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United States District Court,
E.D. Pennsylvania.

Martin HARRIS, et al
v.
The CITY of Philadelphia, et al

No. CIV.A. 82-1847. | June 6, 1995.

Opinion

MEMORANDUM AND ORDER

SHAPIRO

I. INTRODUCTION

***1** Defendants and the Court of Common Pleas have filed motions for reconsideration of the court's rulings on the following motions:

1. Defendants' Motion for a Protective Order Limiting the Scope of the Subpoena *Duces Tecum* Directed to Dr. John S. Goldkamp ("Defendants' Motion");

2. Motion of Non-Party, the Court of Common Pleas of Philadelphia County, for a Protective Order Limiting the Scope of the Deposition of John S. Goldkamp, Ph.D. and of the Subpoena *Duces Tecum* Directed to Him ("Court of Common Pleas' Motion"), Miscellaneous Number 94-MC-0285;

3. Plaintiffs' Motion to Compel Production of Documents ("Plaintiffs' Motion").

II. BACKGROUND

The Stipulation and Agreement entered into by the parties and approved by the court on March 11, 1991 ("Consent Decree") requires defendants to

> [d]esign a comprehensive plan of alternatives to incarceration, for persons who would otherwise be committed to or retained in the custody of the Philadelphia Prison System. Elements of said plan shall include a "good time" program to allow sentenced county prisoners to earn credits toward early parole eligibility; the legislative steps necessary to implement such a program; and the establishment of inpatient drug, alcohol and mental health treatment facilities with sufficient beds to house, at a minimum, inmates whose bail or sentences require participation in such a program or facility as a condition for release.

Consent Decree, Appendix, p. 4.

Defendants submitted an Alternatives to Incarceration Plan on January 4, 1993 ("1993 Plan"). Plaintiffs submitted objections to the 1993 Plan, and the Special Master held discussions with the parties to attempt to resolve those objections. Following recommendations regarding the 1993 Plan, on June 3, 1993 the court declined to approve the 1993 Plan and required defendants to submit a revised plan within sixty (60) days by Order of July 16, 1993.

In response, Dianne Granlund, Deputy Managing Director, by letter of September 14, 1993, argued that defendants had already complied with the terms of the Consent Decree by submitting the 1993 Plan. However, the Special Master had emphasized the need for an implementation schedule; Ms. Granlund, by letter of September 20, 1993, submitted a copy of the timetable appended to a proposed contract with the Criminal Justice Research Institute ("CJRI") to assist in the design and implementation of the 1993 Plan.

The Special Master held further discussions with the parties to attempt to resolve plaintiffs' continuing objections to the 1993 Plan; discussions were delayed when defendants engaged private counsel, who needed time to familiarize themselves with the extensive record. On March 24, 1994, defendants submitted "An Alternatives to Incarceration Plan for Philadelphia: March 1994 Update;" it attached and incorporated by reference the 1993 Plan ("Plan"). A corrected version of the Update was submitted April 8, 1994.

***2** After additional objections to the Plan from plaintiffs and further discussions with the parties, the Special Master, by Memorandum dated July 26, 1994, submitted recommendations regarding the Alternatives Plan to the

court.

The parties having requested a hearing, the court scheduled a hearing on the Plan and the Special Master's recommendations. Plaintiffs then noticed the deposition of Dr. John S. Goldkamp, Ph.D. ("Dr. Goldkamp") by Subpoena *Duces Tecum* ("Subpoena"). Dr. Goldkamp is Director of CJRI; CJRI is a consultant on the design and implementation of the Plan to both defendant City of Philadelphia ("City") and non-party Court of Common Pleas; all materials produced by CJRI are the City's property.

The Subpoena ordered Dr. Goldkamp to produce:

> 1. All documents relating to the Alternatives-to-Incarceration Plan ("Plan") referenced in Section B.4. of the Revised Schedule for Defendants' Submission of Plans Pursuant to the Court's March 11 Consent Order which is attached to the Court's Order of January 7, 1992 in *Harris v. Levine* and on page 4 of the Appendix attached to the Court's Order of March 21, 1991 in *Harris,* including without limitation, drafts of the Plan, working papers used in preparation of the Plan, and correspondence regarding the Plan.
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> 2. All documents relating to any contracts in effect after March 21, 1991 entered into (1) between you and the City of Philadelphia or any of its agencies, including without limitation the Philadelphia prisons, or (2) between you and any of the courts of the Commonwealth of Pennsylvania.
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> 3. All documents relating to new bail guidelines or attempts to establish new bail guidelines for the Philadelphia Court of Common Pleas or Philadelphia Municipal Court.
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> 4. All documents relating to attempts to devise new parole or probation guidelines or options for the Philadelphia Court of Common Pleas or the Philadelphia Municipal Court.
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> 5. Any other documents not called for by the preceding paragraphs relating to efforts to comply with or implement the Alternatives-to-Incarceration Plan requirement referenced in paragraph 1 above.

