

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 08-2649 CW

HABEAS CORPUS RESOURCE CENTER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE  
and ERIC H. HOLDER, JR., in his  
official capacity as Attorney General  
of the United States,

Defendants.

ORDER GRANTING IN  
PART DEFENDANTS'  
SUPPLEMENTAL MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT ON FOIA  
EXEMPTIONS

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The Court previously granted in part the motion of Defendants United States Department of Justice (DOJ) and Eric H. Holder, Jr. for partial summary judgment on the issue of the propriety of their withholding certain documents in response to Plaintiff Habeas Corpus Resource Center's Freedom of Information Act (FOIA) request. The request sought documents related to the DOJ's development of a proposed regulation detailing the certification process for state capital counsel systems. Since the Court ruled on the previous motion, Defendants have completed further document searches, disclosing some documents to Plaintiff and withholding others. Defendants move for a ruling that they have properly withheld the

1   latter under FOIA. Plaintiff has raised questions with respect to  
2   certain of the withheld documents. The Court has reviewed in  
3   camera all of the additional withheld documents and has determined  
4   that the withholding is appropriate except as noted herein.

5                                   LEGAL FRAMEWORK

6           FOIA entitles private citizens to access government records.  
7   “The Supreme Court has interpreted [FOIA’s] disclosure provisions  
8   broadly, noting that the act was animated by a ‘philosophy of full  
9   agency disclosure.’” Lion Raisins v. U.S. Dep’t of Agric., 354  
10   F.3d 1072, 1079 (9th Cir. 2004) (quoting John Doe Agency v. John  
11   Doe Corp., 493 U.S. 146, 152 (1989)). However, FOIA exempts nine  
12   categories of government documents from disclosure. See 5 U.S.C.  
13   § 552(b)(1)-(9). “Unlike the disclosure provisions of FOIA, its  
14   statutory exemptions ‘must be narrowly construed.’” Lion Raisins,  
15   354 F.3d at 1079, (quoting John Doe Agency, 493 U.S. at 152). The  
16   Court reviews the government’s withholding of agency records de  
17   novo, and the government bears the burden of justifying its non-  
18   disclosure. 5 U.S.C. § 552(a)(4)(B).

19                                   DISCUSSION

20   I.    Exemption 5

21           Many of the documents at issue were withheld pursuant to FOIA  
22   Exemption 5. Under this exemption, the government can refuse to  
23   disclose “inter-agency or intra-agency memorandums or letters which  
24   would not be available by law to a party other than an agency in  
25   litigation with the agency.” 5 U.S.C. § 552(b)(5). “This  
26   provision shields ‘those documents, and only those documents,  
27   normally privileged in the civil discovery context.’” Carter v.  
28   U.S. Dep’t of Commerce, 307 F.3d 1084, 1088-89 (9th Cir. 2002)

1 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)).  
2 Exemption 5 incorporates the executive "deliberative process"  
3 privilege, the purpose of which is "'to prevent injury to the  
4 quality of agency decisions' by ensuring that the 'frank discussion  
5 of legal or policy matters' in writing, within the agency, is not  
6 inhibited by public disclosure." Maricopa Audobon Soc'y v. U.S.  
7 Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997) (quoting Sears,  
8 421 U.S. at 150-51.)

9 To qualify for the deliberative process privilege, a document  
10 must be both "predecisional" and "deliberative." Carter, 307 F.3d  
11 at 1089. "A 'predecisional' document is one prepared in order to  
12 assist an agency decisionmaker in arriving at his decision, and may  
13 include recommendations, draft documents, proposals, suggestions,  
14 and other subjective documents which reflect the personal opinions  
15 of the writer rather than the policy of the agency." Assembly of  
16 the State of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th  
17 Cir. 1992) (citations and internal quotation marks omitted). In  
18 this case, the relevant decision was that of the DOJ to propose  
19 promulgating the version of the certification regulation that was  
20 published in the Federal Register. A document is "deliberative" if  
21 its disclosure "would expose an agency's decisionmaking process in  
22 such a way as to discourage candid discussion within the agency and  
23 thereby undermine the agency's ability to perform its functions."  
24 Id. (quoting Dudman Commc'ns Corp. v. Dep't of the Air Force, 815  
25 F.2d 1565, 1568 (D.C. Cir. 1987)). The deliberative process  
26 privilege "does not protect a document which is merely peripheral  
27 to actual policy formation; the record must bear on the formulation  
28 or exercise of policy-oriented judgment." Tigue v. U.S. Dep't of

1 Justice, 312 F.3d 70, 80 (2d Cir. 2002) (quoting Ethyl Corp. v.  
2 EPA, 25 F.3d 1241, 1248 (4th Cir. 1994)). Although the  
3 predecisional and deliberative requirements are distinct, "they  
4 tend to overlap in practice." Carter, 307 F.3d at 1089.

5 The Court has reviewed the documents that were withheld under  
6 FOIA Exemption 5 and concludes that the documents are both  
7 predecisional and deliberative. The withholding was thus proper.

8 II. Exemption 6

9 FOIA Exemption 6 applies to "personnel and medical files and  
10 similar files the disclosure of which would constitute a clearly  
11 unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).  
12 To determine whether an invasion of privacy is clearly unwarranted,  
13 courts must balance four factors: "(1) the plaintiff's interest in  
14 disclosure; (2) the public interest in disclosure; (3) the degree  
15 of the invasion of personal privacy; and (4) the availability of  
16 any alternative means of obtaining the requested information."  
17 Multnomah County Medical Soc. v. Scott, 825 F.2d 1410, 1413 (9th  
18 Cir. 1987).

19 Plaintiff maintains that the DOJ's decision to hire Jennifer  
20 Goldstein, an attorney who played a key role in developing the  
21 certification regulation, was politically motivated. Plaintiff's  
22 FOIA request sought information concerning Ms. Goldstein's hiring  
23 in order to determine whether the regulation's development may have  
24 been tainted by bias. Invoking FOIA Exemption 6, Defendants have  
25 withheld a number of documents related to the process by which Ms.  
26 Goldstein was selected for an attorney position with the DOJ. The  
27 Court has reviewed these documents and concludes that they were  
28 properly withheld except as follows:

1 (1) Group 59, Document 255: The identity of the email  
2 recipient is not confidential and must be disclosed. The  
3 body of the email contains general information about  
4 Jennifer Goldstein's professional background and its  
5 disclosure would not constitute an invasion into Ms.  
6 Goldstein's privacy. It must be disclosed.

7 (2) Group 45, Documents 27-30; Group 46, Documents 31 and 33-  
8 36: The identity of the individual who was contacted for  
9 information about the unsuccessful job applicant is not  
10 confidential and must be disclosed. Defendants may  
11 continue to withhold the other redacted portions of the  
12 emails.

13 CONCLUSION

14 For the foregoing reasons, Defendants' supplemental motion for  
15 partial summary judgment is granted in part and denied in part.  
16 Defendants must forthwith disclose the portions of the documents  
17 discussed herein.

18 IT IS SO ORDERED.

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20 Dated: 6/30/09



21 CLAUDIA WILKEN  
22 United States District Judge  
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