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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MICHAEL ANGELO MORALES,

Plaintiff,

v.

JAMES E. TILTON, et al.,

Defendants.

Case No. C 06 219 JF RS
C 06 926 JF RS

DEATH PENALTY CASE

RELATED CASE PLAINTIFF PACIFIC NEWS SERVICE'S OPPOSITION TO THE OFFICE OF THE GOVERNOR AND THE DEFENDANTS' JOINT MOTION FOR A PROTECTIVE ORDER

Date: February 20, 2007
Time: 1:30 p.m.
Dept.: Courtroom 3
Judge: The Hon. Jeremy Fogel

I. INTRODUCTION

Pacific News Service ("PNS"), the plaintiff in the related case, *Pacific News Service v. Tilton*, Case No. C 06-1793 JF RS, opposes the joint motion of Defendants and the Governor's Office (jointly "the Government") for a protective order. The Government's motion, which is based on the deliberative process privilege, is both premature and inconsistent with the law governing that privilege.

The Government has announced that it will revise California's lethal injection protocol ("OP 770"), after the Court ruled in this case that the current protocol will likely violate the Eighth Amendment. But as the Court indicated in its Memorandum of Intended Decision, PNS's First Amendment challenge to OP 770 is pending, and must be decided "in order to facilitate speedy and complete appellate review of all of the current challenges to OP 770." As such, any order protecting evidence that is generated while the Government revises OP 770 will impact PNS's discovery rights.

Indeed, the protective order that the Government now seeks particularly affects PNS, because it purports to cover evidence that is central to our First Amendment claim. PNS's lawsuit alleges that pancuronium bromide, a paralytic drug administered during executions, conceals important information about whether the inmate is experiencing pain. This conduct infringes the First Amendment right of the public and the press to attend and to witness executions meaningfully. Key evidence in PNS's case will be Defendants' *reasons* for retaining pancuronium bromide in the protocol, if Defendants make that decision. And because OP 770 involves a series of drugs that are operating on the inmate's body at different rates during the same time period, Defendants' reasons for keeping pancuronium bromide in the lethal injection protocol cannot be analyzed in a vacuum. Thus, PNS will likely need information about Defendants' reasoning generally in redesigning the protocol.

But the Government wants to block PNS's access to precisely this information about Defendants' decision-making. The Government asks the Court to rule that certain documents and statements that will be generated or received during the upcoming revision to OP 770 should

be presumptively protected by the deliberative process privilege. Additionally, Plaintiffs would only be able to obtain access to those documents upon a showing of "good cause."

Such an anticipatory protective order would give far too much weight to a very limited evidentiary privilege that is disfavored in civil rights cases, and that cannot easily be evaluated in the context of the *PNS* case. This is particularly true because the Government carries a double burden in its motion: Rule 26(c) requires any party seeking a protective order to first show good cause; and case law places the burden of establishing a privilege on the party asserting it. With these principles in mind, there are three reasons to deny the Government's motion:

First, the Court does not currently have enough *concrete* information to meaningfully accept the Government's assertion of privilege. To determine whether the deliberative process privilege attaches to a document or statement, the Court must be able to examine the particular document or statement, and it must know what the government's final decision is, when that decision effectively became final, and who the deliberators were. The Court does not have any of this information before it, nor does PNS, because this information does not exist yet. Because the Court lacks this necessary information for evaluating the claim of privilege, any order that the Court issues now would be so vague as to be meaningless.

Second, the Government cannot use the deliberative process privilege where, as here, the Government's deliberation is itself at issue. Judge Seeborg has already so ruled in the *Morales* case. That ruling is equally, if not more, applicable to PNS, given that our lawsuit centers on Defendants' *reasons* for using pancuronium bromide.

Third, the Government's proposed protective order sets up a process whereby Plaintiffs would have to establish "good cause" before obtaining documents covered by the deliberative process privilege, which is only a qualified privilege. But no "good cause" requirement exists in the case law. And the Government gives no reason why one should apply here.