Subpoena, attached as Exhibit A to Defendants' Motion. The term "document" was "used in the broadest possible sense and mean[t], without limitation, all materials within the scope of Federal Rule of Civil Procedure 34, including all drafts and non-identical copies in [Dr. Goldkamp's] possession, custody, or control." *Id.*

This document request was narrowed following discussions among counsel. *See* Plaintiffs' Motion, Exhibit A. The revised Schedule A to the Subpoena addressed to Dr. Goldkamp required him to produce:

> 1. All documents relating to the feasibility of developing a schedule for implementation of the Alternatives-to-Incarceration Plan ("Plan") referenced in Section B.4. of the Revised Schedule for Defendants' Submission of Plans Pursuant to the Court's March 11 Consent Order which is attached to the Court's Order of January 7, 1992 in *Harris v. Levine* and on page 4 of the Appendix attached to the Court's Order of March 21, 1991 in *Harris.*
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> ***3** 2. All documents relating to the feasibility of complying with the reporting requirements set forth in the proposed Order submitted by Special Master on July 26, 1994.
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> 3. All documents relating to the current status of efforts to develop the Plan, including without limitation revision of bail, parole and probation guidelines, and the extent of progress to date measured against timetables submitted by Dianne Granlund by letter of September 20, 1993.
>
> 4. All documents relating to any changes in the goals set forth in the City's March 1994 Update to the Plan.
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> 5. All documents relating to the steps needed to finalize and implement the Plan, any known impediments to completing and implementing the Plan, and officials to be involved with and funding for any CJRI contract to finish and implement the Plan.

Plaintiffs' Motion, Exhibit A. The term "document" was again used "in the broadest possible sense and mean[t], without limitation, all materials within the scope of Federal Rule of Civil Procedure 34, including all drafts and non-identical copies in your possession, custody, or control." *Id.* However, "[f]or the purpose of th[e] Revised Schedule A, 'document' ... refer[red] only to those materials prepared after December 1, 1992." *Id.*

On November 18, 1994, defendants filed a motion for a protective order limiting the scope of the Subpoena to those documents which had been provided to the court or Special Master as part of the Plan and limiting Dr. Goldkamp's testimony to an explanation of those parts of the Plan not otherwise self-evident from the face of the Plan itself.

On the same day, non-party Court of Common Pleas filed a similar motion that the scope of the subpoena directed to Dr. Goldkamp be limited to preclude production of documents protected by the Court of Common Pleas' deliberative process privilege and that Dr. Goldkamp not be compelled to answer questions at his deposition on subject matters protected by the Court of Common Pleas'

deliberative process privilege.

Defendants argued that (1) with the exception of documents submitted as part of the Alternatives Plan, the documents requested by the Subpoena are irrelevant under the Consent Decree to the scope of the Court's inquiry with respect to the Alternatives Plan; and (2) the significant majority of the documents requested by plaintiffs—drafts, workpapers and other non-final documents—are subject to the deliberative process privilege and are therefore not discoverable. The Court of Common Pleas limited its motion to assertion of its alleged deliberative process privilege.

The court by telephone conference on November 29, 1994, informed counsel for the parties, the Court of Common Pleas and CJRI[1] that it accepted defendants' suggestion that the court review the disputed documents *in camera;*[2] the court also ordered the City, CJRI, the Court of Common Pleas and/or Dr. Goldkamp to submit to the court detailed lists describing the purportedly privileged document(s), their author(s), recipient(s), and the basis of any privilege or relevancy claim, *see* 11/29/94 Transcript, pp. 5, 7, 13, 23, 30-31; Order of December 2, 1994, ¶ 1; the court also permitted all parties, the Court of Common Pleas and CJRI to file supplemental briefs, on or before December 2, 1994, on the deliberative process privilege or any other related issue, *see* 11/29/94 Transcript, pp. 10, 11-12, 16, 23, 24; Order of December 2, 1994, ¶ 4.[3]

