

Sanchez v. Johnson

United States District Court for the Northern District of California

November 19, 2001, Decided ; November 19, 2001, Filed

No. C-00-1593 CW (JCS)

Reporter: 2001 U.S. Dist. LEXIS 25233; 2001 WL 1870308
STEPHEN SANCHEZ, ET AL., Plaintiffs, v. GRANTLAND
JOHNSON, ET AL., Defendants.

Subsequent History: Judgment entered by, Motion to strike denied by, Motion denied by [Sanchez v. Johnson, 301 F. Supp. 2d 1060, 2004 U.S. Dist. LEXIS 6956 \(N.D. Cal., 2004\)](#)

Disposition: Plaintiffs' Motion to Compel granted in part and denied in part.

Counsel: [*1] For STEPHEN SANCHEZ, by and through his mother and next friend, Joyce Hoebel, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For KORY NIGIAN, by and through his mother and next friend, Irene Ybarra, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For KATHY TOBIASON, by and through her mother and next friend, Sandra Nash, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For SCOTT DE SANTO, by and through his mother and conservator, [*2] Lily Munoz, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For GRACE EWALT, a minor, and through her mother, Suzanne Ewalt, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education &

Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For SCOTT CROSE, by and through his mother and conservator, Janice Crose, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For EDWARD COMPTON, by and through his parents and next friends, Edward and Elaine Compton, Plaintiff: Arlene B. Mayerson, Diane [*3] J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For AUTISM SOCIETY OF LA, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For CA REHABILITATION ASSOCIATION, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For CALIFORNIA COALITION OF UNITED CEREBRAL PALSY ASSOCIATION, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest [*4] Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For EASTER SEALS CA, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For SYSTEMS REFORM INC, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For TIERRA DEL SOL INC, Plaintiff: Arlene B. Mayerson, Diane J. Lipton, Larisa Cummings, Disability Rights Education & Defense Fund, Inc, Berkeley, CA. Thomas K. Gilhool, Judith A. Gran, Max Lapertosa, Public Interest Law Center of Philadelphia, Philadelphia, PA. Valerie Vanaman, Newman Aaronson & Vanaman, Sherman Oaks, CA.

For GRANTLAND JOHNSON, in his official capacity of Secretary of the California Department of Health [*5] and Human Services, defendant: Stephanie Wald, Elizabeth Edwards, CA State Attorney General's Office, San Francisco, CA. Henry S. Hewitt, Erickson Beasley Hewitt & Wilson, LLP, Oakland, CA.

For CLIFFORD ALLENBY, in his official capacity as the Director of the California Department of Developmental Services, defendant: Stephanie Wald, Elizabeth Edwards, CA State Attorney General's Office, San Francisco, CA. Henry S. Hewitt, Erickson Beasley Hewitt & Wilson, LLP, Oakland, CA.

For DIANE M. BONTA, defendant: Stephanie Wald, Elizabeth Edwards, CA State Attorney General's Office, San Francisco, CA. Henry S. Hewitt, Erickson Beasley Hewitt & Wilson, LLP, Oakland, CA.

For B. TIMOTHY GAGE, in his official capacity as the Director of the California Department of Finance, defendant: Stephanie Wald, Elizabeth Edwards, CA State Attorney General's Office, San Francisco, CA. Henry S. Hewitt, Erickson Beasley Hewitt & Wilson, LLP, Oakland, CA.

Judges: JOSEPH C. SPERO, United States Magistrate Judge.

Opinion by: JOSEPH C. SPERO

Opinion

ORDER GRANTING IN PART AND DENYING IN PART WITHOUT PREJUDICE PLAINTIFFS' MOTION TO COMPEL

Plaintiffs' Motion to Compel [Docket No. 104] came on for hearing [*6] on Friday, October 26, 2001, at 9:30 a.m. For the reasons stated below, Plaintiffs' Motion is GRANTED in part and DENTED in part without prejudice.

I. BACKGROUND

A class of disabled individuals and community care providers bring this action, alleging that Defendants are discriminating against them on the basis of disability in their administration of California's developmental disabilities services system. In particular, Plaintiffs allege that wages for community services providers are so low that "receipt of safe, quality services in the community for people with developmental disabilities [is threatened], resulting in their unnecessary institutionalization." Motion at 2; *see also* Complaint at PP 79-111.

Plaintiffs bring claims under three statutes: 1) Title II of the Americans With Disabilities Act ("ADA"), [42 U.S.C. § 12131-12132](#); ¹ 2) Section 504 of the Rehabilitation Act, [29 U.S.C. § 794](#); ² and 3) Title XIX of the Social Security

¹ Section 12132 provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Section 12131 defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." The Supreme Court held in *Olmstead v. Linn*, "that unjustified institutional isolation of persons with disabilities is a form of discrimination" under the ADA. [527 U.S. 581, 144 L. Ed. 2d 540, 119 S. Ct. 2176 \(1999\)](#).

² Section 794 provides that "no otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." In *Olmstead v. Linn*, the Court notes that the implementing regulations for § 794 require that recipients of federal funds "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." [527 U.S. at 591-592](#) (quoting [28 C.F.R. § 41.51\(d\)](#)). On the other hand, the Court notes that the

Act, 42 U.S.C. § 1396a.³ Defendants are: 1) Grantland Johnson, in his official capacity as Secretary of California Department of Health and Human Services [*7] ("HHS"); 2) Clifford Allenby, in his official capacity as Director of the California Department of Developmental Services ("DDS"); 3) Diana Bonta, in her official capacity as Director of California Department of Health Services ("DHS") and 4) Timothy Gage, in his official capacity as Director of the California Department of Finance ("DOF"). After initially denying Plaintiffs' motion for class certification, Judge Wilken granted Plaintiffs' renewed motion for class certification on August 2, 2001. On February 22, 2001, a stipulated protective order was entered. [*8] [*9]

This motion arises out of two sets of document requests: 1) Plaintiffs' First Set of Request for Production of Documents ("First Set"), which requested budgetary and fiscal information related to community service providers; 4 2) Plaintiffs' Third Set of Request For Production Of Documents ("Third Set"), which requested information relating to community service providers.⁵ Within a day or two after Plaintiffs filed their Motion To Compel, Defendants produced a list of community service providers. Therefore, to the extent that the Motion relates to those requests, the Motion is moot. However, the fiscal and budgetary information continues to be in dispute.

[*10] In their Motion, Plaintiffs challenge Defendants' assertion of the deliberative process privilege. See Exhs. B and C to Table of Exhibits in Support of Motion To Compel ("Table of Exhibits") (privilege logs provided by DHS and DDS).⁶ Plaintiffs argue that Defendants have waived the deliberative process privilege by failing to adequately assert it or at least, that Defendants' failure to respond in a timely and sufficient manner to Plaintiffs' requests for production warrants the imposition of sanctions pursuant to *Fed. R. Civ. P.* 37. Plaintiffs argue further that even if the privilege has been preserved, these documents are not protected by the deliberative process privilege because they are not pre-decisional but rather,

are final agency decisions that do not reveal anything about the deliberative process within the agency. Finally, Plaintiffs assert that Defendants should be required to produce these documents because the deliberative process privilege is a qualified privilege and Plaintiffs' need for the documents at issue outweighs any harm that may be caused by their disclosure.

[*11] In their Opposition, Defendants argue that they properly asserted the privilege. Defendants further argue that the documents at issue are, in fact, pre-decisional, because they are used by the Governor and the DOF in formulating the proposed budget that is presented to the California legislature each year. Finally, Defendants assert that Plaintiffs' need for these documents does not outweigh the harm that would result from their disclosure. In support of this argument, Defendants assert that: 1) the budgetary and fiscal documents at issue are of limited relevance to Plaintiffs because their claims depend on the reasonableness of *actual* payments made to community care providers, which are a matter of public record; and 2) the documents are "highly sensitive" and their disclosure would "inhibit the free flow of ideas which is essential" to the budget formulation process.

On September 14, 2001, the Court issued an order continuing the hearing on Plaintiffs' motion and requiring that Defendants submit to the Court a supplemental brief providing, among other things, the following information with respect to each document for which the deliberative process privilege is asserted: [*12] 1) "specific facts demonstrating why each document is 'deliberative' and 'predecisional'"; 2) "specific facts concerning: a) the degree and type of harm that would result from requiring production of each document; and b) what type of protective order would be necessary to reduce that harm or, alternatively, why a protective order would not reduce this harm;" and 3) "what portions of each document are deliberative and, if specific sections are purely factual, why those sections cannot be produced."

Defendants filed their supplemental brief, along with supporting materials, on September 21, 2001. In their brief

provisions of the Rehabilitation Act, in contrast to the ADA, do not explicitly recognize that unnecessary isolation or segregation may constitute discrimination. *Id.* at 600 n. 11. The Court does not reach the question of whether unjustified institutionalization of an individual with a disability constitutes discrimination under the Rehabilitation Act in *Olmstead v. Zimring*.

³ Section 1396a sets out the requirements imposed on the state under Medicaid.

⁴ According to Plaintiffs' Reply for this Motion, the First Set was served on September 15, 2000. The First Set that is provided with the motion was reprinted and does not include a proof of service.

⁵ According to Plaintiffs, the Third Set was served on February 28, 2001. See Motion at 6.

⁶ Plaintiffs suggest that they are challenging the assertion of the deliberative process privilege as to all documents for which it is asserted, but the substantive arguments in their Motion are directed at Defendants' assertion of this privilege as to various budget requests (the so-called "Budget Change Proposals" and "May Revisions") made by the agency Defendants as part of the state's budget formulation and adjustment process. See Exhs. L and M to Table of Exhibits to Motion to Compel (sample Budget Change Proposal and May Revision).

Defendants asserted that "there [was] no applicable authority" which required Defendants to provide the information ordered by the Court and moreover, that it would be "virtually impossible" to comply with the Court's order. Defendants argued further that they had adequately asserted the deliberative process privilege and that the burden should now shift to Plaintiffs to identify which specific documents in Defendants' privilege logs were really at issue. In support of their supplemental brief, Defendants also submitted additional declarations and several new privilege logs.

[*13] In Plaintiffs' response to Defendants' supplemental brief Plaintiffs failed to identify which of the hundreds of documents potentially at issue were sought by the Motion. Rather, they asserted that all of the fiscal and budgetary documents sought are "at the heart of the facts which constitute the subject matter of this case." In addition, Plaintiffs' lead counsel, Thomas Gilhool, states that he was Secretary of Education for the State of Pennsylvania for three years and that the requirement in Pennsylvania that agency requests be made public did not chill discussion in any way. In support of their response, Plaintiffs filed two documents: 1) an excerpt from a 1999 publication by the National Association of State Budget Officers showing that in 32 states, the budget requests made by the agencies are made part of the public record (Appendix A); 2) a provision of the Pennsylvania Administrative Code requiring that all original agency budget requests and revised agency budget requests must be submitted to the General Assembly and at that point become public documents (Appendix B).

III. ANALYSIS

A. Waiver and Sanctions

Plaintiffs assert that Defendants have waived [*14] the deliberative process privilege because: 1) Defendants initially asserted the privilege only as a generalized privilege, without asserting the privilege as to any specific request for production; and 2) Defendants' privilege logs were both untimely and inadequate. Plaintiffs argue further that even if the Court does not find that the deliberative process privilege has been waived, sanctions should be imposed pursuant to *Fed. R. Civ. P. 37*.

In determining whether or not a party has waived a privilege, courts look to the following factors, developed in the context of inadvertent waiver: "(1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the 'overriding issue of fairness.'" *Eureka Financial Corp. v. The Hartford Accident and Indemnity Co.*, 136 F.R.D. 179, 184 (E.D. Cal. 1991) that blanket assertion of

privilege resulted in waiver where party invoking privilege failed to assert the privilege as to specific documents even after motion to compel was filed and where dispositive motions date was fast approaching).

Here, Defendants' initial [*15] blanket assertion of the deliberative process privilege was clearly insufficient to invoke the privilege in that it failed to identify any specific documents -- or even, specific requests - for which Defendants invoked the privilege. *See* Appendix A to Plaintiffs' Motion to Compel: Reprint of Plaintiffs' Production Requests and Defendants' Responses. Further, as to the vast majority of the documents for which Defendants assert the privilege, Defendants, delayed remedying this deficiency for almost an entire year. The first privilege log identifying specific privileged documents was not produced until June of 2001, approximately nine months after the First Set was served. Many of the privilege logs were provided *after* the Motion to Compel was filed, almost a full year after the First Set was served. Indeed, Defendants filed with their supplemental brief approximately 52 pages of *new* privilege logs and stated that they intended to provide additional pages to at least one privilege log. *See, e.g.*, DOF Privilege Log Vol. II, attached to Decl. of Cheryl Stewart in Support of Dept. of Finance Privilege Log and Defendants' Opposition to Motion to Compel, filed September 21, 2001: [*16] HHS Privilege Log, attached to Decl. of Robert Schladale in Support of California Health and Human Service Agency's Privilege Log and Defendants' Opposition to Motion to Compel, filed September 21, 2001: Declaration of Margaret Fraser in Support of Defendants' Supplemental Brief Opposing Plaintiffs' Motion to Compel (stating that DDS is in the process of logging additional privileged documents and will be providing additional privilege log pages).

However, while Defendants' initial assertion of the privilege was inadequate and its efforts to correct this deficiency were slow, the Court declines to find waiver because of the large volume of documents at issue. At oral argument, Defendants represented to the Court that they have asserted the deliberative process privilege as to twelve thousand pages of documents and that review of these documents has been an extremely burdensome process. *See also* Decl. of Margaret Fraser in Support of Defendants' Supplemental Brief Opposing Plaintiffs' Motion to Compel (stating that "to draft a detailed log of the thousands of additional pages we have now located has been very burdensome for DDS legal staff"). In light of the large volume of documents [*17] at issue, the Court finds that waiver would constitute a disproportionate sanction for Defendants' conduct and therefore, would not achieve "overriding fairness." For the same reason, the Court declines to award sanctions pursuant to *Fed. R. Civ. P. 37*.

B. Assertion of Deliberative Process Privilege

1. Documents at Issue

Defendants have provided privilege logs listing thousands of pages of documents for which they assert the deliberative process privilege. Plaintiffs assert in their Motion that all of these documents should be produced. However, in their Motion, Plaintiffs only provide specific arguments on the budget requests made by the various agencies: the Budget Change Proposals ("BCPs") and the May Revisions. Plaintiffs do not address in their Motion any specific documents other than the BCPs and May Revisions and indeed, as to many of these documents, it would have been impossible to do so as Defendants had not yet provided Plaintiffs with many of the privilege logs listing these documents when Plaintiffs filed their Motion to Compel. Therefore, the Court does not reach the question of whether documents other than BCPs and the May Revisions are entitled to [*18] protection under the deliberative process privilege at this time. Rather, the Court denies Plaintiffs' Motion as to all documents other than the BCPs, May Revisions and drafts of those documents without prejudice to Plaintiffs' bringing a future motion to compel that identifies specific documents listed on Defendants' privilege log and explains in detail why these documents should be produced.⁷ In the discussion below, the Court addresses Plaintiffs' Motion only as it relates to the BCPs, May Revisions and drafts of those documents.

[*19] 2. Assertion of Deliberative Process Privilege as to Budget Change Proposals and May Revisions

a. Overview of the Deliberative Process Privilege

The deliberative process privilege has been developed to protect "the decision making processes of government agencies. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975). As the Court explained in *NLRB v. Sear Roebuck & Co.*, "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." The underlying premise of the privilege is that agency decision-making might be impaired if discussions within the agency were subject to public review, thereby discouraging "frank discussion of legal or policy matters." *Id.*

In order to be protected by the deliberative process privilege, a document must be both "predecisional" and

"deliberative." *Assembly of the State of California v. United States Department of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). The Ninth Circuit has adopted the D.C. Circuit's definitions of these terms:

A "predecisional" document is one "prepared in order to assist an agency decisionmaker in arriving at his [*20] decision," . . . and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the 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."

Id. (quoting *Formaldehyde Inst. v. Department of Health and Human Services*, 281 U.S. App. D.C. 285, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (citations omitted)).

Factual material generally is not considered deliberative, but the fact/opinion distinction should not be applied mechanically. *Id.* at 921-922. Rather, the relevant inquiry is whether "revealing the information exposes the deliberative process." *Id.* at 921. Thus, for example, in *Quarles v. Department of the Navy*, the court held that cost estimates prepared by a special study team of the Navy which were formulated to assist the Navy in selecting a "homeport" for an intended battleship ground, fell under the deliberative [*21] process 282 U.S. App. D.C. 183, 893 F.2d 390 (D.C. Cir.). The Court explained:

cost estimates such as these are far from fixed. . . . They derive from a complex set of judgments - - projecting needs, studying prior endeavors and assessing possible suppliers. They partake of just that elasticity that has persuaded courts to provide shelter for opinions generally. *Id.* at 392-393. On this basis, the Court declined to order the Navy to produce the full report of the study team. *Id.* (The Navy had produced a redacted

⁷ It is evident from Plaintiffs' briefs and the copies of the BCP's and May Revisions provided in support of their Motion that the documents that are ordered produced herein are highly relevant to Plaintiffs' claims and that their production intrudes minimally, and without prejudice, into agency deliberations. In contrast, it is not obvious that the same is true for the remaining documents listed on Defendants' privilege logs. Many of these documents appear to be internal e-mails, memoranda and briefing books prepared by staff for policy-makers. Production of these documents may result in a far greater intrusion on the deliberative process than is likely to result from production of the BCPs and May Revisions. However, the Court does not decide this issue at this time.

version which included only the "truly factual information" and omitted all analysis, conclusions and cost estimates). *Id.* Even where material in a document is purely factual, it may be protected under the deliberative process privilege if it "is so interwoven with the deliberative material that it is not severable." *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

Generally, the deliberative process privilege may be invoked only by the agency head after personally reviewing the documents for which the privilege is asserted. See *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998) [*22] (citing to *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 516-517 (D. Del. 1980)). As the court explained in *Coastal Corp.*, "that requirement was designed to deter governmental units from too freely claiming a privilege that is not to be lightly invoked. . . by assuring that some one in a position of high authority could examine the materials involved from a vantage point involving both expertise and an overview-type perspective." *Id.* at 517. The requirement that the privilege be invoked by the agency head need not be applied absolutely literally. *Id.* at 517-518. However, the duty to invoke the privilege cannot be delegated so far down the chain of command that purposes of the requirement are undermined. *Id.*

The deliberative process privilege is not absolute. *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Even if the deliberative process privilege applies, a litigant may obtain discovery of protected material if the need for the documents outweighs the governmental interest in keeping the decision making process confidential. *Id.* "Among the factors to be considered in making this determination [*23] are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.*

Finally, the privilege "must be strictly confined within the narrowest possible limits consistent with the logic of its principles." *K.L. v. Edgar*, 964 F. Supp. 1206, 1208 (N.D. Ill. 1997) (citations omitted); see also *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998) (stating that deliberative privilege is "narrow privilege" which should not be "indiscriminately invoked").

b. Applicability of Deliberative Process Privilege

Plaintiffs assert that the BCPs and May revisions are neither deliberative nor predecisional. Rather, they assert, these documents are final decisions by the Agency recommending increased funding by the legislature.

Plaintiffs argue further that even if these documents are privileged, they must be produced because the deliberative process privilege is a qualified privilege and Plaintiffs' need for these documents outweighs the harm that would result [*24] from their disclosure, especially if disclosure of the contents of these documents were limited by a strict protective order. The Court agrees with Plaintiffs that any qualified privilege that the BCPs, May Revisions and drafts of those documents may enjoy is outweighed by Plaintiffs' need and therefore, that all of these documents should be produced. Therefore, the Court need not reach Plaintiffs' first argument, that the deliberative process privilege does not apply to documents that constitute a final decision of the agency, even if they are used in a decision-making process involving some other agency or the Governor's office.

