

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

COOK COUNTY, ILLINOIS,

et al.,

Plaintiffs,

v.

CHAD F. WOLF, in his official capacity as
Acting Secretary of U.S. Department of
Homeland Security; U.S. DEPARTMENT OF
HOMELAND SECURITY,

et al.,

Defendants.

Case No. 19-cv-6334

Judge Gary Feinerman

JOINT STATUS REPORT REGARDING DISCOVERY

Pursuant to this Court's order, Dkt. 237, Plaintiff ICIRR and Defendants submit the following joint status report identifying unresolved discovery issues and briefly setting forth each side's position on the unresolved issues in advance of the January 12, 2021 status hearing.

I. Discovery Status Update

To date, Defendants produced three document productions and privilege logs for each production. Defendants do not currently anticipate future productions. The parties met and conferred on December 17, 2020 and January 7, 2021, regarding the issues identified within this status report.

II. Privilege Logs, Metadata, and Custodians

At Plaintiff's request, Defendants have also served updated privilege logs for the first and second productions which reveal document family relationships. Furthermore, and again at Plaintiff's request, Defendants made a new document production on December 31, 2020 containing the non-privileged documents from its three prior documents, this time including metadata for these documents.

On January 6, 2021, Plaintiff alerted Defendants that the metadata for certain non-privileged documents—fewer than 30— was omitted from Defendants’ latest. Defendants have agreed to promptly provide Plaintiff with a supplemental system file that will contain the metadata for these documents.

Additionally, in lieu of providing full metadata for all documents in the production, Plaintiff has requested that Defendants provide a list of all the custodians, with corresponding Bates, for each document (including each privileged document). Defendants agreed to consider the request and respond timely.

III. Attorney-Client Privilege

After meeting and conferring by telephone, the parties are at impasse on nine documents where Defendants have claimed attorney-client privilege (ACP) in addition to the deliberative process privilege.

PLAINTIFF’S POSITION:

Plaintiff asserts that the entries for these nine documents do not establish that the predominant purpose of the documents was to render or solicit *legal* advice from an attorney. Defendants do not claim attorney work product privilege (AWP) for any of the nine documents challenged by Plaintiff. Each of the nine documents at issue is also subject to a deliberative process privilege (DPP) claim by Defendants. The Court is reviewing these documents in camera for the DPP (Dkt. 234). In the event the Court removes the DPP protection from these documents, Plaintiff respectfully requests that the Court also determine upon *in camera* review whether the ACP applies and therefore justifies redacting ACP content within the documents.

It is Defendants’ burden to establish that the attorney-client privilege applies to its documents. *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1119-20 (7th Cir. 1983). The party seeking to invoke ACP bears the burden of proving all of its essential elements, including but not limited to that “legal advice of any kind is sought . . . from a professional legal adviser in his capacity as such . . .” *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (quoting 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2292 (John T. McNaughton rev.1961)).

Plaintiff challenges nine documents where Defendants’ privilege log description fails to allege that any sort of legal advice was discussed or sought from an attorney acting in a legal capacity. It is Defendants’ obligation to provide a privilege log that “describe[s] the nature of the documents, communications, ... in a manner that... will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5). Plaintiff has not challenged the ACP designations where the log states legal advice, legal analysis, or litigation strategy was discussed or sought. Plaintiff has challenged documents that notably lack an even passing reference to “legal advice.” This deficit

has persisted even after Defendants met and conferred with Plaintiff on these documents and amended other log entries.

Plaintiff has grouped these nine documents into two buckets, described below:

A. Four Emails That Include An Attorney But “Legal Advice” was Not Alleged To Be Provided or Sought

It is well-established that documents are not privileged simply because they were to, from, or cc’d to an attorney; instead, “[o]nly those communications which ‘reflect the lawyer’s thinking [or] are made for the purpose of eliciting the lawyer’s professional advice or other legal assistance’ fall within the privilege.” *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007); *Urban 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, 334 F.R.D. 149, 160-61 (N.D. Ill. 2020) (holding that ACP does not attach to an email chain where an attorney is copied throughout because “[n]o one in the chain requests any legal advice from [the attorney] and he never offers any.”).

Government attorneys can wear many hats, and advice sought from a government attorney as “a policy advisor, media expert, business consultant, banker, referee or friend” is not protected by the ACP. *In re Cty. of Erie*, 473 F.3d at 421. The “predominant purpose” of the communication must be that a client seeks or receives legal advice. *Id.*

Although the following two entries were sent to or copied USCIS Chief Counsel Craig Symons, the log gives no indication that the communications sought or rendered “legal advice”:

Bates Range	Date	From	To	CC	TAG - CC Privilege Description
DHS_NDILL_0002668-72	8/9/2018	Ries, Lora L.	Nuebel Kovarik, Kathy	Cissna, Francis; Stoddard, Kaitlin V.; Symons, Craig M.	Predecisional deliberative, email chain involving USCIS leadership, and assessing the public charge rule in light of certain media inquiries. Contains employee phone numbers and email addresses and names of staff level employees.
DHS_NDILL_0002673-74	7/10/2018	Nuebel Kovarik, Kathy	Cissna, Francis ; Symons, Craig M.		Predecisional, deliberative email chain including DHS OGC attorneys and USCIS leadership, discussing attached predecisional, deliberative documents relating to inquiries from

Bates Range	Date	From	To	CC	TAG - CC Privilege Description
					various federal agencies concerning the proposed public charge rule. Contains employee phone numbers and email addresses and names of staff-level employees.

In *County of Erie*, the Second Circuit considered the purpose and objective of the government attorney’s client, Erie County, when determining that ACP justified withholding certain documents: “Erie County’s objective was to ascertain its obligations under the Fourth Amendment and how those requirements may be fulfilled, rather than to save money or please the electorate (even though these latter objectives would not be beyond the lawyer’s consideration).” In contrast, the log demonstrates that the predominant purpose of the two above documents was not legal in nature:

- In DHS_NDILL_0002668-72, the USCIS Chief of Staff Lora Ries copied USCIS Director Francis Cissna, USCIS Advisor to the Director Kaitlin Stoddard, and USCIS Chief Counsel Craig Symons on an email to USCIS Office of Policy and Strategy Chief Kathy Nuebel Kovarik stemming from “certain media inquiries”;
- DHS_NDILL_0002673-74 is an email from USCIS Office of Policy and Strategy Chief Kathy Nuebel Kovarik to USCIS Director Francis Cissna and USCIS Chief Counsel Craig Symons relating to inquiries from “various federal agencies” about the Rule.

Because the predominant purpose of these communications appears from the face of the log to have been nonlegal in nature, Defendants have not met their burden to establish that the ACP applies to these documents. The attorney-client privilege is construed narrowly, as it operates in derogation of the search for the truth and runs counter to the public’s right to every person’s evidence. *Swidler & Berlin v. United States*, 524 U.S. 399, 411, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). Documents seeking even sensitive advice regarding public relations or political strategy—but not legal advice—from a government attorney do not meet the ACP standard.

Two other documents at issue are emails from the Associate General Counsel for Regulatory Affairs Christina McDonald. Plaintiff’s investigation indicates that Ms. McDonald is an attorney who sits on a Regulatory Reform Task Force that makes policy recommendations on which regulations could be repealed, replaced, or modified. *See* April 14, 2017 “Memorandum for Component Heads,” at https://www.dhs.gov/sites/default/files/publications/2017-HQFO-00626-00667%20records-2_1.pdf. Ms. McDonald’s position on the Regulatory Reform Task Force coupled with an analysis of the privilege log descriptions describing emails she has sent,

indicate that Ms. McDonald gave policy advice in addition to legal advice. *Compare* DHS_NDILL_0000830 (email from Ms. McDonald “including legal advice related to the rule” where ACP is not herein challenged by Plaintiff) *with* DHS_NDILL_000018-19 *and* DHS_NDILL_000022-23 (emails from Ms. McDonald “discussing aspect of the public charge rule” where ACP is challenged by Plaintiff, below).

Bates Range	Date	From	To	CC	Privilege Description
DHS_NDILL_000018-19	6/24/2019	McDonald, Christina	Mitnick, John; Maher, Joseph; Mizelle, Chad	Browne, Rene; Baroukh, Nader; Fischler, Danny; Fishman, George; Kelliher, Brian; Kortokrax, Christine	Pre-decisional, deliberative communications among attorneys within the DHS Office of the General Counsel discussing aspect of public charge rule. The communications also include email addresses, phone numbers, and staff-level names.
DHS_NDILL_000022-23	6/24/2019	McDonald, Christina	Mitnick, John; Maher, Joseph; Mizelle, Chad	Browne, Rene; Baroukh, Nader; Fischler, Danny; Fishman, George; Kelliher, Brian; Kortokrax, Christine	Pre-decisional, deliberative communications among attorneys within the DHS Office of the General Counsel discussing aspect of public charge rule. The communications also include email addresses, phone numbers, and staff-level names.

In the government context, seeking an attorneys’ advice as a “policy advisor” or other non-legal role does not suffice for ACP; the communication must seek or render legal advice, and must be for the predominant purpose of seeking or rendering legal advice. *In re Cty. of Erie*, 473 F.3d 413, 421 (2nd Cir. 2007). Communications about some “aspect” of the Rule – but not providing “legal advice” – are not protected by ACP. Plaintiff challenges the assertion of ACP for these documents because it does not appear that Ms. McDonald provided legal advice in these entries.

B. Five Attachments to Emails That Do Not Allege “Legal Advice” was Provided

Plaintiff challenges the assertion of ACP for the following five attachments to emails because it does not appear that any legal advice was requested or rendered in the attachment. Attachments are judged separately from their primary documents and to be withheld, each must individually meet the privilege standard. *See Muro v. Target Corp.*, No. 04 CV 6267, 2006 WL 3422181, at *5 (N.D. Ill. Nov. 28, 2006). Defendants do not assert that these attachments contain “legal advice” and have not amended the description after meeting and conferring and having ample opportunity to amend those descriptions. Plaintiff asserts that “input” or “feedback” even from attorneys is distinct from “legal advice” and the documents must pertain to legal advice to be withheld or redacted on the basis of ACP:

Bates Range	Privilege Description
DHS_NDILL_0000839	Pre-decisional, deliberative chart of comments and answers regarding the draft public charge rule, including attorney input.
DHS_NDILL_0000841	Pre-decisional, deliberative chart of comments and answers regarding the draft public charge rule, including attorney input.
DHS_NDILL_0002677	Predecisional,deliberative [sic] draft Notice of Proposed Rulemaking on public charge, containing input from counsel and internal comments.
DHS_NDILL_0002682	Predecisional deliberative draft Notice of Proposed Rulemaking for public charge rule, containing input from counsel and internal comments.
DHS_NDILL_0002752	Predecisional, deliberative report concerning comments submitted in response to Notice of Proposed Rulemaking. Assesses substantive feedback in anticipation of finalized Rule.

Because these nine documents do not appear to involve *legal* advice or analysis, Defendants may not avail themselves of the ACP to justify their withholding or redaction.

DEFENDANTS’ POSITION:

Any dispute concerning the propriety of the attorney-client privilege designations for the nine documents at issue is premature since, as Plaintiffs’ acknowledge, these documents were also withheld on the DPP grounds, and the Court is currently assessing whether those DPP designations were proper. If the Court concludes that these documents were properly withheld on DPP grounds, then the parties need not litigate (and the Court need not resolve) whether the documents were also properly withheld on grounds of attorney-client privilege. Conversely, if the Court concludes that these documents were not properly withheld on DPP grounds, Defendants will have to assess whether these documents should still be withheld in full, or if they can only be withheld in part, based on an attorney-client privilege claim. The parties can

then litigate whether the attorney-client privilege designations are proper (or whether Defendants' privilege log descriptions are sufficient).

Accordingly, Defendants need not establish at this juncture that the attorney-client privilege designations for these nine documents is proper. To the extent the Court concludes that these documents were not properly withheld on DPP grounds, or concludes that the parties should immediately proceed with litigating Plaintiffs' challenges to the attorney-client privilege designations for these documents, the parties can submit another JSR setting forth their respective positions over whether these documents were properly withheld, in whole or in part, on grounds of attorney-client privilege.

Dated: January 7, 2021

Respectfully submitted,

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