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United States District Court  
Northern District of California

FIRST RESORT, INC.,  
  
Plaintiff,  
  
v.  
DENNIS HERRERA, et al.,  
  
Defendants.

Case No.: CV 11-5534 SBA (KAW)  
  
ORDER REGARDING JOINT DISCOVERY  
LETTER BRIEF (DKT. NO. 51) AND  
DOCUMENTS SUBMITTED FOR IN  
CAMERA REVIEW

United States District Court  
Northern District of California

On November 26, 2013, this matter was referred to the undersigned for discovery purposes. On December 6, 2013, the parties filed three joint discovery letter briefs. The court held a hearing on the matter on January 2, 2014. At the conclusion of the hearing, the court ordered the parties to meet and confer to narrow the scope of their discovery disputes and ordered the defendants to file an amended privilege log. The parties narrowed their discovery disputes as set forth in a February 4, 2014 joint status report. The defendants included a copy of their amended privilege log with that status report. The court then issued an order on February 14, 2014. In that order, the court resolved some of the parties' remaining disputes. The court, however, deferred ruling on the defendants' claims of privilege as to certain documents and instead ordered the defendants to produce the purportedly privileged documents for in camera review. The court has received those documents. After reviewing the documents in camera, the court orders production of certain documents as set forth below.<sup>1</sup>

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<sup>1</sup> As the discovery disputes outlined in Dkt. Nos. 52 and 53 have been resolved, the court hereby terminates those docket entries.

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**I. DISCUSSION**

**A. Documents purportedly subject to the attorney-client privilege or the attorney work-product doctrine**

The attorney-client privilege attaches to communications "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived." *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). "The party asserting the privilege bears the burden of proving each essential element." *Id.* (internal citations and quotations omitted).

The attorney work-product doctrine applies to "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." FED. R. CIV. P. 26(b)(3)(A). To qualify for protection under this doctrine, a document must "(1) be prepared in anticipation of litigation or for trial and (2) be prepared by or for another party or by or for that other party's representative." *United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011). Where a document was not prepared exclusively in anticipation of litigation or for trial, "the 'because of' test is used." *Id.* Under this test, such a document qualifies for work-product protection "if in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *Id.* In applying this standard, courts are to consider "the totality of the circumstances and determine whether the document was created because of anticipated litigation, and would have not been created in substantially similar form but for the prospect of litigation." *Id.* (internal quotations and citations omitted).

The City contends that the attorney-client privilege, or the attorney work-product doctrine, protects document nos. REV-0025017, REV-0025018, REV-0030376 through REV-0030383, REV-0030384, REV-0031050 through REV-0031057, REV-0031058, REV-0031059 through REV-0031060, REV-0031061, REV-0031062 through REV-0031069, REV-0041353 through

1 REV-0041361, and CCSF003307-CCSF003307 from disclosure. (Def.'s Privilege Log, Dkt. No.  
2 79 at 1, 2, 3.) The court addresses each item in turn.<sup>2</sup>

3 **1. Document no. REV-0025017**

4 Document no. REV-0025017 is a September 27, 2011 email from Deputy City Attorney  
5 Erin Berstein to Supervisor Cohen's legislative aide, Andrea Bruss. (Privilege Log at 1.) The  
6 email is titled "drey re cps.doc." (Id.) The email's subject matter is "[f]oward[ing] information  
7 from Dr. Drey." (Id.) The email footer reads "attorney-client privilege and/or attorney work  
8 product privilege." (Id.) The City also indicates that "[t]o the best of [its] knowledge, th[e]  
9 document was not shared with anyone outside the City." (Id.)

10 Having reviewed the email message in camera, the court finds that the message is  
11 attorney-client privileged and thus protected from disclosure. See Graf, 610 F.3d at 1156. The  
12 communication is between Deputy City Attorney Erin Bernstein, and a legislative aide to  
13 Supervisor Cohen. The communication is designated privileged and confidential, which is  
14 appropriate given that the content of the message directly relates to the legislative proceedings  
15 concerning the crisis pregnancy center ordinance and contains Ms. Bernstein's advice as to how to  
16 proceed in the handling of certain related information. As the attorney-client privilege provides a  
17 proper basis for withholding the document, the court need not reach the City's claim that the email  
18 may also be protected from disclosure under the attorney work-product doctrine. Accordingly,  
19 the City need not produce Ms. Berstein's September 27, 2011 email.

