

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**NOTICE OF FILING OF SUPPLEMENTAL DECLARATION IN SUPPORT OF
DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

The Court will please take notice of the attached Supplemental Declaration of James R. Little, which is being filed in support of defendant's opposition to plaintiffs' motion to compel and in response to the Court's January 20, 2004 Memorandum Order.

Respectfully submitted,

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Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

/s/ **Lisa A. Olson**
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Dated: Feb. 6, 2004

CERTIFICATE OF SERVICE

I certify that on February 6, 2004, Defendant's Notice of Filing of Supplemental Declaration in Support of Defendant's Opposition to Plaintiffs' Motion to Compel, and attached Supplemental Declaration of James R. Little, were filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon plaintiffs' counsel as follows:

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ANN VENEMAN, Secretary of)	Judge: James Robertson
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Defendant.)	
<hr/>		

Supplemental Declaration of James R. Little

I, James R. Little, do hereby state and declare as follows:

1. I am the Administrator of the Farm Service Agency ("FSA"), United States Department of Agriculture ("USDA"), Washington, D.C. I have held this position since October 23, 2001. Before serving in the capacity of Administrator of FSA, I served as Acting Administrator beginning on January 24, 2001. I have been employed by the USDA, FSA, and its predecessor agencies since October 1984, with the exception of the period from January 2, 2000 through January 23, 2001, when I was the Associate Financial Officer at USDA.
2. As the Administrator of FSA, I am responsible for the overall operation of FSA, including the farm loan programs and the non-credit farm programs, such as the disaster benefit program. As part of this responsibility, I am aware of the various files maintained by FSA on farmer participants in FSA programs, including the recipients of farm loans and disaster benefits.
3. The statements made in this declaration are based on knowledge that I have acquired in the performance of my official duties, information provided to me by FSA personnel and attorneys from the Office of the General Counsel, USDA (OGC), and my knowledge of the issues being litigated in the above-captioned matter.
4. I am aware of the above-captioned litigation and of the discovery requests for documents made by plaintiffs. I am also aware that USDA has withheld documents from FSA customer files based on the deliberative process privilege, the attorney-client privilege, and the attorney work product doctrine. I have reviewed all documents withheld under the deliberative process privilege and a representative sample of documents withheld under the attorney-client privilege, and the attorney work product doctrine and I hereby assert the deliberative process privilege, the

attorney-client privilege, as well as the protection afforded under the attorney work product doctrine on the behalf of USDA. The purpose of this declaration is to explain the bases for USDA's decision to withhold or redact certain documents based on the deliberative process privilege, attorney-client privilege, and attorney work product doctrine.

5. FSA operates a variety of programs for the benefit of farmers, including a farm loan program and a disaster benefit program. In order for these programs to function effectively, it is crucial that agency personnel are free to have frank discussions about agency action and to be able to make recommendations and provide opinions before final decisions are made. FSA officials also need to be able to freely communicate with attorneys in OGC or at the Department of Justice and various U.S. Attorney's Offices, for the purpose of seeking and receiving legal advice.

Documents Generated by FSA's Deliberative Process

6. The documents that are being withheld under the deliberative process privilege generally fall into the following broad categories:

A. Documents containing the recommendations and opinions of FSA officials to other FSA officials on actions to be taken on delinquent borrower accounts;

B. Documents containing recommendations and opinions of FSA officials to other FSA officials on actions to be taken when there is evidence that a customer may be engaging in criminal or fraudulent behavior;

C. Drafts including, but not limited to, litigation documents, such as draft pleadings, discovery documents, affidavits, and the like, prepared by FSA officials and personnel, attorneys from OGC and the Department of Justice (DOJ) attorneys concerning litigation between USDA and agency customers;

D. Correspondence between attorneys in OGC and/or DOJ concerning litigation between USDA and agency customers; and

E. Correspondence between FSA personnel and attorneys from OGC concerning customer accounts. Such documents contain requests for legal advice and suggested courses of action by FSA personnel, as well as legal, opinions, advice, and guidance from OGC to agency personnel.

7. With regard to documents created by FSA personnel concerning litigation between USDA and agency customers, OGC attorneys often request that FSA personnel assist them in the litigation by preparing draft documents and providing factual information in writing. FSA personnel prepare such documents under the direction of OGC attorneys.

8. I have reviewed all of the documents withheld in the categories listed above. None of the documents reflect communications between USDA and non-federal entities or individuals. All of the documents consist of internal USDA documents that normally would not be disclosed to USDA customers or to the general public. USDA has withheld 148 documents on purely deliberative process grounds and an additional 98 documents on deliberative process grounds as well as other grounds.

Category A: Recommendations and Opinions of FSA Officials on Actions to Be Taken on Delinquent Borrower Accounts

9. The first category of documents consists of recommendations and opinions of FSA officials to other FSA officials regarding actions to be taken on delinquent borrower accounts.

10. Before final agency decisions are made concerning action to be taken where a borrower has become delinquent on his or her account, FSA officials often engage in deliberations about what action would be most appropriate in the particular situation. The officials share their recommendations and opinions as part of the decision-making process in these matters.

11. Examples from this category are as follows:

- A. Document GVL003-0211 is a memorandum from William H. McAnally, Farm Loan Manager, to Larry Owens, Farm Loan Chief, regarding his pre-decisional opinions and recommendations regarding the appropriate action to be taken on Arturo Vasquez's delinquent account. This type of document would have been generated in the course of these FSA officials' deliberations before a final agency decision was made concerning the action to be taken on Vasquez's delinquent account.
- B. Document GVL010-1680 is a memorandum from Lynn Muncy, Agricultural Credit Manager, and Mary Ann Romero to Chris Amend, Agricultural Credit Director, containing recommendations regarding Guadalupe Garcia's Chapter 7 bankruptcy filing.

Category B: Recommendations and Opinions of FSA Officials on Actions to Be Taken Where There is Evidence That a Customer May Be Engaging in Criminal or Fraudulent Activity

12. The second category of documents consists of recommendations and opinions of FSA officials to other FSA officials regarding actions to be taken where there is evidence that a customer may be engaging in criminal or fraudulent activity.

13. FSA officials often exchange their pre-decisional opinions and recommendations

regarding proposed actions to be taken where a customer may be engaging in criminal or fraudulent activity.

14. For example, Document GVL001-1505-1506 contains recommendations by FSA officials for certain action to be taken by the agency where there is evidence that the borrower may have engaged in certain criminal activity concerning his farm operation.

Category C: Drafts Including Litigation Documents Prepared by FSA Officials and Personnel, Attorneys From OGC and DOJ Concerning Litigation Between USDA and Agency Customers

15. This category consists of drafts of documents prepared by FSA officials and personnel, attorneys from OGC and DOJ before final agency decisions are made concerning actions to be taken on accounts and/or concerning litigation between USDA and agency customers.

16. These drafts are created as part of FSA's deliberative process and may evolve from one version to the next based on FSA officials' or their counsel's views. The drafts may be incomplete, inaccurate or need review before being finalized.

17. Examples from this category are as follows:

- A. Document GVL001-2727-2729 is a draft of a Declaration to be signed by Scott Miller, Farm Loan Specialist at FSA. The draft shows handwritten revisions, including deletions and additions.
- B. Document GVL013-0029-0034 is a draft of executive correspondence to the Congressman Bob Goodlatte concerning the administration of a certain cotton loan made to Tyn Davis.

Category D: Correspondence Between Attorneys in OGC and/or DOJ Concerning Litigation Between USDA and Agency Customers

18. This category consists of correspondence between attorneys in OGC and/or DOJ, including the U.S. Attorney's Office, concerning litigation between USDA and agency customers.

19. When litigation arises or is anticipated to arise between USDA and FSA customers, FSA is advised by OGC. In the course of their giving advice, OGC attorneys in headquarters may need to correspond with OGC regional attorneys. DOJ represents the United States in the matter. Therefore, it is necessary for OGC, serving as Agency counsel, and DOJ to collaborate throughout the course of these litigation matters.

20. For example, Document GVL001-2770-2773 is a memorandum from James Michael

Kelly, then Associate General Counsel of the Legislation, Litigation and General Law Divisions of OGC to a Regional Attorney, Lawrence Jakub. The memorandum concerns certain litigation between Frank Velarde and USDA and reflects a recommendation and legal opinion regarding an issue that has arisen in litigation.

Category E: Correspondence Between FSA Officials and Attorneys from OGC Concerning Customer Accounts

21. The documents in this category contain requests for legal advice and suggested courses of action by FSA personnel, as well as legal opinions, advice, and guidance from OGC to agency personnel.

22. OGC advises FSA on various matters regarding customer accounts and, thus, memoranda and other documents are generated in the course of FSA's requests for, and OGC's offers of, legal advice. Additionally, OGC often must work with FSA personnel and officials in preparing litigation documents, such as discovery responses.

23. For example, Document GVL002-1237-1238 is a memorandum from Gary W. Wall, Chief, Farmer Programs, regarding his recommendations and opinions concerning a certain Motion for Injunctive Relief.