First, with respect to Plaintiffs' need, the BCPs and May Revisions, as well as drafts of those documents, contain evidence that is highly relevant to Plaintiffs' claims and very likely to defenses that will be raised by Defendants as well. This case is based on three federal statutes. The first provision, Title XIX of the Social Security Act, requires that department heads "provide such methods and procedures relating to. . . the payment of care and services. . . as may be necessary to. . . assure that payments are consistent with efficiency, economy [*25] and quality of care and are sufficient to enlist enough providers." 42 U.S.C. § 1396a(a)(30)(A). Plaintiffs' second and third, claims are based on Title II of the ADA and Section 504 of the Rehabilitation Act of 1973, under the theory articulated by the Supreme Court in *Olmstead v. Zimring*, that undue institutionalization of people with disabilities constitutes discrimination. 527 U.S. 581, 600, 144 L. Ed. 2d 540, 119 S. Ct. 2176 (1999). Under *Olmstead*, "states are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodate, *taking into account the resources available to the State and the needs of others with mental disabilities.*" *Id.* at 606 (emphasis added).

The BCPs and May Revisions, as well as drafts of those documents, are highly relevant to Plaintiffs' claims. They contain detailed facts and analysis concerning the adequacy of funding for various programs for the disabled, which, in turn, bear directly on whether the State's expenditures on [*26] community care are reasonable and sufficient, in light of the needs of others with developmental disabilities. This is a key issue in Plaintiffs' case. Further, while some of the factual information contained in these documents may be available elsewhere, it is obvious that the quality and persuasiveness of such

evidence is likely to be substantially inferior to the agencies' own budget requests, which provide detailed analysis by those entrusted with administering the State programs for the developmentally disabled.

Finally, the Court is not persuaded that the disclosure of the BCPs, May Revisions and drafts of those documents poses such a threat to the deliberative process that they should not be produced. Although Defendants assert that any disclosure whatsoever of these documents would lead to a "chilling effect" on the behind-the-scenes discussion concerning the Governor's annual budget, they fail to explain why 32 states make agency budget requests part of the public record, apparently without any "chilling effect." Defendants also have failed to explain why a protective order limiting disclosure of these documents would not reduce any harm that might result from ordering their [*27] production, despite the Court's order explicitly requiring Defendants to address this issue. In fact, the Court finds that the protective order that is currently in place, with minor modification, will sufficiently protect Defendants interests. ⁸See *Price v. County of San Diego*, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (concluding that documents at issue should be produced and noting that "the infringement upon the frank and independent

discussions regarding contemplated policies and decisions by the County. . . can be alleviated through the use of a strict protective order").

[*28] **IV. CONCLUSION**

For the reasons stated above, the Court GRANTS Plaintiffs' Motion to Compel with respect to all BCPs, May Revisions and drafts of those documents for which Defendants assert the deliberative process privilege. Defendants shall produce those documents within ten (10) days of the date of this Order. All such documents shall be confidential pursuant to the February 22, 2000 Protective Order, as amended by this Order. With respect to all remaining documents for which Defendants assert the deliberative process privilege, the Court DENIES Plaintiffs' motion without prejudice.

IT IS SO ORDERED.

Dated: November 19, 2001

JOSEPH C. SPERO

United States Magistrate Judge

⁸ At oral argument. Defendants expressed concern that the current protective order covers only documents that "contain individually identifying information." See Protective Order at P 1. In order to address Defendants' concern, the Court amends the current protective order to cover all documents for which Defendants have claimed or will claim the deliberative process privilege. In particular, the Court adds the following provision to Paragraph One:

In addition, all documents for which any defendant in this litigation claims the deliberative process privilege that are ordered produced shall be considered confidential information. In addition, the following provision shall be added to Paragraph Three:

In addition, if any party seeks to file with the Court any document for which any defendant in this litigation claims the deliberative process privilege that is ordered produced, such party shall apply for an order, pursuant to Civ. L. R. 79-5, that the document be filed under seal.