***4** Defendants' counsel asserted a claim of privilege with regard to twelve (12) documents, *see* 11/29/94 Transcript, p. 18, and for the first time asserted an attorney-client privilege and/or attorney work-product doctrine as to three (3) of those documents. *See* 11/29/94 Transcript, pp. 8-9, 26-30. Because these three (3) documents might reveal litigation strategy in a non-jury proceeding, a separate procedure was developed for *in camera* review of two (2) of the documents by Magistrate Judge M. Faith Angell, *see* 11/29/94 Transcript, p. 30; Order of December 2, 1994, ¶ 3; the court planned to treat the third document separately. Before these separate procedures could be implemented, the parties resolved their dispute with regard to these three (3) documents. *See* 12/2/94 Transcript, pp. 12-13; Order of December 2, 1994, ¶ 5.

Plaintiffs' and CJRI's counsel agreed on December 1, 1994, that the revised schedule of documents would be further narrowed so that only the following documents (with the exception of those claimed to be privileged) would be produced by Dr. Goldkamp:

> 1. Documents that discuss, although not necessarily in the following terminology, the feasibility of developing a schedule for implementation of the Alternatives-to-Incarceration Plan ("Plan") referenced in Section B.4. of the Revised Schedule for Defendants' Submission of Plans Pursuant to the Court's Order of January 7, 1992 in *Harris v. Levine* and on page 4 of the Appendix attached to the Court's Order of March 21, 1991 in *Harris.*
>
> 2. Documents that discuss, although not necessarily in the following terminology, the feasibility of complying with the reporting requirements set forth in the proposed Order submitted by Special Master on July 26, 1994.
>
> 3. Documents that discuss, although not necessarily in the following terminology, the status of efforts to develop the Plan, including without limitation revision of bail, parole and probation guidelines, and the extent of progress to date measured against timetables submitted by Dianne Granlund by letter of September 20, 1993.
>
> 4. Documents that discuss, although not necessarily in the following terminology, any changes in the goals set forth in the City's March 1994 Update to the Plan.
>
> 5. Documents that discuss, although not necessarily in the following terminology, the steps needed to finalize and implement the Plan, any known impediments to completing and implementing the Plan, and officials to be involved with and funding for any CJRI contract to finish and implement the Plan.

See December 1, 1994 letter from plaintiffs' counsel to CJRI's counsel ("December 1, 1994 letter"). The document request was limited to "the latest version of documents (draft or otherwise), versions of documents sent or delivered out of CJRI, and documents received by CJRI." *Id.*

Following *in camera* review of the documents remaining in issue, the court held a conference call on December 9, 1994;[4] after the parties and the Court of Common Pleas argued the merits of their relevancy and deliberative process privilege objections, the court rejected defendants' relevancy arguments; it also rejected defendants' and the Court of Common Pleas' deliberative process privilege claims with regard to Documents # 1-5 but upheld the privilege with regard to Documents # 6-9 (with the exception of an attachment to Document # 9) and stated its reasons. *See* Order of December 9, 1994.

***5** This memorandum articulates the reasons for the court's December 9, 1994 Order and its decision on defendants' and the Court of Common Pleas' motions for reconsideration.

II. DISCUSSION

Fed.R.Civ.P. 26(b)(1) limits the scope of discovery to information "*not privileged,* which is *relevant* to the subject matter involved in the pending action." (emphasis added). Fed.R.Civ.P. 45(c)(3)(A)(iii) provides, "On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it ... requires disclosure of *privileged* or other protected matter and no exception or waiver applies." (emphasis added).[5]

Fed.R.Evid. 501 reads, in relevant part: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *See also* Fed.R.Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.").

Defendants' Relevancy Objection

The court denied defendants' relevancy objection because the terms of the Consent Decree make clear that plans must be submitted and implementation of those plans, if not an inherent right of the court, is specifically provided for in the Consent Decree. The monitoring by the Special Master of the implementation is referred to expressly in the Consent Decree. The plaintiffs argued that the Plan can only be approved with an implementation schedule and defendants argued it is not possible to have an implementation schedule. Any documents that reflected on whether it was possible to have an implementation program were therefore relevant. The plaintiffs had to be given an opportunity to argue that there could be an implementation schedule. *See* Transcript of December 9, 1994 conference call ("12/9/94 Transcript"), pp. 7, 16.

On reconsideration, the court holds that its December 9, 1994 ruling on defendants' relevancy objection was clearly correct.

The Deliberative Process Privilege

The deliberative process privilege has been called the "executive," "governmental," "official information," "confidential intra-agency," "predecisional," and "administrative deliberation" privilege. *See, e.g., N.L.R.B. v. Sears,* 421 U.S. 132 (1975); *United States v. O'Neill,* 619 F.2d 222, 225 (3d Cir.1980); *Conoco Inc. v. United States Dept. of Justice,* 687 F.2d 724, 727 (3d Cir.1982); *Resident Advisory Bd. v. Rizzo,* 97 F.R.D. 749, 751 (E.D.Pa.1983).

The leading Supreme Court case on the nature and scope of this privilege is *N.L.R.B. v. Sears,* 421 U.S. 132 (1975),[6] decided under Exemption 5 of the Freedom of Information Act ("FOIA").[7] The Court never called it a "deliberative process" privilege; the name comes from later cases referring to *Sears. See, e.g., In re Grand Jury,* 821 F.2d at 959; *Resident Advisory Bd.,* 97 F.R.D. at 751.

***6** The Court recognized that the privilege rests

> on the policy of protecting the decision making processes of government agencies ... and focus on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.... The point ... is that the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and that the decisions and policies formulated would be the poorer as a result.

Sears, 421 U.S. at 150 (internal quotations omitted).

Because "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions," it only protects "communications received by the decision-maker on the subject of the decision *prior to the time the decision is made.*" *Id.* at 151 (emphasis added).

> [I]t is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, *as long as prior communications and the ingredients of the decisionmaking process are not disclosed.*

Sears, 421 U.S. at 151 (emphasis added). *See also In re Grand Jury,* 821 F.2d at 957 ("Even while granting governmental officials a qualified, confidentiality privilege, ... the courts have taken pains to insure that the privilege applies only 'to the very limited extent' that the 'public good' in confidentiality transcends the value of 'utilizing all rational means for ascertaining truth.' ") (quoting *Trammell v. United States,* 445 U.S. 40, 50

(1980)).

It is sometimes difficult to distinguish between pre- and post-decisional documents. *See Sears,* 421 U.S. at 152 n. 19 ("We are aware that the line between predecisional documents and postdecisional documents may not always be a bright one."). In such cases, a court must determine whether the document is primarily pre- or post-decisional in nature. *See id.* ("For present purposes it is sufficient to note that [the documents] are *primarily* postdecisional—looking back on and explaining.. . a decision already reached or a policy already adopted—and that their disclosure poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions."). *See also Jordan v. United States Dept. of Justice,* 591 F.2d 753, 774 (D.C.Cir.1978) ("Communications that occur *after* a policy has already been settled upon—for example, a communication promulgating or implementing an established policy—*are not* privileged."); *Resident Advisory Bd.,* 97 F.R.D. at 753 ("The material sought to be protected ... concerns primarily legal and administrative tasks incident to implementation of Orders of this Court and policies already formulated ...; these appear ministerial in character and not protected by the deliberative process privilege."). Documents which are primarily predecisional in nature are subject to the claim of privilege; those that are primarily postdecisional are not.

***7** The privilege as to pre-decisional documents does not end after a decision is reached. *See Cuccaro v. Secretary of Labor,* 770 F.2d 355, 359 (3d Cir.1985) ("[A]s to these documents, which are protected by the [deliberative process] privilege ..., the [privilege] was not lost after the relevant agency decision was made.").

Primarily fact-based, as opposed to primarily opinion-based, documents are also not subject to this privilege. *See E.P.A. v. Mink,* 410 U.S. 73, 87-88 (1973) ("[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery."). Compiled factual material or purely factual material contained in deliberative memoranda and severable from its context must be disclosed, unless such factual material is so intertwined with the policymaking process that its disclosure would be inconsistent with the purposes of the privilege. *See Resident Advisory Bd.,* 97 F.R.D. at 753.

The deliberative process privilege may be asserted by decision-makers within all three branches of government,[8] even when performing functions not generally thought to be within their branch's core. *See Centifanti v. Nix,* 865 F.2d 1422, 1432 (3d Cir.1989) ("The letter from the Chairman of the Disciplinary Board to the Chief Justice of the Supreme Court [of Pennsylvania] contains [privileged] recommendations and deliberations regarding the development of rules and policy governing regulation of attorneys.");[9] *In re Grand Jury,* 821 F.2d at 958-59 ("[T]he 'deliberative process privilege' for executive officials ... provides a useful analogy for a confidentiality-based privilege for state legislators because executive agencies, like state legislators, engage in a wide variety of activities, including factual investigations for quasi-legislative rulemaking.").

State and municipal governmental entities may assert the privilege. *See Centifanti,* 865 F.2d at 1432 (state judiciary); *In re Grand Jury,* 821 F.2d at 958 (state legislature) (dictum); *O'Neill,* 619 F.2d at 225 (Philadelphia police department); *Frankenhauser,* 59 F.R.D. at 340, 342 (same). *But see O'Neill,* 619 F.2d at 230 n. 5 ("In light of the posture of this case, we express no view as to whether the scope of Executive Privilege available to a state or municipality in a federal cause of action is comparable to that applicable to the federal government.").

Where an agency has "a special need for the opinions and recommendations of temporary consultants, documents reflecting such information should be exempt from disclosure." *Texas v. I.C.C.,* 889 F.2d 59, 61 (5th Cir.1989) (internal quotations omitted). The purpose of the deliberative process privilege is to protect the frank discussion of legal or policy matters necessary to the formulation of policy and in some cases the work of outside consultants or experts would fit this definition even though such persons are not in the government's employment. *See id.*[10]

***8** Generally, four requirements must be met in order for the privilege to be sustained. First, 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. Second, there must be a demonstration, usually by affidavit of the responsible agency official, of precise and certain reasons for preserving the confidentiality of the governmental communication. Third, there must be a specific designation and description of the documents claimed to be privileged, of sufficient detail to allow a reasoned determination as to the legitimacy of the claimed privilege. Fourth, with regard to documents containing both factual information and preliminary opinions, the government must separate discoverable factual material from protected deliberative material. *See Resident Advisory Bd.,* 97 F.R.D. at 752-54.

However, when the disputed documents have been submitted to the court for *in camera* inspection, courts have suggested that compliance with these four requirements is unnecessary. *See O'Neill,* 619 F.2d at 227 ("President's assertion of executive privilege [in *Senate Select Committee v. Nixon,* 370 F.Supp. 521 (D. D.C.),

aff'd, 498 F.2d 725 (D.C.Cir.1974)] rejected because President did not permit *in camera* inspection *or* provide particularized description of applicability of privilege.") (emphasis added); *id.* at 226 (court need not decide whether privilege must "always" be invoked by department head); *see also Frankenhauser v. Rizzo,* 59 F.R.D. 339, 342 n. 6 (E.D.Pa.1973) (proposed Federal Rule of Evidence 509(c) "allows counsel for the government to assert the privilege for official information.... [E]xecutive officials [must] invoke the privilege only where military or diplomatic secrets are concerned, because there the judge's participation in delving into the privilege question is less full than in cases involving less sensitive official information.").[11]

Submission of the documents for *in camera* review may substitute for these four requirements because the court will then have enough information upon which to decide a claim of privilege. *See Conoco,* 687 F.2d at 728 ("We have read the affidavit and index and are satisfied that [the department] has provided sufficient detail from which the district court could make an informed decision."); *contrast with Resident Advisory Bd.,* 97 F.R.D. at 753 ("Several of the documents identified by [the department] as privileged, ... though summarized at some length, do not sufficiently describe the material sought to be privileged or the way in which this material was used in the decision-making process."). The four requirements have only been applied where the documents claimed privileged were *not* submitted for *in camera* inspection. *See, e.g., O'Neill,* 619 F.2d at 230-31 ("We note that the district court made its ruling without examination of the files.... [T]he court may want to use the *in camera* examination device, considered sufficiently protective of the sensitive material involved in [*Nixon,* 418 U.S. at 706]."); *Resident Advisory Bd.,* 97 F.R.D. at 753-54; *Conoco,* 687 F.2d at 726, 728-29.

***9** The documents examined *in camera* are:

1: "Pretrial Release Guidelines for Preliminary Arraignment in Philadelphia—Descriptive Report [.] Pretrial Release Guidelines Volume I [DRAFT]."[12]

2: "Charge Seriousness, Risk Classification and Resource Implications: Three Outstanding Issues in Implementing Pretrial Release Guidelines[.] Pretrial Release Guidelines Volume II [DRAFT]."

3: 1"Draft Operational Manual [.] Pretrial Release Guidelines Volume III."

4: "Working Schedule for Implementing the Basic Components of Philadelphia's Alternatives to Incarceration Plan DISCUSSION DRAFT."

