

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



NICOLAS HARRISON *et al.*,)
)
Plaintiffs,)
)
v.)
)
PATRICK M SHANAHAN *et al.*,)
)
Defendants.)
_____)

Civil Action No. 1:18-cv-00641 (LMB/IDD)

ORDER

This matter is before the Court on Plaintiffs’ Motion to Compel Documents and Information Withheld on the Basis of Deliberative Process Privilege [Dkt. No. 107]. After an *in camera* review and three hearings, the Court finds that the documents withheld are not protected by the deliberative privilege process because they do not provide opinions or discussions of the military’s HIV policies or that the privilege has been waived.

Defendants argue that the documents withheld or redacted are protected by the deliberative process privilege because they are predecisional and deliberative. *See City of Virginia Beach v. Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (holding that deliberative material reveals the manner in which the agency evaluates possible alternative policies or outcomes). However, upon an *in camera* review, Defendants have failed to persuade the Court that the documents reflect a decision-making process. For example, document number US00013841, withheld in its entirety, are meeting minutes that contain three pages of all the attendees at the meeting. This shows no deliberation or discussion: it is a mere list of names, organizations, and emails. Document number US00025675, also withheld in its entirety, is a draft of the Army Regulations with redline comments. The redline comments are not discussions that reflect the

decision-making process because they do not reveal an opinion or recommendation by a speaker. Instead, it reveals the results of deliberation, not the discussion itself. Therefore, based on these examples, in part, Defendants have not demonstrated that the withheld or redacted documents are deliberative. Even if the deliberative privilege process were applicable, since the documents reveal the government's intent, the balancing test considered by this Circuit, albeit not binding, favors the production of the documents.

To balance the deliberative process privilege with the needs of the party seeking disclosure, the Court considers: "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) 'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.'" *Cipolline v. Liggett Group, Inc.*, 812 F.2d 1400, 1987 U.S. App. LEXIS 19775, at *6-7 (4th Cir. Feb. 13, 1987). Under this test, Defendants have not demonstrated that the deliberative privilege process outweighs Plaintiffs' need for seeking discovery.

First, the documents provided for the *in camera* review all appear relevant to Plaintiffs' lawsuit. In that regard, it appears the requests for the documents are reasonably calculated to lead to the discovery of evidence that may be admissible concerning the government's intent and/or whether the expressed intent is pretextual in promulgating the HIV policies. An example is document number US00025497, draft of the Air Force Instruction ("AFI") 44-178 with redline comments, withheld in its entirety. Air Force Instruction 44-178 establishes the purpose/intent underlying the HIV policies. Second, alternative evidence is not available because Defendants are the only source of the information. Third, the government has a significant role in this litigation because they are a party to the case and they are the entities that proposed and enforced the policies

that are the subject of this matter. Fourth, disclosure of the documents would not hinder frank and independent discussions because there is a protective order in place that would prevent public disclosure of the documents. There is little, if any, risk of a chilling effect.

Lastly, the Court finds that the privilege has been waived for some of the withheld documents. In that regard, the final version of publicly available AFI 44-178 is substantially identical to the draft AFI 44-178.

Accordingly, based on the examples discussed above, in part, the deliberative privilege process does not apply to the documents withheld or redacted because they do not discuss opinions and recommendations that would render the documents deliberative or the privilege has been waived under the circumstances. Further, under the *Cipolline* balancing test, the Court finds that disclosure of the documents to Plaintiffs outweigh the deliberative privilege process. It is hereby

ORDERED that Plaintiffs' Motion is **GRANTED**.

The Clerk is directed to forward copies of this Order to all counsel of record.

ENTERED this 14th day of March 2019.

Alexandria, Virginia



Ivan D. Davis
United States Magistrate Judge