20 **2. Document no. REV-0025018**

21 Document no. REV-0025018 is an attachment to Ms. Berstein's September 27, 2011  
22 email. (Privilege Log at 1.) The attachment is a "[s]tatement from Dr. Drey," an employee at San  
23 Francisco General Hospital's Women's Options Center. (Id.) The attachment's subject matter is  
24 "[a] patient's experience at a Crisis Pregnancy Center." Id. The "[d]ate [the] document [was]

25 <sup>2</sup> With respect to document nos. REV-0031050 through REV-0031057, REV-0031058, REV-  
26 0031061, REV-0031062 through REV-0031069, the City also asserts the deliberative process  
27 privilege in addition to the attorney-client privilege. Privilege Log at 2, 3. In its February 14,  
28 2014 order, the court noted that First Resort only challenged the City's assertions of the attorney-  
client privilege with respect to document nos. REV-0025017 and REV-0025018. The court thus  
presumed that First Resort conceded that the City's other assertions of the attorney-client privilege  
were unchallenged and thus sufficient to protect document nos. REV-0031050 through REV-  
0031057, REV-0031058, REV-0031061, REV-0031062 through REV-0031069 from disclosure.  
For that reason, any discussion of the propriety of the City's assertions of the deliberative process  
privilege with respect to these materials is unnecessary.

1 prepared is unknown," and there are "[n]o recipients listed on [t]he letter." (Id.) The City does  
2 not indicate that the letter was not shared with anyone outside the City. (See id.)

3 The City's description of the letter's subject matter is accurate. (See id.) Dr. Drey's letter  
4 recounts a patient's experience at a crisis pregnancy center. (See id.) As the City points out, the  
5 letter is undated and is not addressed to any recipient. (See id.) In addition, the City does not, as  
6 it does with respect to certain other documents, indicate that the letter was not shared with anyone  
7 outside the City. (See id.) In the section of its privilege log designated for information  
8 concerning the steps taken to ensure the confidentiality of each item, the City indicates only that  
9 the "E-mail footer notes attorney-client privilege and/or attorney-work product privilege." (See  
10 id.) While the email to which Dr. Drey's letter was attached contains that notation, Dr. Drey's  
11 letter itself is not similarly marked. (See id.) This undermines the City's claim of attorney-client  
12 privilege. See Graf, 610 F.3d at 1156 ("[The] party asserting the attorney-client privilege has the  
13 burden of establishing the . . . privileged nature of the communication."). In light of the content  
14 of Dr. Drey's letter, and absent anything from the City suggesting otherwise, there is no indication  
15 that Dr. Drey's letter was transmitted, to a specific intended recipient, in confidence. See id.  
16 (attorney-client privilege attaches to communications made in confidence). In addition, First  
17 Resort maintains, and this court agrees, that this document may already be a part of the legislative  
18 record, a fact which the City has neither confirmed nor denied. (Feb. 4, 2014 Joint Status Rpt.,  
19 Dkt. No. 3 at 3 & n.2.) For these reasons, the court finds that Dr. Drey's letter is not protected by  
20 the attorney-client privilege.

21 The letter is also not protected from disclosure by the attorney work-product doctrine. See  
22 FED. R. CIV. P. 26(b)(3)(A); Richey, 632 F.3d 559, 567 (9th Cir. 2011) ("To qualify for work-  
23 product protection, documents must (1) be prepared in anticipation of litigation or for trial . . .")  
24 (internal quotations and citation omitted). There is no indication that Dr. Drey's letter, which is  
25 undated and not addressed to any particular recipient, was prepared for any type of adversarial  
26 proceeding that may qualify as litigation for the purposes of the attorney work-product doctrine.  
27 Rather, it appears that the letter was prepared to support the passage of the crisis pregnancy center  
28 ordinance and thus would have been prepared without regard to whether litigation was expected  
to ensue. See Richey, 632 F.3d at 568 (document not protected by work-product doctrine where it  
was not "prepared or obtained because of the prospect of litigation"). For this reason, the work-  
product doctrine does not protect Dr. Drey's letter from disclosure.

1 Accordingly, the City shall produce, without redaction, Dr. Drey's letter, identified as  
2 document no. REV-0025018, within 14 days of this order.

3 **B. Documents purportedly protected from disclosure under the deliberative**  
4 **process privilege**

5 The deliberative process privilege protects documents from disclosure if they "reflect  
6 advisory opinions, recommendations and deliberations comprising part of the process by which  
7 government decisions and policies are formulated." *FTC v. Warner Commc'ns*, 742 F.2d 1156,  
8 1161 (9th Cir. 1984) (citation omitted). The purpose of the privilege is to "promote frank and  
9 independent discussion among those responsible for making governmental decisions and also to  
10 protect against premature disclosure of proposed . . . policies or decisions." *Id.* (citations  
11 omitted). The party seeking the privilege must establish that the document at issue is both  
12 predecisional and deliberative. *Id.* "A predecisional document is one prepared in order to assist  
13 an agency decisionmaker in arriving at his decision." *Assembly of the State of Cal. v. U.S. Dep't*  
14 *of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). Such a document "is a part of the deliberative  
15 process if the disclosure of the materials would expose an agency's decisionmaking process in  
16 such a way to discourage candid discussion within the agency and thereby undermine the agency's  
17 ability to perform its functions." *Id.* In addition, "[p]urely factual material that does not reflect  
18 deliberative processes is not protected . . . unless [it] is so interwoven with the deliberative  
19 material that it is not severable." *Id.* (citations omitted).

20 "The deliberative process privilege is a qualified one. A litigant may obtain deliberative  
21 materials if his or her need for the materials and the need for accurate fact-finding override the  
22 government's interest in non-disclosure." *FTC*, 742 F.2d at 1161 (citations omitted). In making  
23 this determination, the court should consider: (1) the relevance of the evidence, (2) the  
24 availability of other evidence, (3) the government's role in the litigation, and (4) the extent to  
25 which disclosure would hinder frank and independent discussion regarding contemplated policies  
26 and decisions. *Id.* (citations omitted); see also *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp.  
27 2d 1118, 1122 (N.D. Cal. 2003).

28 The City identifies the deliberative process privilege as its sole basis for withholding  
document nos. REV-0025031, REV-0029176 through REV-0029184, REV-0029255 through

1 0029258, REV-0029326 through 0029335, REV-0029934 through REV-0029935, REV-0029936,  
2 REV-0031070 through REV-0031071, and REV-0041362. (Def.'s Privilege Log, Dkt. No. 79 at  
3 1, 2, 3.) The City contends that "its assertions of privilege are appropriate, and that its document  
4 descriptions and articulations of the steps taken to preserve document confidentiality are  
5 sufficient to allow meaningful review." (Feb. 4, 2014 Joint Status Rpt. at 3.) The City further  
6 asserts that documents such as internal talking points memoranda and drafts of press releases that  
7 were never publicly issued "are core internal communications," the product of which "would chill  
8 the ability of legislative staff to engage in honest discussions regarding legislation." (Id.) Having  
9 reviewed the documents at issue in camera, the court disagrees. Neither the City's current  
10 privilege log, which it supplied in response to the court's specific instructions to substantiate its  
11 claims of privilege, nor the content of the documents at issue, supports the City's position.  
12 Indeed, much of the materials purportedly subject to the deliberative process privilege relate to  
13 preparations for interviews or other public communications rather than any deliberative process  
14 contemplated by the privilege.

13 **1. Document no. REV-0025031**

14 Document no. REV-0025031 is a draft "press release entitled Board of Supervisors to  
15 Vote on Deceptive Marketing by 'Crisis Pregnancy Centers' Proposal." (Privilege Log at 1.)  
16 According to the City, this draft press release appears to be unrelated to the August 2, 2011 press  
17 release issued by Supervisor Cohen and City Attorney Dennis Herrera. (Id.) The City indicates  
18 that, to the best of its knowledge, the draft press release was never finalized or publicly released.  
19 (Id.)

20 The draft press release at issue may be considered predecisional in that the document was  
21 generated before the adoption of the crisis pregnancy center ordinance. See *FTC*, 742 F.2d at  
22 1161. The draft press release, however, is not predecisional in the sense that it does appear to  
23 have been prepared in order to assist in the making of any decision. See *Assembly of the State of*  
24 *Cal.*, 968 F.2d at 920 ("A predecisional document is one prepared in order to assist an agency  
25 decisionmaker in arriving at his decision.") (quotations and citations omitted). Based on the  
26 content of the press release, the document is also not deliberative in that it would expose only a  
27 description of the legislation and quotes from Supervisor Cohen, not any decision-making  
28 process. See *id.* ("A predecisional document is a part of the deliberative process if the disclosure

1 of the materials would expose an agency's decisionmaking process in such a way to discourage  
2 candid discussion within the agency and thereby undermine the agency's ability to perform its  
3 functions.") (quotations, modifications, and citations omitted); see also *In re McKesson*  
4 *Governmental Entities Average Wholesale Price Litigation*, 264 F.R.D. 595, 600 (N.D. Cal.  
5 2009). In addition, the City has not offered anything in its amended privilege log to suggest that  
6 the document played any role in policy formulation. See *Mayer, Brown, Rowe & Maw LLP v.*  
7 *IRS*, 537 F. Supp. 2d 128, 139 (D.D.C. 2008) (draft press releases related to the public  
8 announcement of the tax consequences of sale-leaseback transactions subject to disclosure  
9 because they did not bear on policy formulation); see also *Chattler v. United States*, No. C-07-  
10 4040 MMC (EMC), 2009 WL 1313227, at \* 2 (N.D. Cal. May 12, 2009) (questioning assertion of  
11 the deliberative process privilege with respect to preparations related to testimony or statements to  
12 Congress or the public, which did not seem to be akin to policymaking). As a result, the  
13 deliberative process privilege does not protect the draft press release from disclosure.

14 Accordingly, the City shall produce, without redaction, the draft press release, document no.  
15 REV-0025031, within 14 days of this order.

16 **2. Document nos. REV-0029176 through REV-0029184**

17 The City describes document nos. REV-0029176 through REV-0029184 as a single email  
18 from Supervisor Malia Cohen to her legislative aide, Megan Hamilton. (Privilege Log at 1.) The  
19 email is titled "CPC talking points." (Id.) The City indicates that the subject matter of this single  
20 email is "[t]alking points and background information/e-mail relating to Crisis Pregnancy  
21 Centers." (Id.) The City indicates that, "[t]o the best of [its] knowledge this document was not  
22 shared with anyone outside the City." (Id.)

23 Document nos. REV-0029176 through REV-0029184 do not represent a single email, but  
24 a string of several emails relaying various content. The latest email in that string, from  
25 Supervisor Malia Cohen to her legislative aide, Megan Hamilton, appears to be predecisional only  
26 in that it predates the adoption of the crisis pregnancy center ordinance. Otherwise, the document  
27 does not appear to be predecisional or deliberative. The content in the message concerns  
28 preparations for an interview, not the formulation of any policy decision. See Assembly of the

1 State of Cal., 968 F.2d at 921 ("Material which predates a decision chronologically, but did not  
2 contribute to that decision, is not predecisional in any meaningful sense."); see also Vaughn v.  
3 Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975) ("Pre-decisional materials are not exempt merely  
4 because they are pre-decisional; they must also be a part of the agency give-and-take of the  
5 deliberative process by which the decision itself is made."). The document is therefore not  
6 protected from disclosure under the deliberative process privilege.

