

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,)
)
Plaintiffs,)
)
v.) Case No. 1:00CV02445
)
ANN VENEMAN, Secretary of) Judge: James Robertson
Agriculture,)
)
Defendant.)
_____)

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

INTRODUCTION

Since the Court denied plaintiffs' motion for class certification in December 2002, this litigation has remained in a state of suspended animation while plaintiffs have undertaken the class discovery they elected to forego before filing their unsuccessful motion, and upon which their renewed class certification motion will be based. In response to the Court's order that defendant produce for plaintiffs the loan files of those of the named plaintiffs that defendant could locate, defendant produced 35 plaintiffs' files containing more than 141,000 pages of materials. Defendant withheld 886 documents from those files on attorney-client, work product, and deliberative process grounds.

Plaintiffs' motion to compel to compel disclosure of the withheld documents is long on invective but short on substance. The motion's most glaring fault is its failure to explain how the materials plaintiffs seek bear at all on the only issue of relevance with respect to class certification; viz., whether plaintiffs can satisfy the commonality criterion for class certification. See Fed. R. Civ.

P. 23(a)(2). In any case, as we explain in detail below, plaintiffs' motion should be denied in its entirety.

To a substantial degree, plaintiffs' motion rests on an entirely manufactured dispute. Defendant offered to forego assertion of the deliberative process privilege with respect to any documents responsive to plaintiffs' discovery requests so long as plaintiffs would agree that such disclosure would not waive defendant's right to assert that privilege with respect to future discovery requests. Plaintiffs refused to accept the offer, and defendant therefore had no choice but to assert the privilege.¹

That defendant properly asserted the deliberative process privilege is established by plaintiffs' failure to deny that the materials in question are deliberative. Instead, plaintiffs contend that defendant's offer to produce the deliberative materials waives the privilege. Plaintiffs' contention runs counter to the established view that cooperation in litigation discovery disputes should be encouraged, not penalized. See Fed. R. Civ. P. 1.

Nor is there merit to plaintiffs' assertion that documents whose author, recipient, and date are unknown cannot be protected under the attorney-client privilege or work product doctrine. Plaintiffs ignore the fact that even where these characteristics about particular documents may be unknown, the elements of the attorney-client privilege and work product doctrine have been met, as the Declaration of James R. Little ("Little Dec.") shows. Hence, the documents are protected.

Finally, defendant's inadvertent production of a handful of privileged documents should not be held to waive defendant's right to assert the attorney client privilege or work product doctrine.

¹ Nonetheless the offer stands, and defendant does not oppose entry of an order that directs disclosure of the deliberative process materials on the terms defendant proposed to plaintiffs.

Pursuant to this Court's order, each document was disclosed to plaintiffs' counsel in its unredacted form before defendant had an opportunity to review it for privilege, and that compelled disclosure negates plaintiffs' claim of waiver.

ARGUMENT

PLAINTIFFS' MOTION TO COMPEL SHOULD BE DENIED

A. Defendant's Assertion Of The Deliberative Process Privilege Should Be Upheld

1. Plaintiffs have manufactured the dispute over deliberative process materials

The "dispute" concerning defendant's assertion of the deliberative process privilege is one plaintiff created. Several months ago defendant offered to forego asserting the deliberative process privilege as to any documents responsive to plaintiffs' pending discovery requests in exchange for plaintiffs' agreement that defendant's "disclosures would not waive or otherwise undermine defendant's assertion of the deliberative process privilege as to any future discovery responses." See July 31, 2003 letter from Lisa A. Olson to Stephen S. Hill (attached). This offer would have provided plaintiffs with 148 of the 886 documents withheld from production and would have avoided the present litigation over those materials. It also would have eliminated the dispute over the deliberative process privilege where it was asserted in conjunction with the attorney client privilege or work product doctrine. Plaintiffs rejected defendant's proposal, however, and now argue that the disclosure offer bars defendant from asserting the deliberative process privilege at all. See 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 ("Pl. Memo") at 6-7. In an analogous situation in Bigelow v. District of Columbia, 122 F.R.D. 111 (D.D.C. 1988), the court rejected the argument that the government had

waived a claim of privilege by voluntarily providing much of the information sought during discovery. The court recognized its own interest in “seeing that the parties voluntarily resolve as many issues as possible during the course of litigation without the necessity of judicial intervention.” Id. at 115. It therefore concluded that the government “should not be penalized because of its cooperation in resolving litigation discovery disputes.” Id.

The same principles apply here. The deliberative process privilege requires a balancing of the detrimental effects of disclosure against the necessity for production shown. See Redland Soccer Club, Inc. v. Department of the Army of the United States, 55 F.3d 827, 854 (3rd Cir. 1995); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 (D.D.C. 1966). Defendant has sought to protect the public’s interest in nondisclosure, and to prevent the harms that would ensue from the release of internal, predecisional and deliberative information. See Little Dec. at ¶¶ 13-16. The fact that she has nevertheless acknowledged plaintiffs’ request for the information and voluntarily agreed to disclosure with a nonwaiver agreement should not inure to defendant’s detriment. See Bigelow, 122 F.R.D. at 115.

2. The withheld materials are predecisional and deliberative

Defendant has properly asserted the deliberative process privilege with respect to the documents in question. The deliberative process privilege is “predicated on the recognition ‘that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.’” Dow Jones & Co. v. DOJ, 917 F.2d 571, 573 (D.C. Cir. 1990) (quoting Wolfe v. HHS, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc)). Thus, agencies may invoke the privilege: (1) to protect creative debate and candid consideration of alternatives within an agency and thereby improve the quality of agency policy decisions; (2) to protect against public confusion that

would result from premature exposure to discussions occurring before policies had actually been settled upon; and (3) to protect the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds. See Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982). To be covered by the privilege, documents must be pre-decisional, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980), although they need not necessarily have ripened into agency decisions, NLRB v. Sears, Roebuck & Co., 421 U.S. 32, 151 n.18 (1975). They must also be deliberative in that they "reflect the give-and-take of the consultative process." Coastal States, 617 F.2d at 866. The privilege therefore covers "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer" Id.

The documents as to which defendant has asserted the deliberative process privilege satisfy these standards. They contain internal, predecisional, and deliberative information. Little Dec. ¶¶ 6-8. The documents fall into five categories and consist of (1) recommendations and opinions on actions to be taken on delinquent borrower accounts, see National Wildlife Federation v. United States Forest Serv., 861 F.2d 1114, 1121 (9th Cir. 1988) ("Recommendations on how to best deal with a particular issue are themselves the essence of the deliberative process"); (2) recommendations and opinions on actions to be taken on possible criminal conduct, see Jimenez v. FBI, 938 F. Supp. 21, 28-29 (D.D.C. 1996) (protecting documents which "illustrate the steps in decision making at the U.S. Attorney's Office and other federal and state agencies in considering possible criminal actions); LaRouche v. United States Dep't of Justice, 1993 WL 388601, at *9 (D.D.C. 1993) (documents advocating prosecution reflect "give-and-take" of agency's internal deliberations) (internal quotation

marks omitted); (3) drafts of litigation and other documents, see Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568-69 (D.C. Cir. 1987) (protecting drafts); (4) correspondence concerning litigation, see Greenberg v. Department of Treasury, 10 F. Supp. 2d 3, 17 (D.D.C. 1998) (protecting “evaluation of the legal status” of a case as deliberative material); and (5) deliberations regarding customer accounts, see Sears, 421 U.S. at 150 (protecting “recommendations”); Nadler v. United States Dep’t of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992) (same). Little Dec. ¶ 6. The categories are described in further detail, with specific explanations as to why they are predecisional and deliberative, in the Little Declaration, at ¶¶ 9-23. As the descriptions and examples show, the materials in question satisfy the elements of the privilege. In every case, the documents consist of intra-governmental communications undertaken in the course of, but prior to completion of, the process of governmental decisionmaking.²

