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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

Noticed Motion Date and Time:
July 19, 2012
9:00 a.m.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

ARGUMENT

I. PLAINTIFFS' CHALLENGES TO VA'S DELIBERATIVE PROCESS ASSERTIONS ARE WITHOUT MERIT[1]

A. The Deliberative Process Privilege

The deliberative process privilege is an ancient common law privilege designed to protect pre-decisional agency deliberations from public scrutiny. *Hongsermeier v. C.I.R.*, 621 F.3d 890, 904 (9th Cir. 2010). Because not all deliberations ripen into final agency decisions or policies, documents generated in support of an anticipated decision, even in the absence of a final decision, may also be covered by the privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153, n.18 (1975). To meet the substantive requirements of the privilege, documents must be both predecisional and deliberative. *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1090 (9th Cir. 2002). "[A] document is predecisional if it was "'prepared in order to assist an agency decisionmaker in arriving at his decision,'" and is deliberative if its release 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.'" *Id.*

Furthermore, factual information may be subject to the deliberative process privilege:

> The distinction between whether the nature of the material is factual or opinion is thus not dispositive of whether the material is deliberative. Courts "focus less on the nature of the materials sought and more on the effect of the materials' release: the key question in [such] cases became whether the disclosure of 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." Thus, "facts contained in such documents must be

[1] Plaintiffs do not challenge those documents that are exact duplicates of documents that the Court has addressed in connection with its previous *in camera* reviews. Plaintiffs do, however, express confusion as to whether DVA090 630 – 634 is a duplicate of a document already reviewed by this Court. As explained in correspondence to Plaintiffs on June 13, 2012, this document consists of an email and an attachment. The email has already been produced to Plaintiffs. Dkt. 447-5 at 2. The attachment to the email appeared in the Department of Defense's ("DoD") privilege log and is discussed in Category 11 of Dr. Kilpatrick's declaration. *Id.* The Court previously reviewed and upheld DoD's assertion of privilege over that attachment. Dkt. 423. However, to avoid any confusion, this duplicate document has been included in VA's *in camera* review submission.

> considered within the context of the document as a whole, and within the context of the document as part of the agency's overall decision-making process."

In re U.S., 321 Fed. Appx. 953, 959-60 (Fed. Cir. 2009) (citations omitted); *see Nat. Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118-19 (9th Cir. 1988) (holding that opinions or recommendations regarding facts or consequences of facts are not automatically ineligible for exemption from disclosure; courts have interpreted the exemption "to protect documents that would reveal the *process* by which agency officials make these determinations, whether or not the documents themselves contain facts or non-binding recommendations").

On the other hand, where the government can segregate and publicly disclose purely factual information that is not inextricably tied to agency deliberations, it must do so. *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008). Indeed, VA has undertaken an enormous effort to do just that, releasing as many redacted documents (as opposed to documents withheld in full) as possible. Although Plaintiffs may not agree with VA's redactions, segregation of factual information from deliberative information does not reflect strategic redactions, but rather fidelity to the law governing the deliberative process privilege.[2]

B. Plaintiffs Have Failed To Meet Their Burden of Establishing A Substantial Need For VA's Documents[3]

Once the government establishes that the documents are both predecisional and deliberative, the party challenging the assertion of the deliberative process privilege bears the burden of demonstrating sufficient need to overcome the government's interest in non-disclosure. Dkt. 294 at 16 (internal citations omitted); *see Ctr. for Biological Diversity v. Norton*, 336 F. Supp. 2d 1149, 1155 (D.N.M. 2004); *Moreland Prop., LLC v. City of Thorton*, No. 07-00716,

[2] Plaintiffs do not dispute, and therefore concede, that VA has satisfied the procedural requirements of the deliberative process privilege. Dkt. 447. In addition, as reflected in the declaration from John J. Spinelli, the documents that Plaintiffs challenge are unquestionably both pre-decisional and deliberative, and the public release of these documents would have a chilling effect on agency deliberations. *See* Declaration of John J. Spinelli. ¶6.

[3] Plaintiffs do not challenge VA's assertion of the attorney-client privilege, and therefore, VA has not submitted for *in camera* review any document where the information subject to the deliberative process privilege is also covered by the attorney-client privilege.

2007 WL 2523385, at *3 (D. Colo. Aug. 31, 2007); *see also Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 854 (3d Cir. 1995). This burden requires a showing of "substantial" need, which is a standard greater than mere relevance. Accordingly, to meet their burden and overcome VA's assertion of privilege, Plaintiffs must establish, among other things, both that the documents sought are highly relevant to the narrow claims in this case and are not cumulative of other, voluminous discovery in this case. *See FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Plaintiffs have failed to meet their burden.

Rather than meet their burden of establishing substantial need for all of the documents or categories of documents identified on VA's log, Plaintiffs instead identify several "examples" and request that this Court order that Defendants produce all documents over which privilege has been asserted. Dkt. 447 at 4-6. Because Plaintiffs have the heavy burden of showing a substantial need for the documents they seek, they cannot meet that burden over documents or categories of documents not specifically addressed in their motion. *See Redland Soccer Club*, 55 F.3d at 854; *Norton*, 336 F. Supp. 2d at 1155; *Moreland Prop.*, No. 07-00716, 2007 WL 2523385, at *3.[4]

1. The Documents Are Legally Irrelevant To Any Claim In This Case

Absent a showing of the relevance of the documents sought to the narrow, largely legal claims in this case, Plaintiffs cannot, as a matter of law, demonstrate "need." *See United States v. Farley*, 11 F.3d 1385, 1390 (7th Cir. 1993). The documents included on VA's privilege log are not relevant to Plaintiffs' claims. First, this Court previously disagreed with VA's argument that 38 U.S.C. § 511(a) precludes district court review of the Plaintiffs' claim of facial bias against VA, which would render Plaintiffs' discovery irrelevant. Dkt. 294 at 13-14. But recently, the

[4] Nor can Plaintiffs simply argue that because some of the documents contained on the current privilege log may fall into similar categories as documents on prior logs, that VA's assertion of privilege should be overruled. Dkt. 447 at 5. Previously, the Court conducted an *in camera* review of documents contained on VA's prior privilege logs and upheld VA's assertion of the deliberative process privilege over the vast majority of documents over which it asserted the privilege. Dkt. 327 at 3 n.1 ("Defendant properly asserted the deliberative process privilege over those documents not specifically referenced in this Order."), Dkt. 423, 430, 436.

landscape of applicable law has been clarified by both the Ninth Circuit and the Supreme Court, and accordingly, the potential relevance of documents to Plaintiffs' claim against VA must be re-evaluated. As discussed in detail in VA's recent motion for leave to seek reconsideration of the Court's November 15, 2010 order permitting Plaintiffs to amend their complaint for a third time to add a facial bias claim against VA (dkt. 431), which Defendants incorporate by reference, the Ninth Circuit's *en banc* decision in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) ("VCS") conclusively forecloses Plaintiffs' claim against the VA. And if the Ninth Circuit's holding in *VCS* did not demonstrate clearly enough that section 511 of the Veterans' Judicial Review Act precludes Plaintiffs' claim against the VA, as explained in Defendants' Opposition to Plaintiffs' Motion to Substitute Kathryn McMillan-Forrest as Plaintiff,[5] which Defendants also incorporate by reference, the reasoning of the Supreme Court's recent decision in *Elgin v. Department of Treasury* makes that conclusion inescapable. *See* No. 11-45, __S. Ct. __, 2012 WL 2076340 (June 11, 2012).[6]

Second, even if Plaintiffs' claim against VA can somehow proceed under *VCS* and *Elgin*, Plaintiffs have failed to articulate how the documents contained on VA's privilege log are relevant, let alone highly relevant, to the sole claim against VA or to the claim of agency delay in the performances of alleged discrete, non-discretionary legal obligations directed to DoD. Plaintiffs' facial bias claim is by definition an exceeding narrow one. Ultimately, the legal claim brought by Plaintiffs is whether, based upon VA's alleged involvement in the test program, VA, as a matter of law and in the absence of any facts, operates as an inherently biased adjudicator. Dkt. 459 at 2. The District Court appears to have recognized the narrowness of Plaintiffs' claim against VA when it allowed Plaintiffs to amend their complaint for a third time, and noted that

[5] Defendants intend to file a redacted version of their Opposition on the public record, pending the District Court's order on Defendants' Administrative Motion to File Under Seal. Dkt. 451-52.

[6] Because the legal issues associated with Plaintiffs' challenge to VA's assertion of deliberative process assertion are, in large respects, inextricably tied to the District Court's resolution of the legal issues associated with VA's motion for reconsideration and Plaintiffs' motion to substitute, it would be appropriate for this Court to defer consideration of Plaintiffs' motion to compel pending the District Court's resolution of those two outstanding motions.

"[t]he Court is not persuaded that Plaintiffs' claim that the DVA functions as a biased decision-maker would inject any undue delay." Dkt. 177 at 14. This conclusion presumably was based upon the District Court's view that the claim against VA required little, if any, discovery or factual development to establish a claim of inherent facial bias.

Finally, Plaintiffs assert that they have substantial need for all documents on VA's privilege log, but do not address (even perfunctorily) the purported relevance of documents related to many of the categories of documents. As just a few examples, Plaintiffs cannot possibly demonstrate the relevance to their facial bias claim of documents related to internal deliberations about how VA will respond to an individual's FOIA request or to media inquiries. Nor can they demonstrate the relevance to a facial bias claim of documents reflecting deliberations concerning materials to include on the VA's website or documents reflecting deliberations concerning individual claims. By failing to articulate even general relevance for most of the documents contained on VA's privilege log, Plaintiffs fail to meet the heavy burden required to overcome the assertion of privilege.

2. The Documents Plaintiffs Seek Are Cumulative of the Extensive Discovery Produced By Defendants In This Case

Any determination by this Court that Plaintiffs have substantial need for the privileged documents must necessarily consider the massive discovery conducted thus far in the case. *See Warner Commc'ns, Inc.*, 742 F.2d at 1161. Defendants have produced more than 2 million pages of discovery (including documents produced pursuant to Orders from this Court), Defendants have responded to hundreds of interrogatories and requests for admissions, and the parties have taken approximately 40 depositions. Defendants have identified the voluminous discovery already obtained by Plaintiffs in previous briefs. Dkt. 276, 371. Plaintiffs' Motion is conspicuously devoid of any discussion of the discovery they have received in this case and how the discovery they currently possess relates to the additional documents they now seek. And, while this Court has concluded in the past that certain documents appear "highly relevant" to Plaintiffs' claims, it has not yet addressed the equally important issue of cumulativeness.

Plaintiffs claim they need documents related to VA's outreach efforts in order to learn more about VA's "use of the Database to 'verify' participation and thus, to determine who is sent an outreach letter and whose claims are denied from inception for lack of verification." Dkt. 447 at 5. Putting to one side the irrelevance of this information to the narrow issues in this case, Plaintiffs have an abundance of information and documents on precisely this topic. Not only do Plaintiffs themselves cite some of the documents they already have, (*id*.), they have also elicited hours of testimony from numerous deponents on this precise topic, including, among others, VA employees and former employees David Abbot and Joe Salvatore, and DoD employees and contractors Dee Dodson Morris, Martha Hamed, and Roy Finno. Dkt. 371, n.19. Given the extraordinary amount of information that Plaintiffs already possess, they cannot demonstrate a substantial need sufficient to overcome VA's legitimate interest in withholding these documents.

Plaintiffs also claim that they need information related to VA's Chem-Bio training letter in order to support their claims for notice against DoD. According to Plaintiffs, "[t]hese documents ***may*** reflect interactions between DVA and DOD concerning purported ("notification") efforts". Dkt. 447 at 6 (emphasis added). This connection between an internal VA document and DoD's alleged legal obligation to notify test participants is confounding. Plaintiffs suggest that these documents "may" contain interactions between DoD and VA. Yet despite having VA's privilege log, which contains descriptions of each document, including sender and recipient of any communication, Plaintiffs are unable to indicate which documents "may" contain such interactions. Moreover, there is no basis to believe that Plaintiffs might discern additional information about DoD's outreach efforts through VA's training letter. VA's training letter is an internal VA document instructing VA adjudicators as to the process of evaluating claims. There is no basis for the conclusion that DoD's decision concerning outreach efforts is related in any way to VA's adjudication of claims. Finally, Plaintiffs have had more than ample opportunity to explore the bases and impetuses for DoD's outreach efforts. Dkt. 371, n.10.

Plaintiffs' demands for documents related to the contents of the DoD Chem-Bio Database are clearly cumulative. As previously discussed, Plaintiffs possess voluminous documents and testimony concerning the creation, population, and use of the DoD database. Dkt. 371, n.10, p. 12, n. 11. In addition, they have access to the Chem-Bio database. *Id.* They have failed to identify any information concerning the database that they do not possess that they need to litigate their claims.

Finally, Plaintiffs cannot claim that they need information related to the content of VA's website on mustard gas exposure. In addition to being entirely irrelevant to any claim in this case, Plaintiffs have access to the publicly available VA website. *See* *http://www.warrelatedillness.va.gov/WARRELATEDILLNESS/education/exposures/edgewood-aberdeen.asp*. Notably, the Court rejected Plaintiffs' claim of substantial need over similar types of deliberative, pre-decisional documents identified by DoD related to drafts of documents concerning DoD's website. Dkt. 423 at 3-4. That decision applies with equal, if not greater, force to these documents. Accordingly, Plaintiffs' motion to compel should be denied.

II. PLAINTIFFS' BELATED REQUEST THAT DEFENDANTS REIMBURSE COSTS ASSOCIATED WITH THE RE-OPENING OF CERTAIN DEPOSITIONS SHOULD BE DENIED

Plaintiffs now request that Defendants cover the costs associated with re-opening the deposition of Joe Salvatore and David Abbot, without offering any legal authority for that position, and refusing to acknowledge their own tactical decisions regarding discovery in this case. There is no legal or factual basis for Plaintiffs' request.

With respect to Mr. Salvatore's deposition, the chronology concerning this issue is important. VA provided Plaintiffs with its original privilege log related to documents withheld from its response to a Rule 45 subpoena on October 21, 2010. That privilege log identified 483 documents withheld either in full or in part. As this Court has found, Plaintiffs made the tactical decision to proceed with Mr. Salvatore's deposition on June 29, 2011 despite full knowledge that VA had withheld a number of documents on the basis of privilege. Dkt. 408 at 14. Plaintiffs

identify no basis for suggesting that they should be the beneficiary of those tactics through the shifting of costs associated with the re-opening of that deposition.

Furthermore, on November 23, 2011, this Court ordered the production of approximately 50 of the 483 documents over which VA had asserted privilege. Four months later, Plaintiffs moved to re-open Mr. Salvatore's deposition based exclusively upon the approximately 50 documents the Court ordered disclosed. Dkt. 404 at 21-22. Tellingly, nowhere in this motion did Plaintiffs seek costs associated with re-opening Mr. Salvatore's deposition based upon the approximately 50 documents that the Court ordered produced. Dkt. 404 at 21-22. Plaintiffs have no good faith basis for making such a request now, and their newfound request should be denied.

On April 6, 2012, the Court permitted Mr. Salvatore to be re-deposed for up to three hours, and limited his questioning to the approximately 50 documents produced in response to the Court's November 23 Order and the documents identified in the Court's April 6 Order. Dkt. 408 at 14-15. On May 1, 2012, the Court reconsidered the aspect of its April 6 Order that held that VA had waived its assertions of privilege by failing to timely produce a privilege log. Dkt. 420. In a footnote, the Court stated that Plaintiffs were prejudiced by the production of VA's January 2012 privilege log and that "if necessary, the Court will consider the question of remedy following the Court's *in camera* review." Dkt. 420 at n3.

Latching onto this language in the footnote of the Court's Order, Plaintiffs now seek to have Defendants cover the costs associated with his deposition, as well as the deposition of Mr. Abbot.[7] There is no factual or legal basis for Plaintiffs' request. As an initial matter, we respectfully disagree with the Court's suggestion that any "remedy" is appropriate based upon the Court's ruling on VA's assertion of the deliberative process privilege. The fact that the Court

[7] Plaintiffs' assertion that resuming the deposition of Mr. Salvatore was "necessitated by DVA's failure to log documents it was withholding for 15 months" is factually incorrect for at least two reasons. Dkt. 447 at 7. First, as discussed above, Plaintiffs moved to reopen Mr. Salvatore's deposition based solely upon VA's November 2010 privilege log, which they did not challenge until August 2011. Second, contrary to Plaintiffs' assertion, VA did not fail to log documents on its January 2012 privilege log for 15 months. Rather, as the Court concluded, VA logged the documents associated with Plaintiffs' Rule 34 discovery responses within seven months of the identification of the documents over which VA asserted privilege. Dkt. 420 at 3.

