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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SURF & SAND, LLC.,
Plaintiff,
v.
CITY OF CAPITOLA, ET AL.,
Defendants.

Case No.: C 09-05542 RS (PVT)
ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF SURF & SAND’S MOTION TO COMPEL
[Docket No. 42]

INTRODUCTION

Plaintiff Surf & Sand, LLC moves for the following: (1) to compel answers at depositions; (2) for a protective order regarding speaking objections and coaching of witnesses during deposition; (3) for an order authorizing further deposition of Robert Begun; and (4) for an award of costs totaling \$7,081.16. (“Surf & Sand”). Defendant City of Capitola opposes the motion. (“Capitola”). On October 5, 2010, the parties appeared for hearing. Having reviewed the papers and considered the arguments of counsel, plaintiff Surf & Sand’s motion to compel is granted in part and denied in part.¹

¹ The holding of this court is limited to the facts and particular circumstances underlying the present motion.

1 **BACKGROUND**

2 Surf & Sand is a rent-controlled mobile home park located in the City of Capitola. It
3 overlooks the Pacific Ocean. Under current rent-control laws, Surf & Sand rents spaces to tenants
4 for \$300 a month. Surf & Sand could rent the spaces to tenants for five times that amount on the fair
5 market. It later decided to close the mobile home park and “leave it as bare dirt, with no proposed
6 new use.” However, the local city council voted to deny permission to Surf & Sand to close its park
7 on the grounds that its proposed relocation benefits for displaced residents would be inadequate.
8 Surf & Sand alleges that the denial to close its park was improper, and defendant Capitola failed to
9 make any findings regarding what constitutes adequate relocation benefits for displaced mobile
10 home residents.

11 “In essence, [Surf & Sand] alleges [that Capitola] wants to force the owners of [Surf & Sand]
12 to sell the Park to the tenants for a fraction of the underlying value of the property and that the entire
13 administrative process, including the final decision, was designed from the beginning to prevent
14 closure.” Mot. at 2.

15 Specifically, plaintiff Surf & Sand challenges the administrative process that led the city
16 council to deny it permission to close the mobile home park, and alleges that Capitola violated and
17 disregarded federal and state law, its municipal code, and its own local coastal plan for purely
18 political purposes. Plaintiff Surf & Sand alleges federal claims for private taking, substantive due
19 process, procedural due process, and other claims for fraud, breach of contract, and rescission
20 arising out of a consulting agreement Capitola required to process the closure application. “[T]he
21 City’s real purpose was to confiscate the underlying property of [Surf & Sand] from the owners for
22 the benefit of the tenants.” Mot. at 4. Finally, plaintiff Surf & Sand alleges that Capitola’s actions
23 toward Surf & Sand is disparate from its treatment of city-owned and other tenant-owned mobile
24 home parks and is unrelated to any legitimate state objective. *Id.*

25 During the course of deposing some city council members, defendant Capitola has asserted
26 certain privileges, including the deliberative process and mental process privileges. Defendant
27 Capitola has also asserted the attorney-client privilege as to discussions held by the city council and
28 its attorneys during closed sessions.

1 **LEGAL STANDARD**

2 “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
3 party’s claim or defense. . . .” Fed. R. Civ. P. 26(b). “For good cause, the court may order
4 discovery of any matter relevant to the subject matter involved in the action.” *Id.* “Relevant
5 information need not be admissible at the trial if the discovery appears reasonably calculated to lead
6 to the discovery of admissible evidence.” *Id.* “The scope of discovery permissible under Rule 26
7 should be liberally construed; the rule contemplates discovery into any matter that bears on or that
8 reasonably could lead to other matter that could bear on any issue that is or may be raised in a case.”
9 *Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A., et al.*, 254 F.R.D. 568, 575 (N.D. Cal. 2008).

