

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, :

v. :

CIVIL ACTION NO.:
1:13-CV-3675-WBH-JCF

Undetermined quantities of all articles:
of finished and in-process foods, etc, :

Defendants. :

and :

HI-TECH PHARMACEUTICALS, :
INC. and JARED WHEAT :

Claimants

ORDER

This matter has been referred to the undersigned to address discovery issues. At a hearing held on October 6, 2016, Claimants asserted that a privilege log¹ prepared by the Government suffered from several shortcomings. The parties discussed the issue, and Claimants agreed to re-examine the Government's amended privilege log before making a decision concerning whether the issue needed additional attention. (*See* Doc. 83 at 7 & n.3). Shortly thereafter,

¹ Claimants first raised this issue in connection with their Motion To Compel (Doc. 60, filed 12/23/2015) which was denied without prejudice on August 26, 2016 (Doc. 74).

Claimants raised the contention, in a Court-mandated teleconference, that the amended log remained deficient concerning the Government's assertion of the deliberative process privilege. (*See* Minute Entry of 10/13/2016). During the telephonic hearing held on October 18, 2016, Claimants asserted that the amended log included numerous documents withheld solely on the basis of the deliberative process privilege supposedly created *after* April 24, 2012, the date of the warning letter in this case. The undersigned concluded that an *in camera* review was warranted, and directed the Government to submit all documents withheld solely on the basis of the deliberative process privilege and created after April 24, 2012. (Doc. 84). The Government submitted the documents and privilege log by October 31, 2016 as contemplated by the Order.

The undersigned has completed the *in camera* review. Given the substantial amount of documents at issue, it is impractical to memorialize every consideration given to each document. Discovery is slated to expire on November 30, 2016, and the parties are apparently working feverishly to complete numerous depositions while preparing to file summary judgment motions which are due no later than December 14, 2016. (Docs. 84, 85). In light of the time constraints under which the parties are working, the undersigned has attempted to strike an appropriate balance between providing a reasonable analysis of the issues raised by the

privilege log while moving expeditiously to complete the review and to issue this order.

DISCUSSION

The Government seeks to withhold from production as substantial number of documents based on the deliberative process privilege. “The deliberative process privilege protects the internal deliberations of an agency in order to safeguard the quality of agency decisions.” *Georgia Aquarium, Inc. v. Pritzker*, 134 F. Supp. 3d 1374 (N.D. Ga. 2014) (internal quotation omitted). To properly invoke the privilege, the party asserting it must show that the material is pre-decisional, meaning “prepared in order to assist an agency decision maker in arriving at his decision.” *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1263 (11th Cir. 2008). The privilege applies to “the withholding of all papers which reflect the agency’s group thinking in the process of working out its policy and determining what its law shall be.” *Florida House of Representatives v. U.S. Dep’t of Commerce*, 961 F.2d 941, 950 (11th Cir. 1992) (internal quotation omitted).

In addition, the material must be deliberative - - “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Miccosukee Tribe*, 516 F.3d at 1263 (internal quotation

omitted). “The purpose of this privilege is to allow agencies to freely explore possibilities, engage in internal debates, or play devil’s advocate without fear of public scrutiny.” *Moye, O’Brien, O’Rourke, Hogan, & Pickert v. Nat’l R.R. & Passenger Corp.*, 376 F.2d 1270, 1277 (11th Cir. 2004).

Generally speaking, facts must be disclosed, but opinions are protected. *Id.* at 1278. But factual material may properly be withheld if it “is so inextricably connected to the deliberative material that its disclosure would reveal the agency’s decision making processes ... or when it is impossible to segregate in a meaningful way portions of factual information from the deliberative information.” *Nadler v United States Dep’t of Justice*, 955 F.2d 1479, 1491 (11th Cir. 1992) *abrogated on other grounds by United States Dep’t Justice v. Landano*, 113 S.Ct. 2014 (1993). With the governing standard in mind, attention is now directed towards the Government’s log, with additional authority to be discussed where necessary.

I. The Government’s Amended Privilege Log

The Government timely submitted an amended privilege log. Some features of the submission deserve attention before turning to specifically addressing the issues surrounding the withheld documents. Candidly, some aspects of the production have likely contributed to Claimants’ suspicion that it was likely that

non-privileged documents were withheld. At a minimum, certain of these aspects of the submission have complicated the Court's task in reviewing the documents.

A. Bates Numbering And Organization

The first issue relates to the manner in which the Government bates-numbered its documents. In an unconventional approach, rather than numbering each individual page, the Government assigned a different singular bates number to each document. For this reason, it was impossible for the Claimants to determine how many pages made up each document, which undoubtedly contributed to Claimants' sensitivity over this issue. In addition, the log did not organize documents in order by bates number, adding an additional layer of complexity to the review.

B. Duplicates

The production of many duplicates also made the review unnecessarily cumbersome. Some documents were simply produced and logged twice, such as GOV-07170 and GOV-06621. For others, the Government inexplicably assigned different bates numbers to documents which appear to be identical.²

C. Some Documents Did Not Need To Be Logged.

² For example Bates. Nos. 6867 and 7844 appear to be the same document. The same is true for Bates Nos. 6053, 6055, 6060, and 6064. This list is illustrative rather than exhaustive.