disagreed with those good faith assertions in some instances (and upheld the assertion in the overwhelming majority of instances) does not justify any sort of sanction against VA. Defendants are unaware of any support for the proposition that, where a court orders the production of certain documents contained on a privilege log after a party takes a particular deposition (with full awareness that the party had withheld documents on the basis of privilege), but sustains the assertion of privilege over the overwhelming majority of documents, the other side should bear the costs associated with re-opening that deposition. Indeed, case law appears to hold precisely the opposite. *See Fullerton v. Prudential Ins. Co.*, 194 F.R.D. 100, 101 (S.D.N.Y. 2000) (holding that certain documents contained on a privilege log should be produced and allowing for re-opening of deposition, but requiring party to bear its own costs).

More fundamentally, there are a number of additional reasons why Plaintiffs' claimed costs associated with re-opening depositions is unwarranted. First, Plaintiffs acknowledge that they are not seeking costs associated with the deposition of DoD employee Dr. Kelley Brix, whose deposition the Court limited to four hours and "newly produced evidence." Dkt. 408 at 16. Dkt. 447-3 at 2. As discussed above, the Court has also ordered that Mr. Salvatore's deposition be limited to no more than three hours. For this reason, Defendants have repeatedly offered to make both Dr. Brix and Mr. Salvatore available on the same day, as the total amount of time Plaintiffs are entitled to for both witnesses is the same as the one seven hour deposition provided for under Rule 30. This would mean that Plaintiffs would incur the same airfare, ground transportation, meals and lodging costs, as these are costs that they necessarily would incur for Dr. Brix's deposition.[8] To date, Plaintiffs have refused to agree to this reasonable proposal.

Plaintiffs also request that VA cover the costs associated with re-opening the deposition of former VA employee David Abbot. Plaintiffs' request to re-open Mr. Abbot's deposition is based largely upon the fact that VA recently discovered a file he placed onto an old server. Declaration

[8] Defendants do not understand what Plaintiffs mean by "host costs." Dkt. 447, 448. To date, the overwhelming majority of the depositions have taken place in one of three locations: Plaintiffs' counsel's offices, the offices of the Department of Justice, or United States Attorney's Offices.

of Lily Farel ¶2, Ex. A. Beyond the fact that many of these documents contain information that is duplicative of the types of documents already produced in this case, there is no basis to order VA to cover costs associated with the re-opening of Mr. Abbot's deposition. As discussed above, the basis for the Court's order regarding the possibility of a "remedy" related to VA's January 2012 privilege log. But the basis for Plaintiffs' request to re-open Mr. Abbot's deposition relates to VA's recent discovery of files he placed on an old server. Accordingly, there is simply no connection between the Court's order regarding a "remedy" and Plaintiffs' justification for seeking to re-open Mr. Abbot's deposition.

Beyond that, even if the Court determined that certain costs should be covered by VA, the categories of costs Plaintiffs seek are not justifiable. There are a number of means for reducing or eliminating the costs associated with re-opening depositions including, among other things, utilizing attorneys and office space in Plaintiffs' counsel's DC offices or conducting the depositions either telephonically or through written question under Rule 31. Plaintiffs have failed to explain why they are unwilling to utilize these reasonable, cost-saving approaches to discovery. In addition, there is absolutely no basis for requiring VA to bear the large costs associated with a videographer, particularly in a bench trial such as this one.[9] Notably, Plaintiffs did not videotape Mr. Salvatore's June 2011 deposition, and they have identified no justification for videotaping his re-opened deposition or Mr. Abbot's deposition, let alone requiring VA to bear the costs associated with videotaping. Plaintiffs' request that VA shoulder the costs associated with these two depositions should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied, and Plaintiffs should bear their own costs for re-opening the depositions of Joe Salvatore and David Abbot.

[9] Plaintiffs filed this lawsuit in California despite none of the individual Plaintiffs residing in California and none of the actions by the Defendants associated with those individual Plaintiffs having taken place in California. If Plaintiffs' contention is that they seek to videotape the depositions of the Defendants because these witnesses reside outside of the District, this is a problem exclusively borne by their tactical decision to file this lawsuit in this District. The government should not be responsible for subsidizing Plaintiffs' tactical decision.

June 28, 2012

Respectfully submitted,

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