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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ECOLOGICAL RIGHTS FOUNDATION,
Plaintiff,
v.
FEDERAL EMERGENCY
MANAGEMENT AGENCY, et al.,
Defendants.

Case No. [15-cv-04068-DMR](#)

**ORDER ON JOINT DISCOVERY
LETTER**

Re: Dkt. No. 34

The parties filed a joint discovery letter in which Defendant Federal Emergency Management Agency (“FEMA”) seeks clawback of three documents inadvertently produced to Plaintiff Ecological Rights Foundation in response to a Freedom of Information Act (“FOIA”) request. [Docket No. 34 (Jt. Letter).] This matter is appropriate for resolution without a hearing pursuant to Civil Local Rule 7-1(b). For the following reasons, Defendant’s motion is denied.

I. BACKGROUND

Plaintiff filed this action on September 5, 2015, seeking declaratory and injunctive relief under FOIA, 5 U.S.C. § 552(a)(4)(B). Plaintiff challenged FEMA’s response to its June 8, 2015 request for

all documents addressing Endangered Species Act (“ESA”) section 7 consultations (16 U.S.C. § 1536) that have been initiated or proposed pertaining to the implementation of the National Flood Insurance Program (“NFIP”) in California; all documents concerning any ESA section 10 permits or habitat conservation plans (16 U.S.C. § 1539) that have been initiated or proposed, pertaining to the implementation of the NFIP in California; and all documents submitted to FEMA by [the National Marine Fisheries Service], [U.S. Fish and Wildlife Service], the [California Department of Fish and Wildlife], or any other State or Federal agency or department pertaining to the ESA and the implementation of the NFIP in California.

Compl. ¶ 15.

By way of background, section 7(a)(2) of the Endangered Species Act, 16 U.S.C. §

1 1536(a)(2), which the Ninth Circuit has described as “[t]he heart” of the Act, requires all federal
2 agencies to “‘insure that any action authorized, funded, or carried out’ by the agency ‘is not likely
3 to jeopardize the continued existence of any endangered species or threatened species or result in
4 the destruction or adverse modification of habitat of such species.’” *W. Watersheds Project v.*
5 *Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010) (quoting 16 U.S.C. § 1536(a)(2)); *Nat. Res. Def.*
6 *Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998). “To carry out this substantive mandate,
7 agencies must engage in a consultation process with the appropriate expert wildlife agency on the
8 effects of any federal action to listed species.” *Cal. ex. rel. Lockyer v. U.S. Dep’t of Agric.*, 575
9 F.3d 999, 1018 (9th Cir. 2009). “After the formal consultation is completed, the relevant Service
10 will issue a Biological Opinion evaluating the nature and extent of effect on the threatened or
11 endangered species. If the Biological Opinion concludes that the proposed action is likely to
12 jeopardize a protected species, the agency must modify its proposal.” *Nat. Res. Def. Council*, 146
13 F.3d at 1125.

14 Plaintiff is a public interest environmental organization. According to Plaintiff, the
15 requested documents “are of vital importance to the public to understand how the National Flood
16 Insurance Program, which can have an enormous impact on development in floodplains and on
17 wildlife habitat, is fulfilling its obligations under the [Endangered Species Act].” Compl. ¶ 15.
18 Plaintiff alleges that it “is concerned that since a number of federal courts have already held that
19 FEMA had failed to properly consult with National Marine Fisheries Service (“NMFS”) or [U.S.
20 Fish and Wildlife Service] over the [National Flood Insurance Program], that FEMA has not
21 fulfilled its requirements under the [Endangered Species Act] in California.” *Id.* Plaintiff made its
22 FOIA request “to learn more about whether the required consultations between FEMA and the
23 National Marine Fisheries Service and/or U.S. Fish and Wildlife Service have occurred over the
24 [National Flood Insurance Program].” [Docket No. 19 (Dec. 9, 2015 Jt. CMC Statement at 2).] In
25 its complaint, Plaintiff alleges that FEMA failed to provide a final determination concerning the
26 June 8, 2015 request within statutory or regulatory time limits and failed to promptly release
27 documents that are responsive to the request. Compl. ¶¶ 17, 37, 38.

28 On October 19, 2015, Defendant sent its first interim FOIA response and release of

1 documents to Plaintiff. Jt. Letter at 1. It reviewed 445 pages and determined that 213 pages were
2 “entirely releasable,” and that portions of 204 pages were exempt from disclosure. Id. In this
3 discovery dispute, Defendant states that it “inadvertently” produced the following three documents
4 to Plaintiff: 1) a letter dated July 6, 2015; 2) a letter dated August 25, 2016; and 3) a June 2015
5 email chain. Id. Defendant does not state when it produced the three documents to Plaintiff, but
6 asserts that it first learned of the inadvertent production on March 11, 2016. Defendant requested
7 clawback nine business days later. Id. Ex. 1 (Mar. 24, 2016 letter to Plaintiff seeking clawback).
8 According to Defendant, the three documents are protected from release by FOIA Exemption 5. It
9 asks the court to order Plaintiff to destroy all copies of the documents in its possession and refrain
10 from using any information contained therein, as well as “take reasonable steps to retrieve” all
11 copies of the documents that Plaintiff has disseminated to third parties. Jt. Letter at 3.¹

12 The parties jointly lodged the three documents for in camera review pursuant to court
13 order. [Docket No. 32.] Plaintiff also filed an administrative motion for leave to file four
14 additional exhibits in support of its position, which Defendant does not oppose. [Docket Nos. 35,
15 36.] On November 22, 2016, the court ordered the parties to submit supplemental briefing
16 addressing whether the attorney-client privilege and/or the attorney work product doctrine applies
17 to the June 2015 email chain. [Docket No. 45.] The parties timely filed the requested briefing.
18 [Docket Nos. 46 (Def.’s Brief), 51 (Pl.’s Brief).]

19 **II. DISCUSSION**

20 **A. Whether the Court Has Authority to Order Plaintiff to Return the Documents**

21 As a threshold issue, the parties dispute whether the court may order the requested relief.
22 Defendant argues that the court has the inherent authority to order the requested relief to prevent
23 Plaintiff “from irresponsibly retaining documents that are exempt, were produced inadvertently,
24 and that FEMA acted promptly to claw back.” Jt. Letter 2. It notes that Federal Rule of Civil
25 Procedure 26(b)(5)(B)² provides for the return of privileged or attorney work product produced in

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27 ¹ After filing the instant letter, the parties settled the action and stipulated to dismissal of all claims
except for this dispute. [Docket No. 42.]

28 ² Under Rule 26(b)(5)(B), “[i]f information produced in discovery is subject to a claim of privilege

1 discovery, and asks the court to apply the same in these circumstances. Plaintiff argues that
2 clawback is not available in these circumstances. Since the documents at issue were released
3 under FOIA rather than produced in discovery, Plaintiff argues that FOIA governs this matter, not
4 the Federal Rules of Civil Procedure.

