UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA INC. AND HUMANA INC., *Defendants*.	Case No. 1:16-cv-1494 (JDB) REDACTED FOR PUBLIC FILING

SPECIAL MASTER REPORT AND RECOMMENDATION NO. 6

Pending before the Special Master is Defendants Aetna's and Humana's Motion to Compel production of a single document which the United States contends was inadvertently produced. The United States claims that this document is protected by the deliberative process privilege and requests that it be clawed back. Having reviewed the Motion, Opposition and Reply, and for the reasons that follow, the Special Master recommends that the Court deny Defendants' Motion.

I. Background / Arguments of the Parties

The facts of this case are well known to the parties, and do not bear repeating in detail. In brief, this case concerns Plaintiffs' efforts to enjoin the proposed merger of Defendants Aetna, Inc. and Humana, Inc. due to alleged violations of Section 7 of the Clayton Act. The case is currently before the Special Master for purposes of ruling upon, *inter alia*, "[a]ll disputes or matters relating to discovery … as to the parties and non-parties subject to discovery, including but not limited to claims of privilege." [Order Appointing Special Master (Dkt. No. 53) at ¶ 2].

[redacted] (Mot. Exh. 1 at 1).

Defendants subsequently submitted the instant Motion, arguing that the document is "highly relevant to Defendants' arguments." (Mot. at 1). According to Defendants, the United States has not shown that the document is predecisional because it has not shown it to be clearly connected to any particular policy or decisionmaking process, nor has it shown that the documents' "contents have not been subsumed by later agency action." (*Id*. at 1-2). Defendants further argue Defendants have failed to segregate purely factual material from any deliberative portions of the document. (*Id*. at 2). Finally, Defendants contend that, even if the deliberative process privilege does protect this document, it should still be produced because Defendants have a significant need for the information it contains. (*Id*. at 2-3).

The United States responds that the document is predecisional because it sets forth specific policy considerations, because "[t]he reasoning contained in the document has never been disclosed and deliberations about issues raised in the [document] are ongoing." (Opp. at 1). The United States further argues that the document is deliberative because it reflects internal "give and take," and disclosure of this document "would unfairly suggest that these analyses and predictions are an 'agency position' instead of 'only a personal position.'" [*Id*. at 2 (citation omitted)]. With respect to the question of segregability, the United States contends that it cannot provide factual information from this document without exposing internal analyses and judgments "that were meant to be 'uninhibited opinions and recommendations' on the issue and policy options discussed." [*Id*. at 3 (citation omitted)]. Finally, the United States disputes

Defendants' claim to have a significant need for the information contained in the document. (Opp. at 3).

As part of its invocation of the deliberative process privilege, the United States offers [redacted]

In their Reply, Defendants contend that the United States' submission "fail[s] to identify any 'clear' decisional 'process' that [the document] addresses," and argue that they have a need for the document [redacted] (Reply at 1).

Having considered all of these arguments and for the reasons set forth below, the Special Master recommends upholding the invocations of deliberative process privilege.

II. Legal Standard

The Case Management Order in this case permits a party to claw back inadvertently produced documents that are subject to an "applicable legal or evidentiary privilege." [Case Management Order (Dkt. 55) at ¶ 14(G)]. The United States claims that these documents are protected by the deliberative process privilege.

"Courts… permit agencies to invoke the deliberative process privilege in order to protect information that exposes their decisionmaking processes, and thus ultimately, to 'prevent injury to the quality of agency decisions.'" [*Colorado Wild Horse and Burro Coalition, Inc. v. Kempthorne*, 571 F. Supp. 2d 71, 75 (D.D.C. 2008) (quoting *Petroleum Info. Corp. v. U.S. Dep't of the Interior,* 976 F.2d 1429, 1434 (D.C.Cir.1992))]. The privilege applies only to documents

that are (1) predecisional, meaning that the documents were created prior to the agency decision at issue; and (2) deliberative, such that they "reflect[ ] the give-and-take of the consultational process." [*Id*. (citing *Petroleum Info. Corp.,* 976 F.2d at 1434)].

With respect to the first prong, a document can only be considered predecisional if it was actually "generated before the adoption of an agency policy." [*Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980))]. "Although a document need not 'contribute to a single, discrete decision,' … an agency must "identify[ ] the decisionmaking process to which [the document] contributed." [*Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 466 (D.C. Cir. 2014) (quoting *Access Reports v. Dep't of Justice,* 926 F.2d 1192, 1196 (D.C.Cir.1991))].

