at his decision, and may  
24 include recommendations, draft documents, proposals, suggestions, and other  
25 subjective documents which reflect the personal opinions of the writer rather than  
26 the policy of the agency.” *Id.* (quoting *Assembly of Cal. v. U.S. Dep’t of*  
27 *Commerce*, 968 F.2d 916, 920 (9th Cir.1992)). “A predecisional document is a  
28 part of the ‘deliberative process,’ if the disclosure of the materials would expose an

1 agency's decisionmaking process in such a way as to discourage candid discussion  
2 within the agency and thereby undermine the agency's ability to perform its  
3 functions.” *Id.*

4 The two categories of documents at issue here meet both requirements. The  
5 documents relating to the drafting of DoD issuances were created before the  
6 issuances themselves were promulgated, and the documents contain agency  
7 deliberations regarding the content of the issuances. *See* Exhibit 1, Declaration of  
8 Mr. Bill Carr, pg. 3-5. Likewise, the internal memoranda concerning the  
9 PERSEREC Reports were created before the reports themselves were issued, and  
10 the memoranda contain deliberations regarding the findings and conclusion in the  
11 reports. *Id.* at 5-6.

### 12 C. The Deliberative Process Privilege Has Been Formally 13 Invoked

14 When a claim of deliberative process privilege is challenged, the party  
15 asserting the privilege must provide a formal invocation of the privilege by “an  
16 agency head or a subordinate with high authority.” *Mobil Oil Corp. v. Department*  
17 *of Energy*, 102 F.R.D. 1, 6 (N.D.N.Y.1983); *see also Freeman v. Seligson*, 405  
18 F.2d 1326, 1338-39 (D.C. Cir. 1969) (declaration from agency head required only  
19 after challenge to the privilege has “been adequately bolstered by a general  
20 showing of relevance and good cause.”)

21 The Government stated in its responses to a select number of Plaintiff’s  
22 document requests that certain responsive documents may be subject to the  
23 deliberative process privilege. Because Plaintiff did not confer with the  
24 Government before bring this motion, the Government was unaware that Plaintiff  
25 planned to challenge the assertion of the privilege until receiving Plaintiff’s portion  
26 of the Joint Stipulation. In response to Plaintiff’s challenge, the Government has  
27 provided, as an attachment to this Supplemental Memorandum, the declaration of  
28 Mr. Bill Carr, Deputy Under Secretary of Defense for Military Personnel Policy,

1 formally invoking the deliberative process privilege. Mr. Carr is an individual of  
2 high authority within the DoD and oversees, among other things, the office  
3 primarily responsible for administering the Policy. In his declaration, Mr. Carr  
4 invokes the privilege based on his detailed review, and he explains for each group  
5 of documents why asserting the privilege is necessary to assure the free flow of  
6 ideas and candid discussion of alternatives as the DoD continues to conduct studies  
7 and implement policy decisions through its issuances. Exhibit 1, Declaration of Mr.  
8 Bill Carr, pg. 2-6.

9 Because the Government has properly asserted the deliberative process  
10 privilege over documents that are both predecisional and deliberative, and has  
11 provided a declaration from an individual of high authority at DoD formally  
12 invoking the privilege, Plaintiff's motion seeking to compel the production of  
13 deliberative documents should be denied.

## 14 **II. The Government Has Reasonably Limited Its Search for Responsive** 15 **Documents to the DoD**

16 Plaintiff's suit challenges a policy that is administered exclusively by and  
17 applies exclusively to the DoD. Because the DoD administers the Policy, the  
18 injunctive and declaratory relief that Plaintiff seeks must necessarily lie against  
19 that agency. In addition, to the extent the Administrative Procedures Act ("APA")  
20 provides the necessary waiver of sovereign immunity for Plaintiff's claims, that  
21 waiver is premised on "agency action," 5 U.S.C. § 702, which for this matter is  
22 necessarily confined to the agency charged with administering 10 U.S.C. § 654: the  
23 DoD. Moreover, because the Policy applies exclusively to the DoD, documents  
24 housed outside of that agency are not likely to be relevant to Plaintiff's claims in  
25 this case and thus it is unduly burdensome for the Government to conduct a  
26 broader search. For all of these reasons, the Government has reasonably limited its  
27 search for responsive documents to the DoD, and Plaintiff's motion, seeking to  
28 compel Defendants to search outside of DoD, should be denied.

1 **III. Plaintiff's Motion to Compel Should Be Denied**

2 As set forth above, Plaintiff's request that the Court compel the Government  
3 to produce documents properly protected by the deliberative process privilege and  
4 search for responsive documents outside of the DoD is both unreasonable and  
5 unsupported by law. Accordingly, Plaintiff's motion to compel should be denied.  
6

7 Date: March 4, 2010

8 Respectfully submitted,

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15 /s/ Ryan B. Parker

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