UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-0805-CIV-KING

ROBERTO TEFEL,

Plaintiff,

v.

JANET RENO, et al.,

Defendant.
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ORDER

THIS CAUSE comes before the Court upon two emergency appeals by the Defendants (collectively "the Government") seeking review of discovery Orders entered by Magistrate Judge Brown on June 3, 1997. Both appeals were filed on June 4, 1997. The Plaintiffs filed memoranda in opposition to the Government's appeals, and the Court took argument on the appeals during the afternoon and evening of June 4th. After a thorough review of the record and pleadings, and having considered the argument of counsel and conducted an ex parte, in camera review of the disputed documents, the Government's appeals are GRANTED IN PART and DENIED IN PART. The Government shall, at or before 12 noon on June 6, 1997, produce to the Plaintiffs the items identified as: 117P, 119P, 129P, 135P, 138P, 141P, 45P, 49P and 50P. The materials identified as 30P and 79P need not be produced.

I.

This lawsuit is brought by a class of Nicaraguan immigrants seeking to challenge a decision by the Board of Immigration Appeals that allegedly infringes the rights of these individuals. The case

117/#

was assigned to United States District Judge James Lawrence King, who entered, and subsequently extended, a temporary restraining Order precluding the Government from deporting individuals or otherwise adjudicating cases based on the challenged decision. A preliminary injunction hearing has been scheduled for June 12, 1997 before Judge King. Due to the absence of Judge King, who is out of the district, Magistrate Judge Stephen T. Brown has been presiding over the pre-trial process including the production of documents by the Government. In late May, the Government supplied Magistrate Judge Brown with a privilege log, identifying the documents that it believes need not be disclosed. The log was thereafter amended on multiple occasions. The Magistrate Judge has entered a number of rulings with respect to the Government's claims of privilege; the instant appeals, which were assigned to this Court due to Judge King's absence, arise out of two of the Magistrate's rulings.

II.

The Government's first appeal concerns a written Order entered by Magistrate Brown on June 3, 1997, which in pertinent part compelled the Government to produce six (6) documents over which a deliberative process privilege had been claimed. These documents are identified as items 117P, 119P, 129P, 135P, 138P and 141P. This Court stayed the Magistrate Judge's production Order pending its review of the Government's arguments.

The Government claims that the items in dispute are drafts of documents that were intended to reflect and explain changes in INS policy with respect to certain groups of Nicaraguan immigrants.

The materials submitted to Magistrate Judge Brown (including an affidavit from the Commissioner of the INS) articulated the circumstances surrounding the creation of these items at a very high order of abstraction. In its "objections" to the Magistrate's Order, the Government claims that the disputed items are drafts of an "emerging policy statement." When pressed on this point during oral argument before this Court, Government counsel provided a somewhat different explanation. He suggested that the items were essentially drafts of "fact sheets" eventually disseminated to the public and Nicaraguan immigrants who would be affected by the changes in policy. Counsel indicated that the actual policy changes to which the fact sheets referred were announced in the Federal Register.

We start by making two observations. First, our review of Magistrate Judge Brown's Order is not wholly de novo. Rule 72(a) of the Federal Rules of Civil Procedure provides that a Magistrate Judge's Order on a non-dispositive motion cannot be set aside on appeal unless it is found to be "clearly erroneous or contrary to law." See also 28 U.S.C. §636(b)(1)(A). The Supreme Court has recognized that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum, 333 U.S. 364, 395 (1948). Pursuant to this highly deferential standard of review, Magistrate Judges are afforded broad discretion in resolving discovery disputes, and reversal is

appropriate only if that discretion is abused. See, e.g., Commodities Future Trad. Comm'n v. Standard Forex, Inc., 882 F. Supp. 40, 42 (S.D.N.Y. 1995).

Second, we observe that Fed. R. Civ. P. 26(b)(1) permits discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, [and] need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." In order to preserve the liberal discovery contemplated by the Federal Rules, the burden falls on the party opposing discovery — in this context, the Government — to prove its entitlement to a privilege for otherwise relevant documents. See, e.g., In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. 515, 518 (N.D. Ill. 1990) (reaffirming the well-settled proposition that "the party seeking the privilege has the burden of establishing all of its essential elements").

The six documents at issue here are culled from a set of nine items addressed in the Magistrate Judge's written Order. After conducting his review, Magistrate Judge Brown allowed three documents to be withheld, but denied protection for the six now in dispute. After citing the leading Eleventh Circuit case on point, Nadler v. Department of Justice, 955 F.2d 1479 (11th Cir. 1992), Magistrate Brown explained that "[a]lthough [the six] documents appear to be predecisional (indeed, some if not all of the documents are clearly drafts), they comprise factual material markedly unvarnished by opinions or recommendations." In open

Court on June 3d (sometime after he released his Order), Magistrate Brown stated that he denied the Plaintiffs access to the three documents not because he thought that a privilege applied, but rather because he felt that, after applying a "balancing test," the documents were "of no value" and "insignificant" to the Plaintiffs' case.

As one court has explained, the deliberative process privilege, in the context of administrative agencies, "encourages free-ranging discussion of alternatives; prevents public confusion that might result from the premature release of such nonbinding deliberations; and insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions, but 'for matters they considered before making up their minds.'" City of Virginia Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993). As this excerpt suggests, because the privilege is designed to protect "the inter-governmental exchange of thoughts that actively contribute to the agency's decisionmaking process," post-decisional documents explaining or justifying a decision already made are not shielded. Texas Puerto Rico, Inc. v. Department of Consumer Affairs, 60 F.3d 867, 884-85 (1st Cir. 1995). In Nadler, the Eleventh Circuit discussed the contours of the deliberative process privilege. The court explained that the privilege "protects the internal decision making processes of the executive branch in order to safeguard the quality of agency decisions." Two prerequisites must be met before the privilege will be sustained: "First, the document must be

'predecisional,' i.e., 'prepared in order to assist an agency decisionmaker in arriving at his decision.' Second, it must be 'deliberative,' that is 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" 955 F.2d at 1491.[1] Once this threshold showing

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[1]Somewhat different considerations come to the fore when the purportedly protected documents contain facts (as opposed to explicit recommendations or opinions):

> [P]urely factual material that does not reflect the agency's deliberative process generally is not protected. Factual material may be withheld, however, when that material is so inextricably connected to the deliberative material that its disclosure would reveal the agency's decision-making processes, or when it is impossible to segregate in a meaningful way portions of the factual information from the deliberative information.

Id. (citations omitted). As Nadler suggests, a document is not beyond the purview of the deliberative process privilege simply because it contains what might be seen as "facts." In Florida House of Representatives v. United States Department of Commerce, 961 F.2d 941 (11th Cir.), cert. denied, 506 U.S. 969 (1992), for example, the Court of Appeals upheld a deliberative process exemption under FOIA for statistically adjusted "block level" census data prepared by Census Bureau officials who proposed to the Secretary of Commerce that results using this methodology be published in lieu of results obtained through the traditional headcount (which had been compiled through questionnaires and door-to-door inquiries). The Secretary declined to adopt the Bureau's proposed methodology. The Eleventh Circuit held that the block level data constituted a "proposal or recommendation that eventually was rejected by the person in charge." Id. at 949-50. The panel made clear that a court should focus on "examin[ing] the documents in the context in which the documents were used, or put another way, within the context of the agency's professional approval process." Id. at 948. Thus, "if, looking at the deliberative process as a whole, data can be deemed advice or opinion, it is necessarily deliberative." Id. For this reason, the Magistrate Judge's finding that the disputed items contain only "unvarnished facts" may not completely answer the question of whether the privilege applies.

is made, the court may "weigh competing interests" and determine whether the need for access to the documents outweighs any perceived harm from disclosure. See, e.g., Texas Puerto Rico, 60 F.3d at 885. Nadler itself sustained the Government's claim of a privilege over a prosecutive memoranda from a Justice Department lawyer to his supervising attorney that summarized the status of a criminal investigation and made recommendations as to how to proceed. While some courts outside this Circuit have suggested that draft material "particularly when presented by a subordinate to a superior for revision, is likely to receive deliberative process protection," Virginia Beach, 995 F.2d at 1253, the fact that a document is a draft plainly does not absolve the Government of its burden of establishing that the draft relates to a deliberative process with respect to matters of law or policy.

The Magistrate Judge did not apply an incorrect legal standard in evaluating the Government's contextually-driven claim of privilege. The question becomes, therefore, whether the Magistrate's eventual finding that no privilege applies to the six items constitutes clear error. On this record, the Government cannot surmount this substantial hurdle. To begin with, we do not agree that, under these facts and circumstances, the drafts (or the handwritten edits on the drafts) pertain to or arise out of a deliberation about agency policy. During oral argument, Government counsel acknowledged that the final versions of these drafts were not designed or intended to formulate policy; rather, they were intended to explicate, in layman's terms, a policy change already

fashioned at a different time and published separately in the Federal Register. From this standpoint, the items in dispute can be analogized to press releases. And while we suggest no bright-line standard governing the kinds of materials that constitute policy-making (since even the drafting of a press release or public information sheet may embody some measure of deliberation and some exercise of discretion on the part of agency officials), we are not convinced that the six items at issue here genuinely were components of the process of reshaping federal policy concerning Nicaraguan immigrants. As Nadler makes clear, for a privilege to apply, the documents play a direct and active role in the "deliberative process" with respect to "legal or policy matters." 955 F.2d at 1491. Notably, the purportedly privileged drafts do not differ markedly from the final versions eventually disseminated to the public.[2]

Equally troubling is the fact that the Government has failed to provide a meaningful evidentiary foundation for its claims of privilege. With respect to five of the six documents, for example, it is unclear who prepared the drafts, who was intended to receive the drafts, who actually received the drafts or who added the

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[2]At this Court's prompting, the Government clarified that the drafts actually related to items eventually released in "final" form. The Government thereafter submitted these "final" documents for the Court's inspection. In a Notice of Correction served on this Court shortly after the submission of the "final" version of the documents, the Government indicates that one of the "final" fact sheets, dated July 24, 1995, was actually a draft prepared on June 24, 1995. This "correction" underscores our concern with the absence or murkiness of many critical foundational details.

handwritten notations, let alone how these individuals fit into the agency's policymaking hierarchy. Absent these details, it is impossible to confirm that the drafts were part of INS's deliberative process. Moreover, not until oral argument before this Court in conjunction with the Government's appeal did the Government provide significant details about the context of the disputed items and the circumstances surrounding their creation. These details were not supplied to the Magistrate Judge, and plainly were not recounted in the Government's privilege log.

As the party seeking a privilege, the burden falls on the Government to provide a persuasive foundation for its right to withhold relevant evidence. We cannot say, on this record, that the Government has met its burden. More to the point, we cannot say that Magistrate Judge Brown's ruling was clearly erroneous or contrary to law. Accordingly, the Magistrate Judge's ruling must be affirmed.

II.

The Government's second appeal relates to five additional documents that Magistrate Judge Brown orally directed the Government to produce. Three of these documents — 45P, 49P and 50P — are claimed to be subject to the deliberative process privilege. For all of the reasons stated above, we do not agree that the Magistrate committed clear error or acted contrary to law with respect to these items, which the Government again suggests are drafts of materials eventually disseminated to the public outlining changes in policy concerning Nicaraguan immigrants. The Government

simply has not established (1) an adequate foundation for its claims of privilege, or (2) a sufficient showing that the disputed materials reflect the formulation of policy as opposed to explications of a policy already fashioned through the exchange or publication of other materials at other times.

A different result obtains for the two items — 30P and 79P — with respect to which the Government claimed an attorney-client privilege. These items are identical, and consist of a single document entitled "Background for Attorney General's Meeting with Nicaraguan Foreign Minister, March 31, 1997 Re: Suspension of Deportation." The document was prepared by a member of the INS's legal staff, and reviewed by the agency's general counsel. The bulk (although not the entirety) of the document is devoted to an analysis of the provisions and legal consequences of the Illegal Immigration and Immigrant Responsibility Act of 1996. The Magistrate Judge refused to recognize a privilege for the document.

The purpose of the attorney-client privilege is to encourage open and complete communication between a client and its attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications. See, e.g., United States v. Noriega, 917 F.2d 1543, 1550 (11th Cir. 1990), cert. denied sub nom, 498 U.S. 976 (1991). In order to invoke this privilege, the claimant must establish the following:

> (1) the asserted holder of the privilege is . . . a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication

> relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. (quoting United States v. Kelly, 569 F.2d 928, 938 (5th Cir.), cert. denied, 439 U.S. 829 (1978)). The privilege undoubtedly may apply to communications by government lawyers to other government officials. See, e.g., United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir.), cert. denied, 522 U.S. 1005 (1991). Contrary to the Plaintiffs' suggestion, an in camera review of the document makes clear that it cannot be deemed a "non-legal" policy or fact oriented communication between individuals acting solely in their capacity as government employees rather than lawyers. The document does more than explicate or formulate policy; rather, it contains legal analysis compiled by agency attorneys and designed to advise and assist the Attorney General (in her role as the chief law enforcement officer of the United States) or her representatives with respect to the elements and ramifications of a new statute she is empowered to enforce. Recognizing a privilege for this document is in no plausible sense "tantamount to a ruling that any attorney employed by the government represents all persons within the same department of government in the capacity of an attorney employed to provide legal advice to a client." While we acknowledge that the Government cannot state with certainty the recipient or recipients of this document, other materials in the

record, as well as the title of the document itself, provides a sufficiently persuasive foundation to sustain the claim of privilege. Accordingly, we conclude that the Magistrate Judge committed clear error by ordering the production of items 30P and 79P.[3]

Consistent with the foregoing, it is hereby

ORDERED AND ADJUDGED that the Magistrate Judge's written Order of June 3, 1997 is AFFIRMED, and items 117P, 119P, 129P, 135P, 138P and 141P shall be produced no later than 12 noon on June 6, 1997. The Magistrate Judge's oral Order of June 3, 1997 is AFFIRMED IN PART. Items 45P, 49P and 50P shall be produced no later than 12 noon on June 6th; items 30P and 79P are privileged and need not be produced.

DONE AND ORDERED in Miami, this 5th day of June, 1997.

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

copies to:
Magistrate Judge Brown
counsel of record

[3]In any event, the documents appears to convey little information not already known or available to the Plaintiffs.