II. PROCEDURAL BACKGROUND

A. PNS's First Amendment claim focuses on Defendants' *reasoning* when designing and revising OP 770.

Plainitff PNS filed suit in March 2006 to vindicate the First Amendment right of the press and the public to attend and to witness executions meaningfully.[1] The lawsuit challenges California's practice of paralyzing inmates while executing them. Paralysis is brought about by the administration of pancuronium bromide, the second of three drugs administered during lethal injection executions. PNS alleges that this paralysis does not in any way advance California's interest in killing the inmate or ensuring a humane execution. Rather, pancuronium bromide only serves to conceal from witnesses any pain that an inmate experiences while being executed. Because the First Amendment entitles the press and the public to witness executions meaningfully, the state's practice of paralyzing inmates infringes that right.

As PNS argued in its opposition to Defendants' motion to dismiss, this case will turn on balancing the government's legitimate interest in administering pancuronium bromide against PNS's First Amendment interest in meaningfully witnessing executions.[2] To perform that balancing test, the Court must know Defendants' actual *reasons* for administering pancuronium bromide. This is a central dispute in this case. The Government presented evidence at the evidentiary hearing on Mr. Morales's claim suggesting that, in a rare set of cases, pancuronium bromide will cause the death of the inmate.[3] PNS disputes the Government's evidence, disputes that this is a sufficient reason to paralyze inmates, and disputes that this was the Government's real reason for administering pancuronium bromide. PNS intends to prove that pancuronium bromide does not actually advance the killing process in any meaningfully way. Rather, PNS

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[1] The following description of PNS's case derives from PNS's complaint. *See* Complaint for Declaratory and Injunctive Relief, *PNS v. Tilton*, Case No. 06-1793 (Docket Item No. 2).

[2] *See* Plaintiff Pacific News Service's Opposition to Defendants' Motion to Dismiss Complaint, *PNS v. Tilton*, Case No. 06-1793 (Docket Item No. 36) at 10-12.

[3] *See* Declaration of Ajay S. Krishnan in Support of Related Case Plaintiff Pacific News Service's Opposition to the Office of the Governor and the Defendants' Joint Motion for a Protective Order ("Krishnan Decl."), Ex. A (Transcript of Proceedings, September 28, 2006) at 1034:25 – 1036:3.

intends to show that, given the effects, amount, and timing of the drugs that are administered, pancuronium bromide actually serves no legitimate purpose during an execution.

Thus, the *PNS* case presents an evidentiary dispute about the Government concealing its reasons for performing executions in the manner that it does.

B. The Government asserts the deliberative process privilege to try to protect the very evidence that is the focus of PNS's case.

On December 15, 2006, the Court announced that it intended to rule that OP 770 violates the Eighth Amendment.[4] The Court supplied a non-exhaustive list of five "critical deficiencies" in OP 770, including: (1) inadequate screening of execution team members, (2) inadequate training, supervision, and oversight of team members, (3) improper preparation and administration of sodium thiopental, (4) inadequate record-keeping, and (5) inadequate execution facilities.[5] In response, the Governor's Office directed its administration to "correct the deficiencies identified by the Court."[6] Defendants have stated that they are "committed to reviewing, evaluating, and revising the current lethal injection protocol with respect to the identified deficiencies and any others that may emerge during the evaluation."[7] The Government has stated that it will reveal the new protocol on May 15, 2007. We do not know who will be participating in this revision of the lethal injection protocol. And we do not know what form the Government's forthcoming process for revising the lethal injection protocol will take. We therefore do not know who will be consulted and what types of documents will be generated.

In the midst of this information vacuum, the Government now requests a protective order—based on the deliberative process privilege—to prevent disclosure of "pre-decisional, deliberative documents and statements generated or received" during the forthcoming process of

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[4] *See* Memorandum of Intended Decision; Request for Response from Defendants ("Memorandum of Intended Decision") (Docket Item No. 290).

[5] *Id.* at 91-11.

[6] Response by the Governor's Office to the Court's Memorandum of Intended Decision Dated December 15, 2006 ("Governor's Response") (Docket Item No. 291-1) at 1-2.

[7] Defendants' Response to Memorandum of Intended Decision ("Defendants' Response") (Docket Item No. 292) at 2.

altering the lethal injection protocol.[8] The Government's proposed protective order states that any such "pre-decisional, deliberative documents and statements generated or received" will be presumptively protected from discovery, but that this presumption may be overcome by a showing of good cause.[9] The Government asserts that it needs such a protective order to ensure a "candid dialogue."[10] But the Government's motion for a protective order is not supported by any declarations or evidence of any kind.

Importantly, PNS does not intend to and will not seek discovery with regard to the Government's forthcoming process for revising the lethal injection protocol until the Government announces its new protocol, which is expected to occur on May 15, 2007. Thus, PNS's discovery efforts will not disrupt the Government's deliberations. PNS will continue, however, to pursue the outstanding discovery that it has already sought but not received.

Lastly, it is worth mentioning that the Government filed its motion for a protective order only in this case, *Morales v. Tilton*, Case No. C 06-219 JF RS. The Government never made any effort to meet and confer with PNS, the plaintiff in the related case, despite the requirement that a party moving for a protective order must certify that it "in good faith conferred or attempted to confer *with other affected parties* in an effort to resolve the dispute." Fed. R. Civ. P. 26(c) (emphasis added). This is so even though discovery is ongoing in the *PNS* case, this Court's Memorandum of Intended Decision explicitly stated that the *PNS* case is still live, and the protective order the Government seeks obviously impacts PNS's discovery rights.

C. Judge Seeborg has already ruled that Defendants cannot assert the deliberative process privilege to block disclosure of its deliberations.

This is not the first time Defendants have invoked the deliberative process privilege in this case.[11] Defendants also tried to assert it the last time they revised OP 770, which resulted in the March 16, 2006 version of OP 770. Specifically, early last year, Mr. Morales sought

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[8] The Office of the Governor and the Defendant's Points and Authorities in Support of Joint Motion for a Protective Order Pursuant to FRCP 26(c)(4) (Docket Item No. 294) ("Mot.") at 5.

[9] *Id.*

[10] *Id.* at 5-6.

[11] The following discussion derives from Magistrate Judge Seeborg's Order Granting in Part Plaintiff's Motion to Compel (Docket Item No. 151) at 2-3.

discovery regarding "the genesis and development of OP 770." At issue, among other things, was discovery concerning a meeting held in February 2006 in the Governor's Office involving various officials from the Governor's Office, the Department of Corrections, and the Attorney General's Office at which the Government discussed revising OP 770. Defendants invoked the deliberative process privilege, and Morales moved to compel.

Judge Seeborg categorically denied Defendants' assertion of the deliberative process privilege with regard to the "genesis and development of OP 770." He began by noting that the deliberative process privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principles." He then rejected Defendants' assertion of privilege on two grounds. First, he ruled that the deliberative process privilege is limited to high-level policy formulation, but that the Government's development of OP 770 was merely the "routine implementation by corrections officials of the State's policy choice of lethal injection as its primary method of execution." Second, and more importantly, Judge Seeborg ruled that the privilege was inapplicable because the Government's deliberations "are directly at issue in the instant litigation due to allegations contained in [Morales's] Amended Complaint." The Court therefore rejected Defendants' prior invocation of the deliberative process privilege. The Government omits any mention of this prior ruling in its instant motion for a protective order.

III. ARGUMENT

Federal Rule of Civil Procedure 26(c) only permits the Court to issue a protective order upon a showing of "good cause." Additionally, the burden of establishing a privilege rests on the party asserting it. *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 1981). Moreover, the deliberative process privilege is a qualified privilege, and only applies to a narrow category of documents. And it often requires a good deal of context to apply. Given these limitations, the Government lacks good cause for the sweeping anticipatory protective order that it seeks.

A. The Court cannot issue now a meaningful order protecting deliberative documents because it currently lacks the information needed to evaluate the Government's claim of privilege.

The deliberative process privilege is a *qualified* privilege, that "was designed to help preserve the vigor and creativity of the process by which government agencies formulate important public *policies*." *Kelly v. City of San Jose*, 114 F.R.D. 653, 658 (N.D. Cal. 1987) (emphasis in original). Determining whether the deliberative process privilege acts to prevent disclosure of documents or statements is a two-step process. *North Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1121-22 (N.D. Cal. 2003). In Step One, a court must determine whether the privilege attaches to the documents or statements at issue. *Id.* In Step Two—if it is determined that the privilege attaches—the court must determine whether a litigant's "need for the materials [or information] and the need for accurate fact-finding override the government's interest in non-disclosure." *Id.* at 1122 (alteration in original) (quoting *Fed. Trade Comm'n v. Warner Commc'ns*, 742 F.2d 1156, 1161 (9th Cir. 1984)).

To determine whether the privilege attaches—*i.e.*, to determine whether Step One is satisfied—involves at least three considerations. *First*, the document or statement must be "predecisional." A document or statement is "predecisional" if it was "'prepared in order to assist an agency decisionmaker in arriving at his decision.'" *Assembly of the State of California v. U.S. Dep't of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992) (quoting *Renegotiation Bd. v. Gruman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). This means that the document or statement must predate the agency's decision, and it must "contribute" meaningfully to the agency's decision. *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002) (citing *Assembly*, 968 F.2d at 921).

Second, the document or statement must be "deliberative." A document or statement is "deliberative" if "'the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Assembly*, 968 F.2d at 920 (alteration in original) (quoting *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). In other words, deliberative documents or statements "reveal the mental

processes of decision-makers." *Id.* at 921 (quoting *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988). "Purely factual material that does not reflect deliberative processes is not protected." *North Pacifica*, 274 F.Supp. 2d at 1122 (quoting *FTC*, 742 F.2d at 1161).

Third, the deliberation that takes place must amount to "policy formulation at the higher levels of government." Order Granting in Part Plaintiff's Motion to Compel (Docket Item No. 151) at 3 (quoting *Scott v. Bd. of Educ.*, 219 F.R.D. 333, 337 (D.N.J. 2004)); *see also Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal. 1995) ("The deliberative process privilege should be invoked only in the context of communications designed to directly contribute to the formulation of important public policy."). Indeed, usually only agency heads are allowed to invoke the deliberative process privilege after personally reviewing the documents claimed to be privileged "to insure that the privilege remains a narrow privilege which is not indiscriminately invoked." *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998); *see Sanchez v. Johnson*, No. C-00-1593 CW (JCS), 2001 WL 1870308 at * 5 (N.D. Cal. Nov. 19, 2001). As Judge Seeborg ruled last May, "Routine operating decisions cannot be transformed into policy formulation at the higher levels of government simply because they are made at public institutions." Order Granting in Part Plaintiff's Motion to Compel (Docket Item No. 151) at 3 (quoting *Scott*, 219 F.R.D. at 337).

Applying these principles to the protective order the Government seeks will pose an obvious problem. As a threshold matter, it appears that the Government is asking the Court to perform Step One of the privilege analysis now—that is, to rule now that the deliberative process privilege presumptively attaches to a certain group of documents—and to perform Step Two later, once the Government announces the new protocol. This is apparent because the Government's Proposed Order states, "All pre-decisional deliberative documents and statements generated or received [in the forthcoming process] shall be presumptively deemed privileged." That language mirrors the considerations involved in Step One of the analysis. The Proposed Order goes on to state that plaintiffs may nonetheless compel production of deliberative documents upon a showing of "good cause" as to "why the presumption of privilege should not

apply." This language roughly (but not accurately) reflects the balancing test of Step Two. Thus, in order to issue the protective order the Government seeks, the Court must at least be able to perform Step One of the privilege analysis at this time.

But the Court is unable to perform Step One of the privilege analysis now, when it has so little *concrete* information about the documents or statements that will be generated or the process that will take place. As a general matter, a blanket assertion of the deliberative process privilege, as the Government attempts to do here, is insufficient to invoke the privilege. *Sanchez*, 2006 WL 1870308 at *3 (holding assertion of deliberative process privilege inadequate because it failed to "identify any specific documents"). If the Government were to invoke the privilege in this blanket fashion, *even after the documents and statements were generated*, that would still be insufficient to invoke the privilege. *See id.* Indeed, the type of anticipatory, blanket relief that the Government seeks violates the rule that only the agency head may invoke the deliberative process privilege *after personally reviewing the documents claimed to be privileged*. *See id.*; *Rozet*, 183 F.R.D. at 665; *see also Kelly* 114 F.R.D. at 669-70 (requiring a declaration from a responsible non-lawyer official at the agency with personal knowledge of the documents "to provide the court with the information it needs to make a reasoned assessment of the weight of the interests"). PNS knows of no other such anticipatory ruling on the deliberative process privilege, and the Government has cited none.

As a practical matter, the Court does not even have the information it would need to evaluate the assertion of privilege. Consider the three requirements that must be satisfied before the privilege attaches. *First*, to determine whether the documents or statements that will be generated are "predecisional" we must know whether they predate or postdate the Government's decision. Although we know that the Government intends to *announce* its decision on May 15, 2007, it may effectively arrive at a final revised protocol well before that time. And it is not at all unusual for an agency to generate documents post-dating a decision that indicate the reasons for that decision. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). Thus, May 15th is not a workable cut-off date for evaluating whether a document or statement predates the decision. Additionally, until we know what the nature of the Government's revised protocol

is, we cannot know whether a particular document or statement meaningfully "contribute[d]" to that decision. *See Assembly*, 968 F.2d at 920 ("'[T]he line between predecisional documents and postdecisional documents may not always be a bright one.'") (alterations in original) (quoting *Sears*, 421 U.S. at 152 n.19).

Second, the Court cannot determine at this time whether particular documents or statements are "deliberative." This is because the "deliberative" requirement focuses on whether the particular documents or statements "reveal the mental processes of decision-makers." The *Assembly* and *Carter* cases are both excellent examples of how a Court needs to know both the nature of the agency's final decision and the particular documents at issue before it can determine whether the document is "deliberative." Both cases dealt with the same fact pattern, one pertaining to the 1990 census, and the other pertaining to the 2000 census. In both cases, the Commerce Department was deciding whether to release its adjusted data, which is supposed to more accurately reflect the population of minorities and disadvantaged groups. In both cases, after a highly contextual analysis, the Ninth Circuit held that the public would not be able "to derive the formulas, or the process that created the formulas, from the adjusted data." *Carter*, 307 F.3d at 1090-91 (quoting *Assembly*, 968 F.2d at 922-23). Thus, producing the documents would not reveal the mental processes of agency employees. Obviously, this is the type of contextual analysis that this Court could not possibly perform now, as both the documents and the agency decision are merely hypothetical at this point.

Third, the Court cannot evaluate now whether the forthcoming process is indeed "policy formulation at the higher levels of government." The Government has not told us the rank of the government officials who will be involved in the forthcoming revision of OP 770. Moreover, we do not have a complete sense of what they will be deciding. Defendants have announced that they are "committed to reviewing, evaluating, and revising the current lethal injection protocol with respect to the identified deficiencies and any other that may emerge during the evaluation."[12] But most of the "identified deficiencies" do not seem to amount to high-level policy formation. For instance, the Court identified inadequate training and screening of the

execution team, inadequate record-keeping, inadequate drug-mixing, and inadequate lighting as some critical deficiencies. While these issues are certainly important or "critical" to Mr. Morales' constitutional rights, these are not what one would typically call high-level decisions of policy formulation. Indeed, the only reason why these "identified deficiencies" appear to be high-level now is because Defendants performed their duties so inadequately in the past that it gave rise to a federal civil-rights lawsuit. And while the Court invited a "thorough review" with the possibility of "making significant improvements in the 'infrastructure' of executions,"[13] the Government has not promised to do that. It has only really committed to reviewing the "identified deficiencies." We will have to wait and see what the Government actually does before we can know whether it is engaging in high-level policy formulation.

Thus, the Court cannot accept the Government's assertion of privilege at this time. The Government's Proposed Order presumptively protects all "predecisional, deliberative documents and statements." Issuing such an order would be tantamount to ruling that "All documents and statements to which the deliberative process privilege attaches are presumptively protected by the deliberative process privilege," or, more succinctly, "All privileged documents are privileged." What would be the effect of such a ruling? What legal questions would such a ruling decide? As opposed to litigating after May 15 whether certain documents and statements are protected by the *deliberative process privilege*, the parties will have to litigate whether those same documents and statements are protected by the *Court's protective order*. Indeed, given Defendants' demonstrated reluctance to satisfy their discovery obligations thus far,[14] the most likely impact of issuing such a protective order now would be to embolden Defendants to assert the deliberative process privilege in an overbroad manner, thus resulting in additional motion practice after May 15.

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[12] Defendants' Response at 2.

[13] Memorandum of Intended Decision at 16.

[14] *See* Memorandum of Intended Decision at 14 ("The Court is prepared to issue formal findings....However, it will require additional time to do so, in part because Defendants still have not fulfilled their discovery obligations.").

B. The *qualified* deliberate process privilege does not apply in a suit such as PNS's, where an agency's deliberative process is itself at issue.

Although the Court currently lacks the information necessary to *accept* the Government's assertion of privilege, it does has enough information to *reject* it. The deliberative process privilege is a qualified privilege. In cases such as PNS's, where a civil-rights plaintiff places at issue a government agency's deliberative process—particularly in cases whether the agency's reasons or intent are at issue—the privilege gives way to the plaintiff's need for relevant evidence and the Court's interest in accurate fact-finding. Judge Seeborg has already so ruled.

For Step Two of the deliberative process privilege analysis—*i.e.*, determining whether a litigant's need for deliberative materials and the need for accurate fact-finding override the government's interest in non-disclosure—Ninth Circuit and the Northern District of California employ a balancing test that weighs four non-exclusive factors:

> 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.

FTC, 742 F.2d at 1161; *Sanchez*, 2001 WL 1870308 at *5.

It is important not to overvalue an agency's unsupported assertion that non-disclosure promotes candor. *See, e.g.*, *Sanchez*, 2001 WL 1870308 at *5 (stating the need to "deter governmental units from too freely claiming a privilege that is not to be lightly invoked") (quoting *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 517 (D. Del. 1980)); *Kelly*, 114 F.R.D. at 669 (requiring the government to submit "competent declarations" showing the court "*what interests* would be harmed, *how* disclosure under a protective order would cause the harm, and *how much* harm there would be").[15] This concern has lead to the rule that "[e]ven if established, the privilege is strictly confined within the narrowest possible limits consistent with the logic of its principles." Order Granting in Part Plaintiff's Motion to Compel (quoting *North Pacifica*, 274 F.

[15] Indeed many have questioned the empirical basis behind the claim that a closed process actually promotes candor. *Kelly*, 114 F.R.D. at 664-65; *Irvin*, 127 F.R.D. at 172 n.4; 26A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5680 (2006).

Supp. 2d at 1122); *Sanchez*, 2001 WL 1870308 at *6 (same quote) (quoting *K.L. v. Edgar*, 964 F. Supp. 1206, 1208 (N.D. Ill. 1997)).

But in a civil-rights case where the government's deliberations are themselves at issue, the value of the first two factors, which go to the litigant's *need* for the deliberative documents, become the overwhelming consideration. *See* Order Granting in Part Plaintiff's Motion to Compel at 3 (quoting *Scott*, 219 F.R.D. at 337); *Irvin*, 127 F.R.D. at 174 (quoting *United States v. Bd. of Educ.*, 610 F. Supp. 695, 700 (N.D. Ill. 1985)). This is because, when a lawsuit poses the question, "What were the reasons and intent behind the government's decisions?," the government's deliberations are not just relevant evidence: they are irreplaceable evidence. *See Bd. of Educ.*, 610 F. Supp. at 700 ("Here the decisionmaking process is not 'swept up into' the case, it *is* the case.").

With this backdrop in mind, PNS's need for relevant information and the Court's interest in accurate fact-finding will outweigh the Government's interest in non-disclosure. PNS's lawsuit focuses on Defendants' reasons for including pancuronium bromide in the lethal injection protocol. Obviously, to investigate this factual question, PNS needs to know Defendants' reasoning; *no other evidence will do*. Moreover, the Government's invocation of the weak policy interest in a closed process is no different from any other assertion of deliberative process privilege in any other case. And, the Government has provided no evidence of any sort. It simply asserts that individuals would not be willing to participate in its process without a protective order. How many individuals? What roles would they play? What are their specific reasons for not participating? The Government provides no specifics. Indeed, there is some reason to disbelieve the Government's bare assertion that a closed process is necessary to design a new lethal injection protocol. After all, Florida is currently evaluating its own lethal injection procedure by using a commission that holds public proceedings.[16] Thus, the need for

[16] *See* Krishnan Decl., Ex. B (Florida executive order, Exec. Order No. 2006-260 (Dec. 15, 2006), "Executive Order that creates the Governor's Commission on Administration of Lethal Injection to review the method in which the lethal injection protocols are administered by the Department of Corrections," *available at* http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/December/06-260-lethalinjection.pdf) (stating that "[a]ll meetings of the Commission shall be open to the public"). The court may take

discovering evidence of the Government's deliberations will outweigh the Government's weak—and potentially non-existent—interest in a closed process.

As such, the Court has a sufficient basis to reject the Government's assertion of privilege for failure to satisfy Step Two of the deliberative process privilege analysis.

C. The Court should not insert a "good cause" requirement into any protective order, because no such requirement exists in the case law.

The second portion of the Government's proposed protective order—the portion that purports to codify Step Two of the deliberative process privilege analysis—is entirely unjustified: it seeks to impose upon Plaintiffs a "good cause" requirement that exists nowhere in the case law. The Government simply invented this "good cause" requirement, and, without any reasons or justification, inserted it into their proposed protective order. Recall that Rule 26(c) states that a protective can only issue upon a showing of "good cause." Thus—to disambiguate these two "good cause" requirements—the Government would have to show that there is "good cause" to impose a "good cause" requirement on Plaintiffs. The Government has shown no cause. The Court should not adopt such a requirement.

For Step Two of the deliberative process privilege analysis, the Ninth Circuit and the Northern District do not place any burden on the party seeking disclosure, let alone a "good cause" requirement; they simply ask the Court to balance the interests.[17] This is true for the other California district courts as well.[18] Indeed, with regard to Step Two of the deliberative

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judicial notice of publicly available orders from other jurisdictions. *See Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1025 (N.D. Cal. 2002).

[17] *See FTC*, 742 F.2d at 1161-63; *Sanchez*, 2001 WL 1870308 at *5-*7; *Chao v. Mazzola*, No. C-04-4949 PJH (EMC), 2006 WL 2319721 at *1 (N.D. Cal. Aug. 10, 2006); *Pac. Gas & Elec. v. Lynch*, No. C-01-3023 VRW, 2002 WL 32812098 at *3 (N.D. Cal. Aug. 19, 2002); *see also Kelly*, 114 F.R.D. 653 at 662-63 (placing the burden on the government by fashioning a ten-factor balancing test that is "moderately pre-weighted in favor of disclosure"); *North Pacifica*, 274 F. Supp. 2d at 1122 (applying the eight-factor balancing test of *United States v. Irvin*, *see infra* note 3, and stating that "[t]he burden of establishing application of the privilege is on the party asserting it.").

[18] *See, e.g., Price v. County of San Diego*, 165 F.R.D. 614, 619-20 (S.D. Cal. 1996); *United States v. Irvin*, 127 F.R.D. 169, 173-174 (C.D. Cal. 1989) (performing an eight-factor balancing test for Step Two, but not placing the burden on the party seeking discovery); *Newport Pac., Inc. v. County of San Diego*, 200 F.R.D. 628, 636-41 (S.D. Cal. 2001) (holding that "[a]s with any privilege, the burden of establishing the application of the deliberative process privilege is on the party opposing discovery," and performing the eight-factor *Irvin* balancing test without placing

process privilege analysis, PNS knows of no Ninth Circuit or California district court case imposing any burden, let alone a "good cause" requirement, on the party seeking disclosure. And the Government has not cited any such case.

Thus, there is absolutely no basis for inserting the Government's "good cause" requirement into any protective order. Shifting the burden from the party asserting the privilege to the party seeking discovery is the Government's own invention; it simply is not a part of the privilege the Government asserts.

IV. CONCLUSION

For the foregoing reasons, PNS respectfully requests that the Court either (1) decline to rule now on the Government's assertion of the deliberative process privilege, or (2) rule now that the Government cannot assert the deliberative process privilege as a basis for not disclosing documents or statements received or generated during the forthcoming process of revising OP 770.

Dated: January 31, 2007

ACLU FOUNDATION OF NORTHERN CALIFORNIA

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the burden on the party seeking discovery); *Am. Bankers Assocs. v. Lockyer*, No. CIVS02-1138 FCD JFM, 2002 WL 32988052 at *2-*3 (E.D. Cal. Nov. 27, 2002) (recognizing both the four-factor and eight-factor tests, and performing a balancing test without placing the burden on the party seeking discovery); *Kay v. City of Rancho Palos Verdes*, No. CV 02-03922 MMM RZ, 2003 WL 25294710 at *17-*22 (C.D. Cal. Oct. 10, 2003) (same).

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