IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff,	)	Case No. 1:19-cv-150
	)	
vs.	)	**ORDER**
	)	
United States of America,	)	
	)	
Defendant.	)	

Plaintiff State of North Dakota moves to compel production of documents which defendant United States of America withheld on the basis of privilege. (Doc. 187). In its motion, North Dakota argues the United States' privilege log does not comply with Rule 26 and asserts documents in three categories were improperly withheld. The court directed North Dakota to identify representative documents from each category for in camera review and permitted the United States to identify a like number of documents. For the reasons discussed herein, North Dakota's motion is granted in part and denied in part.

Background

North Dakota filed its complaint against the United States on July 18, 2019, alleging employees of the United States Army Corps of Engineers (USACE or Corps) and other federal employees committed various torts by inviting, enabling, and encouraging protestors of the Dakota Access Pipeline (DAPL) to engage in dangerous and illegal conduct on federal lands. More specifically, North Dakota claims federal employees' actions and inactions during eight months in 2016-17—when several thousand persons engaged in protest activity against construction of the DAPL in Morton County, North

Dakota—resulted in North Dakota incurring costs of law enforcement time and first responder time.

North Dakota brought its claims under the Federal Tort Claims Act (FTCA) and seeks $38,005,071.66 in damages. On October 19, 2020, after a motion to dismiss for lack of jurisdiction was granted in part and denied in part, the United States filed its answer. A few weeks later, on November 6, 2020, this court entered a scheduling order based on the parties' agreement. (Doc. 52). The scheduling order recognized the parties "reciprocal duty" to produce a privilege log that described each document withheld on the basis of privilege and the justification for each privilege claim. Id. at 7. A subsequent stipulation, adopted by the court, clarified privilege log entries for withheld emails "may identify the author, recipient(s), subject, dates and times." (Doc. 61, p. 13). Also, if an email includes both privileged and non-privileged communications, the non-privileged communications must be produced while the privileged communications may be redacted. Id. at 13-14.

On December 10, 2021, the United States served its first privilege log. The United States identified 1,068 withheld documents on its privilege log, most of which were emails withheld on the basis of the attorney-client privilege or the work product doctrine. (Doc. 187-2). For each withheld email, the log disclosed (1) the email's subject, (2) the date sent, (3) the sender, (4) the recipient, (5) any individuals copied or blind copied, (5) whether the document was partially redacted or withheld in full, and (6) the privilege asserted and its asserted justification. Id.

On January 14, 2022, in response to questions from North Dakota, the United States provided additional information regarding thirty individuals identified on the

privilege log as senders or recipients of documents asserted to be privileged. (Doc. 198-2). On April 24, 2022, North Dakota sent additional questions to the United States regarding certain privilege log entries. Unable to resolve the dispute in conferral, North Dakota raised the issue during an April 28, 2022 status conference, and the court authorized North Dakota to file a motion to compel. (Doc. 182, pp. 7-8).

In its motion, North Dakota asserted documents in three categories are protected by neither the attorney-client privilege nor the work product doctrine:
(1) communications where counsel was included in an email chain but did not respond, (2) communications between non-attorneys, and (3) communications not prepared by counsel. (Doc. 189, p. 4). Shortly after North Dakota filed its motion, the court ordered in camera review and directed North Dakota to identify representative documents from each category and for the United States to provide those documents ex parte.[1] (Doc. 190). The United States was permitted to identify additional documents for in camera review. Id. Altogether, twenty-eight documents were submitted to the court for in camera review. The court has thoroughly reviewed each of those documents.

Law and Discussion

1. Governing Law

The court has discretion to resolve discovery disputes. See Corkrean v. Drake Univ., No. 421CV00336RGESHL, 2022 WL 18632, at *2 (S.D. Iowa Jan. 3, 2022). