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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MORGAN HILL CONCERNED
PARENTS ASSOCIATION,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
EDUCATION,

Defendant.

No. 2:11-cv-03471-KJM-AC

ORDER

This matter is before the court on plaintiffs’ motion for discovery. ECF No. 324. Defendant filed an opposition (ECF No. 327), and plaintiffs filed a reply (ECF No. 328). A hearing was held before the undersigned on September 6, 2017. ECF No. 329. Based on the hearing and a review of all papers filed, the court GRANTS plaintiffs’ motion and overrules all of defendant’s assertions of deliberative process privilege contained in its privilege logs. Defendant is ORDERED to turn over all documents withheld exclusively on the basis of deliberative process privilege to plaintiffs within ten (10) days of this order. Because plaintiffs brought a meritorious motion to compel, the court GRANTS their request for attorneys’ fees, but at a reduced amount. The court awards plaintiffs’ attorney’s fees in the amount of \$38,622.50, to be paid within 10 days of this order.

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1 **I. Introduction**

2 Plaintiffs – two associations of parents of children with disabilities – allege that defendant
3 is violating the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400, *et*
4 *seq.*, through its systemic failure to provide a “free appropriate public education” (“FAPE”) to
5 children with disabilities. Pending before the undersigned is plaintiffs’ motion to compel
6 discovery. ECF No. 324. Plaintiffs request (1) the production of documents that defendant has
7 claimed are protected by deliberative process privilege, and (2) attorney’s fees and costs. Id.

8 **II. Relevant Background**

9 The parties in this matter have been engaged in numerous discovery disputes over the five
10 and three-quarters years that this case has been active. See, e.g., ECF Nos. 64, 90, 129, 186, 265,
11 273. Most pertinent to the issue presented here is this court’s February 2, 2017 order that
12 specifically addressed the issue of privilege logs. ECF No. 287. In that order, the court found
13 that defendant’s privilege log failed to comply with Federal Rule of Civil Procedure (“Fed. R.
14 Civ. P.”) 26(b)(5)(A) because the log did not contain sufficient information to convey the content
15 of the allegedly privileged material such that plaintiffs and the court could make a reasonable
16 evaluation regarding the claim of privilege. Id. at 16-17. In the February 2017 order, the court
17 declined to find a blanket waiver of privilege, but gave defendant 30 days to produce an adequate
18 privilege log with the warning that it was defendant’s “final chance to produce adequate privilege
19 logs, and any assertions of privilege that are incapable of determination will be overruled once
20 and for all” in the event of additional delay or further inadequacy. Id. at 19.

21 Plaintiffs claim they received defendant’s amended privilege log on or about March 6,
22 2017. ECF No. 324 at 3. No declarations to support claims of deliberative process privilege were
23 included in this submission. Id. at 3-4. Plaintiffs allege that the March 2017 log contained
24 significant deficiencies, prompting plaintiffs to write a letter to defense counsel on May 8, 2017.
25 Id. at 4. Plaintiffs sent a follow up letter on May 30, 2017. Id. On June 1, 2017, plaintiffs allege
26 they received an e-mail from defendant stating its belief that declarations are not necessary to
27 support claims of deliberative process privilege. Id. On June 2, 2017, plaintiffs sent a letter of
28 disagreement and stated the intent to file a motion to compel production of documents withheld

1 under the deliberative process privilege. Id. On June 9, 2017, defense counsel contacted
2 plaintiffs to arrange a telephonic meet and confer conference in early July. Id. at 5.

3 Before the meet and confer, defendant alleges it undertook a review of documents
4 withheld solely on the grounds of deliberative process privilege (not inclusive of documents
5 withheld on multiple grounds including deliberative process privilege). ECF No. 327 at 2.
6 Following that process, defendant produced an additional 30 documents to plaintiffs' counsel on
7 June 15. Id. at 3. Shortly before the parties' scheduled meet and confer conference on July 7,
8 2017, defendant sent three declarations of individuals employed by defendant seeking to justify
9 the withholding of three groups of documents pursuant to deliberative process privilege
10 (addressing 172 out of 600 withheld documents). ECF No. 324 at 5. Plaintiffs assert that the
11 documents as referenced in the declarations use a different naming protocol than is used in the
12 privilege log. Id. at 5. Plaintiffs' counsel wrote defendant on July 7, 2017 regarding the
13 mismatch in labeling, but alleges she did not receive a response. Id. at 6. Defendant alleges that
14 on July 17, plaintiffs told defendant that none of its efforts were sufficient to obviate the need for
15 a motion to compel. ECF No. 327-2 at 4.

16 **III. Motion**

17 Plaintiffs filed the pending motion to compel on August 9, 2017. ECF No. 324.
18 Defendant filed its opposition on August 23, 2017. ECF No. 327. Plaintiffs replied on August
19 30, 2017. ECF No. 328. A hearing will be held on September 6, 2017.

20 Plaintiffs contend that defendant's assertions of the deliberative process privilege in its
21 privilege log are incomplete and not properly presented, and that defendant has now waived this
22 privilege claim for three reasons: (1) the log is untimely; (2) defendant failed to include
23 foundational declarations to support deliberative process privilege; and (3) the privilege log is not
24 compliant with this court's February 2, 2017 order. ECF No. 324-1 at 6-7.

25 Substantively, plaintiffs claim that defendant's log is insufficient because (a) the log
26 entries lack sufficient detail to allow for proper evaluation of the documents' deliberative or pre-
27 decisional nature; (b) the log entries indicate the documents are about the impact of legislation on
28 defendant and therefore those documents are not about the formulation of policy, and are not

1 covered by deliberative process privilege; (c) defendant failed to provide foundational
2 declarations to support the privilege claims, as required by deliberative process privilege; (e) the
3 privilege only protects decision makers, and some of the people involved in the claimed
4 documents are not decision makers; and (f) the privilege is narrowly construed, and plaintiff's
5 claims do not fall within it. ECF No. 324-1 at 8-10.

6 Plaintiffs further assert that even if deliberative process privilege were properly presented,
7 the balancing test associated with deliberative process privilege should cause the court to overrule
8 the claim of privilege. Finally, plaintiffs assert that even if the deliberative process privilege was
9 properly presented, deliberative process privilege cannot apply when the plaintiffs' claim goes
10 directly to the decisional process, as plaintiff alleges is the case here. Id. at 9-10.

11 Plaintiffs argue they should receive attorney's fees and costs for having to bring a motion
12 to compel as a result of defendant's noncompliance. Plaintiffs claim to have spent 185.91 hours
13 in preparation of their motion to compel. ECF No. 324-1 at 32. Defendant claims plaintiffs'
14 claimed costs and hours spent are unreasonable, that its actions are substantially justified, and that
15 an award of fees would be unjust. ECF No. 327 at 20-24.

16 **IV. Analysis/Summary of the Evidence**

17 **A. Deliberative Process Privilege**

18 "The deliberative process privilege rests on the obvious realization that officials will not
19 communicate candidly among themselves if each remark is a potential item of discovery and front
20 page news, and its object is to enhance 'the quality of agency decisions,' by protecting open and
21 frank discussion among those who make them within the Government[.]" Dep't of Interior v.
22 Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (internal citations omitted).

23 Deliberative process privilege "covers documents reflecting advisory opinions, recommendations
24 and deliberations comprising part of a process by which governmental decisions and policies are
25 formulated[.]" Id. (internal citations omitted). "[P]roper invocation of the privilege requires: (1)
26 a formal claim of privilege by the head of the department possessing control over the requested
27 information, (2) an assertion of the privilege based on actual personal consideration by that
28 official, and (3) a detailed specification of the information for which the privilege is claimed,

1 along with an explanation why it properly falls within the scope of the privilege.” Coleman v.
2 Schwarzenegger, No. C01-1351 TEH, 2008 WL 2237046, at *4 (E.D. Cal. May 29, 2008)
3 (internal citations omitted).

4 To qualify under the deliberative process privilege, a “document must be both (1)
5 “predecisional” or “antecedent to the adoption of agency policy” and (2) “deliberative,” meaning
6 “it must actually be related to the process by which policies are formulated.” Nat’l Wildlife Fed’n
7 v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988) (internal citations omitted). A
8 document is “predecisional” if it is “prepared in order to assist an agency decisionmaker in
9 arriving at his decision and may include “recommendations, draft documents, proposals,
10 suggestions, and other subjective documents which reflect the personal opinions of the writer
11 rather than the policy of the agency.” Assembly of State of Cal. v. U.S. Dep’t of Commerce, 968
12 F.2d 916, 920 (9th Cir. 1992), as amended on denial of reh’g (Sept. 17, 1992) (internal citations
13 omitted). The predecisional document is also deliberative “if the disclosure of the materials
14 would expose an agency’s decisionmaking process in such a way as to discourage candid
15 discussion within the agency and thereby undermine the agency’s ability to perform its
16 functions.” Id. (internal citations omitted). The central inquiry is “whether revealing the
17 information exposes the deliberative process.” Id. at 921.

18 B. Requirements of a Privilege Log

19 As this court has already stated in its February 2017 order, the descriptions of allegedly
20 privileged documents in a privilege log must “enable other parties to assess the applicability of
21 the privilege or protection.” Rule 26(b)(5), ECF No. 287 at 17. The Ninth Circuit has made clear
22 that “boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for
23 production of documents are insufficient to assert a privilege.” Burlington N. & Santa Fe Ry. Co.
24 v. U.S. Dist. Court for Dist. of Mont., 408 F.3d 1142, 1149 (9th Cir. 2005).

25 In general, Rule 34’s 30-day time limit applies to the production of a privilege log.
26 However, there is no per se waiver if the 30-day limit is violated:

27 Instead, using the 30–day period as a default guideline, a district
28 court should make a case-by-case determination, taking into
account the following factors: the degree to which the objection or

1 assertion of privilege enables the litigant seeking discovery and the
2 court to evaluate whether each of the withheld documents is
3 privileged (where providing particulars typically contained in a
4 privilege log is presumptively sufficient and boilerplate objections
5 are presumptively insufficient); the timeliness of the objection and
6 accompanying information about the withheld documents (where
7 service within 30 days, as a default guideline, is sufficient); the
8 magnitude of the document production; and other particular
9 circumstances of the litigation that make responding to discover
10 unusually easy (such as, here, the fact that many of the same
11 documents were the subject discovery in an earlier action) or
12 unusually hard.

13 Id. at 1149.

14 C. Failure to Comply with Privilege Log Requirements

15 Defendant’s claims of deliberative process privilege in its privilege log are legally
16 insufficient and are OVERRULED. The court declines to reach the issue of whether declarations
17 to support the assertion of deliberative process privilege are necessary because the deliberative
18 process privilege claims asserted in defendant’s privilege log do not withstand scrutiny on their
19 face. The court reviewed the annotated privilege log filed by plaintiffs, and found defendant’s
20 deliberative process claims to be both lacking and suspect. ECF No. 326 (sealed). For example,
21 defendant claims deliberative process privilege with respect to emails that do not meet the
22 “deliberative” prong of the privilege, such as e-mails addressing the “impact” of the
23 implementation of legislation. See, e.g., Id. at 10, Rows 24, 23. These documents, based on
24 defendant’s own description of them, are not “related to the process by which policies are
25 formulated.” Nat’l Wildlife Fed’n, 861 F.2d at 1117. Nor are these documents “predecisional” –
26 they are not “prepared in order to assist an agency decisionmaker in arriving at his decision.” Id.
27 at 921. To the extent defendant, at the hearing on this matter, asserted that the “impact”-based
28 privilege claims referred to determining agency policy based on newly passed legislation, such an
29 assertion is too little too late. It is not clear in the privilege log that the “impact”-based claims
30 related directly to agency policy implementation, and as this court has said before, the privilege
31 log itself must be clear on its face.

32 Other documents allegedly covered by the deliberative process privilege are described in
33 such vague terms that it is impossible for plaintiffs or the court to determine whether the privilege

1 actually applies. See, e.g. ECF No. 326 (sealed) at 38, rows 133-135, 152, row 604. And still
2 other documents contain communications with third parties. See e.g., Id. at 442, rows 1663-1665.
3 Communications including third parties are inherently not aimed at the goal of protecting “candid
4 discussion *within* the agency” and are therefore not “deliberative.” Assembly of State of Cal.,
5 968 F.2d at 920 (9th Cir. 1992) (emphasis added). The court understands defendant’s contention
6 that some or all of the external communications involved consultants, however, it was defendant’s
7 obligation to make it clear in their privilege log, in the first instance, who the third parties were to
8 demonstrate that the deliberative process privilege was still applicable. They did not, and
9 therefore the privilege claim cannot survive.

10 As the Ninth Circuit famously stated, “much ink has been spilled on the costs of abuse of
11 the discovery process,” and that is most certainly the case here. Burlington N. & Santa Fe Ry.
12 Co., 408 F.3d at 1148. This court’s February 2017 order required defendant, in no uncertain
13 terms, to provide a privilege log that, in and of itself, provides all the information the plaintiffs
14 and the court need to assess the assertions of privilege. ECF No. 287 at 18. Defendant was
15 cautioned that the February order was its “final chance to produce adequate privilege logs, and
16 any assertions of privilege that are incapable of determination will be overruled once and for all”
17 if defendant again failed to produce an adequate log. Id. For the reasons discussed above,
18 defendant’s privilege log is inadequate with respect to its claims of deliberative process privilege.
19 Accordingly, defendant’s claims of deliberative process privilege are OVERRULED, and all of
20 the documents that defendant has withheld solely on the basis of deliberative process privilege
21 must be turned over to plaintiff within 10 days of this court’s order.

22 D. Attorney’s Fees and Costs

23 Because plaintiffs’ motion to compel is meritorious, an award of fees and costs is
24 appropriate pursuant to Federal Rule of Civil Procedure 37(a)(5)(A) and E.D. Cal. R. (“Local
25 Rule”) 230. The appropriate method for computing fees in this case is the lodestar approach, in
26 which the court multiplies the number of hours reasonably expended on the litigation by a
27 reasonable hourly rate. Cunningham v. Cty. of Los Angeles, 879 F.2d 481, 484 (9th Cir. 1988).
28 “The measure to be used ‘is not actual expenses and fees but those the court determines to be

1 reasonable.” Matter of Yagman, 796 F.2d 1165, 1184–85 (9th Cir.1986). The court has already
2 set the fee rate for this case at \$350 per hour for attorneys and \$75 per hour for paralegals, and the
3 court will not reconsider these rates. ECF No. 312 at 7. Only the hours billed and costs claimed
4 are disputed.

5 Plaintiffs allege that they have spent a total of 183.9 attorney hours and 2.10 paralegal
6 hours in preparation of their motion to compel. As this court previously stated, Fed. R. Civ. P.
7 37(a)(5)(A) does not entitle plaintiff to recover fees for all efforts on discovery; the Rule only
8 allows only for recovery of fees and expenses “incurred *in making the motion*[.]” (emphasis
9 added). Many of plaintiffs’ claimed hours relate back to general research on deliberative process
10 privilege (see, e.g., 4.9 hours and 3 hours on 5/3/17, 1.75 hours on 5/8/17., 4.5 hours on 5/9/17,
11 275 hours on 5/25/17, .6 hours and 3.75 hours on 6/1/17) and the parties’ meet and confer efforts
12 (see, e.g., 3.85 hours on 5/4/17, 2.25 hours on 5/8/17, 5.75 hours on 6/2/17, 2.0 hours on 6/8/17,
13 .7 hours on 6/9/17). ECF No. 324-3. These hours, which took place early in the meet and confer
14 process, were not incurred “in making the motion” and thus are not recoverable. The court
15 understands plaintiffs’ concern that failing to award fees for the meet and confer process may
16 encourage defendants to unnecessarily drag out the meet and confer process without any real
17 intention of good faith compromise. The court is not creating a hard and fast rule regarding fees
18 for the meet and confer process; hours claimed for any subsequent discovery motion will be
19 independently reviewed and awarded based on the circumstances presented. Having reviewed
20 plaintiffs’ billing declaration line by line, in this instance, the court finds plaintiffs have no
21 recoverable paralegal hours and 110.35 recoverable attorney hours, for a total of \$38,622.50 in
22 recoverable attorney’s fees to be awarded.

23 Plaintiffs are not entitled to recover any costs. While costs are recoverable under Fed. R.
24 Civ. P. 37(a)(5)(A), plaintiffs have submitted a cost list that is too vague to be clearly linked to
25 their motion to compel. Plaintiffs’ accounting of costs consists of two line items, both labeled as
26 unidentified “Research Online Legal Databases.” ECF No. 324-3 at 103. The court has
27 previously instructed plaintiffs that such non-specific research costs are not recoverable. ECF
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1 No. 312 at 6. Again, because the undersigned cannot confidently link any of plaintiffs' claimed
2 costs to the motion to compel, no costs will be awarded.


3 **V. Conclusion**

4 For the reasons explained above, it is hereby ordered as follows:

- 5 a. Plaintiffs' motion for discovery and to compel the production of documents
6 withheld under the deliberative process privilege (ECF No. 324) is GRANTED;
7 b. Defendant's claims of deliberative process privilege are OVERRULED and
8 defendant is ORDERED to turn over all documents withheld solely on the basis of
9 deliberative process privilege within 10 days of this order;
10 c. Defendant is ORDERED to pay plaintiff \$38,622.50 in attorney's fees within 10
11 days of the order.

12 IT IS SO ORDERED.

13 DATED: September 18, 2017

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15 ALLISON CLAIRE
16 UNITED STATES MAGISTRATE JUDGE
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