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United States District Court  
Northern District of California

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

VIETNAM VETERANS OF AMERICA,  
et al.,  
  
Plaintiffs,  
  
v.  
  
CENTRAL INTELLIGENCE AGENCY, et  
al.,  
  
Defendants.

Case No.: 09-cv-0037 CW (JSC)

**ORDER RE: DEFENDANT  
DEPARTMENT OF VETERANS  
AFFAIRS IN CAMERA  
SUBMISSION OF DOCUMENTS**

Defendant Department of Veterans Affairs (“DVA” or “Defendant”) submitted documents for review in camera per the Court’s October 5, 2011 order. The Court subsequently ordered Defendant to provide further information and Defendant did so on November 10, 2011. The Court has reviewed Defendant’s in camera submission and hereby orders Defendant to produce certain documents to Plaintiffs as outlined below.

**DISCUSSION**

In response to Plaintiffs’ discovery requests, Defendant asserted the deliberative process privilege over 483 documents. Of these, Defendant indicated that 44 documents

1 were covered by other claims of privilege as well. Defendant indicated that the documents  
2 fell within the following subject areas:

- 3 (1) documents concerning the adjudication of an individual plaintiff's claim for VA  
4 disability compensation;
- 5 (2) documents concerning VA Executive correspondence with members of Congress,  
6 Veterans Service Organizations, and other federal government agencies;
- 7 (3) documents concerning collaboration between DOD and VA regarding providing  
8 notice to test subjects;
- 9 (4) documents concerning the content of VA's notice letter within the Veterans  
10 Health Administration;
- 11 (5) documents concerning DOD's "Fact Sheet" regarding VA health care and  
12 examinations;
- 13 (6) documents concerning legislative proposals, including draft legislative proposals  
14 and analyses of those proposals;
- 15 (7) emails and memoranda discussing drafts of the Under Secretary for Health's  
16 Information Letter;
- 17 (8) documents concerning the Veterans Benefits Administration, including draft  
18 training letters, outreach reports and meeting summaries, emails regarding  
19 outreach efforts, drafts of the notification letter to test volunteers, and emails  
20 regarding the development of those notification letters; and
- 21 (9) documents concerning the Veterans Health Administration ("VHA"), including  
22 emails regarding a potential response to congressional inquiry about Edgewood  
23 Arsenal and emails discussing the possibility of future registries within VHA.

22 (Dkt. No. 276, 8:12-9:9).

23 As discussed in detail in this Court's October 5, 2011 order (Dkt. No. 294), the  
24 deliberative process privilege is a qualified privilege that "permits the government to  
25 withhold documents that reflect advisory opinions, recommendations, and deliberations  
26 comprising part of a process by which governmental decisions and policies are formulated."  
27 Hongsermeier v. Commissioner of Internal Revenue, 621 F.3d 890, 904 (9th Cir. 2010)  
28 (internal citations omitted). The deliberative process privilege may be overcome by a strong

1 showing of relevance and an inability to obtain the information from other sources. See  
2 Schwarzer, Tashima & Wagstaffe, Fed. Civ. P. Before Trial § 11:767 (TRG 2010) (citing  
3 Sanchez v. City of Santa Ana, 936 F.2d 1027, 1034 (9th Cir. 1990)). Courts consider the  
4 following factors in determining substantial need: 1) the relevance of the evidence, 2) the  
5 availability of other evidence, 3) the government’s role in the litigation, and 4) the extent to  
6 which disclosure would hinder frank and independent discussion regarding contemplated  
7 policies and decisions. See F.T.C. v. Warner Comms. Inc., 742 F.2d 1156, 1161 (9th Cir.  
8 1984).

9 The Court analyzed these factors in detail in its October 5, 2011 order, and found that  
10 an in camera review of documents in categories two-nine was the only way to determine  
11 whether the deliberative process privilege actually applied, and if so, whether Plaintiffs had  
12 demonstrated substantial need sufficient to overcome the privilege. The Court has  
13 conducted a detailed review of Defendant’s voluminous in camera production and concludes  
14 that with respect to some of the documents at issue the deliberative process privilege does  
15 not apply, and in some cases where it does apply, sufficient substantial need exists to justify  
16 disclosure of the documents.<sup>1</sup>

17 With respect to documents to which no privilege applies, the Court notes that the  
18 deliberative process privilege only applies to deliberative materials; that is, documents that  
19 reflect advisory opinions, recommendations and deliberations comprising the government  
20 agency’s decision-making process. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150  
21 (1975). In contrast, “[p]urely factual material that does not reflect deliberative processes is  
22 not protected.” F.T.C. v. Warner Communications Inc., 742 F.2d at 1161 (internal citations  
23 omitted). Accordingly, to the extent that Defendant has asserted the deliberative process  
24 privilege over documents that only reflect factual information, the Court finds that the  
25 deliberative process privilege does not apply to these documents.

26  
27 <sup>1</sup> This Order only addresses those documents which fall within these two categories;  
28 Defendant properly asserted the deliberative process privilege over those documents not  
specifically referenced in this Order.

1 As for the documents which are covered by the deliberative process privilege, the  
2 Court finds that in some cases Plaintiffs' substantial need for the documents overcomes the  
3 qualified deliberative process privilege. The Court has reviewed the documents and finds  
4 that some of the documents provide information which is extremely relevant to Plaintiffs'  
5 facial bias claim against DVA and their notice claim against the other Defendants, and  
6 because this information cannot be obtained from another source Plaintiffs' substantial need  
7 for the documents overrides the government's interest in non-disclosure.

8 **Category Two Documents**

9 Defendant shall produce the following documents:

- 10 ○ 1702
- 11 ○ 1791-1792
- 12 ○ 3419 without redactions

13 Defendant should also confirm that document 280-281 was previously produced to  
14 Plaintiffs. If not, Defendant shall produce this document.

15 **Category Three Documents**

16 Defendant shall produce the following documents:

- 17 ○ 233-277
- 18 ○ 1852-1853 (duplicate of 1426-1427)
- 19 ○ 1332
- 20 ○ 176-177
- 21 ○ 1757

22 For several documents in this category that were marked "draft," Defendant has  
23 indicated that no final version of the documents exists. The Court finds that to the extent  
24 these documents are deliberative, upon the Court's review, substantial need exists for the  
25 documents' disclosure. Accordingly, Defendant shall produce the following documents:

- 26 ○ 165-166
- 27 ○ 335-370

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1 Defendant has indicated that document 1100-1101 is protected by deliberative process  
2 and attorney work product privileges and that the document was produced to Plaintiffs in a  
3 redacted form. It is not clear how the attorney work product privilege applies to this email.  
4 Defendant shall clarify how the privilege applies – is Mark Brown an attorney? If the  
5 privilege was asserted in error, Defendant shall produce the document without redactions.

6 **Category Four and Five Documents**

7 Defendant shall produce the following documents:

- 8 ○ 1047-1048
- 9 ○ 1446-1447

10 **Category Six and Seven**

11 Category Six documents contain various forms of legislative proposals, only some of  
12 which relate to the issues in this lawsuit. Of those which do relate to the issues in this  
13 lawsuit, the Court finds that the documents are extremely relevant to Plaintiffs' claims and  
14 that there is no other source of this information because Defendant has indicated that "there  
15 is no final version of any VA draft legislative proposal because either VA managers or the  
16 Office of Management and Budget did not approve VA submission of the draft legislation."

17 See November 9, 2011 letter from Lily Farel counsel for Defendant DVA. Accordingly,

18 Defendant shall produce the following documents:

- 19 ○ 984-986
- 20 ○ 1482-1484
- 21 ○ 1536-1538
- 22 ○ 2617-2619
- 23 ○ 2625-2626
- 24 ○ 3452-3454
- 25 ○ 4123-4125
- 26 ○ 4139-4146
- 27 ○ 4168-4170
- 28 ○ 4188-4196

1 Defendant has asserted deliberative process and Privacy Act privileges over the  
2 following document and produced the document with portions redacted. Defendant shall  
3 produce the document without redactions. If Defendant has privacy concerns, it may  
4 produce the document pursuant to the protective order governing this action. (Dkt. No. 176).

- 5 ○ 3138-3140

6 **Category Eight**

7 Defendant shall produce the following documents:

- 8 ○ 3420
- 9 ○ 3455-3456
- 10 ○ 3596-3599
- 11 ○ 4450-4451, if not already produced to Plaintiffs
- 12 ○ 3765-3767
- 13 ○ 1426-1427 (duplicate of 1852-1853)
- 14 ○ 3665
- 15 ○ 1848
- 16 ○ 4115-4116
- 17 ○ 4440

18 As with the Category Six draft legislative proposals, Defendant indicates that there  
19 are no final versions for the following draft documents. For the same reasons as stated for  
20 the Category Six documents, the Court orders Defendant to produce these documents:

- 21 ○ 207
- 22 ○ 1133-1138
- 23 ○ 1139-1146
- 24 ○ 1736-1743

25 Defendant has asserted deliberative process and Privacy Act privileges over the  
26 following document and produced the document with portions redacted. Defendant shall  
27 produce the document without redactions. Given that the information in the email originated  
28 from a reporter, the Court questions Defendant's Privacy Act claim, but to the extent

1 Defendant has privacy concerns, it may produce the document pursuant to the protective  
2 order governing this action. (Dkt. No. 176).

- 3 ○ 4479-4482

4 The privilege log indicates that document 3667 was produced with redactions based  
5 on Privacy Act objections; however, the version produced to the Court does not contain any  
6 notations regarding which text was redacted. Defendant shall produce the document without  
7 redactions; any privacy concerns may be addressed by producing the document pursuant to  
8 the protective order governing this action. (Dkt. No. 176).

9 **Category Nine**

10 Defendant shall produce the following documents:

- 11 ○ 2944 without redactions
- 12 ○ 3553-3554

13 Defendant has produced the same document twice, see 2983-2987 and 3466-3470.  
14 With respect to the first version of this document (2983-2987), Defendant asserts  
15 deliberative process privilege. For the second version (3466-3470) Defendant indicates that  
16 deliberative process, attorney client and attorney work product privileges all apply and the  
17 privilege log indicates that David Barrans, VA Deputy Assistant General Counsel, is a  
18 recipient of the email; however, Mr. Barrans' name does not appear on the email. Defendant  
19 shall clarify the nature of the privilege(s) it is asserting over this document. If Defendant  
20 asserts attorney work product and/or attorney client privilege, Defendant shall identify the  
21 attorney on the email chain. If Defendant only asserts deliberative process privilege,  
22 Defendant shall produce the document.

23 Document 4332-4333 is a recent forward of the email chain also marked 3138-3140  
24 and discussed under Category Six above. For the reasons previously stated, Defendant shall  
25 produce 4332-4333 as well.

26 **CONCLUSION**

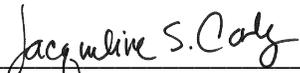
27 As set forth above, the Court finds that certain documents over which Defendant has  
28 asserted deliberative process privilege are either not deliberative, and thus, not entitled to any

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protection, or that the qualified deliberative process privilege is overcome by Plaintiffs' substantial need for the documents. Accordingly, Defendant shall produce the documents identified above by December 1, 2011. To the extent necessary, for the two documents over which Defendant has also asserted attorney client and/or attorney work product privilege, and about which the Court seeks further information, Defendant shall file its response by the same deadline.

**IT IS SO ORDERED.**

Dated: November 23, 2011

  
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JACQUELINE SCOTT CORLEY  
UNITED STATES MAGISTRATE JUDGE