² See, e.g., Doc. #100 (memorandum from County Supervisor to USDA State Director concerning how to respond to appeal letter from borrower); Doc. #246 (summary and recommended action prepared by USDA District Director regarding possible debt settlement and release of liability of borrower); Doc. #320 (memorandum from USDA Farm Loan Chief to USDA Deputy Administrator summarizing borrower account and activity for possible action on account); Doc. #494 (memorandum from USDA County Supervisor to USDA State Director containing recommendations regarding possible action to foreclose on loan); Doc. #630 (memorandum from USDA Farm Loan Programs Director to Farm Loan Manager containing recommendations with respect to government's possible bid at foreclosure); Doc. #729 (memorandum from USDA Farm Loan Manager to USDA Farm Loan Chief containing recommendations concerning possible increase in interest rates imposed on borrower and handling of appeal); Doc. #832 (handwritten notes of unknown USDA official setting forth proposed response to borrower's appeal of USDA's denial of loan servicing); Doc. #873 (memorandum from USDA Civil Rights and Small Business Utilization Staff to USDA State Executive Director providing advice regarding investigation of borrower's discrimination complaint).

3. **Plaintiffs have failed to show any need that would outweigh the adverse effects of disclosure**

It is settled that there is a strong public interest in protecting the deliberative process materials in question, see Russell, 682 F.2d at 1048, and their disclosure would result in serious adverse consequences. Specifically, their release would, inter alia, chill frank discourse within FSA regarding policies or final decisions on customer accounts; hamper open communications about legal matters among Office of General Counsel and FSA personnel; and confuse agency customers and the public with prematurely disclosed information and drafts. Little Dec. ¶¶ 24-28..

On the other hand, plaintiffs have failed to show that they actually need the deliberative process information they seek or that it is relevant to the only pending issue before the Court; viz., the commonality requirement that is a prerequisite to class certification. See Fed. R., Civ. P. 23(a)(2). To compel disclosure, plaintiffs must make “a showing of necessity sufficient to outweigh the adverse effects the production would engender.” Carl Zeiss, 40 F.R.D. at 328-29. A requesting party cannot, as a matter of law, demonstrate “need” in the absence of relevance. See United States v. Farley, 11 F.3d1385, 1390 (7th Cir 1993). Yet plaintiffs have not explained how the deliberative documents at issue will enable them to show that defendant's policies or practices had a uniformly discriminatory effect on the purported class members.

The deliberative process materials in question consist largely of documents containing recommendations, advice, and opinions regarding proposed actions to be taken by different USDA officials on the loans and accounts of various complainants in an assortment of contexts. Little Dec. ¶ 6. Plaintiffs have altogether failed to explain how, for example, defendant's deliberations regarding a plan to end the delinquency of the Rodriguez Brothers, see Privilege Log Document

("Doc.") #791 (see Pl. Exhibit 1), her consideration of the cash flow proposal submitted by the Garcias, see Doc. #572, or her determinations concerning the debt settlement of Joe Contreras, see Doc. #256, would further plaintiffs' arguments regarding commonality. See International Paper Co. v. Federal Power Comm'n, 438 F.2d 1349, 1358-59 (2d Cir.) ("[V]iews of individual members of the [agency's] staff are not legally germane"), cert. denied, 404 U.S. 827 (1971). Perhaps more importantly, the documents at issue pertain to processing decisions on FSA loans that have already been granted to the putative class representatives. Hence, they would be irrelevant to proving plaintiffs' central claim, i.e., that defendant discriminated against the purported class members in the "denial of the application to participate in the farm program." Second Amended Class Action Complaint at 15.

The deliberative process materials were withheld because they reveal internal agency deliberations concerning customers' existing loan accounts. Little Dec. ¶¶ 6-23. These materials comprise only a small segment of the loan files that already are in plaintiff's possession and which include documents pertaining to the final decisions USDA made in connection with loan processing issues, and pertaining to all other nonprivileged matters relating to complainants' FSA loans. Little Dec. ¶ 27. That plaintiffs cannot articulate a valid justification for further delving into privileged territory, is fatal to their motion.³

³ Defendant has produced approximately 141,997 pages of loan files and other discovery materials to plaintiffs. See Carl Zeiss, 40 F.R.D. at 328 ("Necessity of production is sharply reduced where an available alternative for obtaining the desired evidence has not been explored") (citing United States v. Reynolds, 345 U.S. 1, 11 (1953)).

B. Defendant's Assertions Of The Attorney-Client Privilege And Work Product Doctrine Should Be Upheld⁴

Plaintiffs' challenge to defendant's assertion of the attorney-client-privilege and work product doctrine rests largely on the erroneous contention that these protections cannot be invoked with respect to documents whose authors, recipients, or dates are unknown.⁵ Pl. Memo. at 7-9. That these characteristics might be unknown is not fatal to assertion of the attorney-client privilege because all that is required in order to properly assert the privilege or work product doctrine is that the respective elements of the privilege or doctrine be satisfied. As shown below, those elements are satisfied with respect to each document defendant has withheld.

1. The withheld documents satisfy the elements of the attorney-client privilege

The attorney-client privilege protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 304 (1976); In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984). On the basis of this privilege, defendant withheld documents that fall into three broad categories: (1) communications between FSA officials and their in-house counsel concerning legal advice sought by FSA; (2) communications between

⁴ In Part IV of their Memorandum, at 13, plaintiffs assert that defendant has withheld documents as privileged without including them in the privilege log. In fact, these documents are not privileged and defendant's contractor mistakenly withheld them from production. They are therefore being produced.

⁵ Thirteen documents whose author and recipient are unknown were withheld under the attorney client privilege: ## 1, 9, 76, 115, 124, 206, 208, 497, 540, 555, 643, 694, 728.

Sixty-four documents whose author or recipient were unknown were withheld under the work product doctrine: ## 37, 54, 60-62, 71-73, 75, 76, 79, 81, 86, 110-115, 119, 122-124, 127-130, 133, 135, 141, 148-151, 159-161, 312, 326, 327, 418, 420, 421, 487, 517, 520, 539, 541, 551-553, 555, 587.1, 614, 616, 631, 676, 718, 725, 769, 772, 773, 796.2, 799.1.

FSA's in-house counsel and FSA's legal representatives at DOJ or the U.S. Attorney's Office concerning advice or representation sought by FSA; and (3) documents prepared by FSA officials describing legal advice received from their in-house counsel or from attorneys at DOJ and the U.S. Attorney's Office.⁶ Little Dec. ¶¶ 29-42; see Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) ("In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer"). Each document is therefore protected by the attorney client privilege.⁷

The application of the privilege should not be undermined even if the author, recipient, or date of the document is unknown. Little Dec. ¶¶ 31-33; see Pl. Memo at 7-9. For example, Document #643 is a note to the file describing telephone conversations with USDA's Office of General Counsel regarding litigation that involves plaintiff Wesley Myers. Although the signature on the note is illegible, its description of internal USDA matters indicates that it was drafted by a

⁶ Communications between USDA's Office of General Counsel and USDA's legal representative at the U.S. Attorney's Office are covered by the attorney-client privilege even if they are to and from attorneys. See, e.g., NBC v. SBA, 836 F. Supp. 121, 124-25 (S.D.N.Y. 1993); Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984).

⁷ See, e.g., Doc. #16 (letter from USDA Regional Attorney to U.S. Attorney seeking advice regarding proposed Foreclosure Decree in pending case against borrower); Doc. #164 (litigation report from USDA Associate Regional Attorney to Assistant U.S. Attorney referring suit to collect delinquent ad valorem taxes from borrower); Doc. #231 (memorandum from USDA Office of General Counsel legal assistant to USDA County Supervisor providing advice regarding steps to be taken to foreclose deed of trust given as security for loan made to borrower); Doc. #325 (memorandum from USDA Associate Regional Attorney to USDA State Executive Director advising as to action to be taken by FSA regarding Chapter 12 Plan of Reorganization of borrower); Doc. #493 (letter from USDA Specialist in Agriculture Credit to U.S. Attorney seeking advice regarding dismissal of Chapter 12 and lifting of stay against borrower); Doc. #659 (memorandum from USDA Farm Loan Programs Director to Office of the General Counsel requesting advice regarding possible action on debtor's account, and describing request for advice from U.S. Attorney); Doc. #838 (memorandum from USDA State Executive Director to Office of General Counsel requesting guidance regarding possible loan deficiency payment to borrower).

USDA official who was recording and considering legal advice provided by USDA's the Office of General Counsel. It therefore satisfies the elements of the attorney-client privilege. All of the other documents withheld under the attorney-client privilege similarly meet the applicable legal standard, whether or not their author, recipient, and date are unknown. See Little Dec. ¶ 31.

2. The withheld documents satisfy the elements of the work product doctrine

The attorney work product doctrine shields materials "prepared in anticipation of litigation or for trial by or for [a] party or by or for that . . . party's representative (including the . . . party's attorney, consultant, . . . or agent)." Tax Analysts v. IRS, 117 F.3d at 620 (quoting Fed. R. Civ. P. 26(b)(3)); see also United States v. Nobles, 422 U.S. 225, 238-39 (1975). The privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Work product encompasses "interviews, statements, memoranda, correspondence, [and] briefs." Hager, M.D. v. Bluefield Reg'l Med. Center, Inc., 170 F.R.D. 70, 76 (D.D.C. 1997) (quoting Hickman v. Taylor, 329 U.S. 495, 511 (1947)).

All of the documents defendant has withheld under the work product doctrine satisfy these elements. Little Dec. ¶ 43. They fall into two broad categories: (1) factual and opinion work product prepared in the anticipation of litigation by or for FSA officials or personnel, often under the direction of FSA's in-house counsel or legal representatives, to assist in the litigation, see Sterling Drug Inc. v. Harris, 488 F. Supp. 1019, 1026-27 (S.D.N.Y. 1980) (Documents prepared by federal agency staff member under the supervision of lawyers preparing for litigation were work-product protected); and (2) factual and opinion work product prepared by or for FSA's in-house counsel or legal representatives in anticipation of litigation to assist in the litigation, see Jimenez v. FBI, 938

F. Supp. at 28 (“attorneys’ trial preparation, trial strategy, interpretations, handwritten notes, and personal evaluations and opinions” concerning a case were “classic, privileged attorney work-product”); see also LaRouche v. United States Dep’t of Justice, Civ. Action No. 90-2753, 1993 WL 388601, *9 (June 25, 1993) (“attorney’s reflections on strategic decisions about pending litigation and evaluations of a case’s strength and weaknesses” are protected work product). Little Dec. ¶¶ 44-46, 51-57. The withheld materials are therefore protected by the work product doctrine.

Plaintiffs’ contention that work product cannot be protected if their authors, recipients, or dates are unknown is unfounded. Little Dec. ¶¶ 46-47. For example, although Document #86 does not reveal this information, it is a draft entitled "Government's Objection to Motion to Stay Pending Appeal and Designation of Supersedeas Bond and Brief" concerning the matter of Frank Velarde, which clearly reflects its preparation by or for USDA or its attorney for litigation purposes. It therefore qualifies as work product. Document #487 does as well, although its author, recipient, and date are unknown. As an "FSA List of Payments due Lupe Garcia and Garcia & Sons re Chapter 12 Bankruptcy," Document #487 clearly was prepared by or for USDA or its attorney in connection with bankruptcy litigation involving Garcia & Sons. It is self-evident from the description and subject matter of the remaining documents withheld under the work product doctrine that they too were prepared by or for USDA or its attorney pursuant to litigation concerning the designated complainant. Little Dec. ¶¶ 47-48.

Plaintiffs’ argument that the attorney work product doctrine cannot be invoked to protect documents authored by non-attorneys, see Pl. Memo. at 9, is without merit. "By its own terms . . . the work product privilege covers materials prepared by or for *any party or by or for its representative*; they need not be prepared by an attorney or even for an attorney." Hertzberg v. Veneman, 273 F.

Supp. 2d 67, 2003 WL 21731285, *3 (D.D.C. 2003). In other words, materials need not have been prepared by an attorney or an attorney's agent to enjoy work product protection, as long as they were prepared in anticipation of litigation. *Id.* at *4, and cases cited therein. All of the documents plaintiffs take issue with⁸ fall into this category.

For example, Mr. McAnally appears to have authored Document ##166, 182, 377, 755, and 758. Although he may not be an attorney, the documents consist of draft declarations and notices of trustees' sales which were clearly prepared for use in litigation concerning USDA and the designated complainant. Hence, they are protected as work product. Similarly, Documents ##422 and 554 consist, respectively, of a memorandum from State Executive Director Hall asking a USDA official to respond to certain allegations in the Garcia case, and guidance to that effect. While Mr. Hall and the recipient may not be attorneys, the document was prepared by USDA pursuant to the present lawsuit and is therefore work product. Little Dec. ¶¶ 49-50. The remaining documents at issue, while perhaps not drafted by or directly for an attorney, were nevertheless prepared in anticipation of, or for use in, litigation. Little Dec. ¶ 49.⁹

⁸ Plaintiffs challenge defendant's assertion of the work product doctrine on this basis with respect to Document ## 166, 182, 236, 330, 377, 387, 403, 404, 422, 466, 490.1, 538, 554, 755, 758, 795, 796.1.

⁹ *See, e.g.*, Doc. #403 (e-mail containing information regarding plaintiffs' case files "to support the efforts of the Assistant United States Attorney handling this important matter"); #404 (e-mail describing and seeking information requested by legal counsel regarding plaintiffs' FSA loan files); ##330, 387 (draft Proofs of Claim authored by USDA officials to be filed in U.S. Bankruptcy Court); #236 (draft declaration to be signed by USDA official regarding the loan status of, and foreclosure actions taken against, Joe Contreras); #466 (draft Stipulated Judgment of Foreclosure in Western Bank case) (the privilege log erroneously indicates that Western Bank is the author, when in fact, the author is unknown).

Regarding Document ##795 (draft pleading entitled "Application for Authority to Pay Administrative Expense of Harvest apparently authored by Richard Ladd) and #796.1 (copy

C. The Prior Compelled Disclosure Of Complainants' Files Negates Plaintiffs' Claim Of Waiver

Plaintiffs' assertion that defendant has waived the attorney client privilege with respect to the handful of documents inadvertently disclosed by defendant's contractor is without merit. Pl. Memo. at 11-13. In April 2003, defendant was ordered to produce for plaintiffs' inspection all of the named plaintiffs' files in response to plaintiffs' class certification discovery requests. May 8, 2003 Protective Order; April 29, 2003 Hearing Transcript at 19-20, 27-28. To accelerate the discovery proceedings, defendant was ordered to allow plaintiffs access to the files prior to making any redactions of information pursuant to the Privacy Act or any applicable privilege or doctrine. Therefore, defendant placed the unredacted files in a room to which plaintiffs' counsel were given unfettered access.¹⁰ In response to plaintiffs' subsequent request for copies of every document in every file, which totaled approximately 141,997 pages, defendant reviewed the files and withheld 886 documents on the basis of the attorney-client and/or deliberative process privileges, and the

provided to Joyce Thompson at USDA of draft proposed Agreed Order Authorizing Use of Cash Collateral), defendant has reconsidered its original assertion of the work product doctrine and determined that these documents are not subject to the doctrine and should have been disclosed. They will therefore be produced to plaintiffs.

Document #490.1 is not, as plaintiffs allege, a communication to the Senior Vice President of Western Bank. Pl. Memo. at 9 n.21. Rather, it is merely a draft letter setting forth FSA's possible position regarding Western Bank's proposal that FSA pay off G.A. Garcia & Sons' delinquent loans.