In addition, the Government identified some documents which were not due to be logged. The undersigned's minute entry called for the service of an amended privilege log for all documents for which the Government asserted only the deliberative process privilege which were created after April 24, 2012, the date of the relevant warning letter issued in this controversy. (Doc. 84). The Government then submitted numerous emails and email strings *created* before April 24, 2012 but simply *forwarded* via email after that time. More specifically, the following documents did not need to be logged because they were created before April 24, 2012: Bates Nos. 6933, 6935, 6936, 6940, 6944, 6953, 6955, 6974, 7127, 7134, 7693, 7695, 7696, 7701, 7703, and 7704. It appears that these emails were forwarded in May 2013, but the mere fact of forwarding of a document presumably to facilitate review and possible production would not waive any privilege. Having highlighted some of the general issues surrounding the review, now attention will be given to particular issues and documents.

II. Drafts And Related Documents Are Not Subject To Disclosure.

But all the difficulty and inefficiency here is not the fault of the Government. Claimants insisted that drafts of documents that were later produced must be logged, and the Government dutifully did so. However, internal memoranda and drafts such as the ones identified here are not subject to disclosure.

See Moye, O'Brien, 276 F.3d at 1279; *Georgia Aquarium, Inc.*, 134 F. Supp. 3d at 1379 (N.D. Ga. 2014) (“Documents such as “ ‘recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency,’ are considered deliberative.”); *see also Appleton v. FDA*, 451 F. Supp. 2d 129, 143 n.9 (D.D.C. 2006) (draft documents and letters privileged). Having reviewed and considered each of the documents withheld on the basis of being drafts of internal memoranda, the undersigned finds that the Government is not required to produce those documents.

III. Intra-Agency Communications

The Government has asserted the deliberative process privilege over documents shared with other governmental agencies. Sharing information with other agencies does not waive the protection of the deliberative process privilege. *See Chilivis v. S. E. C.*, 673 F.2d 1205, 1211–12 (11th Cir. 1982). The undersigned finds the documents identified as being shared with other agencies are privileged despite having been sent to or received from other agencies.

IV. Data Compilations Concerning Adverse Events

The Government has identified numerous excel documents made up of information related to adverse events reported involving the substance at issue and

similar substances that it contends are entitled to protection. It supports this assertion by citing to *Moye, O'Brien*, 376 F.3d at 1281 n.8, which states “[T]he selection and sifting of factual materials . . . may itself be the product of a government agency’s deliberative process and, therefore, entitled to the privilege.”.

But “factual findings and conclusions are not protected, unless disclosure of the factual material would reveal the deliberative process or where the factual material is so inextricably intertwined with the deliberative material that meaningful segregation is not possible.” *See Kearney Partners Fund, LLC v. United States*, No. 2:10-cv-153-FTM-SPC, 2013 WL 1966967 at *2 (S.D. Fla. May 13, 2013) citing *Miccosukee Tribe*, 516 F.3d at 1263. As this Court put it, where it “would be impossible to segregate from the deliberative material in a meaningful way, [factual material] may properly be withheld.” *Georgia Aquarium, Inc.*, 134 F. Supp. 3d at 1380 (N.D. Ga. 2014). Conversely, if the privileged material may readily be excised from the non-privileged, the non-privileged material should be produced.

The Government provided to the undersigned the electronic version of many excel documents. On its privilege log, it identifies specific columns of each withheld excel document which it asserts are entitled to protection. For example, the first such entry of the log, for GOV-024490, describes the document as

“internal analyses relating to NDI enforcement with opinion/analysis reflected in columns F,G, & H.” The undersigned has reviewed each excel document featuring this type of description and has determined that in each instance asserted by the Government the information in the specifically-identified columns is protected under the deliberative process privilege. But this does not end the inquiry, for each of the documents in question features a substantial amount factual material over which the Government did not assert the privilege.

The Government’s submission does not indicate whether the excel documents have been produced with information in the columns identified as privileged having been redacted. As it is clear that the privileged and non-privileged material in the excel documents may readily be segregated, the non-privileged material is due to be produced. In particular, to the extent not already produced, for each of the documents listed below, the Government must produce the non-privileged material³ in those documents⁴ no later than noon on Friday, November 18, 2016:

024489 024490 024491 024492 024493 024494

³ The undersigned’s ruling on this issue presumes that the content of the columns in question may readily be deleted from the relevant excel document prior to production.

⁴ The documents are not listed sequentially; instead the numbers track the order in which the documents appear in the Government’s privilege log.

024495	024500	024501	024502	024503	024504
024508	024509	024407	024460	024430	024338
024339	024340	024387	024391	024406	024408
024410	024436	024437	024438	024439	024442
024443	024445	024449	024456	024462	024463
024466	024475	024396	024397	024401	024403
024478	026485	026489	026490	024479	

In light of the conclusion that the deliberative process privilege applies to all documents on the amended log other than those documents specifically listed above, the undersigned need not resolve the Government's contention that other privileges apply to other documents on the log. *See* GOV- 7681(law enforcement privilege); GOV-7078 (work product); GOV-32130-31 (attorney client and work product).

CONCLUSION

Upon consideration of the materials submitted by the Government for *in camera* review, and in accordance with the authorities cited above, the undersigned finds that the deliberative process privilege applies to each of the documents identified by the Government, however the factual material present in the documents specifically identified in section IV must be produced no later than noon on Friday, November 18, 2016 with appropriate redactions consistent with the particular columns of information identified as privileged on the Government's

amended privilege log. The case remains referred to the undersigned for resolution of any additional discovery disputes.

SO ORDERED this 14th day of November, 2016.

/s/ J. CLAY FULLER
J. CLAY FULLER
United States Magistrate Judge