7 The content of the second email in that string is also not predecisional. That email was  
8 drafted by a legislative aide and sent to assist Supervisor Cohen to prepare for an interview, not  
9 "to assist an agency decisionmaker in arriving at [a] decision" contemplated by the deliberative  
10 process privilege. See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp, 421 U.S. 168, 184  
11 (1975). The email is also not deliberative. The source of its content is a publicly-available .pdf  
12 document, not any agency give-and-take. See Vaughn, 523 F.2d at 1144. For these reasons, this  
13 second email is not protected from disclosure under the deliberative process privilege.

14 The final email, sent to Megan Hamilton by an employee affiliated with an outside  
15 organization, is similarly unprotected by the deliberative process privilege. As with the prior  
16 email communications, the material in the message appears to relate to a public interview, not an  
17 agency decision-making process. See Chatter, 2009 WL 1313227, at \* 2.

18 Accordingly, the City shall produce, without redaction, document nos. REV-0029176  
19 through REV-0029184, within 14 days of this order.

20 **3. Document nos. REV-0029255 through 0029258**

21 The City describes document nos. REV-0029255 through 0029258 as an email titled:  
22 "Our materials on the Limited Service Pregnancy Center legislation." (Privilege Log at 1.) In its  
23 privilege log, the City indicates that "[t]o the best of [its] knowledge this document was not  
24 shared with anyone outside the City." (Id.)

25 Document nos. REV-0029255 through 00292258 also do not represent a single email but a  
26 series of email messages. These messages contain communications regarding the drafting and  
27 finalization of a response to an "inquiry regarding Limited Serve Pregnancy Centers." (Privilege  
28 Log at 1.) Looking at the email messages alone and considering that the origin of the inquiry is



1 unspecified,<sup>3</sup> it appears that the content of this communication does not "bear on the policy  
2 formulation." See Vaughn, 523 F.2d at 1144 (only documents that are a "direct part of the  
3 deliberative process" and "make[] recommendations or express[] opinions on legal or policy  
4 matters" are protected by the deliberative process privilege"). In fact, the content in these  
5 messages reveals that the crisis pregnancy center ordinance had been heard and forwarded to the  
6 Board of Supervisors at the time these messages were being shared. See Soto v. City of Concord,  
7 162 F.R.D. 603, 613 (N.D. Cal. 1995) ("The deliberative process privilege should be invoked  
8 only in the context of communications designed to directly contribute to the formulation of  
9 important public policy.") (citation omitted); see also Mayer Brown, 537 F. Supp. 2d at 136  
10 (noting that materials intended to brief government agency employees once a ruling was issued  
11 were too far "removed from an actual policy decision" to warrant protection under the deliberative  
12 process privilege) (citations omitted). This defeats the City's claim that this email string is  
13 protected from disclosure by the deliberative process privilege.

14 Based on the foregoing, the City shall produce document nos. REV-0029255 through  
15 0029258, without redaction, within 14 days of this order.

16 **4. Document nos. REV-0029326 through 0029335**

17 Document nos. REV-0029326 through REV-0029335 are duplicative of the documents  
18 identified as REV-0029176 through 0029184. Accordingly, the City shall produce these  
19 duplicative documents in the same manner discussed supra Part I.B.2.

20 **5. Document nos. REV-0029934 through 0029935**

21 Document nos. REV-0029934 through 0029935 are an email containing a draft newsletter  
22 "blurbs" and a quote from Supervisor Cohen. (Privilege Log at 1.) The content of the message,  
23 as it concerns crisis pregnancy centers, is not deliberative, but largely factual. For example, the  
24 "blurb" relating to the crisis pregnancy center legislation explains when the legislation was  
25 introduced, when it went to committee, and when the legislation was scheduled for a tentative  
26 vote. It also contains a quote, from an unidentified source, regarding the legislation. The factual

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28 <sup>3</sup> The document does show, however, that the individual to whom the final response is directed  
does not have a "sfgov.org" email address.