5 In support of its position, Defendant cites three cases in which courts ordered a receiving
6 party to destroy or return copies of documents inadvertently produced in response to a FOIA
7 request. In *Hersh & Hersh v. U.S. Department of Health & Human Services*, No. C 06-4234 PJH,
8 2008 WL 901539, at *9 (N.D. Cal. Mar. 31, 2008), the court ordered the plaintiff to return two
9 FOIA productions that were later superseded and which contained inadvertently produced
10 documents. In *ACLU v. Department of Defense*, No. 09 Civ. 08071 (BSJ) (FM), slip. op. at 13-15
11 (S.D.N.Y. Mar. 20, 2012), the court, citing its inherent authority and *Hersh*, ordered the plaintiffs
12 to return a classified document that had been inadvertently produced by the producing agency.
13 The document had been part of a production made in accordance with a court-supervised FOIA
14 response. Finally, in *Kielty v. FEMA*, No. 14-CV-3269 (PGS)(LHG), slip. op. (D.N.J. Dec. 8,
15 2014), the court ordered the plaintiff to destroy or return all copies of information that was
16 inadvertently produced in response to his FOIA request and enjoined his use of the information for
17 any purpose unless it was disclosed under FOIA or by court order. Plaintiff attempts to
18 distinguish these cases, arguing that *Hersh* and *Kielty* are conclusory, and that *ACLU* is
19 distinguishable because the production occurred pursuant to a court-ordered process. However, all
20 three cases support the conclusion that the court may exercise its inherent powers to order the
21 return of the documents if they are protected from release under an applicable FOIA exemption.
22 See also *Long v. U.S. IRS*, 693 F.2d 907, 909 (9th Cir. 1982) (describing courts as the
23 “enforcement arm of the FOIA”). Accordingly, the court will analyze whether the documents are

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26 or of protection as trial-preparation material, the party making the claim may notify any party that
27 received the information of the claim and the basis for it. After being notified, a party must
28 promptly return, sequester, or destroy the specified information and any copies it has; must not use
or disclose the information until the claim is resolved; must take reasonable steps to retrieve the
information if the party disclosed it before being notified; and may promptly present the
information to the court under seal for a determination of the claim. The producing party must
preserve the information until the claim is resolved.”

1 exempted from disclosure under FOIA.

2 **B. Exemption 5**

3 Defendant contends that the three documents are protected from release by FOIA
4 Exemption 5. Exemption 5 protects “inter-agency or intra-agency memorandums or letters that
5 would not be available by law to a party other than an agency in litigation with the agency.” 5
6 U.S.C. § 552(b)(5). “The exemption is ‘cast in terms of discovery law,’” and thus covers the
7 deliberative process privilege, the attorney-client privilege, and the attorney work product
8 doctrine. *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997)
9 (citations omitted).

10 Defendant argues that all three documents are protected by the deliberative process
11 privilege. It also asserts that parts of the third document, the June 2015 email chain, are protected
12 by the attorney-client privilege and attorney work product doctrine.

13 **1. Deliberative Process Privilege**

14 **a. Legal Standard**

15 The deliberative process privilege “permits the government to withhold documents that
16 reflect advisory opinions, recommendations and deliberations comprising part of a process by
17 which government decisions and policies are formulated.” *FTC v. Warner Commc’ns Inc.*, 742
18 F.2d 1156, 1161 (9th Cir. 1984). The privilege is designed to “promote frank and independent
19 discussion among those responsible for making governmental decisions,” *id.*, and the “ultimate
20 purpose” of the privilege is to “prevent injury to the quality of agency decisions.” *NLRB v. Sears,*
21 *Roebuck & Co.*, 421 U.S. 132, 151 (1975).

22 For a document to qualify for exemption 5 under the deliberative process privilege, it must
23 be both “predecisional” and “deliberative.” *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d
24 1114, 1117 (9th Cir. 1988). Predecisional means that the document was “antecedent to the
25 adoption of agency policy.” *Id.* Deliberative means that the document “must actually be related to
26 the process by which policies are formulated.” *Nat’l Wildlife Fed’n*, 861 F.2d at 1117. This dual
27 requirement reflects the privilege’s purpose of protecting the deliberative process leading up to
28 decisions. *Id.* “Purely factual material that does not reflect deliberative processes is not

1 protected.” FTC, 742 F.2d at 1161.

