IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN McKINLEY, Plaintiff, v. FEDERAL HOUSING FINANCE AGENCY, Defendant.	)	Civil Action No. 10-cv-01165 (HHK)

PLAINTIFF'S REPLY IN SUPPORT OF ITS
<u>CROSS-MOTION FOR SUMMARY JUDGMENT</u>

Plaintiff Vern McKinley, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this reply in support of his cross-motion for summary judgment. As grounds thereof, Plaintiff states as follows:

I. Introduction.

Plaintiff sent a Freedom of Information Act request to Defendant Federal Housing Finance Agency seeking information about why Defendant chose to place Fannie Mae and Freddie Mac into conservatorship. Defendant has searched for and located two memoranda – totaling thirteen pages – which were prepared to assist senior policymakers with analyzing the various policy options of receivership and conservatorship. Defendant now withholds these two documents pursuant to unsubstantiated claims of the attorney work product doctrine and the deliberative process privilege.

II. Argument.

A. Defendant Improperly Applies the Attorney Work Product Doctrine.

Defendant asserts that "Documents 2 and 3 were created for meetings with senior executives at FHFA to discuss various policy options that the agency could take with regard to [Fannie Mae and Freddie Mac] and were provided to these senior policymakers in order to assist their decision making." Reply in Support of Defendant's Summary Judgment Motion and in Opposition to Plaintiff's Motion for Summary Judgment ("Def's Reply") at 11. Yet, Defendant also asserts that "although portions of these documents are focused on assisting policymakers in their policy decision-making process, the documents themselves were prepared due to reasonably anticipated litigation resulting from any of the contemplated courses of action." Def's Reply at 5.

Defendant cannot have it both ways. The documents either were prepared to assist policy makers or they were prepared in anticipation of litigation. Based on Defendant's own description of the documents, it is clear that the primary purpose of the documents was to assist policymakers in their policy decision making process. *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment at 7-8.

Moreover, the possibility of a legal challenge exists with almost every decision made by a government agency. It is not unique to this particular decision that Fannie Mae and Freddie Mac "had a statutory right to bring a legal challenge." Def's Reply at 5. If that were the standard for withholding documents under the attorney work product doctrine, then no document that happened to be prepared by, or at the direction of, an attorney would be subject to disclosure. Government agencies would have limitless power to withhold responsive documents.

Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980) ("The mere fact that [documents] deal with specific factual situations is not sufficient; if an agency were entitled to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated.") Instead, it has been held repeatedly that "[t]he work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest." *Coastal States*, 617 F.2d at 864 (D.C. Cir. 1980) (*quoting Jordan v. U.S. Department of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978)). Defendant is not authorized to withhold the two documents simply because they were prepared by attorneys. Because Defendant's claim of attorney work product is too broad, Document Nos. 2 and 3 must be produced

B. Defendant Improperly Applies the Deliberative Process Privilege.

Instead of demonstrating that Plaintiff is allegedly asking the Court to apply an incorrect legal standard, Defendant merely asserts that Plaintiff is wrong. Although Judge Huvelle may have held that, under the deliberative process privilege, a government agency is not required to show that the release of documents would harm the decision making process (*McKinley v. FDIC*, No. 09-1263 (D.D.C. Sept. 29, 2010)), that specific ruling currently is on appeal. *McKinley v. Board of Governors of the Federal Reserve System*, No. 10-5353 (D.C. Cir.).

As Plaintiff established in his opening brief, the law of the Circuit is clear. For documents to be withheld pursuant to the deliberative process privilege, a government agency must demonstrate that the documents are predecisional and deliberative. *Horowitz v. Peace Corps*., 428 F.3d 271, 276 (D.C. Cir. 2005); *see also, Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010). In the instant matter, it is undisputed that the two documents are predecisional. The issue is whether the two documents are deliberative in nature. To determine whether a document is deliberative, courts must ask "whether the disclosure of [the document] would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Horowitz*, 428 F.3d at 276 (*quoting Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

Defendant's argument fails to address twenty-four years of binding precedent in the D.C. Circuit. In his opening brief, Plaintiff explained how the deliberative process privilege has evolved over the years to prohibit a government agency from withholding documents by simply asserting that those documents are "deliberative." Since 1987, it has been clear that a government agency must show that the release of the withheld documents would cause harm to the agency's decision making process. Because Defendant has not demonstrated that the disclosure of Document Nos. 2 and 3 "would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions," its attempted assertion of the deliberative process privilege fails and the documents must be produced.

C. *In Camera* Review of the Withheld Documents Is Appropriate.

For Defendant to withhold Document Nos. 2 and 3 pursuant to the deliberative process privilege, it must show that the release of these documents would harm Defendant's decision making process. Defendant failed to make this showing. With respect to the attorney work product doctrine, the parties dispute the content of the documents. Based on Defendant's own description, the documents are not attorney work product, but instead were prepared to assist policymakers with their decision-making. Yet, Defendant argues that the documents are protected from disclosure by the attorney work product doctrine. Given this discrepancy between Defendant's description of the documents and its own legal argument, *in camera* review of the two documents – which total only thirteen pages – is appropriate because it may assist the Court in assessing the content of these documents. *Quinon & Strafer v. Federal Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. Cir. 1996) ("[W]hen the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents, *in camera* review may be more appropriate."). At a minimum, Plaintiff requests that the Court conduct an *in camera* review of the two documents.

III. Conclusion.

For the reasons set forth in Plaintiff's opening memorandum and the additional reasons set forth above, Defendant's motion for summary judgment should be denied, Plaintiff's cross-motion for summary judgment should be granted, and Defendant should be compelled to produce Document Nos. 2 and 3.

Dated: February 2, 2011

Respectfully submitted,

Paul J. Orfanedes (D.C. Bar No. 429716)

/s/ Michael Bekesha
Michael Bekesha (D.C. Bar No. 995749)
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Attorney for Plaintiff