

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PUEBLO OF ZUNI, on behalf of itself)	
and all others similarly situated,)	
)	
Pueblo,)	
)	
v.)	
)	
UNITED STATES OF AMERICA; et al.,)	Case No. CIV 01-1046 WJ/WPL
)	Filed Electronically
Defendants.)	
_____)	

PLAINTIFF’S RULE 37(a)(2)(B) MOTION TO COMPEL DISCOVERY

Pursuant to Rule 37(a)(2)(B) of the Federal Rules of Civil Procedure and D.N.M.LR-Civ. 37.1 of the Local Rules, Plaintiff Pueblo of Zuni, by and through undersigned counsel, hereby moves for an Order compelling disclosure of two documents withheld from the Defendants’ production and logged in a privilege log as DEF29715 and DEF29716. *See* Exh. 2 (Discovery Responses) and Exh. 3 (November 23, 2005 Privilege Log).¹ The Pueblo respectfully directs the Court to Dkt. 137, pp. 2-3 for a recitation of the nature of this case and current status of class discovery proceedings.

The disagreements prompting this Motion are as follows: First, the Defendants have claimed “deliberative process privilege” and refused to produce “[s]ample language provided to Area Offices for inclusion in contracts and compacts in 1997.” Exh. 3 (listing DEF29715). In response to the Pueblo’s request for more information, the Defendants stated:

¹ Pueblo’s counsel has in good faith conferred with Defendants’ counsel in an attempt to resolve these matters without court intervention. *See* Exh. 4 (Certificate of counsel). The Motion is filed within the extended period stipulated to by the parties in order to allow time to meet and confer. *See* Exh. 5 (Stipulation).

I have learned from Ron Demaray that, although he is not certain, he believes that this document was prepared for internal discussion between the Office of Tribal Programs and the Office of the General Counsel and was not more widely circulated to IHS Area Offices. And although he is not sure, he does not believe that it was used in any contracts or compacts.

Exh. 6 (Jan. 5, 2006 letter). The Defendants' 'guesses' about the background on DEF29715 do not meet their high burden to prove that the "sample language" was generated for the purpose of developing IHS policies, *i.e.*, that it is both predecisional and deliberative. *EPA v. Mink*, 410 U.S. 73, 88 (1973); *Hunt v. U.S. Marine Corps.*, 935 F.Supp. 46, 51 (D.D.C. 1996) (noting the agency's burden); *Providence Journal Co. v. U.S. Dept. of Army*, 981 F.2d 552, 557, 559 (1st Cir. 1992) (discussing at length these two prongs). Alternatively, the Pueblo can overcome the qualified deliberative process privilege, *see In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997), because (1) "sample language" is highly relevant to the Defendants' common practice of applying non-binding policies on all tribal contractors during the 1990's that resulted in class-wide underfunding of contract support costs ("CSC"); (2) the Pueblo has no other way of obtaining proof that IHS used "sample language" other than through disclosure by IHS; and (3) Mr. Demaray stated in his deposition that he was not aware of when IHS began developing "common language," Exh. 7 (Demaray Dep. 55-56), yet the description of DEF29715 (authored by Mr. Demaray) suggests that it was at least as far back as 1997.

Second, the Defendants have refused to produce an undated "typed note on plain paper discussing whether IHS should seek/support legislation related to contract support costs," claiming deliberative process privilege, attorney-client privilege, and work product privilege. Exh. 3 (listing DEF29716). While the note apparently contains a "recitation by Mr. Demaray of his understanding

of the Office of General Counsel’s advice on the meaning of current appropriations,” the Defendants recognize that “this recitation could be redacted.” Exh. 6 (Jan. 5, 2006 letter). The attorney-client privilege does not apply to the unredacted portion of DEF29716.²

The deliberative process privilege does not apply because the Defendants have not produced any evidence that the note was created for the purpose of (or actually used for) developing IHS policy. *Mink*, 410 U.S. at 88. Somewhat inconsistently, the Defendants state that the note discusses “whether IHS should seek/support legislation related to contract support costs,” Exh. 3, but also that “Mr. Demaray believes the note was written in response to proposed congressional language.” Exh. 6. If the Defendants are not sure about the purpose or use of the note, the Pueblo and the Court should not be required to accept their guess. IHS must prove both the “predecisional” and “deliberative” prongs of this privilege. *Supra* 2.