Document #538 is a draft "Order Confirming Chapter 12 Plan as Modified," prepared by USDA or its counsel and intended to be signed by a bankruptcy judge. Hence, it too is work product. Defendant's privilege log mistakenly describes Document #538 as having been authored by the Bankruptcy Judge, which it was not.

¹⁰ Due to the Privacy Act protective order entered by the Court, it was not necessary to remove Privacy Act information. May 8, 2003 Protective Order.

work product doctrine. Defendant inadvertently produced eight of the privileged documents, which consisted of a total of eleven pages, at the time she produced the non-privileged documents.

In this Circuit inadvertent disclosures can waive the attorney-client privilege except in extraordinary circumstances such as a court-compelled disclosure. In Re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (citing Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651 (9th Cir. 1978)). In Transamerica, the Ninth Circuit held that the factual circumstances surrounding a trial court's order dramatically accelerating discovery amounted to a "compelled disclosure" that negated the opposing party's claim of waiver. Transamerica, 573 F.2d at 651; see United Mine Workers of Am. Employee Benefit Plans Litig., 156 F.R.D. 507, 511 n.6 (D.D.C. 1994).

Such a de facto compelled disclosure has occurred here. Since plaintiffs were given unfettered access to the privileged materials under a scheme mandated by the Court that did not allow defendant to segregate out attorney-client, work-product, or other privileged materials, the normal rule that any disclosure of privileged materials waives the privilege should not apply here. Defendant made a Court-ordered disclosure of privileged documents that cannot amount to a waiver, and that disclosure, not the later, inadvertent one, is the disclosure that first afforded plaintiffs access to the privileged materials. Thus, the rationale of In Re Sealed Case - that the importance of privileged documents demands the sort of attention that failure to provide makes fatal - simply has no application here given that defendant initially disclosed the privileged materials pursuant to the Court's order.¹¹

¹¹ In any event, any waiver of the attorney-client privilege should be "narrowly construed and limited to those other documents addressing the same *specific* subject matter as the documents already produced." See United Mine Workers of Am. Employee Benefit Plans Litigation, 159 F.R.D. at 307 (emphasis in original). The Court has the "discretion to define the subject-matter of the disclosed documents narrowly to prevent the scope of the subject-matter

D. An In Camera Inspection Of The Withheld Documents Is Not Warranted

In camera inspection of withheld documents is by no means the rule in privilege disputes. To the contrary, where an agency has met its burden by submitting a reasonably specific declaration, "[i]n camera review is neither necessary nor appropriate." Hayden v. National Sec. Agency, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); see also Quinion v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (in camera review should not be "resorted to as a matter of course, simply on the theory that 'it can't hurt'"). Defendant clearly has met that standard here. She has prepared a detailed and specific privilege log and a declaration of the type that is required in disputes about the discoverability of privileged materials. And given the number of documents at issue, an in camera inspection would impose a substantial burden on the Court. In these circumstances, the Court should deny plaintiffs' request for an in camera inspection.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to compel should be denied.

Respectfully submitted,

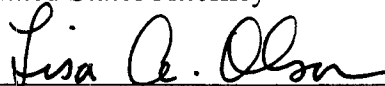
waiver from being unduly broad." Id. at 309.

Moreover, a waiver of the attorney work product doctrine "does not extend to other documents addressing the same subject matter." Id. at 310. Instead, it is limited to the documents actually disclosed. Id.

This narrow construction of waiver applies to the disclosure of documents to Tyne Davis in response to his request to the county office for his own loan file. See Pl. Memo. at 19. The county office, when screening documents for privilege before providing the file to Mr. Davis, may have inadvertently provided some privileged or protected documents. However, defendant's waiver of privilege or protection as to those documents is limited as described above.

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Dated: Oct. 14, 2003

CERTIFICATE OF SERVICE

I certify that on October ~~14~~¹⁵, 2003, a copy of Defendant's Opposition to Plaintiffs' Motion to

Compel was served upon plaintiffs' counsel as follows:

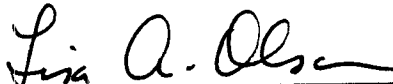
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