

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

INSTITUTE FOR FISHERIES
RESOURCES, et al.,

Plaintiffs,

v.

SYLVIA MATHEWS BURWELL, et al.,

Defendants.

Case No. 16-cv-01574-VC

**ORDER GRANTING MOTION TO
COMPEL COMPLETION OF THE
ADMINISTRATIVE RECORD**

Re: Dkt. No. 75

A complete administrative record includes "all documents and materials directly or indirectly considered by agency decision-makers." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis omitted). It is obvious that in many cases internal comments, draft reports, inter- or intra-agency emails, revisions, memoranda, or meeting notes will inform an agency's final decision. Therefore, the government is wrong to assert that these types of materials, as a categorical matter, should be excluded from the universe of materials "directly or indirectly considered by agency decision-makers."

Of course, these types of materials could be protected from disclosure by the deliberative process privilege. *See F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). But the scope of the privilege doesn't define the scope of the material directly or indirectly considered. If a privilege applies, the proper strategy isn't pretending the protected material wasn't considered, but withholding or redacting the protected material and then logging the privilege. *See, e.g., People of State of Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, No. C05-03508 EDL, 2006 WL 708914, at *3 (N.D. Cal. Mar. 16, 2006). *But see, e.g., Oceana, Inc. v. Pritzker*, No. CV 15-1220 (ESH), 2016 WL 6581169, at *5-7 (D.D.C. Nov. 4, 2016).

Given the government's reliance on an overly narrow understanding of the universe of materials that may need to be included in the administrative record, its failure to produce a full privilege log, and its concession that at least one document was inadvertently omitted from the record, the plaintiffs have met their burden to overcome the presumption that the administrative record is complete. *See, e.g., Gill v. Dep't of Justice*, No. 14-CV-03120-RS (KAW), 2015 WL 9258075, at *6 (N.D. Cal. Dec. 18, 2015). The plaintiffs' motion is therefore granted, and the government is ordered to complete the administrative record and/or produce a log of documents withheld from the record on privilege grounds within 30 days.

The plaintiffs have leave to conduct appropriate third-party discovery on their ESA claim. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011); Order Granting Motion to Dismiss (Dkt. No. 66) at 5 n.1.

IT IS SO ORDERED.

Dated: January 10, 2017



VINCE CHHABRIA
United States District Judge