

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE AMERICAN CIVIL LIBERTIES
UNION OF NORTH CALIFORNIA, et al.,

Plaintiffs,

v.

FEDERAL BUREAU OF
INVESTIGATION,

Defendant.

Case No. [10-cv-03759-RS](#)

**ORDER REGARDING CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

I. INTRODUCTION

Plaintiffs the American Civil Liberties Union of Northern California, the Asian Law Caucus, and the San Francisco Bay Guardian filed this action, averring that the Federal Bureau of Investigations has improperly withheld or redacted documents in violation of the Freedom of Information Act, 5 U.S.C. § 552 (2012). In 2010, the Plaintiffs filed two FOIA requests, seeking documents relating to the FBI’s alleged surveillance activities of Muslim and other ethnic and racial groups in Northern California. The FBI has produced responsive documents and an index describing the documents withheld or redacted and explaining why the documents are not subject to disclosure.

Having failed to demonstrate that 5 U.S.C. § 522(b)(7)—Exemption 7—justifies withholding and redaction of the documents that Plaintiffs seek, the FBI now asserts that it has properly withheld and redacted documents pursuant to 5 U.S.C. § 522(b)(5) (Exemption 5). That

1 exemption shields from disclosure documents and information covered by the attorney-client and
2 deliberative-process privileges. *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 979 (9th Cir.
3 2009) (internal quotation marks omitted) (deliberative-process privilege); *see also NLRB v. Sears,*
4 *Roebuck & Co.*, 421 U.S. 132, 154 (1975) (attorney-client privilege). Plaintiffs contest the
5 applicability of Exemption 5 to three categories of documents: Human Source Advisory Notices,
6 Frequently Asked Questions for Threat Assessments, and Draft Training FAQs. At issue now is
7 (1) whether attorney-client privilege relieves the FBI of its obligation to produce the Human
8 Source Advisory Notices; (2) whether attorney-client privilege applies to the entirety of the FAQs
9 for Threat Assessments, or whether portions can be redacted; and (3) whether the deliberative-
10 process privilege exempts from production the draft training FAQs. After the hearing, the FBI
11 submitted the Human Source Advisory Notices for *in camera* review.

12 In general, the Human Source Advisory Notices do not contain communications protected
13 by attorney-client privilege with one exception. One email dated November 26, 2003,¹ contains
14 detailed communications about an ongoing investigation, rather than generalized policy
15 statements. Accordingly, Exception 5 exempts from disclosure the redacted portion of that email.
16 The FBI's evidence is insufficiently specific to determine that attorney-client privilege applies to
17 the withheld or redacted information, and therefore the FBI has not established that the FAQs are
18 exempt from disclosure. Because the FBI has conceded that the draft training FAQs were not
19 predecisional and has not demonstrated that disclosure of the document would discourage frank
20 deliberation, the FBI may not use the deliberative-process privilege to withhold the draft training
21 FAQs.

22 II. BACKGROUND

23 Upon hearing reports that the FBI had been surveilling certain ethnic and religious
24 communities in Northern California, Plaintiffs became concerned that the FBI's practices were
25 impacting the civil liberties of those groups' members. In order to assess the impact of the FBI's
26 surveillance practices on the civil liberties of the targeted groups, Plaintiffs filed two FOIA
27

28 ¹ The document is Bates-stamped "MC-1396."

1 requests with the FBI. The first request sought records pertaining to the FBI's policies and
2 practices as to the use of informants; assessment practices; legal justifications for the
3 investigations and assessments; training materials regarding Islam, Muslim culture, and Muslim,
4 Arab, South Asian, and Middle Eastern communities; use of race, religion, ethnicity, language, or
5 national origin for law-enforcement purposes; the FBI Citizenship Academy; the FBI Junior Agent
6 Program; and domain management. Plaintiffs also requested records concerning the FBI's
7 investigation of mosques, Islamic centers, Muslim community centers, mosque members, Muslim
8 leaders, and imams; and the targets and outcomes of law-enforcement activity in Northern
9 California in comparison with the rest of the country.

10 Later, Plaintiffs filed a second FOIA request, seeking records pertaining to the FBI's
11 attempts to map racial and ethnic demographics, behaviors, and lifestyle characteristics. Included
12 among the FBI's policies and procedures that Plaintiffs sought were those regarding the type of
13 racial and ethnic information the FBI can collect; the collection of information and mapping of
14 ethnic businesses or facilities; the behavioral characteristics that the Domestic Investigations and
15 Operations Guide ("DIOG") classifies as "associated with a particular criminal or terrorist element
16 of an ethnic community"; and how the FBI used the collected racial and ethnic data. Plaintiffs
17 also demanded information about the data that the FBI collected and the maps that the FBI
18 created; the number of communities in Northern California that the FBI targeted; and descriptions
19 of the maps of Northern-Californian racial and ethnic communities.

20 The FBI did not produce the documents requested initially within the time period
21 prescribed by statute, and so Plaintiffs commenced this action. When the FBI did not disclose the
22 documents sought in Plaintiffs' second FOIA request, Plaintiffs amended their complaint to
23 incorporate a second FOIA claim. The parties mediated with the assistance of a magistrate judge
24 and agreed on a production schedule for the release of the remaining responsive documents. Since
25 that time, the FBI has released over 50,000 full or redacted pages of responsive records and
26 withheld approximately 47,794 records on the ground that those records are exempt from FOIA's
27 production requirements. To facilitate litigation about the applicability of the FOIA exemptions,
28 the parties agreed to provide Plaintiffs with descriptions of the withheld responsive documents and

1 detailed justifications for the application of the exemption. *See Vaughn v. Rosen*, 484 F.2d 820,
2 826-28 (D.C. Cir. 1973).

3 After Plaintiffs reviewed the FBI's *Vaughn* indexes, they agreed not to challenge the FBI's
4 application of Exemptions 1, 3, 4, 6, 8, and 9, but reserved the right to challenge other exemptions
5 and the adequacy of the FBI's *Vaughn* write-ups. The parties filed cross motions for summary
6 judgment regarding the propriety of the FBI's decision to withhold certain documents; the
7 sufficiency of the FBI's descriptions of the withheld and redacted materials; and the adequacy of
8 the FBI's explanations for withholding and redacting certain materials under 5 U.S.C. § 552(b)(7)
9 ("Exemption 7"). In March 2015, this Court agreed with Plaintiffs: the FBI may no longer
10 employ Exemption 7 to withhold documents because the FBI has not demonstrated that there is a
11 "rational nexus" between the particular documents withheld and the FBI's law-enforcement
12 activities.

13 Following the order regarding Exemption 7, the FBI filed a supplemental brief in support
14 of summary judgment, asserting that Exemptions 2 and 5 apply to certain information and
15 documents. 5 U.S.C. § 522(b)(2) ("Exemption 2), exempts from disclosure "matters that are . . .
16 related solely to the internal personnel rules and practices of an agency," and therefore permits the
17 withholding of the minimum passing test scores required in order for FBI employees to pass two
18 internal web-based tests. Plaintiffs do not contest the applicability of Exemption 2 to these
19 materials. Further, at this juncture, Plaintiffs do not challenge the FBI's redaction of portions of
20 the Electronic Communication on Intelligence Oversight Board Matters, but reserves the right to
21 challenge the redactions to this document after the FBI produces it. Pls.' Resp. to FBI's Suppl. Br.
22 at 9. The sole issue presently pending therefore is whether Exemption 5 applies to three categories
23 of documents and redactions: Human Source Advisory Notices; Frequently Asked Questions for
24 Threat Assessments, and Draft Training FAQs. Both parties move for summary judgment on that
25 question.

26 III. LEGAL STANDARD

27 Summary judgment is proper "if the movant shows that there is no genuine dispute as to
28 any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

1 The parties do not claim that there is a dispute of material fact, as is often true in FOIA cases. *See*
2 *Minier v. Cent. Intelligence Agency*, 88 F.3d 796, 800 (9th Cir. 1996). To determine which party
3 is entitled to summary judgment, the first step is to determine whether the FBI has met its burden
4 of showing that it has discharged fully its FOIA obligations. *Shannan v. I.R.S.*, 637 F. Supp. 2d
5 902, 912 (W.D. Wash. 2009). Next, the FBI has the burden of demonstrating that the undisclosed
6 information falls within one of the nine FOIA exemptions. *Id.* The final step is to determine
7 whether the FBI has satisfied its burden of establishing that “all reasonable segregable portions of
8 the document[s] have been segregated and disclosed.” *Pac. Fisheries, Inc. v. United States*, 539
9 F.3d 1143, 1148 (9th Cir. 2008); 5 U.S.C. § 522(a)(4)(B), (b). At this juncture, Plaintiffs do not
10 dispute that the FBI has discharged adequately its FOIA obligations, nor do the parties address the
11 segregability questions. Their dispute is therefore limited to whether the FBI’s invocation of
12 Exemption 5 is proper.

13 “FOIA ‘was enacted to facilitate public access to Government documents.’” *Lahr*, 569
14 F.3d at 973 (quoting *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)). Congress designed
15 FOIA “to pierce the veil of administrative secrecy and open agency action to the light of public
16 scrutiny.” *Ray*, 502 U.S. at 173 (internal quotation marks omitted). Consequently, there is a
17 “strong presumption in favor of disclosure,” *id.*, and “exemptions should be interpreted narrowly,”
18 *Lahr*, 569 F.3d at 973 (internal quotation marks omitted).

19 IV. DISCUSSION

20 FOIA does not require that the FBI disclose “inter-agency or intra-agency memorandums
21 or letters which would not be available by law to a party other than an agency in litigation with the
22 agency.” 5 U.S.C. § 522(b)(5). “Exemption 5 shields those documents, and only those
23 documents, normally privileged in the civil discovery context,” including documents covered by
24 attorney-client and deliberative-process privileges. *Lahr*, 569 F.3d at 979 (internal quotation
25 marks omitted) (deliberative-process privilege); *see also Sears*, 421 U.S. at 154 (attorney-client
26 privilege).

27 A. Attorney-Client Privilege

28 “The attorney-client privilege protects confidential communications from clients to their

1 attorneys made for the purpose of securing legal advice or services” and “communications from
2 attorneys to their clients” to the extent that “the communications rest on confidential information
3 obtained from the client.” *Tax Analysts v. Internal Revenue Servs.*, 117 F.3d 607, 618 (D.C. Cir.
4 1997) (internal citation and quotation marks omitted). Thus, between FBI officials and the
5 Bureau’s lawyers communications are privileged if they contain information communicated by the
6 attorney in confidence for the purpose of obtaining legal advice, the attorney was acting in her
7 capacity as a lawyer, the communications were related to the purpose of obtaining legal advice,
8 and the FBI did not waive attorney-client protection. *See United States v. Ruehle*, 583 F.3d 600,
9 607 (9th Cir. 2009). “The privilege does not exempt a document from disclosure simply because
10 the communication involves the government’s counsel.” *Elec. Privacy Info. Ctr. v. Dep’t of*
11 *Justice*, 584 F. Supp. 2d 65, 79 (D.D.C. 2008) (internal quotation marks omitted). “The privilege
12 protects only those disclosures necessary to obtain informed legal advice which might not have
13 been made absent the privilege” and “confidential information that involves or is about that
14 client.” *Id.* at 79.

15 **1. Human Source Advisory Notices**

16 The FBI has produced Human Source Advisory Notices with significant redactions that
17 render the documents unreadable. *See* R. 141-1, Kleine Decl. Ex. A. According to these
18 documents, the FBI distributes these advisory notices to numerous FBI listservs and “investigative
19 and administrative personnel.” *Id.* at 5. There are two parts to each advisory notice: a notice
20 section and a policy section. *See, e.g., id.* at 18. For the most part, the substance of both of these
21 sections is redacted. In the *Vaughn* index, the FBI explains that the redacted portions “contain[]
22 specific legal and procedural advice, including approval levels and requirements, interpretation of
23 law, source coordination and liaison with other agencies, and information on specific operational
24 techniques for operating sources—which are currently used in cases today.” R. 139-1 at 5, 2d
25 Suppl. Hardy Decl. Ex. II. The FBI contends that the advisory notices include “scenarios” that
26 “stem[] from questions raised to FBI Counsel on actual cases as to when particular investigative
27 techniques should be utilized.” *Id.* After the hearing on this matter, the FBI submitted unredacted
28 copies of the Human Advisory Notices for *in camera* review.

1 The bulk of the redacted portions of the Human Advisory Notices do not include
2 communications to the FBI's attorneys "for the purpose of securing primarily either (i) an opinion
3 on law or (ii) legal services or (iii) assistance in some legal proceeding." *In re Grand Jury*, 475
4 F.3d 1299, 1304 (D.C.Cir.2007) (internal quotation marks omitted). The notice section of the
5 Advisory Notices contains a short description of a situation agents may encounter in the field. The
6 descriptions are general and lack any specific information. The policy section provides a citation
7 to an FBI policy and brief analysis applying the language of the policy to the situation described in
8 the notice section. While the FBI attests that the substance of the Advisory Notices "stem[] from
9 questions raised to FBI Counsel," the Advisory Notices "are more akin to a 'resource' opinion
10 about the applicability of existing policy to a certain state of facts, like examples in a manual, to be
11 contrasted to a factual or strategic advice giving opinion." *Coastal States Gas Corp. v. Dep't of*
12 *Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

13 Only page MC-1396 of the submitted materials falls into the category of attorney-client
14 privileged communications. Unlike the generic descriptions in the Human Advisory Notices, this
15 email contains details about an asset, the assets location, and the reason for the communication.
16 This email is less like a resource opinion and contains fact-specific advice and communications,
17 and therefore Exemption 5 excludes from disclosure the redacted portions of the email.

18 Second, with the exception of page MC-1396, the FBI has not submitted evidence that
19 substantiates its claim that the communications were confidential in fact. Indeed, the wide
20 distribution of the Advisory Notices to all administrative and investigative personnel implies the
21 contrary. *See Nat'l Sec. Counselors*, 960 F. Supp. 2d at 194. Moreover, "[w]here a client is an
22 organization, including a government organization, the privilege extends 'no further than among
23 those members of the organization who are authorized to speak or act for the organization in
24 relation to the subject matter of the communication.'" *Shurtleff v. United States Env'tl. Prot.*
25 *Agency*, 991 F. Supp. 2d 1, 16 (D.D.C. 2013) (quoting *Coastal States Gas Corp. v. Dep't of*
26 *Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980)). The FBI has not submitted evidence to establish
27 that the people who received the Advisory Notices were authorized to speak or act on behalf of the
28 FBI.

1 The FBI has failed to establish, with the exception cited above, that the redacted portions
2 of the Advisory Notices include attorney-client-privileged information. Accordingly, the FBI's
3 motion for summary judgment is denied. The FBI shall produce unredacted copies of the Human
4 Advisory Notices except document MC-1396.

5 **2. FAQ for Threat Assessments**

6 The FBI has withheld entirely the FAQs for Threat Assessments. According to the FBI,
7 the FAQs advise FBI personnel about how to apply FBI policy to threat assessments. To justify
8 withholding the FAQs, the FBI states that these FAQs "encompass opinions given by" and
9 "consist[] of specific policy and procedural applications, advice, and guidance vetted through
10 and/or from" the FBI attorneys to FBI employees. R. 139-1 at 19, 2d Suppl. Hardy Decl. Ex. II.
11 The remainder of the entry in the *Vaughn* index concerning the FAQs merely defines attorney-
12 client privilege and asserts without more that it applies to this information without citing specific
13 facts. *See id.* at 19-20.

14 The FBI has failed to establish that attorney-client privilege shields the entirety of the
15 FAQs from disclosure for many of the same reasons the FBI failed to carry its burden with respect
16 to the redacted portions of the Advisory Notices. First, the FBI's evidence does not substantiate
17 the need to withhold the FAQs in their entirety because some portions of the document do not
18 appear to contain legal advice or confidential communications. Second, the FBI has not provided
19 sufficient information to determine whether the FAQs consist of advice about specific legal
20 questions and situations, or whether they clarify broadly applicable FBI policies. Finally, the FBI
21 has not provided information about who receives the FAQs and whether the recipients are
22 authorized to speak and act on behalf of the FBI. Thus, the FBI must produce the segregable
23 portions of the FAQs or provide more information about which portions contain attorney-client-
24 privileged information.