2 Because the deliberative process is “so dependent upon the individual document and the
3 role it plays in the administrative process[,] [t]he agency must establish what deliberative process
4 is involved, and the role played by the documents in issue in the course of that process.” Elec.
5 Frontier Found. v. CIA, No. C 09-3351 SBA, 2013 WL 5443048, at *12 (N.D. Cal. Sept. 30,
6 2013) (quoting *Animal Legal Def. Fund, Inc. v. Dep’t of Air Force*, 44 F. Supp. 2d 295, 299
7 (D.D.C. 1999) (quotation omitted) and *Senate of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d
8 574, 585-86 (D.C. Cir. 1987)). The agency must also “describe the nature of the decision making
9 authority vested in the office or person issuing the disputed documents, and the positions in the
10 chain of command of the parties to the documents.” *Id.* (citing *Arthur Andersen & Co. v. IRS*, 679
11 F.2d 254, 258 (D.C. Cir. 1982)).

12 The burden of establishing application of the privilege is on the party asserting it. *North*
13 *Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003). “Because FOIA’s
14 purpose is to encourage disclosure, its exemptions are to be narrowly construed.” *Carter*, 307
15 F.3d at 1088.

16 **b. Analysis**

17 The first document is a two-page letter dated July 6, 2015 with an attachment from Donna
18 S. Wieting, Director, Office of Protected Resources, NMFS, to Michael Grimm, Acting Assistant
19 Administrator for Mitigation with FEMA (the “NMFS letter”). NMFS Letter, 149-153. In the
20 letter, on behalf of NMFS, Wieting objects to a FEMA draft rule for the National Flood Insurance
21 Program, expressing the concern that the proposed rule fails to protect endangered species critical
22 habitat. She states NMFS’s position that it is “premature to concur on this draft rule” until NMFS
23 is able to review FEMA’s biological evaluation and complete its own “biological opinion pursuant
24 to Section 7 of the Endangered Species Act.” *Id.* at 149. She also states that the NMFS had
25 previously identified necessary changes to the proposed rule which had not been incorporated into
26 the draft rule, and encloses a three-page attachment containing additional comments on the draft
27 rule. *Id.* at 151-53. In the attachment, the NMFS asserts its position that “FEMA . . . must consult
28 with NMFS under Section 7(a)(2)” regarding the National Flood Insurance Program. *Id.* at 151

1 (“NMFS should conduct an [Endangered Species Act] [section 7(a)(2)] consultation for this
2 project . . .”).

3 The second document is an August 25, 2015 letter with an attachment from FEMA’s
4 Grimm to Wieting in response to Wieting’s July 6, 2015 letter (the “FEMA letter”). FEMA
5 Letter, 175-184. In response to Wieting’s statement that it would be premature for NMFS to
6 concur on the draft rule, Grimm states, “FEMA wishes to clarify that it is not seeking to undertake
7 consultation on the proposed rule per se.” *Id.* at 175. He also informs Wieting that FEMA has
8 concluded that it lacks authority to enact the NMFS’s requested changes to the proposed rule. *Id.*
9 at 177-179. The five-page attachment to Grimm’s letter is entitled, “Limitations on FEMA’s
10 Legal Authority and the Scope of the Proposed Action: Supporting Law and Analysis.” *Id.* at 180-
11 84.

12 The third and final document is a June 2015 email chain consisting of nine emails between
13 several FEMA employees. Email chain, 212-215. Plaintiff asserts that the emails “discuss
14 FEMA’s position that it lacks authority to enforce the Endangered Species Act (ESA) and that,
15 while due to certain ‘litigation outcomes and settlements’ it must ensure its National Flood
16 Insurance Program (NFIP) complies with the Endangered Species Act in some areas, its position
17 remains that it is not otherwise required to engage in ESA § 7 consultations and will not with
18 respect to a proposed rule modifying the NFIP.” *Jt. Letter* at 3. Defendant does not dispute this
19 characterization of the email chain.

20 According to Defendant, all three documents are protected by the deliberative process
21 privilege. It does not address how each individual document falls within the privilege, instead
22 arguing that all three documents are “predecisional, in that they involve FEMA’s ongoing,
23 unresolved deliberations with NMFS and internally over the development of a proposed rule.” *Jt.*
24 *Letter* at 2 (emphasis in original). Defendant further asserts that the documents are “deliberative,
25 as they are part of the consultation process by which FEMA externally and internally deliberates
26 and seeks guidance regarding its interpretation of and compliance with the Endangered Species
27 Act.” *Id.* It provides no additional context for the communications at issue.

28 Defendant’s showing is insufficiently specific to establish the deliberative process

1 privilege as to any of the three documents. As noted, “[b]ecause the deliberative process is “so
2 dependent upon the individual document and the role it plays in the administrative process[,] [t]he
3 agency must establish what deliberative process is involved, and the role played by the documents
4 in issue in the course of that process.” Elec. Frontier Foundation, 2013 WL 5443048. Further,
5 Defendant must “describe the nature of the decision making authority vested in the office or
6 person issuing the disputed documents, and the positions in the chain of command of the parties to
7 the documents.” Id. While Defendant identifies the deliberative process at issue—the
8 development of a proposed FEMA rule for the National Flood Insurance Program—it does not
9 provide basic context and information about the documents at issue, such as a description of the
10 individuals involved in authoring the documents and emails, their roles within their respective
11 agencies, or their roles in the rulemaking process. Defendant also does not explain the
12 relationship between the two agencies communicating about FEMA’s draft rule nor does it
13 describe how these documents played a role in the deliberative process it has identified. FEMA
14 operates under the Department of Homeland Security, while NMFS operates under the
15 Department of Commerce. It is entirely unclear whether NMFS has any official role in FEMA’s
16 rulemaking process.

17 Without the benefit of necessary context, the court is left to guess about the nature of the
18 correspondence between NMFS and FEMA. On their faces, the letters seem to stake out each
19 agency’s official position on a controversial issue: namely, whether FEMA is legally obligated to
20 engage in a section 7(a)(2) consultation with NMFS pursuant to the Endangered Species Act as
21 part of FEMA’s rulemaking process regarding the National Flood Insurance Program. FEMA
22 says it is not legally obligated to do so; NMFS says that FEMA is. This does not appear to be
23 predecisional, because the letters convey each agency’s official policy to the other agency. A
24 document is predecisional if it was “prepared in order to assist an agency decisionmaker in
25 arriving at his decision,” and includes “recommendations, draft documents, proposals,
26 suggestions, and other subjective documents which reflect the personal opinions of the writer
27 rather than the policy of the agency.” *Maricopa Audubon Soc’y*, 108 F.3d at 1093. “Exemption 5
28 does not protect . . . communications that promulgate or implement an established policy of an

1 agency.” *Brinton v. Dep’t of State*, 636 F.2d 600, 605 (D.C. Cir. 1980).

2 The letters also do not appear to be deliberative. A document is deemed “deliberative” if
3 “it reflects the give-and-take of the consultative process,” *Judicial Watch, Inc. v. Food & Drug*
4 *Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (citation omitted), and is “part of the ‘deliberative
5 process,’ if ‘the disclosure of [the] materials would expose an agency’s decisionmaking process in
6 such a way as to discourage candid discussion within the agency and thereby undermine the
7 agency’s ability to perform its functions.’” *Maricopa Audubon Soc’y*, 108 F.3d at 1093 (quotation
8 omitted). Defendant does not explain how the NMFS and FEMA letters reflect the “give-and-
9 take” of the consultative process or reflect FEMA’s decisionmaking process in a way that would
10 undermine the agency.³