1 content is not "so interwoven with the deliberative material that it is not severable" from any  
2 protected material. See *FTC*, 742 F.2d at 1161. The quote, to the extent it is not attributable to any  
3 identified source, would not likely chill any agency communication. In addition, the content of  
4 the message is not predecisional, it resembles more of a public announcement than anything  
5 "prepared in order to assist an agency decisionmaker in arriving at [a] decision." See  
6 *Renegotiation Bd.*, 421 U.S. at 184; see also *Coastal States Gas Corp. v. Dep't of Energy*, 617  
7 F.2d 854, 864 (D.C. Cir. 1980) ("[E]ven if [a] document is predecisional at the time it is prepared,  
8 it can lose that status if it is adopted . . . as the agency position on an issue or is used by the  
9 agency in its dealings with the public.").

10 For these reasons, the City shall produce document nos. REV-0029934 through 0029935,  
11 without redaction, within 14 days of this order.

12 **6. Document no. REV-0029936**

13 Document no. REV-029936 is an email message between Supervisor Cohen's staff.  
14 (Privilege Log at 1.) It summarizes a message received from an individual who expressed an  
15 interest in testifying in support of the crisis pregnancy center ordinance based on her own  
16 experience with a crisis pregnancy center. (Id.) The email contains substantial factual content,  
17 which is not "so interwoven with the deliberative material that it is not severable" from any  
18 protected material. *FTC*, 742 F.2d at 1161.

19 Accordingly, within 14 days of this order, the City shall produce document no. REV-  
20 0029936 without redaction.

21 **7. Document nos. REV-0031070 through REV-0031071**

22 Document nos. REV-0031070 through REV-0031071 are a series of emails discussing a  
23 communication from Supervisor Cohen to the other Supervisors on the Board. This material is  
24 both predecisional and deliberative. It is a communication originating from Supervisor Cohen, in  
25 which she expresses her stance on the crisis pregnancy center ordinance. The message was  
26 obviously intended to be circulated to the other Supervisors on the Board (and their staff) for the  
27 purpose of garnering support for the passage of the legislation. As such, this message is protected  
28 from disclosure by the deliberative process privilege. Moreover, given the nature and content of

1 the document, there is no overriding interest that would compel disclosure. FTC, 742 F.2d at  
2 1161 (listing four factors courts are to consider in determining whether a party's interest in  
3 protected materials overcomes the deliberative process privilege). The content of the message  
4 bears little, if any, relevance to the issues in this litigation. In addition, First Resort has access to  
5 other evidence, including the legislative record, which it may use to advance its position in this  
6 litigation. Furthermore, while the City is a party to this action, and as such, sits in the posture of a  
7 typical civil litigant in terms of its inclination to resist disclosure of unfavorable information and  
8 to assert whatever procedural protections it may invoke to challenge an opposing party's  
9 discovery requests, compelling disclosure of Supervisor Cohen's message would risk chilling  
10 communications between individual Supervisors on matters directly relating to policymaking.  
11 Thus, First Resort's interest in the document does not overcome the City's interest in non-  
12 disclosure.

13 Accordingly, the City need not produce document nos. REV-0031070 through REV-  
14 0031071.

15 **8. Document no. REV-0041362**

16 Document no. REV-0041362 is identical to REV-0025031. The City shall, therefore,  
17 produce that document as discussed supra Part I.B.1.

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**II. CONCLUSION**

For the reasons set forth above, the City shall produce the following materials within 14 days of this order:

- (1) Dr. Drey's letter, document no. REV-0025018, without redaction.
- (2) The draft press release, document no. REV-0025031, without redaction.
- (3) The email string, beginning at document no. REV-0029176 and ending at document no. REV-0029184, without redaction.
- (4) The email string, document nos. 0029255 through 0029258, without redaction.
- (5) The email string, document nos. REV-0029326 through REV-0029335, without redaction.
- (6) The email, beginning at document no. REV-0029934 and ending at document no. 0029935, without redaction.
- (7) The email, document no. REV-0029936, without redaction.
- (8) The draft press release, document no. REV-0041362, without redaction.

IT IS SO ORDERED.

DATE: March 10, 2014

  
KANDIS A. WESTMORE  
United States Magistrate Judge