

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPIRIT OF THE SAGE COUNCIL,
et al.,

 Plaintiffs,

 v.

BRUCE BABBITT,
SECRETARY,
U.S. DEPT. OF THE INTERIOR,
et al.,

 Defendants.

Civil Action No. 98-1873
(EGS) [81-1]

FILED

FEB 15 2001

NANCY MAYER WHITE
U.S. DISTRICT COURT

MEMORANDUM OPINION & ORDER

I Background

This Court ordered Federal defendants to file and serve the administrative record underlying the changes to 50 C.F.R. §§ 17.22(b)(8), 17.32(b)(8) and 50 C.F.R. § 13.28 (a)(5). Plaintiffs contend that these changes were made to bolster the defense of the "No Surprises" rule at issue in this case; a charge that defendants vehemently oppose. The Federal defendants withheld seventy-two documents from production on various grounds, including attorney-client, work-product, and deliberative process privilege. Plaintiffs now bring a motion to compel these documents.

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II Analysis

Federal defendants withheld thirty-five documents under the attorney-client privilege, nineteen of which were also asserted as privileged under the work-product doctrine. An *in camera* review of the documents coupled with defendants' assertion that they were communications made for the purpose of obtaining and providing legal advice justify the invocation of the attorney-client privilege. See *Mead Data Cent., Inc. v. United States Dept. of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Furthermore, this Court finds that Federal defendants did not waive this privilege, as plaintiffs assert. Accordingly, defendants properly withheld documents 3-8, 25, 26, 31-34, 37, 39, 41, 43-46, 48, 50, 53, 55, 56, and 58-68.

Federal defendants' assertion of the work-product privilege to withhold fifty documents, thirty-one of which are not asserted as privileged attorney-client communications, fails. Federal defendants have asserted that they anticipated litigation relating to all actions taken in this area. This may be true, but it does not implicate the work-product privilege and bar this Court from reviewing the whole record as required under *Citizens to Preserve Overton Park, Inc. v. Vlope*, 401 U.S. 402, 409 (1971) and *Walter O. Boswell Memorial Hospital*, 749 F.2d 788, 792 (D.C. Cir. 1984). Furthermore, Federal defendants represented to

this Court that the promulgation of these new regulations after plaintiffs filed their motion to dismiss was coincidental. Thus, they cannot rely on the current litigation for the work-product doctrine. Accordingly, the work-product doctrine does not apply to any of these documents.

Federal defendants also assert the deliberative process privilege for all of the documents. The privilege, which covers documents reflecting advisory opinions, recommendations and deliberations, was fashioned in cases where the governmental decisionmaking process is collateral. 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). This Circuit has held that "[i]f the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield." *Id.* Thus, the Circuit has held that the deliberative process privilege is unavailable in those circumstances where the cause of action is directed at the agency's subjective intent. See *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998). Here, the issue is whether the changes to issue were made to bolster the defense of the No Surprise Rule. Thus, the inquiry is into the agency's subjective intent and the deliberative process privilege is

inapplicable.

Furthermore, these documents are part of the Administrative Record which must be reviewed to make a fair determination of the merits of the case. See *Citizens*, 401 U.S. at 409; *Walter O. Boswell Memorial Hospital*, 749 F.2d at 792. The sweeping coverage of the deliberative process privilege suggested by the Federal defendants seriously undermines the requirement that this Court review the whole record. See *Greenpeace v. Nat'l Marine Fisheries Serv.*, No. C98-492Z (W.D. Wa. Feb. 2, 2000). Accordingly, the Court orders the Federal defendants to produce documents 1, 2, 9-24, 27-30, 35, 36, 38, 40, 42, 47, 49, 51, 52, 54, 57, and 69-72 by February 28, 2001.

IT IS SO ORDERED.

2/15/01
DATE



EMMET G. SULLIVAN
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPIRIT OF THE SAGE COUNCIL, et al.,)

Plaintiffs,)

v.)

BRUCE BABBITT, Secretary, U.S.)
Department of the Interior, et al.,)

Federal Defendants.)

No. 1:98CV1873 (EGS)

**JOINT STIPULATION AND PROPOSED ORDER TO ESTABLISH
BRIEFING SCHEDULE FOR RESOLUTION OF THE CASE**

As the parties advised the court during the September 15, 2000, status conference, they have conferred and agreed upon a schedule to complete briefing on the merits of this case. The parties now request the court's formal approval of that schedule.

This stipulation is based on the mutual agreement that each party will rely on its previously filed briefs with regard to the first two claims in the plaintiffs' Second Amended Complaint, which pertain to the "no surprises rule." Because the court denied those motions on September 20, 1999, without prejudice to refile, the parties request that, once supplemental briefing is completed, the court deem those original motions refiled and renote them for hearing.

In addition, the parties agree to limit the supplemental briefing to (a) the third claim in the Second Amended Complaint, pertaining to the plaintiffs' challenge to the "permit revocation rule" and (b) any new legal authorities concerning the arguments on counts I and II that have arisen since the submission of the initial cross-motions for summary judgment. Nothing in the Stipulation forecloses any party from addressing the relationship between the "no surprises rule" and the "permit revocation rule" in its supplemental briefing.

Before the supplemental briefing takes place, the parties requested, and the court agreed at the status conference, to decide the plaintiffs' pending motion to compel production of documents that the federal defendants withheld from the administrative record for the permit revocation rule. On September 18, 2000, federal defendants submitted the withheld documents to the court for in camera review. Accordingly, the motion to compel is now ripe for decision.

The supplemental briefing schedule identified below will be triggered by the court's decision on the motion to compel. If the court denies that motion to compel in its entirety, the date of the court's order denying that motion will trigger the date for plaintiffs to submit their supplemental summary judgment motion. If the court grants that motion to compel, in whole or in part, the date on which the federal defendants serve the documents on the plaintiffs will trigger the filing date for plaintiffs' supplemental brief.

Subject to these understandings, the parties submit the following briefing schedule for the court's approval:

1. plaintiffs' supplemental motion for partial summary judgment on count III of the Second Amended Complaint (the permit revocation rule claim) -- to be filed either 30 days after the court denies the motion to compel or 30 days after the date on which the federal defendants serve the plaintiffs with any documents required to be produced if the court grants the motion to compel in whole or in part; the plaintiffs' supporting memorandum will be limited to 35 pages;
2. federal defendants' and defendant-intervenors' supplemental cross-motions for partial summary judgment on count III of the Second Amended Complaint and opposition to plaintiffs' motion -- to be filed 30 days after plaintiffs' supplemental motion is filed; these memoranda will be limited to 35 pages each; and

3. plaintiffs' memorandum in response to the defendants' cross-motions and reply in support of its own supplemental motion -- to be filed 21 days after the defendants' cross-motions; the plaintiffs' response/reply brief will be limited to 25 pages.

Federal defendants and defendant-intervenors agree to waive their right to file a final reply brief in support of their cross-motions, provided that the plaintiffs do not rely on new arguments in their reply brief.

After the supplemental briefing is completed, the parties request that the court set this matter for oral argument on all issues raised in the litigation (both the refiled summary judgment motions on counts I and II and the supplemental motions on count III) at the court's earliest convenience. The parties request that the court approve this stipulation and the briefing schedule by signing the proposed order below.

Respectfully submitted this 20th day of September, 2000.

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APPROVED AND SO ORDERED this _____ day of _____, 2000.

Emmet G. Sullivan
United States District Judge