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United States District Court
Northern District of California

UELIAN DE ABADIA-PEIXOTO, et al.,

Plaintiffs,

v.
U.S. DEPARTMENT OF HOMELAND
SECURITY, et al.,

Defendants.

Case No.: CV 11-04001 RS (KAW)

MOTION GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION FOR RECONSIDERATION OF
THE COURT’S MARCH 27, 2013
DISCOVERY ORDER

The Court issued its fourth order regarding the ongoing *in camera* review on March 27, 2013. (*See* Dkt. No. 132.) In that order, the Court found that the deliberative process privilege applied to Document Nos. 18320 and 18345. *Id.* The Court, however, ordered Document No. 18320 produced on the basis that the propounding party’s need for the document overrode the document’s qualified privilege. *Id.* On April 2, 2013, the Government filed a motion for leave to file a motion for reconsideration of the Court’s March 27, 2013 discovery order. (Dkt. No. 133.)

Having considered the Government’s moving papers, the Court GRANTS its motion for reconsideration in part and DENIES it in part. The Court grants the Government’s request to reconsider its prior order, but finds that, after further review of Document No. 18320 in the context of the other documents produced *in camera*, that Document No. 18320 is not subject to the deliberative process privilege for the reasons set forth below.

I. DISCUSSION

The deliberative process privilege permits the government to withhold documents that “reflect[] advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). In order to qualify for the privilege, documents must be both “predecisional” and “deliberative”. *Carter v. U.S. Dep’t of Commerce*, 307 F.3d 1084, 1089 (9th Cir.2002); *see also Hongsermeier v. C.I.R.*, 621 F.3d 890, 904 (9th Cir. 2010).

1 **A. Document No. 18320 is not Predecisional.**

2 A document is predecisional if it is “prepared in order to assist an agency decisionmaker
3 in arriving at his decision.” *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168,
4 184 (1975). This may include “recommendations, draft documents, proposals, suggestions, and
5 other subjective documents which reflect the personal opinions of the writer rather than the policy
6 of the agency.” *Carter*, 307 F.3d at 1084 (quoting *Assembly of State of Cal. v. U.S. Dept. of*
7 *Commerce*, 968 F.2d 916, 920 (9th Cir. 1992)). Alternatively, postdecisional documents “setting
8 forth the reasons for an agency decision already made” are not privileged and are subject to
9 disclosure. *Grumman*, 421 U.S. at 184.

10 Document No. 18320 is an email, dated August 9, 2011, that addresses how ICE
11 Enforcement and Removal Operations (ERO) in San Francisco will determine the appropriate
12 level of restraints for non-criminal asylum seekers even though the courtrooms lack certain
13 technology. The Government argues, and the Court originally shared the belief, that since the
14 documents predated the purported finalization of the asylum seekers shackling policy, the
15 document was predecisional. Upon further review, the document is not predecisional, so much as
16 it concerns the implementation of ICE’s national *Use of Restraints* policy as it relates to one
17 subclass of immigration detainees—non-criminal asylum seekers.

18 The Government certified in its signed pleading that “at the time Document No. 18320
19 was authored, there was not in fact any policy in place requiring Defendants to conduct
20 individualized determinations regarding the use of restraints for asylum seekers.” (Defs.’ Mot. at
21 2:13-15.) This is incorrect, as ICE’s national *Use of Restraints* policy, which was in effect as late
22 as July 13, 2011, required individualized determinations for all immigration detainees:

23 ICE’s *Use of Restraints* is outlined in the recently released Performance Based
24 National Detention Standards; this policy properly balances the safety of the
25 public, detainees, and ICE personnel. Current ICE policy requires the use of
26 restraints on persons within our care and custody be consistent with other ICE
27 policy standards and be used in a manner that is safe, secure, humane, and
28 professional. **ICE policy requires each officer to make an assessment of a
detainee’s risks to the public, ICE personnel, and him or herself, as well as the
likelihood of absconding.** This assessment includes, at a minimum, a review of
the detainee’s criminal history (if any), aggressive or asocial behavior, suspected
influence of alcohol or drugs, physical condition, gender, age, and medical

1 condition... **ICE does not have a blanket policy requiring the use of restraints**
2 **during immigration proceedings instead the use of restraints is individualized**
3 **and based on the risk posed.** We have determined that the immigration courts in
4 San Francisco, California, Oakdale, LA, Boston, MA, and Bloominton, MN are in
5 compliance with ICE’s national policy on restraints.

6 (Document No. 2305, ordered produced on January 7, 2013)(emphasis added.) Document No.
7 2305’s summary of the national restraints policy was dated July 13, 2011, which predated
8 Document No. 18320 by almost one month.

9 The Government completely ignores the existing national policy on restraints for all
10 immigration detainees, and asserts that the Court was incorrect in its belief that the San Francisco
11 Field Office should have already been making individualized determinations regarding the use of
12 restraints for asylum seekers, because “the restraints policy for asylum seekers was not finalized
13 until August 19, 2011, and that Document No. 18320 is “a document proposing a temporary
14 policy and seeking clarification from a superior.” (Defs.’ Mot., at 4-5.) This allegation is not
15 supported by the August 19, 2011 “ERO Field Guidance on Use of Restraints for Asylum Seekers
16 during Immigration Court Proceedings,” which the Government characterizes as the finalized
17 policy, and which provides:

18 **This guidance is to remind** all Field Office Directors (FOD) and Deputy Field
19 **Directors** that when deciding whether to use restraints, ERO personnel shall take
20 into consideration the safety of the general public, ICE personnel, and the detainee.
21 **When using restraints, individualized assessments should balance the risk**
22 **posed by the detainee, including the risk of flight, violence, or disruption,**
23 **while also assessing the setting, environment, and circumstances.**

24 (See Dkt. No. 124, Exh. A)(emphasis added.) The opening clause indicates that this guidance
25 document is not a new policy, but rather reiterates an existing policy, which, in the absence of any
26 cogent explanation from the Government, the Court interprets as a reference to the national
27 restraints policy summarized in Document No. 2305. The guidance document then appears to
28 endorse the use of less restrictive restraints for asylum seekers, by permitting FODs to “produce
asylum seekers for court room proceedings... without the use of restraints or consider the use of
alternatives that are individually tailored to the circumstances.” This is consistent with the
national restraints policy, under which the same individualized assessment should be performed
for every immigration detainee, including asylum seekers. The basis of the Government’s claim

1 of deliberative process privilege is that the document predated the August 19 guidance document,
2 which it characterized as an entirely new policy requiring individualized determinations. For the
3 reasons provided above, this assertion is incorrect.

4 In light of the overarching, national policy on the use of restraints for all immigration
5 detainees, Document No. 18320 is post-decisional, as its subject matter pertains to how San
6 Francisco can implement the national policy of least restrictive restraints for one subclass of
7 detainees—non-criminal asylum seekers—in light of the current unavailability of certain
8 technology.

9 **B. Document No. 18320 is not Deliberative.**

10 A predecisional document is a part of the “deliberative process,” if “the disclosure of [the]
11 materials would expose an agency’s decision making process in such a way as to discourage
12 candid discussion within the agency and thereby undermine the agency’s ability to perform its
13 functions.” *Assembly*, 968 F.2d at 920. “The key inquiry is whether revealing the information
14 exposes the deliberative process.” *Id.* at 921. To be deliberative, it must “reveal the mental
15 processes of the decision-makers.” *Id.* (citing *National Wildlife Fed’n*, 861 F.2d at 119.) Instead,
16 Document No. 18320 appears to seek the approval of specific wording to explain what actions the
17 San Francisco Field Office will take to comply with the national restraints policy in light of the
18 absence of certain technology in its courtrooms, rather than a substantive discussion on what the
19 national restraints policy for non-criminal asylum seekers should include. The Court also notes
20 that the document is specific to San Francisco, and appears wholly unrelated to the August 19,
21 2011 guidance document the Government has characterized as the finalized restraints policy for
22 asylum seekers.

23 In light of the above, the document is not part of the deliberative process.

24 **C. The Government has not met its burden of showing that Document No. 18320 is**
25 **subject to the Deliberative Process Privilege.**

26 When asserting this privilege, the Government must show that the documents are
27 predecisional and deliberative, and then the burden shifts to the propounding party to show that
28 the privilege should be waived. *See Cal. Native Plant Soc’y v. U.S. Env’tl. Prot. Agency*, 251

1 F.R.D. 408 (N.D. Cal. 2008) (citing *Chevron U.S.A. Inc. v. United States*, 80 Fed.Cl. 340, 355-57
2 (Fed.Cl. Jan. 30, 2008)). The Government was given four opportunities to explain why
3 Document No. 18320 was subject to the deliberative process privilege. Despite ample
4 opportunity, the Government waited until it filed the instant motion to describe why it believed
5 this particular document was privileged, and the limited information provided served to persuade
6 the Court that its initial determination of privilege was incorrect.

7 Even if the Court were to find that the document is privileged, the Government assertion
8 that disclosure would “hinder[] frank discussion among decision-makers” is unpersuasive given
9 the content of the document. This assertion is further tempered by the citation to Andrew
10 Lorenzen-Strait’s November 29, 2012 declaration. The paragraph of Mr. Lorenzen-Strait’s
11 declaration cited by the Government claimed that the deliberative process privilege applied to
12 Document Nos. 2305, 18296, 18314, 18316, 18317, 18318, 18320, 18345, 18350, 18351, 18352,
13 and 18353. Of those, three documents were ordered produced, including Document No. 2305,
14 quoted above, because the privilege did not apply. In addition, four other documents withheld by
15 the Government as privileged on other grounds were ordered produced after the Court’s *in*
16 *camera* review, such that, without more information, the Government’s reliance on Mr. Lorenzen-
17 Strait’s declaration is insufficient to carry its burden.

18 The deliberative process privilege is a qualified privilege, so even if the Government had
19 met its burden of showing that the document is both predecisional and deliberative, the Court may
20 still order discovery. *See F.T.C. v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir.
21 1984). Privileged materials may be obtained if the propounding party’s “need for the materials
22 and the need for accurate fact-finding override the government’s interest in non-disclosure. *Id.* at
23 1161 (citing *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658 (6th Cir.1976)). When read
24 with Document No. 2305, Document No. 18320 implies that, as of the date written, the San
25 Francisco ERO was not conducting the individualized determination regarding the use of
26 restraints for all detainees as required by ICE’s national policy. As the actions of the San
27 Francisco Field Office are at issue in this case, it is absolutely relevant, and even more probative,
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1 because it relates to the detainee subclass of non-criminal asylum seekers, who, of all immigration
2 detainees, are likely among the least dangerous and the least likely to warrant restraints.

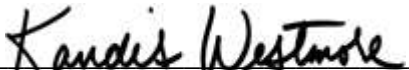
3 So even if the Government had met its burden of showing that the deliberative process
4 privilege applied, Plaintiffs' need for the document overrides the Government's interest in non-
5 disclosure.

6 **II. CONCLUSION**

7 For the reasons set forth above, the Court GRANTS the Government's motion for leave
8 for reconsideration. Accordingly, as to Document No. 18320,¹ the March 27, 2013 Order is
9 VACATED. After further review of those documents produced *in camera*, this Court finds that
10 Document No. 18320 is not subject to the deliberative process privilege, and shall be produced
11 without redaction by April 16, 2013.

12 IT IS SO ORDERED.

13 DATE: April 9, 2013


KANDIS A. WESTMORE
United States Magistrate Judge

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¹ Document No. 18345 remains subject to the deliberative process privilege and is not subject to production.