UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAYMING CHANG *et al.*, **Plaintiffs,** **v.** **THE UNITED STATES OF AMERICA *et al.*,** **Defendants.**	**Civil No. 02-2010 (EGS/JMF)**

MEMORANDUM ORDER

Currently pending and ready for resolution is Defendant District of Columbia's Motion for a Protective Order Regarding Certain Information Sought by Plaintiffs' Subpoena to Produce Documents or to Permit Inspection of Premises in a Civil Action Filed by Thomas Koger [#780]. For the reasons stated below, the motion will be denied.

The District claims that certain documents responsive to a subpoena issued by plaintiffs are protected by the attorney-client, the deliberative process, and the work product privileges. [#780] at 1. These documents were submitted to the Court for an *in camera* review and it is clear that none of the claimed privileges applies.

"The attorney-client privilege protects confidential communications between a client and attorney that are made for the purpose of securing legal services or legal advice." Fudali v. Pivotal Corp., No. 03-CIV-1460, 2010 WL 4910263, at *2 (D.D.C. Dec. 2, 2010). See Vento v. IRS, 714 F. Supp. 2d 137, 151 (D.D.C. 2010). According to the District, "the draft Response contains confidential communications between Mr. Koger and his clients (who were officials of the District) seeking and providing legal advice which would have only been communicated to

other attorneys representing the District." [#780] at 3. The Court disagrees. The draft response details the discovery failures that occurred in cases in which Koger was lead counsel. Specifically, Koger focuses on the District's lack of a document management system and lack of adequate support staff. Although the draft references the various cases Koger was responsible for, at no time does Koger reveal any confidential communications made by other District officials to him or his office for the purpose of seeking legal services or advice.

The District contends that "portions of the attachments to the draft Response contain the predecisional recommendations and suggestions of an OAG attorney to agency officials, specifically recommending possible courses of action for the agency to take with respect to the mass arrest litigation." [#780] at 6. This would trigger the deliberative process privilege. Again, the Court disagrees. A request for resources and the discussions surrounding that request cannot be construed as a part of a process that leads to or may lead to the development of a policy or government position on an issue.

The deliberative process privilege provides protection for those documents which reflect "advisory opinions, recommendations, and deliberations that are part of a process by which Government decisions and policies are formulated." Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (citing N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). The purpose of the privilege is three-fold: first, it "protects candid discussions within an agency"; second, "it prevents public confusion from premature disclosure of agency opinions before the agency established its final policy"; and, third, "it protects the integrity of an agency's decision," preventing the public from judging officials based on information they may have considered prior to issuing their final decision. Alexander v. F.B.I., 192 F.R.D. 50, 55

(D.D.C. 2000) (citing Judicial Watch v. Clinton, 880 F.Supp. 1, 12 (D.D.C.1995), aff'd, 76 F.3d 1232 (D.C. Cir. 1996)). The privilege promotes the quality of agency decision-making by protecting decision-makers' ability to communicate freely and privately without concern that deliberations will become the subject of discovery. Klamath, 532 U.S. at 8-9.

For the privilege to apply, communications must be pre-decisional. Sears, Roebuck & Co., 421 U.S. at 151. Not every document related to a given decision, however, will be protected by the privilege simply because it is pre-decisional. N.L.R.B. v. Jackson Hosp. Corp., 257 F.R.D. 302, 308 (D.D.C. 2009). Pre-decisional documents must also be deliberative to qualify for the privilege. Id, "A document is 'predecisional' if it plays a role in the agency's decisionmaking process, and information within that document is deliberative if it involves the weighing of arguments for and against various outcomes." Wilson v. Dep't of Justice, 87-CIV-2415, 1991 WL 111457, at *4 (D.D.C. June 13, 1991) (citing Access Reports v. Dep't of Justice, 926 F.2d 1192, 1194-95 (D.C. Cir. 1991)). A document is deliberative if it reflects the give-and-take of the consultative process. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). In other words, "the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). Thus, purely factual material is not protected, "'unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.'" Jackson Hosp. Corp., 257 F.R.D. at 308-09 (quoting In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)). Therefore, documents will not be protected in their entirety unless redacting those portions of the documents that reveal deliberations is impossible. Huthance v. District of Columbia, 268 F.R.D. 120, 122-23

(D.D.C. 2010).

The documents at issue fall within two categories. The first is Koger's letter in which he marshals evidence and arguments in support of his contention that he should not be fired but should instead receive a lesser sanction. The second category is created by the attachments to the letter, earlier memoranda, in which Koger asked for additional help. The rejection of those requests supports Koger's claim that it is unfair and unjust to fire him when he warned of the consequences of not receiving assistance with the management of the discovery (and the paper it produced). While the District claims the deliberative process privilege for both, they clearly require separate treatment.

Koger's letter does not make recommendations as to the adoption of a policy. The word "policy" cannot be stretched to mean an individual employment decision that is made by a governmental agency. Instead, the word "policy" means "[a] principle or course of action adopted or proposed as desirable, advantageous, or expedient; *esp.* one formally advocated by a government, political party, etc. Also as a mass noun: method of acting on matters of principle, settled practice." Policy Definition, Oxford English Dictionary, http://www.oed.com//view/Entry/146842?rskey=YcpGKJ&result=1&isAdvanced=false#eid (last visisted 10/17/11). Given the common meaning of the word "policy", it is understandable that courts in cases involving the closely analogous decision to grant or withhold tenure have held that the deliberative process privilege does not shield information collected for and bearing upon such an individual personnel decision. See, e.g., Qamhiyah v. Iowa State Univ. of Science and Tech., 245 F.R.D. 393, 399 n.6 (S.D. Iowa 2007) ("The decision whether to grant plaintiff's tenure had little to do with the formulation of policy or an important governmental decision of

the kind for which the privilege [for deliberative process] is typically reserved."); Torres v. City Univ. of New York, No. 90-CIV-2278, 1992 WL 380561, at *7 (S.D.N.Y. Dec. 3, 1992) ("The deliberative process is designed to preserve the vigor and creativity of the process by which government agencies formulate *important public policy* by not prematurely forcing them to 'operate in a fishbowl.'") (emphasis original) (internal citations omitted); see also Jones v. City of College Park, 237 F.R.D. 517, 520 (N.D. Ga. 2006) (§ 1983 claim based on race discrimination in employment; privilege only applies to communications relating to policy formulation at the higher levels of government).

Similarly, deciding whether and how to discipline an individual employee does not rise to the level of a "policy" as that word must be understood, bespeaking a principle or course of action that is undertaken by a government to describe how it will deal with an occurrence whenever it occurs. The attachments to Koger's letter may come a little closer, but there are several significant problems with applying the deliberative process privilege to them as well.

First of all, since I am releasing the letter, and in the letter Koger describes the nature of the attachments, the "cat is out of the bag". Plaintiffs know from the letter what Koger said when he asked for help and seeing the actual memoranda does not really disclose anything that they do not already know. Second, factual material is not privileged unless "the selection or organization of facts is part of an agency's deliberative process." Ancient Coin Collectors Guild v. U.S. Dept. of State, 641 F.3d 504, 513 (D.C. Cir. 2011). In Ancient Coin Collectors, the court of appeals held that the factual summaries contained in certain reports were privileged because they "were culled by the Committee from the much larger universe of facts presented to it and reflect an exercise of judgment as to what issues are most relevant to the pre-decisional findings and

recommendations." Id. (internal quotations omitted). The court specifically relied upon its earlier decision in Mapother v. Dep't of Justice, 3 F.3d 1533 (D.C. Cir. 1993), wherein it held that the deliberative process privilege shielded from disclosure a document prepared for the Attorney General by the Office of Special Investigations, which detailed the wartime activities of the former Secretary General of the United Nations, Kurt Waldheim, who was an officer in the army of Nazi Germany. Id. at 1539.

The court of appeals began with the premise that "[t]he deliberative character of agency documents can often be determined through 'the simple test that factual material must be disclosed but advice and recommendations may be withheld.'" Id. at 1537. But, it cautioned that this fact/opinion test, "while offering 'a quick, clear, and predictable rule of decision,'" was not infallible and could not be applied mechanically. Id. To protect the deliberative process itself and not merely the material, the court had to be sensitive to the fact that permitting access to all the documents considered would permit a comparison with the facts selected and culled from those documents by the agency staff, and allow the reader to ascertain the process by which that staff deemed some facts important and others not, displaying the forbidden deliberative process in the process. Id. at 1538. The court of appeals stated:

> In this case, the task assigned the OSI staff was similar to that performed by the subordinate agency personnel in these earlier cases. The staff was to cull the relevant documents, extract pertinent facts, organize them to suit a specific purpose, and to identify the significant issues they encountered along the way. It is in essence this task that the EPA Administrator's aides performed in *Montrose Chemical*, that the Air Force historians performed in *Russell* and *Dudman Communications*, and that our own judicial clerks perform in connection with many of the cases we decide. *Cf.* Wolfe, 839 F.2d at 775 n.8 (noting that "courts have long looked by analogy to the needs of their own decision-making processes to

