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United States District Court,
E.D. California.

L.H., A.Z., D.K., and D.R., on behalf of themselves and all other similarly situated juvenile parolees in California, Plaintiffs,
v.
Arnold SCHWARZENEGGER, Governor, State of California, et al, Defendants.

No. CIV. S-06-2042 LKK/GGH. | July 6, 2007.

Attorneys and Law Firms

Carole Shauffer, Corene Thaedra Kendrick, Geoffrey Thomas Holtz, Kristen A. Palumbo, Briana Lynn Morgan, Bingham McCutchen, LLP, Susan Lynn Burrell, Maria V. Morris, Meghan Regina Lang, Michael Bien, Sarah Laubach, Rosen, Bien & Galvan, LLP, San Francisco, CA, Donald Specter, San Quentin, CA, Gay Crosthwait Grunfeld, Rosen Loeb and Pines, Sherman Oaks, CA, for Plaintiffs.

James Michael Sobolewski, Michelle Leigh Angus, Katherine Kylin Nelson, Attorney General's Office of the State of California, Sacramento, CA, William C. Kwong, Minami Tamaki, LLP, San Francisco, CA, for Defendants.

Opinion

ORDER

LAWRENCE K. KARLTON, United States District Court Senior Judge.

***1** Plaintiffs, a class of juvenile parolees, allege that the California parole revocation system deprives them of due process and violates the Americans with Disabilities Act. Defendants are the California Department of Corrections and Rehabilitation ("CDCR"), Division of Juvenile Justice ("DJJ"), and Board of Parole Hearings ("BPH").[1] Pending before the court is plaintiffs' request for reconsideration of the Magistrate Judge's May 25, 2005 Order ("Order") denying plaintiffs' motion to compel production of documents. For the reasons explained herein, plaintiffs' motion for reconsideration is GRANTED.

I.

Facts & Procedural History

At issue are 201 documents consisting of Budget Change Proposals ("BCPs") prepared by the DJJ and BPH for fiscal years 2004-05, 2005-06, 2006-07, and 2007-08, as well as memoranda and emails between various CDCR employees regarding clarification of figures for BCPs, BCP approval and appeal, and legal strategy.[2] The documents at issue relate to two document requests that defendants refused to comply with based on a variety of privileges, including the deliberative process privilege. Order at 4-5. The pertinent portions of the two document requests at issue are:

DOCUMENT REQUEST NO. 9:

> ALL DOCUMENTS and COMMUNICATIONS reflecting arrangements between DJJ and attorneys, to provide legal assistance to WARDS in PAROLE REVOCATION PROCEEDINGS including ... budgets, budget requests, or requests

for funds to provide counsel to WARDS.

DOCUMENT REQUEST NO. 10:

ALL DOCUMENTS and COMMUNICATIONS that RELATE to budgets, budget proposals OR requests for funds for reforms, improvements OR changes of PAROLE REVOCATION PROCEEDINGS.

Joint Statement Re: Plaintiffs' Motion to Compel at 15 ("Joint Statement").

Plaintiffs filed a motion to compel production of these documents on March 22, 2007. Unable to reach a compromise after several meet and confer discussions, the parties filed a Joint Statement regarding this discovery disagreement on April 19, 2007. Oral argument was held on April 26, 2007 before the Magistrate Judge assigned to this case.

The Magistrate Judge held that all documents in question are protected by the deliberative process privilege and are therefore not discoverable. Because the Magistrate Judge found that the documents in question were protected by the deliberative process privilege, he did not reach the question of whether the documents were protected under the other two privileges asserted by defendants, namely, the work product doctrine and the attorney-client privilege.

II.

Standards

A. Standard for Review of Magistrate Judge's Decision

Fed.R.Civ.P. 72(a) provides that non-dispositive pretrial matters may be decided by a Magistrate Judge, subject to reconsideration by the district judge. The district judge shall, upon reconsideration, modify or set aside any part of the magistrate judge's order which is found to be "clearly erroneous" or "contrary to law." *See* 28 U.S.C. § 636(b)(1)(A); Local Rule 303(f); *Ainsworth v. Vasquez,* 759 F.Supp. 1467, 1469 (E.D.Cal.1991).

***2** Discovery motions are non-dispositive pretrial motions within the scope of Rule 72(a) and 28 U.S.C. § 636(b)(1)(A), and thus subject to the "clearly erroneous or contrary to law" standard of review. *Brown v. Wesley's Quaker Maid, Inc.,* 771 F.2d 952, 954 (6th Cir.1985). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *Nat'l Wildlife Fed'n v. United States Forest Serv.,* 861 F.2d 1114, 1116 (9th Cir.1988).

B. Standard for Asserting the Deliberative Process Privilege

The deliberative process privilege protects materials created by administrative agencies during the decision-making process. *Nat'l Wildlife,* 861 F.2d at 1114. The purpose of the privilege is to protect the quality of agency decisions by shielding internal discussions from public scrutiny which might discourage the free-flow of ideas and frank discussion of legal or policy matters. *NLRB v. Sears Roebuck & Co.,* 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29, (1975).

In order for documents to be protected under the privilege, two preliminary procedural requirements must be satisfied: (1) there must be a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer," *United States v. Rozet,* 183 F.R.D. 662, 665 (N.D.Cal.1998) (citing *Unites States v. Reynolds,* 345 U.S. 1, 7-8, 73 S.Ct. 528, 97 L.Ed. 727 (1953)), and (2) the information for which privilege is claimed must be specified and "precise and certain reasons" given for asserting confidentiality. *United States v. O'Neill,* 619 F.2d 222, 226 (3d Cir.1980). *See also In re Sealed Case,* 856 F.2d 268 (D.C.Cir.1988); Moore's Federal Practice, Civil § 26.52.

In addition to these procedural requirements, the party asserting the privilege must prove that the documents in question are "predecisional" and "deliberative." *Carter v. United States Dep't of Commerce,* 307 F.3d 1084, 1089 (9th Cir.2002). This dual requirement reflects the privilege's purpose of protecting the deliberative process leading up to those decisions. *Nat'l Wildlife Fed'n,* 861 F.2d at 1117.

The deliberative process privilege is a qualified privilege rather than an absolute privilege. Therefore, even if the privilege applies, the court must apply a balancing test whereby a litigant may obtain privileged documents "if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *FTC v. Warner Commc'ns., Inc.,* 742 F.2d 1156, 1161 (9th Cir.1984); *see also Rozet,* 183 F.R.D. 662 at 665 ("[privilege] may be overcome by a strong showing of need on the part of the party seeking discovery").

In balancing the need to preserve the integrity of internal government deliberations with the need for open discovery, the court considers the following factors: (1) the relevance of the evidence sought to the litigation; (2) the availability of comparable evidence from other sources; (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 v. Warner,* 742 F.2d at 1161. The court may also take into account (5) the interest of the litigant, and society, in accurate judicial fact finding, *North Pacifica, LLC v. City of Pacifica,* 274 F. Supp 2d 1118, 1122 (N.D.Cal.2003), *United States v. Irvin,* 127 F.R.D. 169, 173 (C.D.Cal.1989); and (6) the seriousness of the litigation and the issues involved, *Irvin,* 127 F.R.D. at 174.

***3** As with privileges generally, the deliberative process privilege should be narrowly construed because confidentiality may impede full and fair discovery of the truth. *See Eureka Fin. Corp. v. Hartford Accident and Indem. Co.,* 136 F.R.D. 179, 183 (E.D.Cal.1991) (citing *Weil v. Investment/Indicators, Research and Management, Inc.,* 647 F.2d 18, 24 (9th Cir.1981)); *see also North Pacifica,* 274 F.Supp.2d at 1122 (deliberative process privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principles.")

III.

Analysis

For the reasons discussed herein, the court concludes that the Magistrate Judge did not err in finding that the documents are protected by the deliberative process privilege. However, given that the privilege is qualified, it appears to the court that plaintiffs may obtain at least some of the documents in question as their "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *FTC v. Warner,* 742 F.2d at 1161.

A. Procedural Requirements

As a preliminary matter, plaintiffs assert that the Magistrate Judge erred in finding that the privilege was asserted by the appropriate head of the agency.[3] The court cannot agree.

In order to assert the deliberative process privilege, there must be a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer," *Rozet,* 183 F.R.D. at 665 (citing *Unites States v. Reynolds,* 345 U.S. 1, 7-8, 73 S.Ct. 528, 97 L.Ed. 727 (1953)).

The Supreme Court has provided the following standard for the invocation of executive privileges such as the deliberative process privilege:

> There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for a claim of privilege ...

Reynolds, 345 U.S. 1, 7-8, 73 S.Ct. 528, 97 L.Ed. 727 (1953).

The purpose of this requirement is to assure "that some one in a position of high authority" within the agency has examined the materials "from a vantage point involving both expertise and an overview-type perspective," and actually believes the items to be privileged. *Rozet,* 183 F.R.D. at 665.[4]

Here, the privilege was asserted by John Monday, Executive Officer of the BPH and Bernard Warner, Chief Deputy Secretary of the DJJ. Plaintiffs argue that the privilege should have been asserted by James Tilton, as the head of the CDCR, or an executive official with authority over budget decisions such as the Governor, a high level official in the Governor's office, or the Director of the Department of Finance. Pls.' Req. for Reconsideration at 10-11, ("Pls.' Req.").

The Magistrate Judge's conclusion that John Monday and Bernard Warner were appropriate department heads to assert the privilege is not clearly erroneous or contrary to law. The BCPs in question are the work product of the DJJ and BPH departments of the CDCR. The memoranda and emails are primarily between employees in these departments, discussing clarification of figures for the BCPs, decisions to appeal Department of Finance ("DOF") decisions regarding these BCPs, and legal strategies. It is clear that the DJJ and BPH are the relevant departments in this matter. Because the Mr. Monday and Mr. Warner are high level officials within these departments, the court declines to find that the Magistrate Judge was clearly erroneous in his determination that these two officials possessed the requisite expertise and overview perspective to properly assert the deliberative process privilege over materials created within their departments.

B. "Predecisional" and "Deliberative" Documents

***4** Plaintiffs also contend that the Magistrate Judge erred in concluding that the documents in question are predecisional. Pls.' Req. at 11.[5] The court cannot agree.

In the Ninth Circuit, "[an] agency must identify a specific decision to which the document is predecisional" in order to successfully assert the deliberative process privilege. *Maricopa Audubon Soc'y v. United States Forest Serv.,* 108 F.3d 1089, 1094 (9th Cir.1997). Here, defendants assert, and the Magistrate Judge agreed, that the relevant decision is the Governor's approval of the final budget. Based on this determination, the Magistrate Judge held that since the BCPs are but a prelude to the Governor's budget, they are predecisional. Order at 7-8.

Plaintiffs contend that if executives of the DJJ and BPH are authorized to assert the privilege, as was determined by the Magistrate Judge, then the relevant decision must be the final BCPs that the DJJ and BPH forwarded to the DOF. Plaintiffs contend that the BCPs in question are therefore not predecisional documents, but rather embodiments of final agency decisions. Pls.' Req. at 11-12.

Plaintiffs' argument is unpersuasive for two reasons. First, they cite no authority (and indeed, the court can find none) for the proposition that the decision that makes the documents predecisional must correspond with the agency head asserting the privilege. Whether the appropriate agency head asserted the privilege is a distinct question from whether the document is predecisional. There is simply no legal authority to support plaintiffs' contention.

Second, even assuming, arguendo, that the relevant decision is the BPH and DJJ's decision to submit BCPs to the DOF, the documents in question are clearly predecisional as they appear to be draft BCPs and documents related to those drafts.[6]

The standard under which the District Court reviews a Magistrate Judge's decision is a highly deferential one, wherein the court reverses a Magistrate Judge's decision only if the decision was clearly erroneous or contrary to law. *Ainsworth,* 759 F.Supp. at 1469. Because the question of which decision within the state's budget process is the relevant one appears, at best, uncertain, and because it could reasonably be interpreted that the Governor's approval of the budget is the relevant decision for the purposes of the privilege, the court cannot find that the Magistrate Judge's order was clearly erroneous or contrary to law.[7]

C. Qualified Privilege

Even if the requirements above are satisfied and the privilege applies, the privilege is qualified and may be overcome if the need for accurate fact-finding outweighs the government's interest in non-disclosure. *FTC v. Warner,* 742 F.2d at 1161. Plaintiffs allege that the Magistrate Judge erred in two ways: (1) by erroneously determining that the documents are not relevant to the litigation and (2) by failing to properly weigh the competing interests under balancing test required by *FTC v. Warner.* Pls.' Req. at 13.

***5** Although the Magistrate Judge set forth the four *FTC v. Warner* factors in the "standards" section of his order, only one paragraph is devoted to analysis of these factors. The order reads, in pertinent part,

> Nor does plaintiffs' contention that the BCPs are highly relevant to their claims hold water. Whether defendants were good, bad, or indifferent in their alleged intent to violate plaintiffs' rights is not particularly significant in this injunctive relief case. Either plaintiffs' due process, equal protection and ADA rights were violated, or they were not. Plaintiffs do not assert that they must demonstrate any state of mind on the part of defendants in order to prevail. The court questioned defendants whether they were raising some type of "feasibility" defense, in which case, of course, budget documents would be very relevant. Defendants represented that they were not, and their answer in this case contains no such affirmative defense.

Order at 11. This court respectfully disagrees with the Magistrate Judge's conclusion. As previously noted, under the *FTC v. Warner* balancing test, courts should consider the following four factors: (1) the relevance of the evidence sought to the litigation; (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 v. Warner,* 742 F.2d at 1161. Courts may also consider (5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, *North Pacifica,* 274 F. Supp 2d at 1122; and (6) the seriousness of the litigation and the issues involved, *id.*

Although the Magistrate Judge appears to have discussed the first two factors, the order is silent as to the other factors. The standard for discovery is that the requested matters may lead to relevant evidence. *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Thus even a finding that the documents are not directly relevant would not lead to the conclusion that they were not discoverable. As explained below, even the finding of irrelevance is open to doubt. In any event, the court finds that with respect to the BCPs, the need for fact-finding outweighs the government's interest in non-disclosure. Because the Magistrate Judge did not fully engage in the balancing test and address each of the factors set forth in *FTC v. Warner,* the court finds that the Magistrate Judge's conclusion is contrary to law.

1. Relevance

The gravamen of plaintiffs' complaint is that the parole revocation system violates their due process rights. As in *Valdivia v. Daivs,* the court looks to *Mathews v. Elridge* to determine what process is due. *See Valdivia v. Davis,* 206 F.Supp.2d 1068, 1072 (E.D.Cal.2002) (Karlton, J.). Under *Mathews,* the determination of what process is due, "requires consideration of three distinct factors:" (1) the private interest affected by the official action, (2) the probable value of any additional procedural safeguards, and (3) "the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail." *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

***6** It appears that at least some of the documents in question pertain to the third prong of the *Mathews* test, namely, the fiscal and administrative burdens associated with increasing procedural safeguards. A central component of this litigation will be determining the level of public burden associated with additional procedures in order to determine what level of process is constitutionally required.

The BCPs and associated attachments represent the DJJ and BPH's own estimates of the types of additional procedures necessary to come into Constitutional compliance, and the estimated costs associated with such procedures. The 2007-08 BCPs (documents bates stamped: 543-636; 637-665; 855-878; 838-855) provide detailed projections of the financial burden associated with providing parole revocation hearings within a certain amount of time and with a certain staffing level. The analysis includes projected workload and funds needed for additional staffing, broken down by tasks such as actual time spent in probable cause hearings, revocation hearings, travel time, rest breaks, and miscellaneous additional time such as escorting parolees and administrative tasks. Other BCP documents reflect expected time needed for attorney training, and developing tracking systems and review procedures.

These documents clearly provide estimates of the fiscal and administrative burden of providing due process to juvenile parolees. The Magistrate Judge's order does not mention the *Mathews* test, and rather focuses on defendant's contention that feasability will not be raised as a defense. The *Mathews* test does not speak of the "defense" of feasability; rather, it sets forth three considerations necessary in the evaluation of what process is due.

Though the BCPs are relevant to the third prong of the *Mathews* due process test, the same cannot be said for the remainder of the documents. As previously mentioned, there are 201 documents at issue. While the documents are not clearly labeled, the court has conducted an independent *in camera* review of the documents and as best the court can decipher, only some of these documents constitute BCPs. The other documents, such as emails, personal notes, and diagrams discuss legal strategy, respond to questions from the DOF regarding BCPs, and the decision to appeal the DOF's recommendation. This information

is merely tangential to the data provided by the BCPs, and sheds little light on the third prong of the *Mathews* test. With respect to these documents, the court finds that they are not relevant.[8]

In sum, the BCPs appear relevant to the third prong of the *Mathews* test and accordingly, this factor weighs in favor of disclosure.

2. Availability of Comparable Evidence from Other Sources

Defendants assert that the privilege should apply to these documents because there is other evidence available, namely final BCPs, depositions, and written discovery. In his order, the Magistrate Judge determined that the documents should remain protected because the "final budgets for the years in question" are available to plaintiffs. Order at 11:16.

***7** Though the final BCPs shed some light on the administrative burden associated with due process compliance, the final BCPs are revised versions, created after the agencies have received recommendations from the DOF. As previously noted, the draft BCPs contain in-depth analysis of the need for budget adjustment, and analyze the costs and burdens associated with providing probable cause and revocation hearings within a certain amount of time.

Plaintiffs suggest, and an independent review of the BCPs confirms, that the Governor's final budget contains information substantially inferior to the agencies' own budget requests. The Governor's final budget contains only a skeletal outline of funding and positions granted to the CDCR's juvenile parole budget, as opposed to the BCPs, which contain detailed analysis of new positions needed.[9] For these reasons, this factor weighs in favor of disclosure.

3. The Government's Role in Litigation

Under *FTC v. Warner,* the court considers the role of the government in the litigation. 742 F.2d at 1161-62. Plaintiffs assert that the Magistrate Judge "did not touch upon this factor at all" in his analysis, thereby committing clear error. Pls.' Req. at 17:15.

Contrary to plaintiffs' contention, the Magistrate Judge did discuss the role of the government in this litigation, albeit, in the context of misconduct. *See* Order at 9-11.[10] In this regard, the Magistrate Judge considered the government's interest in this litigation. The role of the government in this litigation is significant, and weighs in plaintiffs' favor.

4. Extent Disclosure Will Chill Agency Discussion

Under the fourth factor of the *FTC v. Warner* balancing test, the court considers, "the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *FTC v. Warner,* 742 F.2d at 1161. The Magistrate Judge's order did not address this factor.

Defendants argue that releasing the BCPs in the instant case would discourage "candid discussions to consider changes in the budget." Defs.' Opp'n at 9. This argument is unpersuasive. As the parties are well aware, BCPs have been turned over to plaintiffs in both the *Valdiva* and *Coleman* cases. Moreover, defendants' concerns may be mitigated by having the court issue a protective order or have the documents disclosed under seal.[11] *See, e.g., Price v. County of San Diego,* 165 F.R.D. 614, 620 (S.D.Cal.1996) ("the Court is convinced that the infringement upon the frank and independent discussions regarding contemplated policies and decisions of the County ... can be alleviated through the use of a strict protective order against use or dissemination of the materials outside of this lawsuit.").[12]

In sum, because the government's concerns about hindering frank discussion can be mitigated via a protective order or disclosure under seal, this factor does not weigh heavily on the side of non-disclosure.

5. Need for Accurate Fact Finding and Seriousness of Litigation

***8** In addition to the *FTC v. Warner* factors, the court may also consider the interest of the litigant, and ultimately society, in accurate judicial fact finding, *North Pacifica* 274 F.Supp.2d at 1122, *Irvin,* 127 F.R.D. at 173, and the seriousness of the litigation and the issues involved, *Irvin,* 127 F.R.D. at 174. The Magistrate Judge did not address these factors.

The desirability of accurate fact finding weighs in favor of disclosure. *See North Pacifica,* 274 F.Supp.2d at 1124. Moreover, when the issues involved are alleged violations of federally-protected civil rights, courts have consistently found that this need is heightened and the privilege is outweighed. *See United States v. Phoenix Union High School,* 681 F.2d 1235 (9th Cir.1982), cert. denied, 459 U.S. 1191, 103 S.Ct. 1169, 75 L.Ed.2d 422 (1983); *Newport Pacific,* 200 F.R.D. at 640; *Irvin,* 127 F.R.D. at 174.

Plaintiffs' allege that the State juvenile parole system is in violation of the due process clause. This suit clearly involves serious questions of Constitutional magnitude and accordingly, there is a societal interest in accurate fact-finding. *See, e.g., Newport Pacific,* 200 F.R.D. at 640 (where plaintiffs alleged violations of the Federal Fair Housing Act and Section 1983, the court concluded that "[t] he interest in enforcing these laws is not exclusive to the individual. It is an interest common to every citizen, including the federal government. As a result, this factor again favors disclosure.") For these reason, the court finds that these final factors weigh in favor of disclosure.

D. Whether the BCPs are Protected by Other Privileges

Because the Magistrate Judge found that the deliberative process privilege applied, he did not address the question of whether the BCPs would be protected by either the attorney-client privilege or the work-product doctrine.[13] For the reasons explained herein, the court concludes that the BCPs are not protected by either of these alternative privileges.

1. Work Product Doctrine

Defendants assert that many of the BCPs in question are non-discoverable because they fall under the work product doctrine. The court cannot agree.

"The work-product doctrine is a qualified immunity which protects from discovery documents and tangible things prepared by a party or that party's representative in anticipation litigation." *Kintera, Inc. v. Convio, Inc.,* 219 F.R.D. 503, 507 (S.D.Cal.2003); Fed.R.Civ.P. 26(b)(3). As the party claiming the privilege, defendants bear the burden of establishing that the documents claimed as work product were in fact prepared in anticipation of litigation. *Kintera,* at 507.

In order for a document to be protected, it must be one "that would not have been generated but for the pendency or imminence of litigation." *Kintera,* 219 F.R.D. at 507 (internal quotation marks and citations omitted). Accordingly, the doctrine does not protect materials assembled in the ordinary course of business. *Griffith v. Davis,* 161 F.R.D. 687, 698-699 (D.Cal.1995). Rather, the primary motivating purpose behind the creation of the documents must be as an aid in possible future litigation. *Id.*

***9** It is evident that the BCPs and associated attachments in question would have been prepared by the DJJ and BPH as part of the routine budget procedure, regardless of any pending litigation. Defendants fail to allege, much less meet their burden, that the BCPs were created in anticipation of litigation. *See* Joint Statement Re: Pls.' Mot. To Compel at 33. Accordingly, the BCPS are not protected by the work-product doctrine. *See Griffith,* at 698 (no protection for materials assembled in the normal course of business).

2. Attorney Client Privilege

Defendants also assert attorney-client privilege over some of the BCPs and attachments in question. The attorney-client privilege protects "communications between client and attorney for the purpose of obtaining legal advice, provided such communications were intended to be confidential." *Gomez v. Vernon,* 255 F.3d 1118, 1131 (9th Cir.2001). "Because the attorney-client privilege has the effect of withholding relevant information from the fact-finder, it is applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney." *Clarke v. American Commerce Nat'l Bank,* 974 F.2d 127, 129 (9th Cir.1992) (citing *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)). As the party asserting the privilege, defendants bear the burden of establishing that the attorney-client privilege applies. *Clarke,* 974 F.2d at 129.

Defendants have failed to establish that the BCPs and attachments in question are communications between attorney and client, nor that they were intended to be confidential. Unlike some of the emails the court finds to be protected under the

deliberative process privilege, these documents do not appear to be communications between the agency and its attorneys; rather they are drafts of documents to be submitted to another department for approval. Therefore, the court concludes that the BCPs and attachments in question are not protected by the attorney-client privilege.

IV.

Conclusion

The Magistrate Judge was not in error in finding that the documents in question are protected by the deliberative process privilege. That said, the privilege is qualified and as explained above, it may be overcome if the "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *FTC v. Warner,* 742 F.2d at 1161. The Magistrate Judge's order failed to fully analyze this question. Having conducted an independent *in camera* review of the documents at issue, and having analyzed the balancing test forth in *FTC v. Warner,* the court concludes that the need for BCPs and for accurate fact finding outweighs the government's interest in non-disclosure. Specifically, the BCPs are relevant in evaluating the administrative burden associated with increased procedural protections.[14]

Accordingly, the court orders as follows:

***10** 1. Plaintiffs' Request for Reconsideration is GRANTED.

2. The defendants shall produce the following documents under seal to plaintiffs no later than close of business on July 13, 2007:

Bates	**# Document Title**
[593-636]	2007-2008 Budget Change Proposal (BCP) "Division of Juvenile Justice Parolee Due Process"
[637-665]	2007-2008 Budget Change Proposal (BCP) "Division of Juvenile Justice Parolee Due Process"
[855-878]	2007-2008 Budget Change Proposal (BCP) "Division of Juvenile Justice Parolee Due Process"
[838-855]	2007-2008 Budget Change Proposal (BCP) "Board of Parole Hearings-Youthful Offender Hearing Services, Parolee Due Process"
[671-696]	2006-2007 Legislative Proposal Package "Division of Juvenile Justice/BPH-Youth Board, Valdivia/Morrissey Hearing Enhancement"
[821-826]	2006-2007 Legislative Proposal Package "Division of Juvenile Justice/BPH-Youth Board, Valdivia/Morrissey Hearing Enhancement"
[697-716]	2005-2006 Budget Change Proposal (BCP) "Youth Authority Board/Department of the Youth Authority, Morrissey Hearing Enhancements (Valdivia Concept)"

[716-720]	2005-2006 Legislative Proposal "Youth Authority Board/Department of the Youth Authority, Valdivia/Morrissey Hearing Enhancement"
[721-723]	2004-2005 Budget Change Proposal "Youth Authority Board/Department of the Youth Authority, Morrissey Hearing Enhancements (Valdivia Concept)"
[755-65]	Draft BCP attached to Dec. 17 Memo
[743-47]	Undated document: "Response to the Department of Finance BCP Recommendations"
[748-49]	Document dated Nov. 13, 2006: "Response to the Department of Finance BCP Recommendations"

IT IS SO ORDERED.

Footnotes

[1] On September 15, 2006, this case was related to *Valdivia v. Schwarzeneeger,* 94-CV-671 and on February 28, 2007, the court certified a class of California juvenile parolees.

[2] The budget change proposals at issue appear to be narrative explanations of budget requests plus attachments which provide justification in the form of graphs, charts, and numerical data. The BCPs include detailed analysis of current financial burdens associated with providing parole services, as well as projected financial burdens associated with adhering to more stringent time frames, providing increased attorney representation, increasing witness participation, and decreasing hearing location radius.

[3] Plaintiffs do not contend that the second procedural requirement (that the information for which privilege is claimed must be specified and precise and certain reasons given for asserting confidentiality) has not been satisfied.

[4] The requirement that the privilege be invoked by the agency head is not always applied literally, *see e.g., Smith v. Federal Trade Com.,* 403 F.Supp. 1000, 1017 (D.Del.1975) (allowing Chairman of the Federal Trade Commission to assert the privilege rather than the Secretary). However, the duty to invoke the privilege cannot be delegated so far down the chain of command that purposes of the requirement are undermined, *see Coastal Corp. v. Duncan,* 86 F.R.D. 514, 516-17 (D.Del.1980) (disallowing the Assistant Administrator of a sub-agency to assert the privilege over Department of Energy documents rather than the Secretary of Energy).

[5] The plaintiffs do not contest that the documents are deliberative in nature.

[6] Each BCP in question contains some indication that it is a draft. *See, e.g.,* 2007-08 DJJ BCP and attachments (documents bates stamped: 593-636) (including cover sheet but "XX" instead of figures in the narrative); 2007-08 DJJ BCP and attachments (documents bates stamped: 637-65) (containing handwritten notes, which are incorporated into the typewritten text in the version of the BCP at bates stamp 593-636).

[7] Plaintiffs additionally cite the court's June 14, 2006 Order in *Coleman v. Schwarzenegger* (finding that BCPs created by the CDCR were not protected by the deliberative process privilege) for the proposition that BCPs are not predecisional. However, this assertion is misplaced. Privilege was denied in *Coleman* not because BCPs are not predecisional, but rather because it was the deliberative process of the agency itself which was in question. Where the agency's deliberative process is at issue, the deliberative process privilege does not apply. *See In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency,* 145 F.3d 1422, 1424 (D.C.Cir.1998) In the June 2006 Order in *Coleman,* the court stated: "Put directly, the court requires the BCPs in part to determine whether the state's deliberative process is frustrating the ability of the state to comply with the courts orders." *See Coleman v. Schwarzenegger,* No. CIV S-90-0520 LKK-JFM, June 14, 2006 Order, Doc. # 1840. In the case at bar, it is the policies and procedures of the CDCR that are being challenged, not the deliberative process behind those policies. The court's June 14, 2006 Order in *Coleman* is therefore irrelevant to the issue of whether BCPs are predecisional in this case.

[8] The court notes that even if the deliberative process privilege did not protect these tangential documents, these documents may be independently protected as work product or under the attorney-client privilege.

[9] An unpublished decision from the Northern District supports the court' s position. In *Sanchez v. Johnson,* plaintiffs challenged the State's developmental disabilities services and filed a motion to compel disclosure of agency BCPs. The court ordered the documents disclosed:

> [T]he BCPs ... as well as drafts of those documents are highly relevant to Plaintiffs' claims. They contain detailed facts and analysis concerning the adequacy of funding for various programs.... While some of the factual information contained in these documents may be available elsewhere, it is obvious that the quality and persuasiveness of such evidence is likely to be substantially inferior to the agencies' own budget requests, which provide detailed analysis by those encharged with administering the State programs ...

Sanchez. Johnson, No. C-00-1593 CW (N.D.Cal. Nov. 19, 2001).

[10] Plaintiffs cite *North Pacifica* and *Newport Pacific Inc.* for the proposition that the Magistrate Judge should have additionally considered that (1) the government is the defendant and (2) the litigation is constitutional and of serious import. Pls.' Request at 17. However, this assertion is a mischaracterization of the two cases. In both cases, the government's decision-making process (and in *North Pacifica,* the intent of the decision-makers) was in question, and that is what "tip[ped] the scales in favor of disclosure." *Newport Pac. Inc.,* 200 F.R.D. 628, 640 (S.D.Cal.2001); *See also North Pacifica,* 274 F.Supp.2d 1118, 1124 (N.D.Cal.2003). Because neither the decision-making process nor intent of the government is at issue in the case at bar, the court does not find that the Magistrate Judge's order was clearly erroneous in failing to explicitly consider these cases.

[11] When the BCPs were disclosed in the *Coleman* case, the court specifically ordered that the documents be turned over to the Special Master under seal. *See Coleman v. Schwarzenegger,* No. CIV S-90-0520 LKK-JFM, June 14, 2006 Order, Doc. # 1840

[12] The court in *Sanchez v. Johnson,* No. C-00-0593 at 18 (N.D.Cal. Nov. 19, 2001) reached a similar conclusion in finding that the disclosure of BCPs "intrudes minimally and without prejudice into agency deliberations," while production of internal emails, and memoranda "may result in far greater intrusion." *Id.* The court also noted that 32 states make agency budget requests part of the public record, "apparently without any chilling effect." *Id* . The *Sanchez* court compelled production of BCPs and draft BCPs under a protective order in order to reduce any harm that might result from ordering the production. *Id.*

[13] Although the parties did not brief these issues on plaintiffs' request for reconsideration of the Magistrate Judge's order, the issues were fully briefed in the parties' joint statement regarding plaintiffs' motion to compel. Accordingly, the arguments regarding work-product and the attorney client privilege as applied to the BCPs has been fully briefed and may be resolved at this time.

[14] Because the email communications and memoranda do not provide information relevant to the *Mathews* test, these remain protected by the deliberative process privilege and shall not be disclosed.