The Defendants’ “mere allegation that the work-product doctrine applies is insufficient” to meet the Defendants’ burden of proof. *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266-67 (10th Cir. 1995). The work-product doctrine, only extends to documents prepared in anticipation of or concerning litigation. *In re Grand Jury Proceedings*, 727 F.2d 941, 945 (10th Cir. 1984); Fed. R. Civ. Proc. 26(b)(3). Nothing in the privilege log or in the Defendants’ follow-up letter establishes that Mr. Demaray’s note concerns litigation, let alone contains mental impressions or legal strategies

² The Defendants have failed to provide sufficient information for the Pueblo to determine whether Mr. Demaray’s “recitation” would even qualify as a “‘confidential communication[] by a client to an attorney made in order to obtain legal assistance’ from the attorney in his capacity as legal advisor.” *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 278 (10th Cir. 1983) (citations omitted). The Pueblo requests that the Court conduct an *in camera* review to determine whether redaction is necessary at all.

concerning the litigation. The Defendants stretch the protection much to thin by suggesting that all CSC legislative issues that IHS considered behind closed doors since 1996 (or even as far back as 1990) are protected work product simply because CSC litigation was pending.

Lastly, both the work-product privilege and deliberative process privileges are qualified privileges that can be overcome. Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997). Here, (1) the discussion of “whether IHS should seek/support legislation” could show that IHS undertook a practice applicable to all Tribal contractors of failing to request sufficient appropriations, or requesting caps on CSC appropriation levels, or lobbying for an appropriations rider to try to retroactively cap earlier lump-sum CSC appropriation levels (*i.e.*, “Section 314”),³ and then positioning itself behind common legal defenses concerning the nature of its obligations under the ISDA and the meaning of the relevant appropriations Acts; (2) the Pueblo has no other way of determining whether IHS lobbied for nationwide legislation to limit the amount of funds legally or practically available to pay CSC’s to ISDA contractors; and (3) Mr. Demaray and Mr. Black have previously asserted that IHS did not initiate an effort to cap available CSC appropriations or to enact the “Section 314” rider, though the privilege log’s description suggests otherwise. Exh. 7 (Demaray Dep. 221-223); Exh. 8 (Black Dep. 135-137).

For the foregoing reasons, the Pueblo respectfully requests that this Court grant this Motion to Compel Discovery. The Court should also order that the Pueblo be allowed to re-depose Mr.

³ Defendants fail to disclose the “legislation related to [CSC]s” at issue in DEF29716.

Demaray about these newly disclosed documents if the Pueblo deems necessary. Additionally, the Pueblo respectfully requests that the Court award it attorneys' fees pursuant to Rule 37(a)(4)(A), which will be documented upon completion of briefing of this Motion. A proposed Order is included herein as Exhibit 1.

Respectfully submitted this 9th day of January, 2006.

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & MIELKE, LLP

/s/ Melanie B. Osborne

By: _____

Lloyd B. Miller
David C. Mielke
Gary F. Brownell
Arthur Lazarus, Jr., P.C.
Richard D. Monkman
Melanie B. Osborne
500 Marquette Avenue, N.W., Suite 1310
Albuquerque, NM 87102
(Tel) (505) 247-0147

CERTIFICATE OF SERVICE

I hereby certify that I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the PLAINTIFF'S RULE 37(a)(2)(B) MOTION TO COMPEL DISCOVERY, to the following attorneys of record (or their co-counsel) this 9th day of January, 2006:

Rachel J. Hines, Esq.
rachel.hines@usdoj.gov

Julia J. Yoo, Esq.
julia.yoo@usdoj.gov
/s/ Lindy O. Bockhorst

By: _____
Lindy O. Bockhorst