The Effects of Releasing These Deliberative Materials to the Public

24. The release of documents reflecting pre-decisional recommendations and opinions of FSA officials would impede FSA officials' ability to engage in candid, internal discussions before making final decisions on customer accounts or adopting a policy. Further, the release of such documents would hinder the ability of agency officials to engage in full and meaningful intra-agency or inter-agency discussion regarding decisions that have to be made on customer issues, as well as on general policy matters, in that it would chill frank discourse. Such frank discourse is necessary for agency officials to make decisions about customer accounts and general policy.

25. Release of documents containing communications between OGC and FSA personnel also would hamper the ability of agency officials to communicate openly with in-house counsel - that is, OGC attorneys - as well as the ability of OGC attorneys to provide legal opinions and recommendations to FSA personnel. The ability of agency personnel to speak freely with counsel, and for counsel to provide legal guidance, is crucial to the operation of FSA's programs.

26. In addition to hindering the communication among FSA officials and between OGC attorneys and FSA officials, release of documents containing recommended action and opinions would be confusing to agency customers and to the public generally in that it would amount to a premature disclosure of recommended actions and opinions occurring before the final decision is made.

27. Releasing documents that consist of drafts, whether litigation or other documents, would also be confusing to the public and would hinder the communication between FSA personnel and between OGC attorneys and FSA personnel. Moreover, the public normally would have access to documents containing adopted policies and final decisions once those policies and decisions are determined.

28. Further, it is important that the documents protected under the deliberative process privilege in the above-captioned lawsuit be withheld 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.

Documents Withheld Based on the Attorney-Client Privilege

29. The documents withheld based on the attorney-client privilege contain confidential communications between attorney and client relating to a legal matter for which the client has sought legal advice.

30. The attorney-client privileged documents withheld in the above-captioned lawsuit generally fall into the following broad categories:

- A. Communications between FSA officials and their in-house counsel concerning legal advice sought by FSA.
- B. Communications between FSA's in-house counsel and FSA's legal representatives at DOJ or the U.S. Attorney's Office concerning legal advice or representation sought by FSA.
- C. 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.

31. Certain documents that fall into the categories listed above have been withheld on the basis of the attorney-client privilege, but do not contain a date, recipient name or author name. I have reviewed a representative sample of these documents and determined that the documents contain communications between USDA and its legal counsel concerning legal matters for which USDA has sought advice.

32. For example, Document GVL001-0841-0842 does not indicate an author's name. The document is a two-page letter to Michael J. Norton, Esq., U.S. Attorney, and James W. Winchester, Esq., Assistant U.S. Attorney, consisting of a legal opinion and recommended legal strategy regarding litigation between USDA and Frank Velarde. Although the page containing the author's signature is missing, the first page of the correspondence is on OGC letterhead, indicating that the communication came from OGC.

33. Similarly, the signature on Document GVL003-1791 is illegible but the signature line indicates that this communication is from the Assistant Regional Attorney and is "by direction of the Secretary." The document is one page of a letter to Mark M. Greenberg, Assistant U.S. Attorney, regarding a lawsuit to collect delinquent ad valorem taxes from Arturo Vasquez. The letter is therefore correspondence between USDA's in-house counsel and its legal representative at the U.S. Attorney's Office and falls squarely within the attorney client privilege.

Category A: Communications Between FSA Officials and Their In-House Counsel Concerning Legal Advice Sought by FSA

34. The documents in this category consist of communications between FSA officials and their in-house counsel at OGC concerning legal advice sought by FSA.

35. OGC attorneys serve in the capacity of Agency counsel to FSA. As a result, it is necessary for FSA to freely communicate with these attorneys when seeking legal advice.

36. An example of a document in this category is Document GVL001-0804, a one-page memorandum from Judy Jaklich, FSA State Director in Colorado, to the Office of the General Counsel requesting legal assistance in a matter concerning borrower Frank Velarde.

Category B: Communications Between FSA's In-House Counsel and FSA's Legal Representatives at DOJ or the U.S. Attorney's Office Concerning Legal Advice or Representation Sought by FSA

37. This category consists of communications between FSA's in-house counsel in OGC and FSA's legal representatives at DOJ or the U.S. Attorney's Office. These communications reflect legal advice or representation provided to FSA by DOJ or the U.S. Attorney's Office.

38. USDA officials and their in-house counsel must be able to freely and confidentially communicate with USDA's legal representatives at DOJ or the U.S. Attorney's Office when they need legal advice in connection with their official duties and the operation of the agency.

39. An example is Document GVL001-1090-1091 which is a two-page letter from Jack Hanthorn, a Regional OGC Attorney, to Robert N. Miller, U.S. Attorney, regarding a proposed Answer to protect the Agency's interests in a civil action involving borrower Frank Velarde. The letter requests the U.S. Attorney's Office's assistance in the litigation.

Category C: Internal, Confidential Documents Prepared by FSA Officials Describing Legal Advice Received From Their In-House Counsel or From Their Legal Representatives at DOJ and the U.S. Attorney's Office

40. This category consists of communications among FSA officials describing legal advice received from their in-house counsel or from their legal representatives at DOJ or the U.S.

Attorney's Office.

41. FSA officials and personnel may, in the course of their communications with in-house counsel or their legal representatives, prepare notes or other miscellaneous internal documents describing the legal advice received from their in-house counsel or legal representatives.

42. For example, Document GVL026-3094 is one-page of handwritten notes that reflect conversations between the author and in-house OGC counsel concerning legal advice about Gloria Morales' account with FSA given to the author in his/her capacity as FSA official.

Documents Withheld Based on the Attorney Work Product Doctrine

43. The documents withheld based on the attorney work product doctrine are prepared in anticipation of litigation or for trial by or for FSA officials and personnel, or by or for FSA's in-house counsel or legal representatives. Such documents include interviews, statements, memoranda, correspondence, and briefs.

44. The attorney work product withheld in the above-captioned lawsuit generally fall within the following broad categories:

- A. 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.
- B. 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.

45. FSA officials and personnel are often required to work under the direction of OGC in preparing for matters where litigation is anticipated. With respect to these matters, FSA assists OGC in the preparation of pleadings, motions and discovery.

46. During the course of the collaborative efforts between FSA, its in-house counsel, and legal representatives at DOJ and the U.S. Attorney's Office, documents are often prepared by FSA, OGC and the legal representatives at DOJ and the U.S. Attorney's Office which are protected under the attorney work product doctrine.

47. Certain documents that fall into the categories listed above have been withheld on the basis of the attorney work product doctrine, but do not identify a date, recipient or author. I have reviewed a representative sample of these documents and determined that the elements of the privilege are nevertheless satisfied.

48. For example, Document GVL001-2986-3000 is an undated draft litigation document whose author is unknown. However, it is evident that the document is protected by the attorney

work product doctrine. The document is a draft "Farm Service Agency's Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents" in a civil lawsuit. This document is the type that FSA's in-house counsel and legal representatives would prepare in anticipation of litigation.

49. Certain documents in the categories above that have been withheld under the attorney work product doctrine were not authored by an attorney. Nevertheless, they were prepared in anticipation of litigation. I have reviewed a representative sample of these documents and determined that they satisfied the elements of the attorney work product doctrine.

50. For example, GVL017-0766-0770 and GVL026-3679-3679 consist, respectively, of a memorandum from State Executive Director Hall asking a USDA official to respond to certain allegations in the Garcia case, and providing 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.

Category A: Factual and Opinion Work Product Materials Prepared in Anticipation of Litigation By or For FSA Officials or Personnel to Assist in the Litigation.

51. This category consists of factual and opinion work product materials prepared in anticipation of litigation by FSA officials or personnel, often under the direction of FSA's in-house counsel or legal representatives, for the purpose of assisting in the litigation.

52. As part of their official duties, FSA officials and personnel generate these materials, which are protected under the attorney work product doctrine.

53. For example, Document GVL017-0692-0695 is a four-page memorandum from John Smythe, State Executive Director for California, to Carolyn Cooksie, Deputy Administrator for FSA Farm Loan Programs in Washington, D.C., regarding a response to certain allegations made in the above-captioned lawsuit. The document discusses each pertinent allegation in detail for the purpose of formulating responses to the allegations.

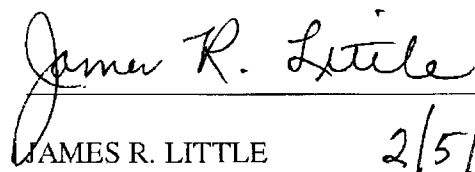
Category B: Factual and Opinion Work Product Prepared By or For FSA's In-House Counsel or Legal Representatives in Anticipation of Litigation to Assist in Such Litigation.

54. This category consists of factual and opinion work product materials prepared in the anticipation of litigation by FSA's in-house counsel or legal representatives from DOJ or the U.S. Attorney's Office to assist in such litigation.

55. In their capacity as counsel to FSA, FSA's in-house counsel or legal representatives often prepare litigation documents including pleadings, discovery, motions, and legal opinions for use or assistance in litigation matters involving FSA.

56. For example, Document GVL004-0425-0435 consists of a litigation report prepared for Louis Contreras, et al. v. United States of America, No. 93-248L, U.S. Court of Federal Claims. The litigation report summarizes the Agency's position on the pertinent facts and its response to the complaint. The report contains legal opinions, including views regarding applicable regulations and case law.

On this 5th day of February, 2004, I declare under penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is true and correct.



JAMES R. LITTLE 2/5/04
Administrator
Farm Service Agency
U.S. Department of Agriculture
Washington, D.C.