11 As to the June 2015 email chain, the emails reflect an internal FEMA discussion about
12 whether FEMA must engage in Endangered Species Act section 7 consultations. It is not clear
13 whether this discussion relates to the proposed rule discussed in the NMFS and FEMA letters, and
14 Defendant does not “‘pinpoint an agency decision or policy to which the document contributed,’
15 or identify a decisionmaking process” to which the email chain contributed. See *Judicial Watch,*
16 *Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 259 (D.D.C. 2004) (citations omitted). The Ninth
17 Circuit has held that “an agency may not satisfy its burden of proof simply by producing the
18 withheld materials for in camera review.” *Maricopa Audubon Soc’y*, 108 F.3d at 1093, 1093 n.1
19 (“the district court’s inspection prerogative is not a substitute for the government’s burden of
20 proof.” (quotation omitted)). By failing to provide basic information about the deliberative
21 process at issue, and the role played by the specific documents, Defendant cannot meet its burden
22 of establishing that the deliberative process privilege protects any of the three documents.

23 **2. Attorney Client Privilege and Work Product Doctrine**

24 Defendant also asserts that the bulk of the June 2015 email chain is protected by the
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27 ³ The court also notes that the FEMA and NMFS letters were apparently published online by
28 NMFS, (Jt. Letter at 4), indicating that NMFS was not concerned that the disseminating the
communications would undermine the goal of promoting “frank and independent discussion”
between the two agencies.

1 attorney-client privilege and attorney work product doctrine. The email chain consists of nine
2 emails between FEMA employees, with the first email in the chain sent on June 11, 2015 at 1:45
3 pm and the last, most recent email sent on June 12, 2015 at 2:38 pm. In supplemental briefing,
4 FEMA clarifies its position that the attorney-client privilege and work product doctrine apply to
5 only the seven most recent emails in the chain (the third through ninth emails). It no longer
6 contends that the first two emails in the chain (sent June 11, 2015 at 1:45 pm and June 11, 2015 at
7 4:51 pm) are protected by the attorney-client privilege and work product doctrine.⁴

8 **a. Legal Standards**

9 The attorney-client privilege protects from discovery “confidential communications
10 between attorneys and clients, which are made for the purpose of giving legal advice.” United
11 States v. Richey, 632 F.3d 559, 566 (9th Cir. 2011) (citation omitted). The privilege, which is
12 narrowly construed, *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012), attaches
13 when:

14 (1) legal advice of any kind is sought (2) from a professional legal
15 adviser in his capacity as such, (3) the communications relating to
16 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.

17 *Richey*, 632 F.3d at 566 (brackets and citation omitted).

18 The fact “[t]hat a person is a lawyer does not, ipso facto, make all communications with
19 that person privileged.” *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). “The
20 privilege does not allow an agency to withhold a document or portions thereof merely because it is
21 a communication between the agency and its lawyers.” *Elec. Frontier Found.*, 2013 WL 5443048,
22 at *16. Rather, “the agency must show that it supplied information to its lawyers with the
23 expectation of secrecy and the information was not known by or disclosed to any third party.” *Id.*

24 The work product doctrine shields from discovery “documents and tangible things that are
25 prepared in anticipation of litigation or for trial by or for another party or its representative.” *Fed.*

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27 _____
28 ⁴ Defendant also apparently abandoned its claim that the first two emails in the chain are protected
by the deliberative process privilege. See Def.’s Brief at 2 (“Defendant would not object to
producing the first two emails in the chain (i.e., the last two emails on Page 215).”)

1 R. Civ. P. 26(b)(3)(A). The doctrine aims to balance the “promotion of an attorney’s preparation
2 in representing a client” and “society’s general interest in revealing all true and material facts to
3 the resolution of a dispute.” In re Seagate Tech., LLC, 497 F.3d 1360, 1375 (Fed. Cir.2007)
4 (citation and quotation marks omitted).

5 **b. Analysis**

6 **i. The Privileged Status of the June 2015 Email Chain**

7 In response to the court’s order for supplemental briefing, Defendant submitted a
8 declaration by Amy Weinhouse, an “Attorney-Advisor” in the Flood Insurance and Mitigation
9 Legal Division of FEMA’s Office of Chief Counsel (“OCC”). [Docket No. 47 (Weinhouse Decl.,
10 Dec. 5, 2016) ¶ 1.] She explains that in the second email in the chain, a FEMA employee named
11 G. Morgan Griffin seeks clarification about his role in an internal process. In the third email in the
12 chain, dated June 11, 2015 at 1:54 pm, FEMA’s Michael Nakagaki responded to Griffin’s question
13 by stating “[w]e will coordinate our conversation with OCC here” and copying Weinhouse.
14 Weinhouse asserts that starting with Nakagaki’s 1:54 pm email, legal advice was being sought
15 from the OCC. Weinhouse Decl. ¶¶ 3, 4. What follows includes an email from Weinhouse that
16 she states includes legal advice and an ensuing email “conversation” between Griffin, Nakagaki,
17 Weinhouse and others. Id. at ¶ 4. Weinhouse states that the information discussed “was not
18 known by or disclosed to any third party until the email chain was inadvertently produced to
19 Plaintiff.” Id. at ¶ 6.

20 Upon careful review of the email chain and the Weinhouse declaration, the court finds that
21 Defendant has satisfied its burden to demonstrate that the most recent seven emails in the June
22 2015 email chain are attorney-client privileged communications. The chain involves
23 communications sent between FEMA employees, including an OCC attorney, which were made
24 for the purpose of obtaining legal advice about FEMA’s Endangered Species Act section 7
25 consultations. See Richey, 632 F.3d at 566.

26 **ii. Waiver**

27 Notwithstanding the court’s conclusion that the most recent seven emails in the June 2015
28 email chain contain privileged communications, the court must determine whether FEMA waived

1 its claim of privilege. Plaintiff argues that FEMA waived privilege for the June 2015 email chain
2 (as well as for the NMFS and FEMA letters), because it produced the document in October 2015
3 but did not request clawback until March 2016, over five months later.

4 “As with all evidentiary privileges, the burden of proving that the attorney-client privilege
5 applies rests not with the party contesting the privilege, but with the party asserting it. One of the
6 elements that the asserting party must prove is that it has not waived the privilege.” *Weil v.*
7 *Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (internal citations
8 omitted). “[I]nadvertence’ of disclosure does not as a matter of law prevent the occurrence of
9 waiver.” *Id.* at 24. However, inadvertent disclosure does not constitute a waiver of the attorney-
10 client privilege or work product doctrine if:

- 11 (1) the disclosure is inadvertent;
- 12 (2) the holder of the privilege or protection took reasonable steps to
13 prevent disclosure; and
- 14 (3) the holder promptly took reasonable steps to rectify the error,
15 including (if applicable) following Federal Rule of Civil Procedure
16 26(b)(5)(B).

16 Fed. R. Evid. 502(b).⁵

17 Here, Plaintiff does not dispute that the disclosure of the June 2015 email chain in
18 Defendant’s October 19, 2015 FOIA production was inadvertent, satisfying the first factor of the
19 test. As to the remaining factors, Defendant states only that it discovered the inadvertent
20 production on March 11, 2016 and requested clawback on March 24, 2016, nine business days
21 later. *Jt. Letter* at 1, Ex. 1. Defendant is silent as to whether it took any “reasonable steps to
22 prevent disclosure” of privileged information and does not identify any precautions it took to
23

24 ⁵ Federal Rule of Evidence 502(b) applies to inadvertent disclosures “made in a federal proceeding
25 or to a federal office or agency.” Fed. R. Evid. 502(b). The parties did not brief the waiver
26 standard applicable in this context, where Defendant inadvertently disclosed documents in
27 connection with a FOIA release, outside the usual discovery process. However, since Defendant
28 contends that all of the documents at issue are protected from release by FOIA Exemption 5,
which “is ‘cast in terms of discovery law,’” *Maricopa Audubon Soc’y*, 108 F.3d at 1092, the court
finds it appropriate to analyze the issue of waiver under Rule 502(b). Moreover, in its March 24,
2016 letter advising Plaintiff of the inadvertent production, Defendant sought clawback of the
documents pursuant to Rule 502(b). *Jt. Letter Ex. 1.*

1 prevent such disclosure. It provides no information about the initial inadvertent production or its
2 discovery thereof, such as a description of any time constraints it faced in responding to Plaintiff's
3 FOIA request or the number of documents it reviewed in order to respond to the request. See Fed.
4 R. Evid. 502 Advisory Comm. Notes (describing factors a court may consider in evaluating
5 whether an inadvertent disclosure waives privilege or protection, including "the reasonableness of
6 precautions taken" and "the number of documents to be reviewed and the time constraints for
7 production."). In the absence of any information at all about Defendant's efforts to identify and
8 protect privileged materials, Defendant has not demonstrated that it took reasonable steps in order
9 to prevent inadvertent disclosure.

10 As to the third factor, Defendant asserts that it acted "promptly" to request clawback of the
11 documents, notifying Plaintiff nine business days after discovering its inadvertent production. In
12 light of Defendant's failure to establish that it "took reasonable steps to prevent disclosure" of
13 privileged or protected information, the court need not decide whether Defendant's nine-day delay
14 before requesting clawback was reasonable. However, the court notes that numerous courts have
15 held that "once a party realizes a document has been accidentally produced, it must assert privilege
16 with virtual immediacy." *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 585 (Fed. Cl.
17 2012) (citing cases in which failure to assert privilege within periods ranging from six days to six
18 months weighed in favor of waiver); see also *Mycone Dental Supply Co. Inc. v. Creative Nail
19 Design Inc.*, No. C-12-00747-RS (DMR), 2013 WL 4758053, at *3 (N.D. Cal. Sept. 4, 2013)
20 (collecting cases). Since Defendant has failed to establish that its production of the June 2015
21 email chain did not constitute a waiver of the attorney-client privilege, the June 2015 email chain
22 is not protected by the attorney-client privilege.⁶

23 In sum, the court concludes that Defendant has failed to establish that the three documents
24 inadvertently produced to Plaintiff fall within the protections of the deliberative process privilege.
25 Further, Defendant waived the attorney-client privilege as to emails in the June 2015 email chain

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27 ⁶ Based on the court's finding of waiver, it need not address whether the June 2015 email chain is
28 also protected by the work product doctrine, since any such protection was also waived by
Defendant's disclosure of the emails to Plaintiff.

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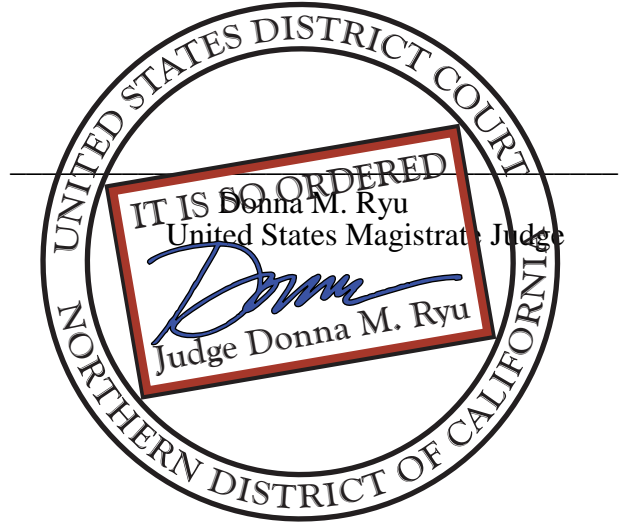
for which it claimed privilege. Defendant’s motion for clawback is therefore denied.⁷

III. CONCLUSION

For the foregoing reasons, Defendant’s motion for clawback is denied.

IT IS SO ORDERED.

Dated: January 3, 2017



⁷ Because the court did not rely on any of the exhibits submitted with Plaintiff’s administrative motion to supplement the record, the administrative motion is denied as moot.