10 In federal question cases, the courts look to federal law to determine whether a privilege
11 applies. *Kenneth Kaufman v. Board of Trustees, et al.*, 168 F.R.D. 278, 280 (C.D. Cal. 1996)(citing
12 *Kerr v. United States District Court Northern District Of California*, 511 F.2d 192, 197 (9th Cir.
13 1975)). “The rationale of the Court of Appeals in *Kerr* is applicable here. The plaintiff is seeking to
14 enforce a right secured by federal law against a local governmental entity, and to assure plaintiff’s
15 ability to prosecute his claims, federal law must be used to determine the existence and scope of any
16 claimed privilege.” *Id.* “Apart from not being a privilege recognized under federal law, the Brown
17 Act does not establish an evidentiary privilege at all; rather, it merely permits the withholding of
18 certain information from the public generally.” *Id.*

19 ““Federal common law recognizes the deliberative process privilege.”” *Brian Thomas v.*
20 *Matthew Cate*, 2010 WL 671254 *2 (E.D. Cal. Feb. 19, 2010)(citing *North Pacifica, LLC v. City of*
21 *Pacifica*, 274 F. Supp. 2d 1118, 1120 (N.D. Cal. 2003)). ““The deliberative process privilege
22 exempts from discovery information reflecting advisory opinions, recommendations, and
23 deliberations comprising part of a process by which government decisions and policies are
24 formulated.” *Id.* (internal citations omitted). “The burden of establishing application of the
25 deliberative process privilege is on the party asserting it.” *Id.*

26 “The deliberative process privilege is a qualified rather than an absolute privilege.” *U.S. v.*
27 *Lawrence K. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989) (internal citations omitted). ““The primary
28 rationale for the intra-governmental opinion privilege is that effective and efficient governmental

1 decisionmaking requires a free flow of ideas among government officials and that inhibitions will
2 result if officials know that their communications may be revealed to outsiders.” *Id.*

3 “Whether agencies or local legislators are involved, there are two requirements to establish
4 the applicability of the privilege. First, the document or testimony must be pre-decisional- i.e., it
5 must have been generated before the adoption of [a] policy or decision.’ Second, the document or
6 testimony ‘must be deliberative in nature, containing opinions,
7 recommendations, or advice about . . . policies [or decisions].” *North Pacifica, LLC v. City of*
8 *Pacifica*, 274 F. Supp. 2d at 1121.

9 The court must balance the following factors in determining whether the qualified privilege
10 applies: (1) the interest of the litigants, and ultimately of society, in accurate judicial fact finding; (2)
11 The relevance of the evidence sought to be protected; (3) the availability or unavailability of
12 comparable evidence from other sources; (4) the seriousness of the litigation and the issues involved;
13 (5) the presence of issues concerning alleged governmental misconduct; (6) the role of government
14 in the litigation itself; (7) the possibility of future timidity by government employees; and (8) the
15 federal interest in the enforcement of federal law. *Id.* at 173.

16 “The mental process privilege is a corollary to the deliberative process privilege that
17 ‘protects uncommunicated motivations for a policy or decision.’” *Brian Thomas v. Matthew Cate*,
18 2010 WL 671254 at *7. “The ‘mental process privilege is ‘inextricably intertwined’ with the
19 deliberative process privilege.” *Id.* “Like the deliberative process privilege, the mental process
20 privilege must be raised with particularity, and the party asserting the privilege bears the burden of
21 establishing its applicability.” *Id.* “Whether the mental process privilege affords broader protection
22 than the deliberative process privilege is unsettled.” *Id.* “It is clear, however, that like the
23 deliberative process privilege, the mental process privilege is a qualified one that may be overcome
24 by a litigant.” *Id.*

25 Permissible discovery may be limited by the attorney-client privilege. *Phoenix Solutions,*
26 *Inc. v. Wells Fargo Bank, N.A., et al.*, 254 F.R.D. at 575. The party asserting the attorney-client
27 privilege bears the burden of proving that it applies. *Pauline Weil, et al. v. Investment/Indicators,*
28 *Research and Management, Inc., et al.*, 647 F.2d 18, 25 (9th Cir. 1981)(internal citations omitted).