In addition, the "predecisional" element requires a showing that the opinions contained in a document have not been "adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." (*Coastal States Gas*, 617 F.2d at 866). This is so because the purposes of the privilege are to "(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationale that were not in fact ultimately the grounds for an agency's action." [*Defenders of Wildlife v. U.S. Dep't of Agriculture*, 311 F. Supp. 2d 44, 57 (D.D.C. 2004) (citing *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (add'l citations omitted)]. Once an agency has adopted a particular opinion or policy, these purposes no longer apply. "At the very instant that an agency aligns its policy or program congruently with the views expressed in a particular document, the document is no longer seen as 'reflecting the personal opinions of the writer,'" but rather "it reflects the position of the

agency," and, as such, "it is the agency, not the individual drafter, that may thereafter be exposed to ridicule or criticism if the policy proves ill-advised." [*General Elec. Co. v. Johnson*, 2006 WL 2616187 at *4 (D.D.C. Sept. 12, 2006)(emphasis in original)].

The burden is on the agency claiming that a document is protected under the deliberative process privilege – here, DOJ on behalf of HHS - to show that a document is predecisional in nature. To do so, "the agency must establish that it has never implemented the opinions or analyses contained in the document, incorporated them into final agency policy or programs, referred to them in a precedential fashion, or otherwise treated them as if they constitute agency protocol." [*General Elec. Co.*, 2006 WL 2616187 at *5).

With respect to the second prong, a document will only be treated as deliberative if it is shown to be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." [*Ascom Hasler Mailing Sys. Inc. v. U.S. Postal Svc.*, 267 F.R.D. 1, 4 (D.D.C. 2010) (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C.Cir.1975))]. "Thus, purely factual material is not protected, 'unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.'" [*Id*. (quoting *N.L.R.B. v. Jackson Hosp. Corp*., 257 F.R.D. 302, 308 (D.D.C. 2009)); *see In re Sealed Case,* 121 F.3d 729, 737 (D.C.Cir.1997)]. "To determine whether a document is recommendatory in nature, courts often consider the following traits: language; tone; circulation stream; apparent purpose; relative hierarchical positions of the drafter and recipients; depth and extent of subsequent adherence or reference to, or citation of, the document; and whether the agency has ever used the document to train personnel, treated it as precedential, or described it as having been 'amended' or 'rescinded,' for example." [*General Elec. Co.*, 2006 WL 2616187 at *6 (citations omitted)].

To properly invoke the deliberative process privilege, the agency which claims its protections "must 'make a detailed argument, including affidavits from the proper governmental authorities, in support of the 'privilege' because, 'without a specific articulation of the rationale supporting the privilege,' a court cannot rule on whether the privilege applies." [*Ascom Hasler*, 267 F.R.D. at 4 (quoting *Doe v. District of Columbia*, 230 F.R.D. 47, 51-52 (D.D.C. 2005)]. More specifically, the declaration must contain

> (1) a formal claim of privilege by the "head of the department" having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege.

[*Landry v. FDIC,* 204 F.3d 1125, 1135 (D.C. Cir. 2000) (citations omitted)]. These requirements are "designed to ensure that the privilege[ ] [is] presented in a deliberate, considered, and reasonably specific manner." (*Id*. at 1135-36).

Finally, even if a party does show that the deliberative process privilege protects a document, that document may still be producible upon "a sufficient showing of need." (*In re Sealed Case* (1997), 121 F.3d 729, 737 (D.C. Cir. 1997)].

> This need determination is to be made flexibly on a case-by-case, ad hoc basis. [E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests," taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees."

[*Id*. (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992))].

III. Discussion

The document at issue consists of two parts: [redacted]

Both the language of the document and the context that [redacted] provide establish that this document is protected deliberative process.

The document qualifies as predecisional. [redacted] The government has therefore met its burden to show both a particular decisionmaking or policy process to which this document relates, and to describe how the document contributes to that concern. [*See Nat'l Sec. Archive v. C.I.A.*, 752

[1] [redacted] is of sufficiently senior status to assert a formal claim of privilege as to this document. [See C*obell v. Norton*, 213 F.R.D. 1, 7 (D.D.C. 2003) (citing *Landry*, 204 F.3d at 1135-36) (noting that it is not necessary for an actual agency secretary to assert a claim of privilege)].

F.3d 460, 466 (D.C. Cir. 2014); *Agility Public Warehousing Co. K.S.C. v. Dep't of Defense*, 110 F. Supp. 3d 215, 220 (D.D.C. 2015)].

In addition, neither the document nor the information it contains appears to have been either publicly disseminated or adopted by HHS. It is labelled "Draft – not for release," which alone is not sufficient to show that the document is predecisional because "drafts are not presumptively privileged," and "the designation of documents as 'drafts" does not end the inquiry" into whether a document meets this requirement. [*Judicial Watch, Inc. v. U.S. Postal Svc*., 297 F. Supp. 2d 252, 260 (D.D.C. 2004) (quoting *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C.Cir.1982)].

[redacted] The document does not, in other words, "memorialize[ ] or evidence[ ] the policy the agency ultimately adopts on an issue," because there is no evidence [redacted]. [*Banner Health v. Sebelius*, 2013 WL 11241368 at *5 (D.D.C. July 30, 2013) (quoting *Coastal States*, 617 F.2d at 866)].

[redacted]

[redacted]

For these reasons, based on both the document content and the [redacted], the Special Master concludes that this document is predecisional.

The document is also deliberative in nature. As noted above, a document is deliberative when it "reflects the give-and-take of the consultational process." [*Colorado Wild Horse*, 571 F. Supp. 2d at 75 (citing *Petroleum Info. Corp.,* 976 F.2d at 1434)]. [redacted]

[redacted] description of the document, as well as the content of the document itself, both establish that it "reflect[s] the personal opinions of the writer[s]" concerning [redacted] "rather than the [redacted] policy of the agency." (*Coastal States*, 617

F.2d at 866). Put differently, "[r]evealing this [document] would bring to light the preliminary thoughts of agency staff about how best" [redacted]. (*Agility Public Warehousing*, 110 F. Supp. 3d at 221).

Additionally, the Special Master notes [redacted] assertion that the [redacted] [redacted] (*Id*.) Such discussions are precisely the type of consultative conversations that the deliberative process privilege is intended to protect.

The United States has shown that factual elements of this document are not segregable from its policy discussions. While the memorandum contains some information drawn from factual sources, that information is included in order to support the policy considerations that constitute the majority of the document. (*See* [redacted] As such, it is so "inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." (*In re Sealed Case (1997)*, 121 F.3d at 737). [redacted]

[redacted]

Finally, while the deliberative process privilege is a qualified privilege and may be overcome in certain circumstances, in this instance, Defendants have not shown that their need for this document outweighs the harm likely to flow from its disclosure.

Defendants claim to have a need for the information contained in this document because [redacted] Additionally, Defendants note that Plaintiffs [redacted] (*Id.*) [redacted]

[redacted]

If this document were not subject to the deliberative process privilege and were to be submitted in court, [redacted] might go only to the weight of the document, and not to the overall admissibility. Here, however, this fact [redacted] thereby undermining Defendants' claims to have a significant need for the information it contains.

For similar reasons, to the extent that Defendants' need argument centers on its claims that [redacted] is not a persuasive reason to require its production. [redacted] Finally, as Plaintiffs note, Defendants have [redacted] (Opp. at 3).

The Special Master finds similarly unpersuasive Defendants' claim that this information is not available elsewhere inasmuch as [redacted] The limited relevance of the information contained in the document make its availability (or lack thereof) immaterial here. To the extent that Defendants do have a

need to access relevant information regarding [redacted] and as to which deliberative process does not apply, such as those documents addressed in Special Master Report and Recommendation No. 5 in this case.

For all of these reasons, the Special Master concludes that Defendants have not shown a significant need to access this document.

By contrast, potential harm from disclosure of this document is substantial. [redacted]. This is precisely the type "creative debate and candid consideration of alternatives within an agency" which the deliberative process privilege is intended to protect, and which ultimately "improves the quality of agency policy decisions." (*Russell*, 682 F.2d at 1048).

The Special Master thus finds persuasive the United States' position that, if either the [redacted]

[redacted]

are concerned that their thought processes and considerations are likely to be disseminated, they may be less willing to offer a fulsome discussion of all possible policy approaches, and present only those options which are the most publicly palatable at any given time. Such limitations would have an unquestionably negative impact on the public. As the D.C. Circuit has explained, "the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl." [*Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 573 (D.C.Cir.1990)].

This risk that disclosure will have a chilling effect on HHS employees and thereby negatively impact the HHS decision making process greatly outweighs any need that Defendants have for this information.

IV. Conclusion

For all of these reasons, the Special Master concludes that the deliberative process privilege protects this document, that Defendants have not overcome that privilege, and that the United States should be permitted to claw back the document.

October 24, 2016

/s/ Hon. Richard A. Levie (Ret.)
Hon. Richard A. Levie (Ret.)
Special Master

[redacted]