

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN and JANE DOE 1-36, et al.,)	
Plaintiffs,)	
)	8:09CV456
v.)	
STATE OF NEBRASKA, et al.,)	
Defendants.)	
_____)	
JOHN DOE, et al.,)	
Plaintiff,)	4:09CV3266
)	
v.)	
STATE OF NEBRASKA, et al.,)	
Defendants.)	
_____)	
JOHN DOE, et al.,)	
Plaintiff,)	
)	4:10CV3005
v.)	
STATE OF NEBRASKA, et al.,)	
Defendants.)	
_____)	

This matter is before the court on the plaintiffs’ Motion to Compel Disclosure of documents identified in Defendants’ privilege logs. Filing No. [425](#). For the reasons set forth below, the motion is granted in part and Plaintiffs are entitled to the production of a limited number of documents. The remaining documents shall be submitted to the undersigned for an in camera review.

BACKGROUND

The motion to compel now before the court represents the continuation of an ongoing discovery dispute between the parties reaching back to December 9, 2010 – the date Plaintiffs served discovery requests on Defendants. Defendants responded to the discovery

requests, but not to the satisfaction of Plaintiffs. A motion to compel followed and was ruled upon by the undersigned on April 19, 2011. Filing No. [384](#). The motion was granted in part and denied in part and contained instructions for the parties to confer concerning certain documents for which Defendants claimed certain evidentiary privileges.

In response to that order, the parties agreed to protective orders and tailored discovery requests. On July 8, 2011, Defendants served responses to Request for Production of Documents, numbered 3, 4, 7, 8, 12 and 13, along with a privilege log for Requests 3 and 4 asserting the attorney-client privilege. On August 19, 2011, Defendants served an additional privilege log for Requests for Production numbered 1, 2, 5, 6, 9 and 10, asserting the attorney-client and deliberative process privileges. On October 21 and November 1, 2011, Plaintiffs' counsel, Rodney Dahlquist, Jr., conferred with defense counsel, Kevin Griess, regarding potential disclosure of the documents listed on the privilege log. However, the parties were, and remain, unable to come to an agreement, thereby precipitating the necessity of the Motion to Compel Disclosure now before the court.

ANALYSIS

As set forth in their privilege logs and brief in opposition to this motion, Defendants resist the production of a number of documents. Defendants assert the majority of the documents are protected by the attorney-client privilege. They also assert the deliberative process privilege, or a combination of the deliberative process privilege and the attorney-client privilege, preclude the production of the remaining documents.

Attorney-Client Privilege

As both parties acknowledge, the Eighth Circuit essentially adopted the Supreme Court Standard 503 in defining the attorney-client privilege as it exists in federal court. [In re Bieter Co.](#), 16 F.3d 929, 935 (8th Cir. 1994).

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

[Id.](#) (citing Supreme Court Standard 503(b)). The party seeking to avoid production of the communications has the burden to prove the documents qualify for the protection. [Hollins v. Powell](#), 773 F.2d 191, 196 (8th Cir. 1985).

A review of the privilege log provided to Plaintiffs reveals four documents that are not privileged. On the privilege log dated July 9, 2011, Defendants do not identify an author for documents numbered 22, 23, and 24. Filing No. [425-3](#), Ex. B. Similarly, Defendants do not identify a recipient of document number 25. Without such information, Defendants cannot meet their burden of proving these documents are protected by the attorney-client privilege. Accordingly, documents 22, 23, 24, and 25 must be produced.

The status of the remaining documents identified on the privilege logs is unclear. It is well established that governmental agencies enjoy the protection of the attorney-client privilege. See [Coastal Corp. v. Duncan](#), 86 F.R.D. 514, 520 (D. Del. 1980); see also [In re](#)

[Grand Jury Subpoena Duce Tecum, 112 F.3d 910, 915-16 \(8th Cir. 1997\)](#)(noting the “broad proposition that a governmental body may be a client for the purposes of the attorney-client privilege”). “[W]hen the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors.” [Center for Medicare Advocacy, Inc. v. United States Department of Health and Human Services, 577 F. Supp. 2d 221, 237 \(D.D.C. 2008\)](#) (internal quotation marks and citations omitted). However, not every communication between a government agency and government attorneys is protected by the attorney-client privilege. [Id.](#) The communication must meet all of the conditions for protection ,including that the communications were facilitating the “rendition of professional legal services.” [See Borase v. M/A Com Inc., 171 F.R.D. 10, 14 \(D. Mass. 1997\)](#)(finding “nonlegal work” and the documents prepared in the fulfillment of nonlegal responsibilities are not entitled to support under the attorney-client privilege); [see also Electronic Privacy Information Center v. Department of Justice, 584 F. Supp. 2d 65, 79 \(D.D.C. 2008\)](#) (finding attorney-client protection is not available to a government agency simply because the communication involves the government’s counsel); [Coastal Corp., 86 F.R.D. at 521](#) (noting the importance of ensuring the documents meet the requirements for attorney-client protections especially when the government attorneys act as policy makers rather than attorneys).¹

At the heart of the parties’ dispute is a disagreement over the capacity in which the attorney general was communicating with the legislature, with other state agencies, and

¹ Although this court does not characterize the Attorney General’s primary function as “policy making,” the concern in the [Coastal Corp.](#) case is still valid. Where government attorneys perform a variety of functions, the court must investigate exactly what function the government attorneys were fulfilling when making or receiving the communications in question.

internally regarding the legislation that is the subject of this suit. Plaintiffs contend the Attorney General's activities in the case amount to lobbying or that the Attorney General's office was attempting to act as a de facto legislature. Conversely, Defendant argues all of the allegedly privileged communications involving the office of the Attorney General were generated and distributed as part of its provision of legal services. As noted by Defendants, the Attorney General has a wide variety of duties, many of which involve dispensing legal advice to various state agencies. See Neb. Rev. Stat. § 84-205. Of course, not every act the Attorney General performs is necessarily legal in nature. Thus, it falls on the court to determine what type of services the Attorney General was providing when the allegedly privileged communications were disseminated to the various Defendants in this law suit. The vast majority of the entries do not provide sufficient information for the court to determine whether the allegedly privileged documents amount to "confidential communications made for the purpose of facilitating the rendition of professional legal services to [a] client." In re Bieter Co., 16 F.3d at 935. Accordingly, an in camera review is necessary.

Deliberative Process Privilege

In the undersigned's memorandum and order dated April 19, 2011 the court defined the types of documents that it will consider for protection under the deliberative process privilege.

[T]he court finds only documents or communications that were created prior to the passage and implementation of LB 97 and LB 285 that involve opinions, recommendations or advice about legislative decisions between legislators or between legislators and their aides – that is, documents that are pre-decisional, deliberative and contain matters of opinion – will be considered for protection under the deliberative process privilege.

Filing No. [384](#).

The court further noted that even if documents arguably qualified for the deliberative process privilege, protection will not automatically be given.

Courts evaluating whether to apply the deliberative process privilege generally treat it as a qualified privilege and only protect documents from discovery after applying a balancing test based on the following factors: “(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” Qamhiyah, 245 F.R.D. at 396 (quoting F.T.C. v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984)); see also Rodriguez, 280 F.Supp.2d at 101 (quoting In re Franklin Nat’l Bank Secs. Litig., 478 F.Supp. 577, 583 (E.D.N.Y. 1979).

Filing No. [384](#).

Defendants have identified a number of documents in their August 19, 2011 privilege log for which they claim protection under the deliberative process privilege. See Filing No. [425-3](#), Ex. C. A number of these documents appear to facially qualify for the deliberative process privilege, however, as noted above, the court will need to examine the documents and conduct a balancing test to determine if the documents are entitled to protection. Accordingly, all of the documents for which Defendants are claiming the deliberative process privilege shall be produced to the court for an in camera review.

IT IS ORDERED:

- 1) With respect to the documents numbered 22, 23, 24, & 25 on Filing No. [425-3](#), Ex. B, Plaintiffs’ motion to compel (filing no. [425](#)) is granted. Defendants shall produce those documents to Plaintiffs by March 9, 2012.

- 2) Defendants shall file the remaining documents identified in Filing Nos. [425-3](#), Exs. B and C under seal by March 16, 2012 in order for the undersigned to conduct an in camera review and determine if the claimed privileges apply.
- 3) The clerk shall file this document as a spread text order for all three of the above-captioned cases.

DATED this 28th day of February, 2012.

BY THE COURT:

S/ Cheryl R. Zwart
United States Magistrate Judge

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