

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA *ex rel.*)
GLEND A MARTIN and STATE OF)
TENNESSEE *ex rel.* GLEND A MARTIN,)
)
Plaintiffs / Relator,)
) Case No. 1:08-cv-251
v.)
) Judge Mattice
LIFE CARE CENTERS OF AMERICA,)
INC.,)
)
Defendant.)

UNITED STATES OF AMERICA *ex rel.*)
TAMMIE JOHNSON TAYLOR,)
)
Plaintiff / Relator,)
) Case No. 1:12-cv-64
v.)
) Judge Mattice
LIFE CARE CENTERS OF AMERICA,)
INC.,)
)
Defendant.)

ORDER

Before the Court is Defendant's Motion to Compel Production of Documents. (Doc. 212). The parties appeared before the Court for hearings on Defendant's Motion on January 22, 2015 and February 11, 2015, at which they presented argument in support of their respective positions. For the reasons stated herein, the documents identified in Defendant's Motion (Doc. 212) will be **REFERRED TO A SPECIAL MASTER.**

I. BACKGROUND

This consolidated *qui tam* action was filed separately by relators Glenda Martin and Tammie Taylor. (Doc. 69 at 5). The Government moved to intervene as Plaintiff in this case on October 1, 2012, and the Court granted the Government's Motion on November 15, 2012. (Docs. 60, 67). In the same Order, the Court also ordered that Martin and Taylor's cases be consolidated. (Doc. 67). In its Consolidated Complaint in Intervention, the Government identified claims for false and fraudulent claims (Count I); false statements (Count II); unjust enrichment (Count III); payment by mistake (Count IV); and conversion (Count V). (Doc. 69 at 47-48).

On June 7, 2013, Defendant sent the Government its First Set of Interrogatories and First Request for Production of Documents. (Doc. 213-3). In response to Defendant's interrogatories, the Government has issued thirteen privilege logs setting forth its claims of privilege over certain documents that have been requested. (Doc. 213 at 4). As relevant to the instant matter, in the Government's Third, Sixth, Seventh, Eighth, Tenth, Eleventh, and Twelfth Privilege Logs, it has asserted the deliberative process privilege. (Docs. 213-4, 213-5, 213-6, 213-7, 213-8, 213-9, 213-10, 213-11). The Government's assertion of privilege is supported by the declarations of Elizabeth Richter and Jodi Nudelman. The parties met and conferred with one another regarding disclosure of these documents but were unable to reach a resolution.

On November 26, 2014, Defendant filed the instant Motion to Compel Production of Documents. (Doc. 212). Within its Motion, Defendant discusses the documents at issue by grouping them into 13 categories: (1) draft reports, cover memoranda, and summary statements that contain factual information; (2) fact sheets; (3) spreadsheets, data, and data analysis; (4) documents requesting funding for skilled

nursing facility prospective payment system projects; (5) briefing papers; (6) draft press releases; (7) documents reflecting responses or comments on final rules or established policies; (8) documents prepared by non-agency individuals and/or comments, advice, recommendations of non-agency individuals; (9) drafts of design plans; (10) drafts of survey instruments; (11) notes from meetings and meeting minutes; (12) emails; and (13) miscellaneous documents. The specific privileged documents at issue have been identified in the Government's Third, Sixth, Seventh, Eighth, Tenth, Eleventh, and Twelfth Privilege Logs. *See* Doc. 213-2. The Government submits that it is not required to give Defendant these documents because they are protected by the deliberative process privilege. (Doc. 229).

The Court held hearings on Defendant's Motion on January 22, 2015 and February 11, 2015. At these hearings, the Court permitted the parties to discuss whether the Government properly invoked the deliberative process privilege, which was raised in Defendant's reply brief. As a result of the parties' arguments, the Court permitted the Government to file a sur-reply brief, which was filed on February 23, 2015. (Doc. 249).

II. STANDARD OF LAW

Federal Rule of Civil Procedure 26(b)(1) describes the scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1). The United States Supreme Court has construed the term "relevant" to include "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). Thus, the scope of discovery under Rule 26 is “traditionally quite broad.” *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998).

III. ANALYSIS

In its Motion to Compel, Defendant argues that (1) the list of documents identified by the Government as falling within the deliberative process privilege do not fall within the scope of that privilege; and (2) even if the documents were to fall within the privilege, the Defendant’s need for the information outweighs the Government’s interest in protecting them from disclosure. (Doc. 213 at 6, 26). In response, the Government argues that (1) the documents it lists are covered by the deliberate process privilege; and (2) Defendant is unable to show that its need for the information outweighs the Government’s interest in protecting it from disclosure. (Doc. 229 at 8, 39).

Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5) (1982), permits the withholding of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Exemption 5 preserves certain privileges to agencies such as “the attorney-client privilege, the attorney work-product privilege and the executive ‘deliberative process’ privilege.” *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 5 (6th Cir. 1980); *see also Libertarian Party of Ohio v. Husted*, 2014 WL 3509749, at *3 (S.D. Ohio July 14, 2014).

Generally, the deliberate process privilege “protects from discovery ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a

process by which governmental decisions and policies are formulated.” *E.E.O.C. v. Burlington N.*, 615 F. Supp. 2d 717, 719 (W.D. Tenn.) *objections overruled sub nom. E.E.O.C. v. Burlington N. & Santa Fe Ry. Co.*, 621 F. Supp. 2d 603 (W.D. Tenn. 2009) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). To be covered by the deliberative process privilege, a document must be both “predecisional and deliberative.” *Shafizadeh v. Bureau of Alcohol, Tobacco & Firearms*, 229 F.3d 1153 (6th Cir. 2000) (quoting *Schell v. United States Dep’t of Health & Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988)). The privilege does not protect “factual information, even if such information is contained in an otherwise protectable document, as long as the information is severable.” *Redland Soccer Club, Inc. v. Dep’t of Army of U.S.*, 55 F.3d 827, 854 (3d Cir. 1995). It also does not protect communications “made subsequent to an agency decision.” *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993).

The United States Supreme Court has described the deliberative process privilege as resting “on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001).

The purpose of the deliberative process privilege is to

assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.

Schell v. U.S. Dep’t of Health & Human Servs., 843 F.2d 933, 939 (6th Cir. 1988) (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C.

Cir. 1980). Thus, the key issue in deciding whether the privilege applies is whether “disclosure of the materials would expose an agency’s decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency’s ability to perform its functions.” *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (internal quotation omitted).

The communication itself must be “inter-agency or intra-agency,” which “includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent regulatory agency.” *Dep’t of Interior*, 532 U.S. at 8-9 (quoting 5 U.S.C. § 551(1)). However, courts “have held that the exemption extends to communications between Government agencies and outside consultants hired by them.” *Id.* at 10.

A district court has described the process of evaluating an agency’s claim for the privilege as follows:

that privilege must first be invoked by a high official, preferably the head of the agency. The official then must demonstrate, preferably by affidavit, precise and certain reasons why the documents should be kept confidential, and the agency must provide fairly extensive identification and description for each document, to facilitate the court’s application of the balancing test.

In re Consol. Litig. Concerning Int’l Harvester’s Disposition of Wisconsin Steel, 1987 WL 20408, at *7 (N.D. Ill. Nov. 20, 1987). Once the agency has made a sufficient showing that they are entitled to the privilege, the deciding court must “balance the competing interests of the parties.” *Redland Soccer Club, Inc.*, 55 F.3d at 854. Factors that a court can consider in balancing these interests include:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues

involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

First E. Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994). Additionally, the party requesting the information may overcome the 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.” *Redland Soccer Club, Inc.*, 55 F.3d at 854.

The Court held hearings on January 22, 2015 and February 11, 2015, at which Defendant raised the issue of whether the Government properly invoked the deliberative process privilege. Specifically, Defendant argued that the Government did not properly invoke the privilege because agency officials Elizabeth Richter and Jodi Nudelman did not personally examine each document over which they claimed the privilege. *See* Doc. 230 at 8. As the Court noted above, the Government submitted a sur-reply brief addressing this issue, in which it argued that Richter and Nudelman were not required to personally review each document in light of the large number of documents at issue. The Government also submitted that, if the Court were to find that the privilege was not properly invoked, it was requesting “a reasonable amount of time to allow the officials to review a sample of the documents.” (Doc. 249 at 2).

The Court has considered this issue and agrees with the Government’s position that Richter and Nudelman were not required to individually review the documents so long as there was “actual consideration” of the issue by the officer making the declaration. *United States v. Ernstoff*, 183 F.R.D. 148, 152 (D.N.J. 1998) (quoting *United States v. Reynolds*, 345 U.S. 1, 7–8, 73 S.Ct. 528, (1953)). The Court has reviewed the declarations of Richter and Nudelman and finds that, while they may not have individually reviewed each document, they used their experience and professional

background to reach the conclusion that the requested documents were covered by the deliberative process privilege. While relying on general consideration rather than an individualized review is by no means a best practice, the Court is unable to conclude that the Government's process resulted in an improper invocation of the deliberative process privilege. However, after the documents have been reviewed, if the Court ultimately finds that the Government acted unreasonably in asserting the privilege, the cost of reviewing the documents which could not have reasonably fallen within the privilege will be reallocated to the Government. As the Court has now concluded that the deliberative process privilege has been properly invoked, it will now turn to the logistical matters related to the review of the documents at issue.

In addition to considering the invocation issue at the January 22, 2015 Hearing, the Court also put the parties on notice of its intent to appoint a special master to review the documents identified by the Government as falling under the deliberative process privilege. (Doc. 232). The Court's authority to appoint a special master lies in Federal Rule of Civil Procedure 53. Among other things, the Court can appoint such a master to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1)(C). When making an appointment, the Court must consider the "fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay." Fed. R. Civ. P. 53(a)(3). Under Rule 53, objections to factual findings and legal conclusions made by the special master will be reviewed *de novo*, unless the parties stipulate otherwise. Fed. R. Civ. P. 53(f).

Before appointing a special master, the Court must give the parties "notice and an opportunity to be heard." Fed. R. Civ. P. 53(b)(1). The Court can allocate payment based

on “the nature and amount of the controversy, the parties’ means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.” Fed. R. Civ. P. 53(g)(3).

After the hearing on January 22, 2015, the Court issued an order permitting the parties to submit a “proposed standard that they believe the master should apply when reviewing documents for claims of work product and deliberative process privilege.” (Doc. 233 at 2). The Court provided the parties an opportunity to be heard at the subsequent hearing it held on this Motion on February 11, 2015. On February 18, 2015, the Court filed a notice of its intent to appoint Christopher A. Wray of the law firm King & Spalding as the special master to review the documents at issue and also gave the parties until February 28, 2015 to object to the appointment of Mr. Wray as special master. (Doc. 247). The Court has overruled the objections that were filed in a separate order.

Accordingly, as a result of the February 11, 2015 Hearing and the parties’ submissions, the Court **FINDS** that this matter is appropriate for resolution by a special master because the document review required by the parties cannot be effectively and timely addressed by the undersigned or a magistrate judge of this District. Christopher A. Wray, of the law firm King & Spalding, is hereby **APPOINTED** pursuant to Federal Rule of Civil Procedure 53 to serve as a special master for the purpose of reviewing the documents identified in Defendant’s Motion to Compel Production of Documents (Doc. 212) to evaluate whether they fall within the deliberative process privilege. Mr. Wray’s review will not extend to balancing the competing interests of the parties if documents are deemed privileged, but rather will be limited to evaluating whether the documents at

issue fall within the deliberative process privilege as defined by the standard set forth *infra*. Mr. Wray will commence his duties only after filing the certification required by Rule 53(b)(3).