25 **B. Deliberative-Process Privilege**

26 The final document at issue is the FBI's draft training FAQs, which the FBI asserts is
27 shielded from disclosure by the deliberative-process privilege. That privilege shields from
28 disclosure "documents reflecting advisory opinions, recommendations and deliberations

1 comprising part of a process by which governmental decisions and policies are formulated.”
2 *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (internal
3 quotation marks omitted). To fall within the ambit of the deliberative-process privilege, the FBI
4 must demonstrate that the document is both “predecisional” and “deliberative.” *Lahr*, 569 F.3d at
5 979. “A document is predecisional if it was prepared in order to assist an agency decisionmaker in
6 arriving at his decision, rather than to support a decision already made.” *Petroleum Info. Corp. v.*
7 *U.S. Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (internal quotation marks omitted).
8 Documents that “reflect[] the give-and-take of the consultative process” are deliberative. *Id.*
9 (internal quotation marks omitted). Because the purpose of the privilege is to “protect[] open and
10 frank discussion among” employees of an agency who make decisions, *Klamath Water*, 532 U.S.
11 at 9, “the key question in Exemption 5 cases is whether the disclosure of materials would expose
12 an agency’s decision-making process in such a way as to discourage candid discussion within the
13 agency and thereby undermine the agency’s ability to perform its functions,” *Carter v. U.S. Dep’t*
14 *of Commerce*, 307 F.3d 1084, 1090 (9th Cir. 2002) (internal quotation marks and alteration
15 omitted).

16 According to the FBI, the draft FAQ exists in electronic form and consists of redline
17 comments concerning the substance and format of the document. R. 139 at 6, 2d Suppl. Hardy
18 Decl. ¶ 11. David Hardy, the FBI’s Record/Information Dissemination Section Chief, attests that
19 the FBI could not locate a “final” version of the document. *Id.* Hardy asserts in conclusory
20 fashion that the document “reflects the give-and-take process” and would chill future drafters of
21 similar documents from offering comments about the substance and format of the document. *See*
22 *id.* The FBI has not, however, offered specific, non-conclusory information about how the
23 drafters’ comments contributed or informed the decisionmaking process. More importantly, the
24 FBI concedes that the redline comments do not reflect debate about which policies apply or should
25 be adopted. FBI Reply Br. at 3. Instead, the FBI contends that the document is deliberative
26 because the redline comments reflect debate about “how to instruct or convey” the policies to FBI
27 special agents. *Id.* In other words, the FBI asserts that it has decided what to say, just not how to
28 say it.

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

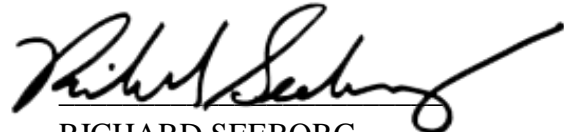
The deliberative-process privilege does apply, however, to documents that “explain[] . . . a decision already reached or a policy already adopted.” *Sears*, 421 U.S. at 153 n.19. The FBI has not contended that the draft FAQs include such quintessentially deliberative content as advice about whether to adopt or reject a policy. Nothing in the FBI’s evidence suggests that advice about whether a comma should be inserted, word choice, or phrasing would discourage members of the Bureau from providing candid advice about the pros and cons of adopting a policy or practice. Thus, the FBI has all but admitted that the document reflects a policy it has adopted, and therefore constitutes the FBI’s “working law.” *See id.* at 152-53. “Working law” is not exempt from disclosure. *Id.* The FBI must therefore produce the draft FAQs.

V. CONCLUSION

The FBI has not carried its burden to demonstrate that Exemption 5 justifies redactions of the Human Source Advisory Notices, or the complete withholding of the FAQs for Threat Assessments and the draft training FAQs. Accordingly, the FBI has thirty (30) days from the date of this order to produce unredacted copies of the Human Advisory Notices, the FAQs for Threat Assessments and draft training FAQs. The redacted portions of page MC-1396 are exempt from disclosure.

IT IS SO ORDERED.

Dated: November 17, 2015


RICHARD SEEBORG
United States District Judge