

1 IN THE UNITED STATES DISTRICT COURTS
2 FOR THE EASTERN DISTRICT OF CALIFORNIA
3 AND THE NORTHERN DISTRICT OF CALIFORNIA
4 UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES
5 PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE
6

7 RALPH COLEMAN, et al.,
8 Plaintiffs,
9 v.
10 ARNOLD SCHWARZENEGGER,
11 et al.,
12 Defendants.

NO. CIV S-90-0520 LKK JFM P
THREE-JUDGE COURT

13 MARCIANO PLATA, et al.,
14 Plaintiffs,
15 v.
16 ARNOLD SCHWARZENEGGER,
17 et al.,
18 Defendants.

NO. C01-1351 TEH
THREE-JUDGE COURT
ORDER

20 This matter is before the court on plaintiffs' motion to compel production of
21 documents that have been withheld by defendants on asserted claims of deliberative process
22 privilege.¹

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27 ¹ The parties' disputes over defendants' assertions of attorney-client privilege and
28 attorney work product were resolved by this court by order filed April 14, 2008. The
disputes over defendants' assertions of official information privilege and privacy have been
resolved by the parties.

1 BACKGROUND

2 The dispute at bar arises from plaintiffs' first request for production of documents,
 3 served in these proceedings on September 5, 2007.² On October 25, 2007, defendants served
 4 responses to plaintiffs' first document production request. Therein, defendants interposed
 5 several general objections, and they asserted various privileges and interposed objections to
 6 each of the specific requests. See Defendants' Responses to Plaintiffs' First Set of Requests
 7 for Production of Documents, filed October 26, 2007.

8 In a stipulation filed November 2, 2007, the parties agreed to a schedule for rolling
 9 production of responsive, non-privileged documents as well as privilege logs. On December
 10 6, 2007, this court heard oral argument on plaintiffs' motion to compel production of
 11 documents withheld pursuant to claims of privilege. At the conclusion of the hearing, the
 12 court issued an oral ruling granting plaintiffs' motion to compel. A written order followed
 13 on December 7, 2007. On the same day, defendants filed a motion for reconsideration or, in
 14 the alternative, for a stay of this court's order.

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17 ² That request contains thirty-eight separate requests for production of documents,
 18 including requests for documents related to: the implementation of Assembly Bill 900 (AB
 19 900); any projected change in California's prison population; the California Department of
 20 Corrections and Rehabilitation's (CDCR) choice of prison sites for construction of additional
 21 prison beds, buildings to treat or house inmates, and reentry program facilities under various
 22 sections of AB 900, including site surveys and Environmental Impact Reports,
 23 communications from or to local community groups and/or government officials, timetables
 24 for the construction of such beds and progress in meeting the timetables; timetables for
 25 transfers of inmates out of state under AB 900; the CDCR's ability or inability to hire and/or
 26 retain medical and mental health staff, including analyses of the effect of AB 900 on medical
 27 and mental health staffing levels; studies or analyses of the effect of AB 900 on medical and
 28 mental health care at the prisons; any measures defendants have considered to reduce prison
 populations other than the measures in AB 900; contingency plans, other than population
 reducing measures, defendants have considered initiating when prisons reach their maximum
 capacity; defendants' determination of the maximum capacity of any prison or the entire
 prison system; timetables for obtaining funding to implement AB 900 and defendants'
 progress therewith; any consideration of placing limits on the prison population; any
 consideration of the effects of sentencing reform, a sentencing commission, and changes in
 parole policies on the prison population; specific matters referenced in the Declaration of
 Scott Kernan filed in opposition to plaintiffs' motion to convene a three judge panel; and
 changes or clarifications of parole discharge policies and parole revocation policies. See Ex.
 F to Declaration of Michael W. Bien in Support of Joint Statement Regarding Discovery
 Dispute, filed October 22, 2007.

1 By order filed December 11, 2007, the three-judge court stayed this court's order.
2 Subsequently, by order filed December 17, 2007, the three-judge court granted defendants
3 additional time to review and revised their privilege logs and the matter was referred back to
4 the undersigned for further proceedings thereon. In accordance with that order, by order
5 filed December 20, 2007, this court directed defendants to serve, inter alia, their revised
6 privilege logs on or before January 28, 2008. On that date, defendants filed revised privilege
7 logs and four declarations in support thereof. Thereafter, defendants were granted an
8 additional period of time in which to complete the revisions to their privilege logs. See Order
9 filed January 30, 2008. Defendants' final revised privilege logs were filed and served on
10 February 22, 2008, together with four supplemental declarations in support thereof.

11 On February 25, 2008, the parties filed a Joint Statement Regarding Discovery
12 Disputes setting forth disputes over defendants' assertions of deliberative process privilege,
13 attorney-client privilege, and attorney work-product doctrine. By order filed March 24,
14 2008, the parties were directed to file a joint statement setting forth all claims and defenses
15 to be presented in this action, identifying the party or parties who will be tendering the claims
16 the defenses so identified, and identifying what, if any, discovery might be needed for each
17 claim and defense so identified. Ruling on the disputes over defendants' assertions of
18 deliberative process privilege raised in the February 25, 2008 statement of discovery disputes
19 was deferred pending filing of said joint statement. See Order filed April 14, 2008, at 3-4.
20 Said disputes are resolved herein.

21 **PLAINTIFFS' MOTION**

22 At issue are 4,653 documents withheld by defendants pursuant to a claim of
23 deliberative process privilege, see Ex. A to Declaration of Lori Rifkin in Support of
24 Plaintiffs' Statement Regarding Discovery Disputed, filed February 25, 2008, and sixty-nine
25 documents listed in Attachment C to this court's April 14, 2008 order.³ Plaintiffs advance

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27 ³ This order does not resolve the dispute tendered to the parties in the Joint Statement
28 Regarding Additional Discovery Dispute, filed May 27, 2008. That dispute will be resolved
by separate order.

1 two main grounds in support of their motion. First, they contend that defendants have not
2 sufficiently established the deliberative process privilege for many of the documents.
3 Second, they contend that the deliberative process privilege is a qualified privilege that “is
4 overcome in this case where almost all of the documents defendants have withheld pursuant
5 to assertions of the deliberative process privilege are directly related to the defenses
6 defendants have raised in this case.” Joint Statement Regarding Discovery Disputes, filed
7 February 25, 2008, at 11 (Joint Statement). In opposition, defendants contend that plaintiffs
8 have not identified with specificity the documents they seek, that plaintiffs have not made
9 “the sufficiently strong showing that is required to override the government’s interest in
10 protecting its deliberative processes” and that they have not put their deliberative processes
11 in issue in these proceedings. Joint Statement, at 31-36.

ANALYSIS

13 || I. General Principles

14 Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that “[p]arties may
15 obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or
16 defense. . . .” Defendants’ claims of privilege in these proceedings are governed by principles
17 of federal common law. See Fed. R. Evid. 501; see also Kerr v. United States District Court
18 for the Northern District of California, 511 F.2d 192, 197 (9th Cir. 1975).

19 It is well-established that the federal “policy favoring open discovery requires that
20 privileges must be ‘strictly construed.’” Dowling v. American Hawaii Cruises, Inc., 971 F.2d
21 423, 425 (9th Cir. 1992) (quoting University of Pennsylvania. v. EEOC, 493 U.S. 182, 189
22 (1990)). The United States Supreme Court has made it clear that an evidentiary privilege is
23 not applied “unless it ‘promotes sufficiently important interests to outweigh the need for
24 probative evidence. . . .’” University of Pennsylvania, 493 U.S. at 198 (quoting Trammel v.
25 United States, 445 U.S. 40, 51 (1980). “Inasmuch as ‘[t]estimonial exclusionary rules and
26 privileges contravene the fundamental principles that “the public . . . has a right to every

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1 man's evidence,"" id. at 50 [internal citation omitted], any such privilege must 'be strictly
2 construed.' 445 U.S. at 50." University of Pennsylvania, id.

3 Rule 26(b)(5)(A) of the Federal Rules of Civil Procedure provides:

4 When a party withholds information otherwise discoverable
5 under these rules by claiming that it is privileged or subject to
protection as trial preparation material, the party must:

6 (I) expressly make the claim; and

7 (ii) describe the nature of the documents, communications, or
8 tangible things not produced or disclosed -- and do so in a
manner that, without revealing information itself privileged or
protected, will enable other parties to assess the claim.

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10 Fed. R. Civ. P. 26(b)(5)(A)(I), (ii). The specific "nature" of the notice required by Rule
11 26(b)(5) "is explicitly left indeterminate." Burlington Northern & Santa Fe Ry. Co. v. U.S.
12 Dist. Court for Dist. of Mont., 408 F.3d 1142, 1147 (9th Cir. 2005). "'The rule does not
13 attempt to define for each case what information must be provided when a party asserts a
14 claim of privilege. . . .'" Id. at 1147-48 (quoting Rule 26(b)(5) advisory committee's note
15 (1993 Amendments)). However, it is clear that "the 'party must . . . provide sufficient
16 information to enable other parties to evaluate the applicability of the claimed privilege or
17 protection.'" Id. at 1148 (quoting Rule 26(b)(5) advisory committee note (1993
18 Amendments)).⁴

19 In Burlington Northern, the United States Court of Appeals for the Ninth Circuit set
20 forth several factors that a court is to consider in determining whether a particular assertion
21 of privilege satisfies the requirements of Rule 26(b)(5)(A):

22 the degree to which the objection or assertion of privilege enables
23 the litigant seeking discovery and the court to evaluate whether
each of the withheld documents is privileged (where providing
24 particulars typically contained in a privilege log is presumptively
sufficient and boilerplate objections are presumptively
insufficient); the timeliness of the objection and accompanying

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26 ⁴ Rule 26(b)(5)(B) provides for the return of information produced during discovery
27 that "is subject to a claim of privilege or of protection as trial-preparation material." See
Fed. R. Civ. P. 26(b)(5)(B). The parties in these proceedings have also entered into a "claw
back agreement." Ex. O to Declaration of Lori Rifkin in Support of Plaintiff's Motion to
28 Compel Production of Documents, filed November 30, 2007.

1 information about the withheld documents (where service within
 2 30 days, as a default guideline, is sufficient); the magnitude of the
 3 document production; and other particular circumstances of the
 4 litigation that make responding to discovery unusually easy (such
 5 as, here, the fact that many of the same documents were the
 6 subject of discovery in an earlier action) or unusually hard. These
 7 factors should be applied in the context of a holistic
 8 reasonableness analysis, intended to forestall needless waste of
 time and resources, as well as tactical manipulation of the rules
 and the discovery process. They should not be applied as a
 mechanistic determination of whether the information is provided
 in a particular format. Finally, the application of these factors
 shall be subject to any applicable local rules, agreements or
 stipulations among the litigants, and discovery or protective
 orders.

9 Id. at 1149.

10 Defendants have the burden of proving application of the asserted privilege. See
 11 Cobell v. Norton, 213 F.R.D. 1, 4 (D.D.C. 2003) In camera inspection of documents by this
 12 court ““is not a substitute for the government’s burden of proof.”” Maricopa Audubon
 13 Society v. U.S. Forest Service, 108 F.3d 1089, 1093 n.2 (9th Cir. 1997)(quoting Church of
 14 Scientology of California v. U.S. Department of the Army, 611 F.2d 738, 743 (9th Cir.
 15 1979)). “In cases involving requests for hundreds of documents, no trial court can
 16 reasonably be expected to wade through a mass of exhibits in camera.” Church of
 17 Scientology, at 743.

18 II. Standards for Deliberative Process Privilege

19 The deliberative process privilege “covers ‘documents reflecting advisory opinions,
 20 recommendations and deliberations comprising part of a process by which governmental
 21 decisions and policies are formulated.’” Department of Interior v. Klamath Water Users
 22 Protective Association, 532 U.S. 1, 8 (2001) (quoting NLRB v. Sears, Roebuck & Co., 421
 23 U.S.132, 150 (1975)).⁵ It “was developed to promote frank and independent discussion
 24 among those responsible for making governmental decisions, Environmental Protection
 25 Agency v. Mink, 410 U.S. 73, 87, 93 S.Ct. 827, 836, 35 L.Ed.2d 119 (1973), and also to

26 ⁵ The case law addressing this privilege has generally been in the context of actions
 27 brought under the Freedom of Information Act, (“FOIA”), 5 U.S.C. § 552. The rationale of
 28 the FOIA cases, however, is equally applicable where the government asserts the privilege to
 protect documents from disclosure during civil discovery. See NLRB, 421 U.S. at 148-50.

1 protect against premature disclosure of proposed agency policies or decisions.” F.T.C. v.
2 Warner Communications Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (citing Coastal States,
3 617 F.2d at 866); see also NLRB, 421 U.S. at 150-51.

4 To qualify for the privilege a document must be both “predecisional” and
5 “deliberative.” Id.

6 “A ‘predecisional’ document is one ‘prepared in order to assist an
7 agency decisionmaker in arriving at his decision,’ and may
8 include ‘recommendations, draft documents, proposals,
9 suggestions, and other subjective documents which reflect the
10 personal opinions of the writer rather than the policy of the
agency. A predecisional document is a part of the “deliberative
process,” if “the disclosure of [the] materials would expose an
agency’s decisionmaking process in such a way as to discourage
candid discussion within the agency and thereby undermine the
agency’s ability to perform its functions.”

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12 Carter v. U.S. Department of Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002) (quoting
13 Assembly of State of California v. U.S. Department of Commerce, 968 F.2d 916, 920 (9th
14 Cir. 1992) (internal citations omitted)).

15 “[P]roper invocation of the privilege requires: (1) a formal claim of privilege by the
16 head of the department possessing control over the requested information, (2) an assertion of
17 the privilege based on actual personal consideration by that official, and (3) a detailed
18 specification of the information for which the privilege is claimed, along with an explanation
19 why it properly falls within the scope of the privilege.” Landry v. F.D.I.C., 204 F.3d 1125,
20 1135 (D.C. Cir. 2000).

21 Defendants have tendered to the court a privilege log setting forth for each document:
22 an identification number, the custodian, the privilege claimed, the type of document, and the
23 state agency that was the source of the document, and a brief description of the document. In
24 addition, where available for each document the privilege log identifies the date of the
25 document, the author, and individuals who received the document. In addition, defendants
26 have tendered declarations and supplemental declarations from Vincent P. Brown, Chief
27 Deputy Director of the California Department of Finance; Cynthia A. Radavsky, Deputy
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1 Director of Long-Term Care Services with the Department of Mental Health of the
 2 California Health and Human Services Agency; David Runnels, Undersecretary of
 3 Operations within the California Department of Corrections and Rehabilitation; and Robert
 4 Gore, Senior Deputy Cabinet Secretary for the California Governor's Office.⁶

5 The court has reviewed the privilege log submitted by defendants as well as the
 6 declarations referred to in the preceding paragraph. The court finds that neither the privilege
 7 log nor the declarations, separately or in combination, meet the legal requirements for
 8 establishing the deliberative process privilege. Specifically, the description of each
 9 document contained in the privilege log is too conclusory to permit an adequate assessment
 10 of the claim of privilege. Cf. Fed. R. Civ. P. 26(b)(5). In addition, none of the declarants
 11 ties any of the statements in their declarations to particular documents for which the
 12 deliberative process privilege has been claimed.⁷ Moreover, although the declarants aver
 13 generally that categories of materials are "maintained as privileged and confidential," see,
 14 e.g., Supplemental Declaration of Robert Gore Regarding Privileged Documents Identified
 15 on February 15, 2008 Privilege Log, at ¶¶ 7-9, there is no proof that defendants have
 16 preserved the confidentiality of each of the specific documents for which a claim of privilege
 17 has been made. Simply put, defendants have not met their burden of establishing that the
 18 deliberative process privilege applies to the documents for which it has been asserted.

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22 ⁶ The declarations of each of these four individuals were filed on January 28, 2008;
 23 their supplemental declarations were filed on February 22, 2008.

24 ⁷ The declaration of Cynthia A. Radavsky filed January 28, 2008 refers to "[a] single
 25 document" that "revealed and enabled pre-decisional discussion of the roles and
 26 responsibilities to be undertaken by the Health and Human Services Agency in a certain time
 27 frame," but provides no information by which this court could identify that document in the
 28 privilege log. Declaration of Cynthia A. Radavsky in Support of January 28, 2008 Revised
 Privilege Log, filed January 28, 2008, at ¶ 15. Similarly, Ms. Radavsky's supplemental
 declaration refers to another document that "reveals proposed salaries for mental health
 clinicians" but sets forth no identification number or other specific identifying information
 for that document. Supplemental Declaration of Cynthia A. Radavsky Regarding Privileged
 Documents Identified on February 15, 2008 Privilege Log.

1 For the foregoing reasons, the claims of deliberative process privilege in the revised
2 privilege logs filed on January 28, 2008 and, finally, on February 22, 2008, have not been
3 established.

4 In accordance with the above, IT IS HEREBY ORDERED that within five business
5 days from the date of this order, defendants shall produce to counsel for plaintiffs for
6 inspection and copying all documents listed in Ex. A to Declaration of Lori Rifkin in Support
7 of Plaintiffs' Statement Regarding Discovery Disputes, filed February 25, 2008, and in
8 Attachment C to this court's April 14, 2008 order.

9 Dated: May 29, 2008.

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11 ~~John F. Worldwide~~
12 UNITED STATES MAGISTRATE JUDGE

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