5: "Implementing Philadelphia's Alternatives to Incarceration Plan: Phase II Focusing on Pretrial and Post-Conviction Strategies[.] A Proposal Submitted to the City of Philadelphia."

6: "Outlining Past, Present and Planned Tasks Relating to Alternatives to Incarceration."

7: "Scheduling Overview of Tasks Related to Implementing Philadelphia's Alternatives to Incarceration Plan."

8: "Scheduling Overview of Tasks Related to Implementing Philadelphia's Alternatives to Incarceration Plan."

9: "Modifications to CJRI Contract No. 94 6642. Attaches Document Entitled Operationalizing Alternatives to Incarceration Strategies: Implementing Revised Pre-Trial Release Guidelines and Systematic Prisons-Based Review of Pre-Trial Detention in Philadelphia, a Contract Proposal Submitted by John S. Goldkamp and M. Kay Harris."

On December 9, 1994, the court held that Documents # 1-5 and the attachment to Document # 9 were not privileged but Documents # 6-9 were privileged. The court ruled that Documents # 1-5 were primarily post-decisional in nature, *i.e.,* they were produced after April 8, 1994, the date the corrected version of the Plan Update was submitted.

Document # 1 was produced during the Spring of 1994; defendants conceded it was produced after the corrected Plan Update's submission. *See* 12/9/94 Transcript, p. 26. Documents # 2-5 were produced in August, 1994, September, 1994, September 1994, and May, 1994, respectively. *See* Amended Log of Documents Withheld by Dr. John S. Goldkamp and the Criminal Justice Research Institute Pending the Resolution of Privilege Claims Asserted By Defendants and By the Philadelphia Court of Common Pleas ("Amended Log").

Conversely, the court ruled that Documents # 6 and 7, dated June 18, 1993 and March 22, 1994 respectively, *see* Amended Log, were primarily predecisional in nature. They were produced prior to submission of the corrected version of the Plan Update to the court and were deemed privileged.

Document # 8 was produced on April 8, 1994, the day the corrected version of the Plan Update was submitted. The court determined it was related to implementation and not privileged, *see* 12/9/94 Transcript, pp. 27-28. Despite the court's clear intent to order production of Document # 8, the court's subsequent Order of December 9, 1994 inadvertently sustained the claim of privilege as to Document # 8.

***10** Document # 9 was produced on August 22, 1994,

after the corrected version of the Plan Update was submitted to the court. Document # 9 was held privileged because it seemed to be a proposal about something other than the Plan Update already submitted; the attachment thereto was deemed not privileged as it had been previously submitted to the court and the Special Master. *See* Order of December 9, 1994, ¶ 9.[13] *See also Mobil Oil,* 879 F.2d at 703 ("[R]elease of an attachment to a document has been found to waive the exemption only for that attachment.").

Defendants and the Court of Common Pleas have filed motions for reconsideration of the court's December 9, 1994 rulings. *See Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir.1985) ("The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence."), *cert. denied,* 476 U.S. 1171 (1986); *see also Cohen v. Austin,* 1994 U.S. Dist. LEXIS 16835, *3 (E.D. Pa.).

Defendants now repeatedly refer to the Plan submitted on April 8, 1994[14] as a "final" and complete plan. *See, e.g.,* Memorandum of Law in Support of Defendants' Motion for Reconsideration ("Defendants' Reconsideration Memorandum"), p. 7: "[T]he Plan is a final document which identifies the ten strategies which the City intends to pursue regarding alternatives to incarceration options." *See also,* 12/9/94 Transcript, p. 26: "I'll reiterate that as of April 8th [1994] we believe that this is a plan document that meets the requirements of the consent decree."

The Court of Common Pleas has agreed with defendants' characterization of the Plan. *See* Memorandum of Law in Support of the Motion of the Court of Common Pleas of Philadelphia County for Reconsideration of the Court's Order of December 9, 1994 Concerning the Deliberative Process Privilege ("Court of Common Pleas' Reconsideration Memorandum"), p. 1: "[The Court of Common Pleas] ... joins in [defendants'] Motion for Reconsideration and incorporates the arguments therein as though fully set forth herein."

By taking the position that the Plan submitted to the court was a "final" and complete plan, defendants and the Court of Common Pleas concede that documents produced *after* the Plan's submission were primarily post-decisional in nature. The judicial estoppel doctrine applies to preclude a party from assuming a position in a legal proceeding inconsistent with one [already] asserted. *See Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 419 (3d Cir.), *cert. denied,* 488 U.S. 967 (1988). Defendants and the Court of Common Pleas are estopped from claiming that documents # 1-5 and Document # 9, all produced after April 8, 1994, are privileged.

Defendants and the Court of Common Pleas have also argued that *all* of the documents were produced to implement the Plan. *See* Defendants' Reconsideration Memorandum, pp. 7-8 ("A careful review of the documents ... reveals that each of those documents was created in connection with the efforts of the City and the Court of Common Pleas to move forward with the Plan strategies.... [A]ll of the documents reflect City strategies for proceeding *in the future* with the undertakings identified in the Plan."); 11/29/94 Transcript, p. 11 ("What is happening here now is a document request, a set of them that are geared for *implementation stages* that we haven't even gotten to.") (statement of defense counsel); Court of Common Pleas' Reconsideration Memorandum, p. 1 ("[The Court of Common Pleas] ... joins in [defendants'] Motion for Reconsideration and incorporates the arguments therein as though fully set forth herein.").

***11** If so, *none* of the documents are protected by the deliberative process privilege. Communications that occur *after* a policy has already been settled upon—for example, a communication promulgating or *implementing* an established policy—*are not* privileged; *See Jordan,* 591 F.2d at 774. Defendants and the Court of Common Pleas are estopped from contending they are privileged. *See Oneida Motor Freight,* 848 F.2d at 419.

Alternatively, all of the documents were produced to implement a court order (i.e., the Consent Decree), so none of them are protected by the deliberative process privilege. *See Resident Advisory Bd.,* 97 F.R.D. at 753 ("The material sought to be protected ... concerns primarily legal and administrative tasks incident to *implementation of Orders of this Court* and policies already formulated ...; these appear ministerial in character and not protected by the deliberative process privilege.") (emphasis added). No attorney-client or work product privilege is asserted by either movant.

"[T]he party seeking disclosure may overcome the claim of privilege by showing a sufficient need for the material in the context of the facts or the nature of the case, ... or by making a prima facie showing of misconduct." *In re Grand Jury,* 821 F.2d at 959; *see also Resident Advisory Bd.,* 97 F.R.D. at 752 ("[T]he predecisional deliberative process privilege ... can be overcome if the party seeking discovery shows sufficient need for the otherwise privileged material.").

The deliberative process privilege can be waived. "[T]he holder of a privilege ... can waive it by permitting a breach of the privilege in his presence." *Matter of Certain Complaints Under Investigation,* 783 F.2d at 1523 n. 32. "[T]he release of certain documents waives [the deliberative process privilege] only for those documents released." *Mobil Oil Corp. v. E.P.A.,* 879 F.2d at 701. *See also Nissen Foods v. NLRB,* 540 F.Supp. 584, 586 (E.D.Pa.1982) (Troutman, J.) ("[T]he scope of any waiver ... is defined by, and coextensive with, the breadth of the prior disclosure."); *Peck v. United States,* 514 F.Supp.

210, 213 (S.D.N.Y.1981) (limiting waiver to those sections of a report that had already been released in part). "The inquiry into whether a specific disclosure constitutes waiver is fact specific." *Mobil Oil,* 879 F.2d at 700.

Because the documents are not protected by the deliberative process privilege, we do not reach whether the privilege would be overcome by a showing of sufficient need for the otherwise privileged material, or if defendants have waived the privilege in the unusual factual context of this court's administration of a consent decree.

An appropriate Order follows.

ORDER

AND NOW, this day of June, 1995, following consideration of defendants' and the Court of Common Pleas' motions for reconsideration of the court's December 9, 1994 Order ("Motions") and plaintiffs' response thereto, it is ORDERED that:

***12** 1. The Motions are GRANTED IN PART and DENIED IN PART; the court grants reconsideration of its December 9, 1994 Order and modifies it as follows:

1. Documents # 6-9 as well as Documents 1-5 are not privileged for reasons stated in the accompanying memorandum;

2. Defendants shall provide plaintiffs with copies of Documents # 6-9 forthwith;

3. The transcript of Dr. Goldkamp's deposition need not remain under seal;

2. The Order of December 16, 1994 is VACATED.

Footnotes

1 CJRI's counsel participated in the telephone conference because CJRI claimed an interest in the subpoena's alleged overbreadth, *see* Transcript of November 29, 1994 conference call ("11/29/94 Transcript"), pp. 17-18, 20; CJRI also suggested it might have a "consultant's privilege," *see* 11/29/94 Transcript, pp. 20-22, or a grant applications privilege, *see* 11/29/94 Transcript, pp. 22-24. The court allowed CJRI to assert and brief any privilege it might have on or before December 2, 1994, *see* 11/29/94 Transcript, pp. 16, 20-21, 23, 24. Following negotiations between CJRI and plaintiffs—which led to a narrowing of plaintiffs' document request—CJRI waived any relevancy and/or privilege claims it might have had. *See* Transcript of December 2, 1994 conference call ("12/2/94 Transcript"), pp. 5-6. CJRI did not take part in the court's final conference call on this issue, on December 9, 1994.

2 *See* Memorandum of Law in Support of Defendants' Motion, p. 21 n. 7 ("Defendants respectfully suggest that, if necessary, the Court review the requested documents *in camera* to determine whether the privilege applies."). *See also Kerr v. United States District Court,* 426 U.S. 394, 405-06 (1976) ("[T]his Court has long held the view that in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege.") (citations omitted).

3 Plaintiffs, defendants and the Court of Common Pleas filed supplemental briefs.

4 The hearing on the Plan and the Special Master's recommendations had been postponed to December 16, 1994.

5 The parties and the Court of Common Pleas agree this dispute is governed by the Federal Rules of Civil Procedure's discovery provisions, even though a final judgment (i.e., the Consent Decree) has been entered. *See* Plaintiffs' Motion; Memorandum of Law in Support of Defendants' Motion, p. 7; Memorandum of Law in Support of Court of Common Pleas' Motion, p. 5. We need not decide this issue because plaintiffs would otherwise be allowed discovery (absent a valid relevancy and/or privilege claim) under the court's inherent power to enforce the consent decree.

6 The federal common law-based "confidential intra-agency"/" executive" privilege discussed in *Sears* is not the constitutionally-based "executive privilege" discussed in *United States v. Nixon,* 418 U.S. 683 (1974). *See Sears,* 421 U.S. at 151 n. 17 ("Our remarks in United States v. Nixon were made in the context of a claim of 'executive privilege' resting solely on the Constitution of the United States."). Here, we are likewise concerned with a claim of executive or deliberative process privilege based on federal common law. *See In re Grand Jury,* 821 F.2d 946, 957-58 (3d Cir.1987) ("When dealing with lesser governmental officials [than the President], courts have treated claims of privilege even more strictly."), *cert. denied,* 484 U.S. 1025 (1988).

7 Most decisions on the deliberative process privilege have been FOIA cases. The Supreme Court "has interpreted [FOIA's Exemption 5] as 'incorporat[ing] the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context.' " *Mobil Oil Corp. v. E.P.A.,* 879 F.2d 698, 700 n. 1 (9th Cir.1989) (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'n,* 421 U.S. 168, 184 (1975)). There are "no functional differences in the applicable principles for an

analysis of the privilege under the [FOIA] or the federal common law." *United States v. Real Property,* 142 F.R.D. 431, 434 (W.D. Pa.1992).

8 *See In re Grand Jury,* 821 F.2d at 957.

9 *Cf. Matter of Certain Complaints Under Investigation,* 783 F.2d 1488, 1505 (11th Cir.) ("[J]udges are not limited to just bench-sitting, and do not violate separation of powers principles when they participate in ancillary court management tasks."), *cert. denied,* 477 U.S. 904 (1986).

10 *See also Conoco,* 687 F.2d at 728 ("Unquestionably, efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects.") (internal quotations omitted); *Real Property,* 142 F.R.D. at 434 ("The fact that, as here, the document was prepared by an outside consultant for the agency's use, does not adversely affect its status as 'interagency.' ").

11 "[T]he proposed rules provide a useful reference point and offer guidance in defining the existence and scope of evidentiary privileges in the federal courts." *In re Grand Jury Investigation,* 918 F.2d 374, 380 (3d Cir.1990) (Becker, J.).

12 These descriptions are found in the document logs submitted to the court by defendants and the Court of Common Pleas. Although the documents—as listed in the logs—are unnumbered, we have numbered them in the order listed.

13 Defense counsel conceded this during the December 9, 1994 conference call. *See* 12/9/94 Transcript, p. 13 ("[T]he attachment to the modification is the same as a previous document over which we do not claim the privilege.") (statement of defense counsel).

14 April 8, 1994 is the date the corrected version of the Plan Update was submitted to the court.