> assess claims of privilege based on the needs of executive decision-making"). It is true that the products of such labors can loosely be characterized as factual, in the sense that the issues ultimately being addressed have a prominent factual component: What is the evidence indicating that DDT is dangerous? What actions did the Air Force undertake, and what results did it achieve in a certain set of operations? Was substantial evidence adduced on a particular point at trial? In cases such as this, however, the selection of the facts thought to be relevant clearly involves "the formulation or exercise of ... policy-oriented *judgment*" or "the process by which *policy* is formulated," Petroleum Info. Corp., 976 F.2d at 1435 (emphasis in original), in the sense that it requires "exercises of discretion and judgment calls." Id. at 1438. Such tasks are not "essentially technical" in nature, Id. at 1437-38; rather they are part of processes with which "[t]he deliberative process privilege ... is centrally concerned." Id. at 1435. Given the need for deliberation to inform discretion and for confidentiality to protect deliberation, we have felt bound to shelter factual summaries that were written to assist the making of a discretionary decision. Given this principle, which is most clearly reflected in *Montrose Chemical*, the Waldheim Report would appear to have been properly withheld.

Id. at 1538-39.

There was no such culling in this case. Koger certainly did not select from a large group of facts of which he was aware those which he thought he could document that would advance his cause or justify his request for more help. To the contrary, Koger's letter recounted the facts that he believed supported his request that he not be fired and, in the earlier memoranda, that he believed justified his request for more help and supported his warning of what would happen if that help was not forthcoming. Since Koger's letter did not constitute the culling of information from a larger universe of facts, the situation defaults to the ordinary and clear rule that facts are not protected by the deliberative process.

Finally, I appreciate that, as to the memoranda, a case can be made that allocating

resources within a government agency may denote a policy adopted by an agency. Those who have been in a supervisory position in government understand that the allocation of limited resources among competing demands articulates how that agency sets priorities. It would be naive and unrealistic to describe the decision of how resources are to be allocated to agency goal "x" and how many to agency goal "y" as not reflecting that agency's priorities; the goal that is allotted the greater amount of resources is clearly more important. The attachments to Koger's letter, however, do not speak to the general allocation of resources within the Attorney General's Office. The letter speaks to why he should not be fired and the memoranda speak to whether he can do his job without more help, such as a document management system. Because they speak only to an individual situation and are a personal *cri de coeur*, the discussion within them cannot be characterized as a discussion designed to advance or retard the adoption of a "policy". As explained above, the word "policy" cannot be stretched to pertain to such a situation. If it could, information on whether to buy office equipment or a software program or hire a para-professional for a particular attorney would be protected by the deliberative process privilege. Surely, shielding such information from public inspection does not advance the purpose of the deliberative process privilege: to encourage robust, candid debate within an agency when the agency deliberates about adopting a course of action that will affect the businesses and individuals it may regulate or aid.

The work product privilege "protects 'documents . . . that are prepared in anticipation of litigation or for trial.'" Fudali, 2010 WL 4910263, at *2 (quoting Fed. R. Civ. P. 26(b)(3)). Although the District also claims that various portions of the attachments contain the mental impressions and litigation strategy of trial counsel related to ongoing litigation involving the

District, none of the documents were prepared for trial or in anticipation of trial. The only mental process that is disclosed is Koger's perception that he needs help to do what has to be done. That he needed help, that he did not receive it, and that he did not wish to be terminated are not the type of "plans, strategies, tactics, and impressions"[1] of trial counsel in an ongoing litigation, which are protected by the work product privilege. Furthermore, even if the documents were protected by the work product privilege, that privilege would "yield to a showing of substantial need and inability to secure the equivalent without undue hardship." Miller v. Holzmann, No. 95-CIV-1231, 2006 WL 3500877, at *1 (D.D.C. Dec. 5, 2006). In this case, there is a substantial need for Koger's explanation as to the discovery failures that have occurred, to permit the Special Master to determine whether those failures warrant further investigation or action by another body.

For the reasons stated herein, it is, therefore, hereby,

ORDERED that Defendant District of Columbia's Motion for a Protective Order Regarding Certain Information Sought by Plaintiffs' Subpoena to Produce Documents or to Permit Inspection of Premises in a Civil Action Filed by Thomas Koger [#780] is **DENIED.** It is further, hereby,

ORDERED that execution of this Memorandum Order is stayed for 10 days pending any appeal that may be taken.

SO ORDERED.

[1] Vento, 714 F. Supp. 2d at 152.

Digitally signed by John M. Facciola
DN: c=US, st=DC, ou=District of Columbia, email=John_M._Facciola@dcd.uscourts.gov, o=U.S. District Court, District of Columbia, cn=John M. Facciola
Date: 2011.10.19 15:47:12 -04'00'

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE