IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Unknown Parties, et al.,

Plaintiffs,

v.

Jeh Johnson, et al.,

Defendants.

No. CV-15-00250-TUC-DCB

ORDER

On June 21, 2016, Defendants filed a Motion for a Protective Order pursuant to Federal Rule of Civil Procedure, Rule 26(b)(2)(C) and (c)(1). Defendants claim privilege in respect to three of the 33 topics noticed by Plaintiffs for deposition inquiries. Defendants object, pursuant to the deliberative process privilege, to the following topics of inquiry:

> 1. The U.S. Border Patrol's "Consequence Delivery System," or "CDS," Including but not limited to the factors considered, rationales behind, purposes of, policy-making process, and oral and written communications regarding this system.
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> 2. The factors considered, rationales behind, purposes of, and policymaking process for the determination of "Duration of Detention: Whenever possible, a detainee should not be held for more than 12 hours" as stated in Section 6.2 of the "Hold Rooms and Short Term Custody," in Defendants' production of documents, Bates number USA000325, including but not limited to the oral and written communications regarding this determination.
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> 3. The factors considered, rationales behind, purposes of, and policymaking process for the determination of "Duration of Detention: Detainees should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities" as stated in Section 4.1 of the "U.S. Customs and Border Protection National Standards on Transport, Escort, Detention, and

> Search," in Defendants' production of documents, Bates number USA000631, including but not limited to the oral and written communications regarding this determination.

(Motion for Protective Order (Doc. 162) at 2-3.)

Defendants argue that each topic of inquiry requires a different witness, which places an undue burden on the Defendants given the subject matter is not discoverable because it is covered by the deliberative process privilege. And, part of topic one is simply not relevant to the parties' claims and defenses. Fed. R. Civ. P. 26(b)(1) (describing scope of discovery to allow inquiry into any nonprivileged matter that is relevant to any party's claim or defense and is proportional to the needs of the case). In other words, Defendants should not have to produce witnesses only to discuss privileged material, especially if it is not relevant.

Federal Rule of Civil Procedure, Rule 26(b) was amended in 2015 to clarify that the scope of discovery is confined by relevancy to the "parties' claims and defenses" by deleting the often incorrectly used phrase, "reasonably calculated to lead to the discovery of admissible evidence" and the unnecessary provision allowing a court, for good cause, to authorize "discovery of any matter relevant to the subject matter involved in the action." The former phrase was never meant to define the scope of discovery because it would swallow any other limitation. The latter phrase is not necessary to allow the courts to authorize discovery of inadmissible evidence which is relevant to the parties' claims and defenses. Fed. R. Civ. P. 26(b)(1), Advisory Committee Notes: 2015 Amendment.

The first inquiry must be relevancy, which Defendants concede in respect to Topics 2 and 3. (Motion for Protective Order (Doc. 162)). In the Reply, Defendants expressly admit they concede to the relevancy of Topics 2 and 3, but for the first time frame the concession as "could be" relevant and suggest as to Topics 2 and 3 the potentially relevant information would be post-decisional application of the policies. Post-decisional information is not covered by the deliberative process privilege. Defendants' suggestion that Topic 2 and 3 deposition questions should be limited to "this potentially relevant and non-privileged material" was raised for the first time in the

Reply. (Reply (Doc. 175) at 4-5.) Plaintiffs have had no opportunity to respond. The Court rejects an argument raised for the first time in a Reply.

Topic 1: Relevancy of the CDS

The Plaintiffs explain that the CDS is an overarching system used by Border Patrol "to apply consequences to [keep] subjects from attempting further illegal entries or participating in a smuggling enterprise. . . ." The consequences appear to be either criminal or administrative immigration proceedings, whichever will be the most effective and efficient way to achieve the desired border security results. Defendants contend: "CDS thus relates purely to the immigration and criminal processing of individuals who illegally enter the United States, and has no effect or impact on the conditions any individual may experience at Tucson Sector Border Patrol facilities." (Motion for Protective Order (Doc. 162) at 8.)

Plaintiffs have alleged the following:

> CBP policies and practices, including the agency's "Consequence Delivery System" ("CDS"), guarantee that large numbers of detainees will be forced to spend multiple nights in inhumane and degrading conditions. For example, consistent with the agency's CDS policy, Border Patrol screens Tucson Sector detainees for referral to "Operation Streamline" proceedings, in which dozens of individuals enter guilty pleas on federal unauthorized entry charges in a single hearing. In Tucson, these proceedings are held every weekday afternoon. Thus, any individual who is apprehended on a Friday and referred for Operation Streamline proceedings will spend a minimum of three nights in Border Patrol custody, while individuals detained during a weekend will spend at least one and often two nights in custody, prior to referral for a Monday hearing. In Tucson, thousands of individuals are referred for these proceedings annually.

(Complaint (Doc. 1) ¶ 96.)

Plaintiffs have alleged a link between Topic 1, the CDS, and the 72 hour minimum stay in place in 2015, which is the subject of Topic 3 as compared to the 12 hour maximum stay in place in 2008 which is the subject of Topic 2. Plaintiffs assure the Court they will not inquire into matters "completely unrelated to detention conditions." (Response (Doc. 174) at 8.) They propose legitimate questions would ask whether the consequences applied by CDS relate to or affect the length of detention, whether the

amount of time and number of individuals being detained were considered in establishing the CDS, and what were the reasons for establishing the CDS. *Id.* at 9.

Plaintiffs argue these inquiries are relevant to disprove the defense raised by Defendant that for the Plaintiffs to prevail, they must establish that the conditions in the BP facilities are punitive and bear no reasonable relationship to the legitimate operational interests of BP. Defendants argue that conditions of confinement are based on various legitimate operational reasons or operational interests, and Plaintiffs respond that they, therefore, need discovery related to what those operational reasons or interests are to show that the conditions of confinement are inflicted with the intent to punish and are excessively harsh in relation to any legitimate purpose. These questions will allow Plaintiffs to determine whether legitimate operational purposes could be accomplished through alternative methods consistent with the Constitution. *Id.* at 9.

In reply, the Defendants argue that Plaintiffs merely proffer a hypothetical theory of BP polices that have no effect or impact on the conditions of confinement and fail to explain, even if CDS as a policy had an effect on the length of detention, how that would be anything other than incidental to immigration processing or whether conditions are punitive relative to the amount of time the individual is subjected to those conditions. (Reply (Doc. 175) at 3.)

The Court agrees with the Defendants that Plaintiffs have not challenged the CDS policy, but the questions the Plaintiffs propose inquire into how the CDS policy affects or impacts the conditions of detention experienced by Plaintiffs because the harshness of the conditions depends on the duration of the detention. This is not a fishing expedition as long as the inquiry is so limited. Topics 1 through 3 are relevant as proposed.

Topics 2 and 3, and the Majority of Topic 1, Are Exempt From Discovery Because The Information Sought is Protected By The Deliberative Process Privilege.

Federal common law recognizes a deliberative process privilege on the ground that officials will not communicate candidly among themselves if each remark could be subject to discovery. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S.

1, 8 (2001). It shields disclosure of inter and intra-governmental communications relating to decision-making matters of law or policy. Then, the privilege applies to information if it meets two threshold requirements: 1) the document must be predecisional and 2) it must be deliberative in nature, containing opinions, recommendations, or advice about agency policies." *F.T.C. v. Warner Commc'ns Inc*., 742 F.2d 1156, 1161 (9th Cir. 1984).

The Court begins with the threshold determination that the CDS and the 12/72 hour-maximum durations for detention implicate agency policymaking. Neither side asserts otherwise.

The privilege protects "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and polices are formulated.'" *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966)). Generally, factual information is not privileged, but in the Ninth Circuit, even factual material can be protected by the privilege where revealing it would be tantamount to publishing the agency's evaluation and analysis. *Nat'l Wildlife Fed'n v. U.S. Forest Serv*., 861 F.2d 1114, 1119 (9th Cir. 1988) (discussing deliberative process privilege and adopting test that is "process-oriented" or "functional" and noting that even factual materials are exempt from disclosure to the extent that they reveal the mental processes of decision-makers).

The rationale for the privilege is to protect frank and open discussions within governmental agencies, which might be "chilled" if the personal opinions and ideas of government personnel involved in the decision-making process were subject to public scrutiny. *Greenpeace v. National Marine Fisheries Service,* 198 F.R.D. 540, 543 (Wash. 2000) (citations omitted). It is narrowly construed, meaning it protects information actually related to the process by which policy-makers formulated a policy—only those materials which bear on the formulation or exercise of agency policy-oriented judgment. *Id.*

The privilege is not absolute; therefore, the Court must determine whether the need for the evidence overrides the government's interest in non-disclosure, including cases where the agency's decision-making process is itself at issue. *Id.* at 543 (citations omitted). To decide whether the qualified deliberative process privilege should be overcome, a court may consider the relevancy of the evidence, the availability of other evidence, the government's role in the litigation, and the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. *F.T.C. v. Warner Communications Inc*., 742 F.2d 1156, 1161 (9th Cir. 1984). The Court may also consider the interest of the litigant, and ultimately society, in accurate judicial fact finding, the seriousness of the issues involved in the litigation, the presence of issues involving alleged governmental misconduct, and the federal interest in the enforcement of federal law. *United States v. Irvin*, 127 F.R.D. 169, 173 (Calif. 1989).

The burden of establishing the applicability of the privilege is on the government, which requires it to show that documents fall within the claim of privilege, and that it has complied with formal procedures necessary to invoke the privilege. Procedurally, the deliberative process must be invoked by an agency head, or his delegate, having control over the requested document, after having personally reviewed the documents for which the privilege is asserted. (Response (Doc. 174) at 3) (citations omitted); *Alpha I , ex rel. Sands v. United States*, 83 Fed. Cl. 279, 289 (Fed. Cl. 2008). The party seeking the protection must state with particularity the information that is subject to the privilege. *Id.* at 5; *In ex rel. Sands,* 83 Fed. Cl. at 289. Therefore, "[b]lanket assertions of privilege are insufficient." *Greenpeace*, 198 F.R.D. at 545 (quoting *Exon Corp. v. Dept. of Energy*, 91 F.R.D. 26, 43 (Texas 1981)). Finally, the agency must give precise and certain reasons for maintaining the confidentiality of the requested documents. *In ex. Rel. Sands*, 83 Fed. Cl. at 289 (citations omitted). Therefore, "without indicating any specific, policy-oriented communication nor proffering any cogent reason for protecting it," bare assertions that internal agency discussions will be "chilled" is nothing but a legal platitude asserted in the abstract. *Greenpeace*, 198 F.R.D. at 545.

Generally the privilege is invoked to protect documents, but courts have applied it to testimony as well and have made no distinction between the two. *North Pacifica LLC v. City of Pacifica*, 274 F. Supp.2d 1118, 1121 n. 1 (Calif. 2003).

In the context of deposition questions, the deliberative process privilege will attach to communications containing opinions, recommendations, or advice that were part of the deliberative process preceding the adoption and promulgation of three specific policies: the CDS, the 12 and 72 hour maximum duration for detention. The Government admits it's motion fails procedurally, "[b]ut this is, in large part, due to the fact that Plaintiffs have declined to clarify or provide any examples of question they might ask under these Topics. Thus, Defendants are left with the broadly stated Topics in Plaintiffs' Notice which, as written, seek discovery of the pre-decisional deliberative process that led to the polices at issue in those topics." (Reply (Doc. 175) at 4.) Defendants complain that Plaintiffs failed to "'describe with reasonable particularity the matters for examination.'" *Id.* at 2 (quoting Fed. R. Civ. P. 30(b)(6)). This argument suggests the Plaintiffs' Notice fails the Rule 30(b) requirement "to provide enough information for Defendants to ensure that the right witnesses, with the right knowledge, are present and prepared to testify." *Id.*

In part, the Defendants' assertion that Plaintiffs' Rule 30(b)(6) Notice is overly broad is linked to Defendants' blanket assertion of the deliberative process privilege. Plaintiffs' Notice identifies each policy topic with particularity: CDS; 12 hour maximum duration for detention; 72 hour maximum duration for detention. Identifying the agency head(s) having knowledge of the deliberative processes related to each of these identified policies will go a long way in satisfying Defendants' obligations under Rule 30(b) to identify the right witnesses to testify and at the same time begins to address the procedural requirements necessary to invoke the deliberative process privilege.

To the extent the Plaintiffs seek written documents, the Defendants have no excuse for procedural non-compliance or for failing to prepare a privilege log with the specificity necessary prevail on the merits of its assertions of privilege.

In the context of the un-asked deposition questions: "No determination can be made about the applicability of the privilege until the privilege is asserted in response to specific questions at the deposition." *E.E.O.C v. Burlington Northern & Santa Fe Ry. Co.*, 621 F. Supp.2d 603, 608 n. 3 (Tenn. 2009). The Motion for a Protective Order is premature. *Alpha IL.P. ex rel. Sands v. United States,* 83 Fed. Cl. 279, 290 (Fed Cl 2008).

The rationale for requiring an agency head or official to whom authority has been carefully delegated to invoke the privilege is to allow those officials with expertise in the nature of the subject matter of the privilege claim and the information requested, rather than counsel, to make the determination whether the public interest in confidentiality outweighs the public interest in disclosure. *Id.* at 288-289. Simply put, Defendants must identify someone who is capable of establishing what deliberative process was involved in the adoption of each of the three policies and the role played by the contested evidence in the course of that process. Subsequent to the depositions, Defendants must satisfy the procedural and substantive requirements for asserting the privilege, and should provide for the Court's *en camera* review of any questions that elicit the privilege assertion and the proposed responses the witnesses would have provided if the privilege had not been asserted.

Accordingly,

IT IS ORDERED that the Motion for Protective Order (Doc. 162) is DENIED, without prejudice to reurging it subsequent to the depositions.

Dated this 21st day of July, 2016.

David C. Bury
United States District Judge