

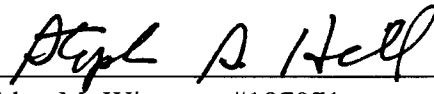
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANNE VENEMAN, Secretary of the)	
United States Department of Agriculture,)	
)	
Defendant.)	

**PLAINTIFFS' MOTION COMPEL PRODUCTION OF CERTAIN ALLEGEDLY
PRIVILEGED DOCUMENTS AND FOR IN CAMERA INSPECTION OF OTHER
ALLEGEDLY PRIVILEGED DOCUMENTS.**

Pursuant to LCvR 7.1 and Fed.R.Civ.P. 37, plaintiffs hereby move to compel defendant to produce certain allegedly privileged documents to plaintiffs and to produce for in camera inspection certain other allegedly privileged documents. In support of this motion, plaintiffs have filed herewith a memorandum of points and authorities.

Respectfully submitted,



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Date: September 25, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,

Plaintiffs,

v.

ANNE VENEMAN, Secretary of the
United States Department of Agriculture,

Defendant.

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) Judge Robertson
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**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF
CERTAIN ALLEGEDLY PRIVILEGED DOCUMENTS AND FOR IN CAMERA
INSPECTION OF OTHER ALLEGEDLY PRIVILEGED DOCUMENTS.**

INTRODUCTION

Plaintiffs submit their memorandum of points and authorities in support of their motion to compel production of certain allegedly privileged documents and for in camera inspection of other allegedly privileged documents. According to defendant's untimely 110-page revised privilege log, defendant has withheld at least 886 documents on the basis of either the deliberative process privilege, the attorney-client privilege, the attorney work product privilege or some combination of the foregoing privileges.¹ As set forth more fully infra, even a cursory review of the revised privilege log makes clear that defendant has improperly invoked privilege claims with respect to hundreds of documents. Pursuant to LCvR 7.1(m), plaintiffs' counsel conferred with defendant's counsel to determine whether defendant would consent to this motion and defendant has declined to do so.

¹ The revised privilege log is attached as Exhibit 1.

The factual background is straight forward. Pursuant to the court's directive, plaintiffs served their discovery requests on January 21, 2003. The court ordered defendant to serve her objections to plaintiffs' discovery on or before February 14, 2003. January 15, 2003 Status Hearing Tr. at 16. On February 14, 2003, defendant filed what she characterized as "general" objections to plaintiffs' discovery requests and unilaterally reserved for herself the right to file specific objections at a later date apparently to be determined by defendant. When those procedural dates were established, the court contemplated holding a hearing on discovery "at some time in early March. . . ." *Id.* at 17. However, as a result of scheduling conflicts on the part of the court and defendant, the court did not hold the hearing until April 29, 2003. Suffice it to say that whatever else defendant did during those intervening 98 days, she did not serve her specific objections.

At the April 29, 2003 Status Hearing, defendant stated that the United States Department of Agriculture ("USDA") had located loan files for 37 of the 110 named plaintiffs and volunteered to produce those files. April 29, 2003 Status Hearing Tr. at 12. The court ordered defendant to produce the proffered files and gave defendant an additional 30 days in which to respond to the January 21, 2003 discovery requests. *Id.* at 24 and 40. Thus, defendant had 128 days to do what the Federal Rules of Civil Procedure require parties to do in 30 days. Despite the court's indulgence, defendant, on the 128th day and without any explanation whatsoever, requested an additional week in which to reply. The court granted the requested relief and, 135 days after plaintiffs served their discovery requests, defendant finally served boilerplate objections² that could not have required 5 days to prepare.

² It is well settled that a court should not even consider boilerplate objections as such objections are insufficient on their face. *See, e.g., Mitchell v. National Railroad Passenger Corporation*, 208 F.R.D. 455, 458 n.4 (D.D.C. 2002). It is equally well settled that "the party opposing discovery must make a specific showing, supported by declaration, as to why the production sought would be unreasonably burdensome." *Pleasants v. Allbaugh*, 208 F.R.D. 7, 12 (D.D.C. 2002); *Pro Football, Inc. v. Harjo*, 191 F. Supp. 2d 77, 80 (D.D.C. 2002); *Natural Resources Defense Council v. Curtis*, 189 F.R.D. 4, 13 (D.D.C. 1999); *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 191 (D.D.C. 1998). While defendant made no such showing, the court nevertheless seemed to credit defendant's unsubstantiated assertions of burden.

On or about May 13, 2003, defendant advised plaintiffs that the proffered loan files would be available for inspection and designation for copying on 48 hours notice beginning May 15, 2003. Plaintiffs responded immediately that they would inspect and designate documents beginning on May 15, 2003. At the appointed time on May 15th, a team of plaintiffs' lawyers arrived at defendant's Washington offices and completed the document inspection and designation that same day. Defendant, however, did not produce the copies (in the form of 10 compact discs) until the morning of July 15, 2003, two months after plaintiffs designated the documents for copying and approximately six hours before the status hearing scheduled for that date. Although it is well settled that a party withholding documents on the basis of a claimed privilege is required to submit a privilege log and plaintiffs explicitly reminded defendant of that obligation, no such log accompanied the documents. See Fed. R. Civ. P. 26(b)(5) and Letter from S. Hill to L. Olson dated July 14, 2003 at 3-5 (attached hereto as Exhibit 2). After an exchange of correspondence, defendant finally produced a 108-page privilege log on or about August 11, 2003,³ more than three weeks after the document copies were produced and nearly three months (11½ weeks) after the documents were designated for copying.

As previously noted, even a cursory review of that privilege log revealed hundreds of improper privilege claims and other irregularities. Indeed, the problems with the privilege log were so extensive that they called into question the validity of all of defendant's privilege claims. Plaintiffs advised defendant of their concerns regarding the privilege log and formally objected to all of the asserted privilege claims. See Letter from S. Hill to L. Olson, dated September 11, 2003 (attached hereto as Exhibit 3). Defendant elected to ignore the objection to her privilege claims.⁴ On the eve of plaintiffs' initially filing the instant motion, defendant served a revised privilege log at approximately 6:00 p.m. on Friday, September 12, 2003. Thus, defendant

³ While the initial privilege log bears the date August 8, 2003, it was not received by plaintiffs' counsel until Monday, August 11, 2003.

⁴ See Exhibit 4 (Letter from L. Olson to S. Hill, dated September 11, 2003) and Exhibit 5 (Letter from S. Hill to L. Olson, dated September 12, 2003).

provided the revised privilege log nearly seven weeks after the document copies were produced and nearly four months (15-1/2 weeks) after the documents were initially designated for copying.

At the July 15, 2003 status hearing, the court required plaintiffs initially to review the 35 loan files to determine whether commonality could be shown among the named plaintiffs. July 15, 2003 Status Hearing Tr. at 22. Plaintiffs have expended considerable time and resources to review the files, only to have their review hampered by gaps in the files owing to improper privilege claims. Worse yet, the proffered privilege logs offer few, if any, clues to the bases for the claimed privileges. For example, defendant has invoked the deliberative process privilege without even attempting to satisfy the requirements for invoking that privilege. Similarly, defendant has invoked the attorney-client and attorney work product privileges for documents whose authors, according to the revised privilege log, are unknown. Moreover, other documents withheld from production, purportedly on the basis of a claimed privilege, have not been included in the revised privilege log. Significantly, some of the documents included in the privilege log were produced to plaintiffs and a review of those documents fails to reveal any basis for the claimed privilege. As discussed more fully infra, plaintiffs submit that defendant has waived any privilege which may have attached to the aforementioned categories of documents.

Finally, the baselessness of defendant's privilege claims with respect to documents that plaintiffs have reviewed calls into serious question the validity of defendant's remaining privilege claims. Accordingly, plaintiffs request an in camera inspection of the remaining documents subject to a claimed privilege. In so doing, plaintiffs are not unmindful of the potential burden that such an inspection would place upon the court. However, the undue delay that plaintiffs have already experienced and the attendant harm, together with defendant's demonstrated determination to obstruct discovery, capped off by the baselessness of the privilege claims with respect to documents that plaintiffs have been able to review, all militate in favor of in camera inspection. Indeed, the only efficient way to address defendant's privilege claims is

for the court to conduct an in camera review of the remaining allegedly privileged documents to determine the validity of such claims or appoint a magistrate to do so.

ARGUMENT

I. DEFENDANT HAS FAILED TO SATISFY THE REQUIREMENTS OF THE DELIBERATIVE PROCESS PRIVILEGE AND THEREFORE MUST BE DEEMED TO HAVE WAIVED THE SAME.

Of the 886 documents listed in the revised privilege log, defendant has withheld 148 documents solely on the basis of the deliberative process privilege.⁵ In addition, defendant has withheld another 101 documents on the basis of the deliberative process privilege and either the attorney-client privilege,⁶ the attorney work product privilege⁷ or both.⁸ The deliberative process privilege prevents the disclosure of certain inter- or intra-agency letters and memoranda. It is intended to promote frank and open discussion among government policymakers and advisors and to protect such deliberations from publicity. A central tenet of the privilege is that disclosure of such deliberations will have a chilling effect on the frank and open discussion among policymakers and adversely affect policymaking. See Ryan v. Department of Justice, 617 F.2d 781, 789-790 (D.C. Cir. 1980). The Supreme Court has held that the privilege does not prevent the disclosure of factual material that may be severed from the document without compromising the protected policy discussions. EPA v. Mink, 410 U.S. 73, 89-91 (1973). In addition, the privilege safeguards only discussions that take place before the final agency policy decision, not those discussions that implement an existing policy. See Ryan, 617 F.2d at 791; accord, Grove v. Department of Justice, 802 F. Supp. 506, 515 (D.D.C. 1992).

⁵ See Appendix 1.

⁶ See Appendix 2.

⁷ See Appendix 3.

⁸ See Appendix 4.

The procedure for invoking the deliberative process privilege is well settled. Indeed, this court has repeatedly “set forth specific procedures that must be complied with before a claim of government deliberative privilege will even be considered.” Williams v. District of Columbia, No. 96-0200-LFO, 1997 U.S. Dist. LEXIS 23711, at *4 (D.D.C. Apr. 25, 1997) (emphasis added); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Inc., 40 F.R.D. 318, 326 and n.33 (D.D.C. 1966), aff’d sub nom. V.E.B. Carl Zeiss, Jena V. Clark, 384 F.2d 979 (D.C. Cir. 1967); Carter v. Carlson, 56 F.R.D. 9, 10 (D.D.C. 1972). Moreover, it is equally well settled that the “deliberative [process] privilege is ‘not to be lightly invoked.’” Williams, 1997 U.S. Dist. LEXIS 23711, at *3; (quoting Zeiss, 40 F.R.D. at 326 n.33 (quoting United States v. Reynolds, 345 U.S. 1, 7-8 (1953))); see also Carter, 56 F.R.D. at 10. As the D.C. Circuit has explained,

[a]ssertion of the deliberative process privilege, like the state secrets privilege, requires a formal claim of privilege by the head of the department with control over the information. That formal claim must include a description of the documents involved, a statement by the department head that she has reviewed the documents involved, and an assessment of the consequences of disclosure of the information.

Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 405 n.11 (D.C. Cir. 1984).

(Emphasis added.) It is also well settled that the required statement by the agency or department head must be in the form of a declaration or affidavit. See, e.g., Cobell v. Norton, 213 F.R.D. 1, 8 (D.D.C. 2003) (“It will be sufficient for the head of the bureau or office within the Interior Department that possesses control over the requested information to file the necessary affidavit.”); The Founding Church of Scientology of Washington D.C. v. F.B.I., 104 F.R.D. 452, 464-65 (D.D.C. 1985). In the instant case, despite having at least four months to review loan files that she volunteered to produce, defendant has failed to satisfy the basic requirements for invoking the deliberative process privilege.

Significantly, defendant has repeatedly offered to “waive” the privilege with respect to the documents as to which only the deliberative process privilege is asserted⁹ provided that

⁹ See Letter from L. Olson to S. Hill dated August 29, 2003, at 2. Attached hereto as Exhibit 6.

plaintiffs agree that such a waiver does not adversely affect her ability to invoke the deliberative process privilege with respect to future discovery demands. Having done so, defendant clearly cannot satisfy the requirement that she demonstrate the adverse consequences of disclosing those same documents to plaintiffs. See Northrop, 751 F.2d at 405 n.11. Thus, even if defendant had complied with the formal procedure for invoking the deliberative process privilege, any such assertion of privilege with respect to those documents would nevertheless fail because defendant cannot demonstrate any adverse consequences that would result from producing to plaintiffs documents that defendant has repeatedly offered to provide to plaintiffs. At a minimum, defendant has waived the deliberative process privilege with respect to the 148 documents that she has offered to produce. See Appendix 1. Furthermore, because defendant has not complied with the required procedure, her deliberative process privilege claims cannot “even be considered” and must be deemed to be waived. Williams, 1997 U.S. Dist. LEXIS 23711, at *4. Accordingly, defendant should be compelled to produce the 249 documents listed at Appendices 1-4 without further delay or precondition.

II. DEFENDANT IMPROPERLY INVOKES THE ATTORNEY-CLIENT AND THE ATTORNEY WORK PRODUCT PRIVILEGE.

A. Defendant Improperly Invokes The Attorney-Client And Attorney Work Product Privileges For Documents Whose Authors Are, By Defendant’s Own Admission, Unknown.

Of the 886 documents listed in the revised privilege log, defendant has asserted the attorney-client communication privilege,¹⁰ the attorney work product privilege¹¹ or both¹² with respect to 76 documents whose authors are, according to the revised privilege log, unknown. Moreover, in a number of instances, not only is the author unknown, but the recipient of the

¹⁰ See Appendix 5.

¹¹ See Appendix 6.

¹² See Appendix 7.

allegedly privileged document is unknown as well.¹³ Furthermore, in some instances, the document is undated or, in any event, the revised privilege log contains no date for the document.¹⁴

As the D.C. Circuit has made clear,

[i]t is settled law that the party claiming the privilege bears the burden of proving that the communications are protected. As oft-cited definitions of the privilege make clear, only communications that seek “legal advice” from “a professional legal adviser in his capacity as such” are protected. Or, in a formulation we have adopted, the privilege applies only if the person to whom the communication was made is “a member of the bar of a court” who “in connection with the communication is acting as a lawyer” and the communication was made “for the purpose of securing . . . assistance in some legal proceeding.”

In re Lindsey, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (citation omitted); In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984); see also Slack v. F.T.C., Nos. 79-973-5, 79-959-5, 1980 U.S. Dist. LEXIS 14996, at *4 (D. Mass. Nov. 18, 1980); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). In addition, “the privilege extends to communications from attorneys to their clients if the communications rest on confidential information obtained from the client.” Alexander v. F.B.I., 186 F.R.D. 21, 45 (D.D.C. 1998).

Clearly, when the author of an allegedly privileged document is unknown, an essential element of the privilege is missing because there is no way to determine if the author is a lawyer or the client. Indeed, when both the author and recipient are unknown as is the case with a number of the documents¹⁵ there is no way to tell whether the document constitutes either an attorney-client communication or an attorney’s work product. Consequently, defendant’s claims of attorney-client privilege and attorney work product privilege with respect to all documents of

¹³ See, e.g., Document Nos. 1, 37, 54, 71, 72, 86, and 541.

¹⁴ See, e.g., Document Nos. 1, 37, 54, 60-62, 71, 72, 73, 75, 79, 81, 86, 110, 113-115, 122, 123, 127-130, 133, 135, 136, 148, 149, 151, 160, 161, 312, 326, 420, 421, 487, 497, 517, 520, 539, 541, 587.1, 614, 616, 725, 769, 772, 773, 796.2, and 799.1.

¹⁵ See n.13.

unknown authorship must fail. Thus, there can be no basis for asserting the attorney-client or attorney work product privilege for the 76 documents listed in Appendices 5-7 and defendant should be compelled to produce them to plaintiffs without further delay.

B. Defendant Indiscriminately Invokes The Attorney Work Product Privilege For Documents Whose Authors Are Not Attorneys And For Documents That If Accurately Described By The Revised Privilege Log, Could Not Possibly Be Subject To Defendant's Work Product Claim.

On information and belief, the following individuals are not attorneys: William McAnally,¹⁶ Nels Christensen,¹⁷ John Smythe,¹⁸ Arthur Hall,¹⁹ Winfred Riley,²⁰ the State Executive Director of USDA, FSA, College Station, Texas, and the 1993 Acting State Director of the FmHA office in Temple, Texas. Nevertheless, defendant has invoked the attorney work product privilege to withhold documents authored by those individuals.²¹

¹⁶ Mr. McAnally is a FSA farm loan officer in Texas.

¹⁷ Mr. Christensen is merely identified as an employee of the U.S. Department of Agriculture. See, e.g., Document No. 403. Revised Privilege Log at 49.

¹⁸ Mr. Smythe is identified in the revised privilege log as the State Executive Director, California State FSA Office. See, e.g., Document Nos. 419 and 422. Revised Privilege Log at 51.

¹⁹ Mr. Hall is Director Loan Servicing and Property Management Division USDA, FSA. See, e.g., Document No. 422. Revised Privilege Log at 51.

²⁰ Mr. Riley is identified as Chief, Farmer Programs, Farmer Home Administration, USDA, Albuquerque, NM in 1994. See, e.g., Document No. 490.1. Revised Privilege Log at 51.

²¹ Defendant has withheld the following documents authored by Mr. McAnally as attorney work product. Document Nos. 166, 182, 377, 755 and 758. Defendant has withheld Document No. 403 authored by Mr. Christensen and Document No. 404 authored by Mr. Smythe as attorney work product. Interestingly, both documents (403 and 404) deal with the location[s] of "direct loan case files" and "case files." Unless, defendant intends to conceal files from discovery, it is difficult to imagine how the physical location of such files could be considered confidential or privileged. Defendant has also withheld two documents authored by Mr. Hall and sent to Mr. Smythe as attorney work product: Document Nos. 422 and 554. In addition, defendant has withheld a letter authored by Mr. Riley addressed to the Senior Vice President of Western Bank (Document No. 490.1) as attorney work product. Defendant has withheld two documents authored by the State Executive Director of USDA, FSA, College Station as attorney work product: Document Nos. 330 and 387. Defendant has also withheld Document No. 236 as attorney work product despite listing the Acting State Director of FmHA as the author.

If the foregoing were not sufficient evidence of defendant's indiscriminately invoking the attorney work product privilege, the court's attention is directed to Document Nos. 466, 538, 795 and 796.1, each of which defendant has withheld subject to claim of attorney work product privilege. In the case of Document No. 466, the undated document is, according to the revised privilege log, authored by the "Western Bank of Las Cruces, NM" and is a "[d]raft 12 page Stipulated Judgment of Foreclosure." Revised Privilege Log at 57.

In the case of Document No. 538, defendant withheld as attorney work product a document which she describes as being authored by the "Bankruptcy Judge and M. Nelson Enmark, Chapter 12 Trustee." Id. at 66. In a similar example of defendant's expansive view of the attorney work product privilege, defendant withheld a Document No. 795 as attorney work product despite the fact that the document's author, Richard D. Ladd, Esq., was at the time an attorney representing Guadalupe Rejino, one of the named plaintiffs. Id. at 98.

In keeping with the aforementioned privilege claims, defendant also withheld Document No. 796.1 as attorney work product. While Document No. 796.1 is authored by P.E. Coggins, who is identified in the revised privilege log as a "U.S. Attorney, Department of Justice[,] Northern District of Texas," it is in fact a "one page letter to Richard Ladd, Lubbock, TX, attaching proposed agreed Order Authorizing Use of Case Collateral." See Document No. 796.1. Id. at 99. Mr. Ladd was, of course, at the time representing Mr. Rejino. Thus, as the foregoing makes clear, defendant's assertions of the attorney work product privilege with respect to Document Nos. 166, 182, 236, 330, 377, 387, 403, 404, 422, 466, 490.1, 538, 554, 755, 758, 795 and 796.1, are baseless and defendant should be compelled to produce those documents without further delay.

III. DEFENDANT HAS INVOKED THE ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES FOR DOCUMENTS THAT HAVE BEEN PRODUCED TO PLAINTIFFS.

Defendant has produced either in connection with the loan files produced on July 15, 2003²² or directly to plaintiffs in response to requests for copies of their loan files²³ at least 15 documents or portions of documents listed on the privilege log. Of the 15 documents, defendant has asserted only the deliberative process privilege with respect to 3 documents.²⁴ Defendant has asserted the deliberative process privilege as well as the attorney-client privilege with respect to 1 of the 15 documents.²⁵ Of the remaining 11 documents, defendant has asserted either the attorney-client²⁶ or the attorney work product privilege²⁷ or both²⁸. While defendant contends that the production of certain of these documents was inadvertent,²⁹ that contention is unavailing as a matter of law.

In this circuit, it is well settled that the disclosure – even the inadvertent disclosure – of allegedly privileged documents waives the privilege. As the D.C. Circuit held in In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989),

[a]lthough the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant.

²² See Appendix 8.

²³ See Appendix 9.

²⁴ Document Nos. 264, 298 and 319. As discussed supra at 6-7, defendant has waived the deliberative process privilege with respect to these documents by offering to produce them.

²⁵ Document No. 532. Defendant has waived the deliberative process privilege with respect to this document by failing to comply with the procedure for invoking that privilege.

²⁶ Document Nos. 221, 300, 313, 437, 482, 540 and 771.1.

²⁷ Document No. 357.

²⁸ Document Nos. 299, 317 and 622.

²⁹ See Exhibit 6.

We therefore agree with those courts which have held that the privilege is lost “even if the disclosure is inadvertent.”

Even assuming Company’s disclosure was due to “bureaucratic error,” which we take to be a euphemism that necessarily implies human error, that unfortunate lapse simply reveals that someone . . . was careless with the confidentiality of its privileged communications. Normally the amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege. . . . The privilege imposes a self-governing restraint on the freedom with which organizations such as corporations, unions, and the like label documents related to communications with counsel as privileged. To readily do so creates a greater risk of “inadvertent” disclosure by someone and thereby the danger that the “waiver” will extend to all related matters, perhaps causing grave injury to the organization. But that is as it should be. . . . In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels. (Citations omitted.)

Moreover, it is equally well settled that the inadvertent disclosure not only waives the attorney-client privilege “as to the documents actually disclosed, but also as to all other communications related to the same subject matter.” In re United Mine Workers of America Employee – Benefit Plans Litigation (“United Mine Workers”), 159 F.R.D. 307, 310 (D.D.C. 1994) (emphasis added); In re Sealed Case, 877 F.2d at 980-81; Chubb Integrated Sys. v. National Bank of Washington, 103 F.R.D. 52, 63 (D.D.C. 1984). Accordingly, defendant has waived the attorney client privilege with respect to Document Nos. 221, 299, 300, 313, 317, 437, 532, 540, 622 and 771.1. In addition, defendant has waived the attorney-client privilege with respect to all other communications related to the same subject matters as those documents. Defendant should be compelled to produce all such documents without further delay.

Similarly, it is well settled that “the disclosure of documents protected by the attorney work product privilege waives the protections of the attorney work product privilege as to the documents disclosed.” In re United Mine Workers, 159 F.R.D. at 310; Wichita Land & Cattle Co. v. American Federal Bank, 148 F.R.D. 456, 460-61 (D.D.C. 1992). However, unlike the attorney-client privilege, the disclosure of a document covered by the attorney work product privilege constitutes a waiver of the privilege only with respect to the disclosed document. See

United Mine Workers, 159 F.R.D. at 310-11. Thus, defendant has waived the attorney work product privilege with respect to Document Nos. 299, 317, 357 and 622.

IV. DEFENDANT HAS WITHHELD DOCUMENTS AS PRIVILEGED WITHOUT INCLUDING THEM ON THE PRIVILEGE LOG.

While the file review is still in progress, plaintiffs have, to date, identified 7 privilege sheets indicating that defendant has withheld a document or a page of a document from plaintiffs on the basis of a claimed privilege without providing any description whatsoever of the withheld material or the nature of the claimed privilege.³⁰ Significantly, Rule 26(b) (5) is quite specific:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege

Fed R. Civ P. 26(b)(5).

Defendant's failure to comply with the requirements of Rule 26(b)(5) despite more than ample time to do so requires that defendant to be deemed to have waived any claimed privileges that might have attached to those documents. See First American Corp. v. Al Nahyan, 2 F. Supp. 2d 58, 63 n.5 (D.D.C. 1998); Bregman v. District of Columbia, 182 F.R.D. 352, 363 (D.D.C. 1998) (“[P]laintiff’s failure to comply with Fed. R. Civ. P. 26(b)(5) . . . bars in itself any claim of privilege, whatever its basis.”); see also Bell v. Domino’s Pizza Inc., No. 99-2376 (PLF/JMF), 2000 U.S. Dist. LEXIS 17592, at * 9 n.1 (D.D.C. Nov. 21, 2000); Avery Dennison Corp. v. Four Pillars, 190 F.R.D. 1, 2 (D.D.C. 1999). To do otherwise would only encourage defendant to persist in unilaterally ignoring the rules of discovery which apply to all other litigants in federal courts.

³⁰ The privilege sheets in question bear the following production numbers: GVL001-1217 – GVL001-1219, GVL001-1436, GVL002-0129, GVL019-3228, GVL028-3576.

Indeed, as a direct result of defendant's playing by her own rules, a process that the rules indicate should be completed in 30 days has dragged on for more than six months and still without full compliance with the requirements of the Federal Rules of Civil Procedure. As the court stated in EEOC v. Los Alamos Constructors, Inc., 382 F. Supp. 1373, 1375 (D.N.M. 1974),

[w]hen the government or one of its agencies comes to court . . . it is to be treated in exactly the same way as any other litigant. Appointment to office does not confer upon a bureaucrat the right to decide the rules of the game applicable to . . . his lawsuits.

Accord Alexander v. F.B.I., 168 F.R.D. at 70-71. Requiring defendant to play by the rules mandates that defendant be deemed to have waived any claim of privilege with respect to any documents that she withheld without complying with the requirements of Rule 26(b)(5).

Accordingly, defendant should be compelled to produce the documents identified by the following production numbers: GVL001-1217-GVL001-1219, GVL001-1436, GVL002-0129, GVL019-3228 and GVL028-3576.

V. GIVEN DEFENDANT'S INDISCRIMINATE ASSERTIONS OF PRIVILEGE, DEFENDANT SHOULD BE COMPELLED TO PRODUCE THE REMAINING ALLEGEDLY PRIVILEGED DOCUMENTS FOR IN CAMERA REVIEW TO AVOID FURTHER NEEDLESS DELAY AND TO AFFORD PLAINTIFFS A FAIR OPPORTUNITY TO REVIEW THE PROFFERED LOAN FILES TO ESTABLISH COMMONALITY.

Through no fault of their own, plaintiffs have experienced repeated delays in their efforts to obtain meaningful discovery from defendant. These delays have resulted in the trial date being pushed back by more than a year. These delays have also been exacerbated by the fact that each day plaintiffs endure ongoing discrimination, harassment, and injury.³¹ If that were not enough, after being afforded more than four months to interpose specific objections to simple, straight-

³¹ One named plaintiff has been harassed to the point that he has filed an EEOC complaint. Another plaintiff had his cotton crop subsidy payment temporarily terminated after submitting his declaration in this proceeding. See *infra* at 16-17. Defendant's latest tactic is to threaten elderly plaintiffs with offsets to their Social Security payments. For elderly plaintiffs who rely on Social Security for subsistence such threats are particularly intimidating. See, e.g., Exhibit 7.

forward discovery, defendant had the audacity to interpose boilerplate objections and indiscriminately asserted various privileges. Indeed, so indiscriminate was her use of the deliberative process privilege that defendant has proposed to “waive” that privilege insofar as it has been invoked with respect to certain of the proffered loan files.³² Defendant’s indiscriminate use of the deliberative process privilege, her assertion of attorney-client and attorney work product privileges for documents whose authors are unknown and the baseless assertion of privilege with respect to allegedly privileged documents that have been produced legitimately call into question the validity of defendant’s other privilege claims.

Although the revised privilege log gives only limited information about the alleged contents of the withheld documents and the alleged bases for withholding them, there can be no reasonable doubt, as the foregoing makes clear, that the defendant has improperly asserted privileges for hundreds of documents.³³ In addition to the foregoing documents whose very descriptions call into question the validity of the privilege claims, defendant has produced a number of documents that she has claims are privileged. However, a review of those documents fails to reveal any legitimate basis for a privilege claim.

Defendant has withheld Document No. 298 asserting the deliberative process privilege. Defendant produced the same document to Mr. Davis in response to his request for his loan file.³⁴ The document in fact reflects a response from the local FSA Farm Loan Manager (Mr. William McAnally) to allegations of discrimination raised by Mr. Davis in a declaration in support of Plaintiff’s Second Supplemental Memorandum In Support of Plaintiffs’ Motion For

³² See, e.g., Exhibit 6. As discussed more fully *supra* at 5-7, defendant’s waiver offer is an empty offer because she has ultimately failed, despite at least four months in which to do so, to satisfy the requirements for invoking the deliberative process privilege claim.

³³ For example, defendant has withheld Document No. 60 under a claim of attorney work product and deliberative process privileges. However, the document’s description makes clear that the privilege claims are baseless. Indeed, defendant describes the document’s author as an “unknown USDA official.” She describes the document as instructions to the child of one of the named plaintiffs on how to exercise the child’s priority rights to purchase her father’s ranch upon which USDA had foreclosed. The revised privilege log is replete with similar entries.

³⁴ See Appendix 9.

Class Certification (“Plaintiffs’ Second Supplemental Memorandum”) in July 2002. See Exhibit 40 to Plaintiffs Second Supplemental Memorandum. Shortly before submitting the declaration, Mr. Davis had been advised that he was eligible to participate in the USDA’s cotton subsidy program. Indeed, he had participated in the subsidy program for a number of years without incident both prior to and subsequent to his having filed for Chapter 12 bankruptcy reorganization. In October 2002, while beginning to harvest his cotton crop, Mr. Davis was advised by his cotton broker, Southwest Irrigated Cotton Growers (“SWIG”), that the FSA had determined him to be ineligible to participate in the cotton program allegedly because of his prior bankruptcy. (According to the SWIG officials with whom Mr. Davis dealt, they had never heard of a farmer being denied eligibility to participate in the cotton subsidy program because of a bankruptcy.) When Mr. Davis visited the local FSA office to inquire about the matter, he was advised by FSA personnel that Mr. McAnally had instructed them to make Mr. Davis ineligible to participate in this program. If allowed to stand, that decision could have cost Mr. Davis in excess of \$100,000 on his cotton crop and severely jeopardized his continued viability as a farmer.

Upon learning of these facts, plaintiffs’ counsel contacted various members of the House Agriculture Committee concerning what appeared to be a clear case of retaliation by an FSA official directed at a witness who had leveled discrimination charges against that official.³⁵ Those letters and the ensuing inquiries from Congress resulted in Mr. McAnally having been asked to respond to the allegations of discrimination. Document No. 298 reflects Mr. McAnally’s response to those allegations. The document also includes a handwritten time line prepared by Mr. McAnally purporting to summarize his actions in connection with the Davis loan account. Significantly, there is nothing in the document that can be arguably characterized as advice on policy or an expression of opinion on USDA or FSA policy. Indeed, within a week

³⁵ See letter from S. Hill to Congressman Goodlatte dated October 17, 2002, attached hereto as Exhibit 8.

after plaintiffs' counsel contacted members of Congress, FSA had reinstated Mr. Davis in the cotton subsidy program and blamed the earlier ineligibility determination on a "computer glitch."

Defendant has also asserted the attorney-client and attorney work product privileges with respect to a number of documents that defendant actually produced to plaintiffs. A brief review of the relevant case law with respect to those privileges makes clear that defendant's privilege assertions are baseless. In this circuit it is well settled that, for the attorney-client privilege to apply, the communication not only must seek or provide legal advice, but it must contain or be based upon information that is confidential. As the court explained in Evans v. Atwood, 177 F.R.D. 1, 3 (D.D.C. 1997),

[i]f a man confides in his lawyer that he wishes to provide for an illegitimate child in his will with the lawyer promising never to disclose that fact while the client lives, the client's confidence ("I am the father of an illegitimate child") is protected. The privilege exists to encourage other clients to provide their lawyers with similar confidences so that the lawyer gets the information she needs to provide effective assistance and sound advice. If, on the other hand, an agency official asks the lawyer whether a particular statute gives one person a priority against another in a reduction in force, the agency official has not communicated to the lawyer any information that is confidential, i.e., unknown by anyone except the client who has disclosed it for the purpose for securing advice. Learning that the agency was contemplating a RIF and sought a lawyer's advice as to how to comply with the pertinent laws hardly discloses a confidential communication.

Thus, "[i]f . . . the client official sought the opinion without disclosing any confidential information, the existence of the opinion and its contents are not privileged." Id. at 5; see also Mead Data Central v. United States Department of the Air Force, 566 F.2d 242, 253 n.3 (D.C. Cir. 1971). As the court further explained in Evans,

[r]estricting the privilege to only that factual information, otherwise unknown, which the client official communicated to the attorney meets the official's reasonable expectation that it would never be disclosed. The restriction is the only path permitted by controlling law and strikes the required balance between disgorging relevant information wherever it exists in the search for the truth without inhibiting future agency officials from disclosing to agency lawyers what they truly and

fairly think will never see the light of day because they only intended their lawyer to know it.

177 F.R.D. at 5.

Similarly, the work product privilege applies to documents prepared by lawyers in anticipation of litigation. See Fed. R. Civ. P. 26 (b)(3). It is not sufficient that the mere possibility of litigation exists. The likelihood of litigation must be more than a remote possibility. Slack, 1980 U.S. LEXIS 14996, at *7. In addition, the document must have been “prepared for litigation and not for some other purpose.” Evans, 177 F.R.D. at 6. That being said, “[t]he work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does.” Id. at 7. The privilege or rule is designed to protect from disclosure a lawyer’s “mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any on-going or prospective trial.” Id. Thus, for example, documents which “advise[] employees of the defendant agency that plaintiffs had filed [a] lawsuit and provide[] guidance as to how to prepare responses for documentation and how to handle inquiries about the lawsuit” are not covered by the privilege because “[i]t is impossible to read [such] document[s] and learn anything about the thought process of the defendants’ attorneys or the actual information they are collecting as they prepare for trial.” Id. at 8.

Defendant has asserted the attorney-client privilege with respect to Document No. 310 on the initial privilege log, but produced the document as part of the July 15 production.³⁶ The document merely announces that the Department of Justice is representing FSA in the Davis bankruptcy proceeding and serves as a transmittal letter for Document No. 317 that is discussed infra. There is nothing about that document that can reasonably be characterized as conveying confidential information inasmuch as the Department of Justice’s representation of FSA in the

³⁶ Defendant has not included that document (GVL013-0230) in the revised privilege log in apparent recognition of the fact that her production of the document on July 15 waived the attorney-client privilege with respect to that document.

bankruptcy proceeding would necessarily be a matter of public record. See Evans, 177 F.R.D. at 4-5.

Defendant has asserted both the attorney-client and the attorney work product privileges with respect to Document No. 299 which was produced to Mr. Davis in response to his request for his files. However, the document contains no confidential information that would be unknown to Mr. Davis. To the contrary, it reports that Mr. Davis had failed to make a Chapter 12 plan payment on time and states the amount of the missed payment -- all facts obviously known to Mr. Davis. The letter requests that the attorney file a motion to modify the bankruptcy listing to permit FSA to foreclose on the collateral – something that the government apparently had been threatening to do for some time. Thus, there is nothing in the letter that could arguably be properly characterized as subject to either the attorney-client or attorney work product privilege. See id. at 4-5, 7-8.

Defendant has withheld Document No. 313 on the basis of the attorney-client privilege while producing it to Mr. Davis in response to his request for a copy of his loan file. This letter merely reports that the confirmation hearing with respect to Mr. Davis' Chapter 12 bankruptcy was held on a specified date and that his plan was confirmed at that time. Clearly, the confirmation hearing, its date and the fact that Mr. Davis' plan was approved by the bankruptcy court at the confirmation hearing were all matters of public record and were certainly known to Mr. Davis. Hence, such information could not have given rise to a proper claim of attorney-client privilege.

Defendant has withheld Document No. 317 while producing the document to Mr. Davis in response to his request for his loan files. Once again the document contains no information that was not known to Mr. Davis. For example, the letter refers to the government's filing an objection to Mr. Davis' Chapter 12 plan – a fact which would have certainly been known to Mr. Davis. The letter also refers to the total amount of three loans that Mr. Davis obtained from FSA. The letter discusses the security instruments that are, in turn, described in the proof of claim filed by FSA in the bankruptcy proceeding, notes the date on which Mr. Davis filed his

petition in the Chapter 12 bankruptcy proceeding, and describes Mr. Davis' collateral. The letter also refers to certain documents copies of which, at the time the letter was written, had been attached to the FSA's proof of claim forwarded to the bankruptcy clerk's office in El Paso for filing. The letter contains nothing that could possibly be construed as confidential or unknown to Mr. Davis and the letter does not seek any legal advice.

It is clear from defendant's revised privilege log and the foregoing examples that defendant has withheld many documents on dubious claims of privilege. In light of this and the time needed to review the files to demonstrate to the court commonality among the named plaintiffs, plaintiffs hereby request the court conduct an in camera review of all the remaining documents that defendant has withheld based on claims of privilege. The obvious burden imposed upon the court is caused by defendant's persistent refusal to abide by the letter and spirit of discovery as reflected in the Federal Rules of Civil Procedure, forcing plaintiffs to seek relief from the court.

Finally, it must be emphasized that plaintiffs are alleging both disparate impact and disparate treatment discrimination. An integral component of the disparate treatment claim is that defendant discriminated against plaintiffs not only in loan making but in loan servicing once the loans were made. The discrimination included the refusal to give Hispanic farmers and ranchers the full range of servicing to which they were entitled and to force them into foreclosure and liquidation while their white male counterparts received such servicing when they encountered financial difficulties, and thus experienced fewer foreclosures. Thus, it is not surprising that most of defendant's highly dubious privilege claims arise in the context of loan servicing issues and bankruptcy and foreclosure proceedings because full and fair discovery in this area is likely to lead to probative evidence hurtful to defendant. Rather than deal with the truth, defendant instead seeks endlessly to stonewall legitimate discovery by raising bogus claims of deliberative process, attorney-client and attorney work product apparently in hopes that plaintiffs will grow weary and give up. If that is indeed defendant's hope it is a vain hope.

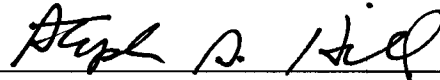
The totality of circumstances in this case -- defendant's delays in responding to discovery and providing a privilege log, the demonstrably dubious nature of many of the privilege claims, and the defendant's obvious incentive to assert such privilege claims to avoid a fair examination of the issue of disparate treatment with respect to loan servicing -- all dictate a substantial discounting of any reliance that ordinarily might be placed upon defendant's assertions of privilege and clearly warrant an in camera review. Indeed, much like many privilege logs, the revised privilege log does not provide anything "more than minimal information . . . the date of the document, its author and recipient, and the briefest possible description of its contents. . . ." Avery, 190 F.R.D. at 2. Consequently, plaintiffs urge the court to "cut to the quick and order[] the production of the documents at issue" for in camera inspection. Id.

CONCLUSION

Accordingly, plaintiffs request that the court enter an order compelling the production of (1) all documents as to which defendant has asserted a deliberative process privilege claim, (2) all documents whose authors are not named in the privilege log; and (3) all documents that have been withheld from production on the basis of an alleged privilege that have not been included in the privilege log as required by Fed. R. Civ. P. 26 (b)(5), i.e. the documents identified by the following production numbers: GVL001-1217-GVL001-1219, GVL001-1436, GVL002-0129, GVL019-3228 and GVL028-3576. With respect to Document Nos. 221, 299, 300, 313, 317, 437, 532, 540, 622 and 771.1, plaintiffs request that the court enter an order finding that defendant has waived the attorney-client privilege with respect to those documents and all other documents relating to the same subject matters as those documents. In addition, plaintiffs request that defendant be compelled to produce to them Document Nos. 166, 182, 236, 330, 377, 387, 403, 404, 422, 466, 490.1, 554, 755, 758, 795 and 796.1. With respect to the remaining documents listed on defendant's revised privilege log, plaintiffs request that the court compel defendant to produce all such documents for an in camera inspection to determine the validity of defendant's privilege claims. Alternatively, plaintiffs request that the court appoint a magistrate

to conduct such a review and to supervise any future discovery disputes, thereby expediting the discovery process and reducing the burden which defendant's conduct creates for the court.

Respectfully submitted,



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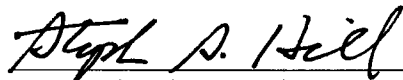
Attorneys for Plaintiffs
GUADALUPE L. GARCIA, JR., et al.

Date: September 25, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Motion To Compel Production Of Certain Allegedly Privileged Documents And For An In Camera Inspection Of Other Allegedly Privileged Documents was served by hand delivery, this 25 day of September, 2003 upon the following:

Lisa A. Olson, Esq.
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
Federal Programs Branch
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Stephen S. Hill

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANNE VENEMAN, Secretary of the)	
United States Department of Agriculture,)	
)	
Defendant.)	

ORDER

The Court, having fully considered Plaintiffs' Motion To Compel Production Of Certain Allegedly Privileged Documents And For In Camera Inspection Of Other Allegedly Privileged Documents and defendant's response thereto, finds Plaintiffs' Motion to be well taken and it is hereby ORDERED that Plaintiffs' Motion is GRANTED. It is further ORDERED that:

1.) Defendant shall produce all documents listed in Appendices 1-7 to Plaintiffs' Memorandum Of Points And Authorities In Support Of Their Motion To Compel Production of Certain Allegedly Privileged Documents And For In Camera Inspection Of Other Allegedly Privileged Documents. In addition, defendant shall produce to plaintiffs Documents Nos. 166, 182, 236, 330, 377, 387, 403, 404, 422, 466, 490.1, 538, 554, 755, 758, 795 and 796.1 as well as the documents identified by the following production numbers: GVL001-1217-GVL001-1219, GVL001-1436, GVL002-0129, GVL19-3228 and GVL028-3576

2.) Defendant has waived the attorney-client privilege with respect to Document Nos. 221, 299, 300, 313, 317, 437, 532, 540, 633 and 771.1 on the revised privilege log and all other documents related to the same subject matters as those documents.

3.) Defendant shall produce all remaining documents listed in the revised privilege log to the Court for an In Camera inspection by October __, 2003.

IT IS SO ORDERED, THIS ____ day of October, 2003.

James Robertson
United States District Judge