1 **DISCUSSION**

2 **I. Deliberative Process and Mental Process Privileges**

3 As a initial matter, plaintiff Surf & Sand seeks documents or testimony that pre-date
4 Capitola’s decision to deny it permission to close the mobile home park. And the documents or
5 testimony are deliberative in nature. Therefore, the two requirements to establish the applicability of
6 the privilege have been met here.

7 The court then considers the 8 factors set forth above and balances them to determine
8 whether the qualified privilege applies. First, the above-captioned action involves federal
9 constitutional claims, and the federal interest in the enforcement of federal constitutional rights
10 weighs in favor of disclosure. Second, the evidence sought to be protected is relevant. Plaintiff Surf
11 & Sand seeks to determine the background and rationale for the city council to deny its application
12 to close the mobile home park. The evidence is relevant to its constitutional taking, procedural due
13 process, and substantive due process claims. Third, any evidence of discriminatory intent may not
14 be apparent from the administrative record itself. Nevertheless, plaintiff Capitola may also use other
15 sources of circumstantial and direct evidence. *See Village of Arlington Heights, et al. v.*
16 *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268, 97 S.Ct. 555 (1977). Fourth, the
17 allegations here are serious. Plaintiff Surf & Sand has alleged that defendant Capitola has engaged
18 in violations of federal constitutional rights. Fifth, the issues in the case involve allegations
19 regarding decisions made by the city council for the City of Capitola and a challenge to the
20 administrative process used to reach those decisions. As a result, there are issues of alleged
21 government misconduct. Sixth, the City of Capitola is a defendant in the above-captioned action.
22 Seventh, there is no indication that there is a possibility of future timidity by government employees.
23 And eighth, based on the claims alleged there is a federal interest in enforcing federal laws.
24 Therefore, on balance, the court finds that the deliberative process privilege is overcome here.
25 Accordingly, plaintiff Surf & Sand may question city council members regarding their “objective
26 manifestations of the decision-making process.” *North Pacifica, LLC v. City of Pacifica, supra*, 274
27 F. Supp. 2d at 1125.

28 For example, NP may ask the City Council members about what they said to others
about NP and Condition 13(b), what they heard, what they read, what they were told

1 and so forth. The Court will not allow NP to inquire as to the City Council members’
2 subjective uncommunicated thoughts. Such inquiry is likely to be obviated to a large
3 extent because NP can explore the objective evidence that surrounded and
4 illuminated the decisionmaking process.

5 *Id.* at 1125-1126. However, plaintiff Surf & Sand may not question city council members regarding
6 their subjective uncommunicated thoughts.

7 **II. Attorney-Client and Work-Product Privileges**

8 Federal common law recognizes the attorney-client privilege. *North Pacifica, LLC v. City of*
9 *Pacifica, supra*, 274 F. Supp. 2d at 1126. The Ninth Circuit describes it as:

10 (1) when legal advice of any kind is sought (2) from a professional legal adviser in
11 his or her capacity as such, (3) the communications relating to that purpose, (4) made
12 in confidence (5) by the client, (6) are, at the client’s instance, permanently protected
13 (7) from disclosure by the client or by the legal adviser (8) unless the protection be
14 waived.

15 *Id.* “The party asserting the privilege has the burden of establishing all of its elements and, even if
16 established, the privilege is strictly construed.” *Id.*

17 Here, defendant Capitola contends that certain city council meeting sessions are protected by
18 the attorney-client privilege. It states that the sessions were closed because an attorney was present
19 and the discussions involved pending and prospective litigation. Like the discussions in *North*
20 *Pacifica LLC v. City of Pacifica*, however, defendant Capitola has not shown that “all
21 communications during the closed sessions of the City Council, with the presence of legal counsel,
22 are necessarily privileged.” *Id.* at 1127.

23 In reviewing the various city council minutes attached to defendants’ request for judicial
24 notice, it appears there were closed sessions held with legal counsel present regarding potential and
25 actual cases. *See, e.g.*, Defendants’ Request for Judicial Notice, Exh. A; Plaintiff’s Supplemental
26 Request for Judicial Notice, ¶ 1, Exh. 1. Defendant Capitola bears the burden of establishing all of
27 the elements of privilege. At this juncture, it has not met its burden. The city council minutes
28 merely reflect that the city council held closed sessions in a conference with legal counsel regarding
existing litigation, including *Surf & Sand, LLC v. City of Capitola*. For example, defendant Capitola
must show, *inter alia*, that legal advice was sought, that legal counsel was there and acting in the
capacity of a professional legal adviser, that the communications related to that purpose, and that the

1 communications were made in confidence. Therefore, plaintiff Surf & Sand may inquire during
2 deposition regarding the closed sessions. Defendant Capitola may object, and then endeavor to
3 establish all of the elements of privilege. If plaintiff Surf & Sand believes that the elements have not
4 been met for the closed sessions, it may move to compel further responses at deposition.

5 **III. Conduct of Counsel at Deposition**

6 Counsel shall refrain from making speaking objections or engaging in other colloquy. All
7 objections to the form of a question shall be made on the record by stating “objection, form.”
8 Deposing counsel may ask for clarification of the objection if he or she so chooses. Otherwise,
9 counsel defending the deposition shall make no further statement about the pending question, nor
10 ask the deposing attorney for clarification. However, the *deponent* may ask for clarification of any
11 question if in good faith he does not understand any portion of it. If a question calls solely for
12 privileged information, counsel defending the deposition may instruct the witness not to answer by
13 stating “objection, privilege, I instruct the witness not to answer.” If the full response to a question
14 might include both privileged and unprivileged information, the deponent shall provide only the
15 unprivileged information, if any. The objection on grounds of privilege shall be preserved *without*
16 being stated on the record. Further, counsel defending the deposition shall not prompt or “remind”
17 the witness that he is not to disclose attorney-client communications. All preparation of the witness
18 regarding how to handle questions that may call for both privileged and unprivileged information
19 shall be completed prior to the deposition. Any objections on the grounds of relevance are preserved
20 for trial and shall not be stated on the record at a deposition. Any other objections shall be made by
21 stating “objection” and citing the section number of the applicable Federal Rule of Evidence,
22 without further discussion.

23 **IV. Further Deposition of Robert Begun**

24 During the course of Robert Begun’s deposition, the parties contacted the court to resolve the
25 dispute regarding the various privileges discussed above. The court sought further briefing from the
26 parties and as a result, the deposition of Mr. Begun was curtailed. Moreover, the deposition
27 transcript is replete with lengthy objections related to those privileges. Therefore, it is appropriate to
28 allow plaintiff Surf & Sand with additional time to depose him. Accordingly, plaintiff Surf & Sand

1 may depose Mr. Begun for an additional 3 hours.

2 **V. Motion for Attorneys' Fees and Costs**

3 Plaintiff Surf & Sand further moves for an award of attorneys' fees and costs totaling
4 \$7,081.16. It estimates that \$13,000 is the total amount of attorneys' fees and costs incurred in
5 bringing the above motion. This total amount includes \$810.16 for obtaining an expedited
6 deposition transcript for Mr. Begun, and an estimate of \$500 for traveling and appearing for the
7 hearing. Plaintiff Surf & Sand "contends that the manner in which the City asserted the objections
8 was improper and unnecessarily interfered with the deposition process." Mot. at 20-21.

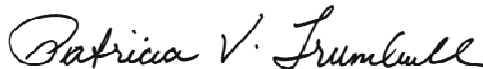
9 As a general matter, a motion for attorneys' fees must be separately filed. *See* Civ. L.R. 7-
10 8(a). Notwithstanding the above, plaintiff Surf & Sand's motion for attorneys' fees and costs is
11 denied.

12 **CONCLUSION**

13 For the foregoing reasons, plaintiff Surf & Sand's motion to compel is granted in part and
14 denied in part and the motion for attorneys' fees and costs is denied.

15 IT IS SO ORDERED.

16 Dated: October 28, 2010



17 PATRICIA V. TRUMBULL
18 United States Magistrate Judge
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