The review contemplated by this Order **SHALL** be completed by **July 15, 2015**. If the Special Master reports to the Court that the review cannot be completed by that deadline, the Court will extend the deadline for a reasonable period. The parties are hereby **ON NOTICE** that no other deadlines in this case will be affected by an extension.

After the Special Master files his certification pursuant to Rule 53(b)(3), he **SHALL** perform a review of the documents over which the Government has claimed the deliberative process privilege and apply the standard identified by the Court to determine whether the privilege applies. The Special Master shall have the rights, powers, and duties provided in Rule 53 and may adopt such procedures as are not inconsistent with that Rule or with this or other orders of the Court. The Special Master shall be empowered to communicate on an *ex parte* basis with a party for purposes of seeking to maintain the confidentiality of privileged information or for routine scheduling and other matters which do not concern the merits of the parties' claims. The Special Master may communicate with the Court *ex parte* on all matters as to which the Special Master has been empowered to act.

In identifying whether documents fall under the deliberative process privilege, the Special Master should apply the following standards:

1. Documents that are inter-agency or intra-agency which comprise of part of a process by which governmental decisions and policies are formed that are both predecisional and deliberative and whose disclosure would affect

candid deliberations within an agency shall fall within the scope of the deliberative process privilege, subject to the exceptions identified *infra*.

a. “Predecisional”

- i. A document from a subordinate to a superior officer is more likely to be predecisional, whereas a document from a superior officer to a subordinate is more likely to involve a decision that has already been made.

b. “Deliberative”

- i. A document is deliberative when it reflects the give-and-take of the consultative process.
2. Communications made by outside consultants may fall under the privilege so long as they were acting as an employee.
3. Factual information within privileged documents shall not be covered by the deliberative process privilege as long it can be severed from the privileged document.
4. Communications which were made subsequent to an agency decision shall not be covered by the deliberative process privilege.

Each party is **ORDERED** to designate a lead attorney as a point of contact for the Special Master. The lead attorney shall have sufficient authority and knowledge to make commitments and carry them out to allow the Special Master to accomplish his duties. The parties are directed to give the Special Master their full cooperation and to promptly provide the Special Master access to the documents which the Special Master deems necessary to complete his duties. After consultation with the Special Master, the parties will provide all documents in a reasonably accessible electronic form. This will

include, but is not limited to, the parties providing any spreadsheet or presentation files, including Microsoft Access, Excel, and PowerPoint files in their native formats. Additionally, all hardcopy documents will be provided as image files with searchable OCR text and unitize the hardcopy documents to the extent possible (i.e., multi-page documents shall be produced as a single document and not as several single-page documents). Disclosure of privileged information connected with the litigation to the Special Master shall not be a waiver of privilege in this case and is also not a waiver in any other Federal or State proceeding. Thus, a claim of privilege may not be raised as a basis to resist disclosure to the Special Master.

The Special Master shall make findings of fact and conclusions of law with respect to the matters presented by the parties and **SHALL** report to the Court pursuant to Rule 53(f) by **July 15, 2015**. The Special Master's report shall identify his activities, state the status of matters within his purview, and state any outstanding issues which may require Court action. The Special Master **SHALL** file a report of his findings on the Court's electronic docket and any parts of his report that are confidential shall be filed under seal pending further order of the Court. Any objections to the Special Master's report **SHALL** be filed fourteen (14) days after he files his report, and the Court will review them under a *de novo* standard of review.

Subject to later apportionment by the Court, the Special Master's compensation, as well as reasonable and necessary expenses, will be paid by the parties in equal shares. The Special Master has the authority to use King & Spalding personnel and an outside e-discovery vendor as reasonably necessary. The Special Master and other King & Spalding personnel will be billed at their customary market rates. Any outside e-discovery vendor shall be contracted at market rate. The Special Master shall submit to

both parties invoices for services performed according to his normal billing cycle and the Government and Defendant in equal shares shall pay such invoices within thirty (30) days of receipt.

SO ORDERED this 27th day of April, 2015.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE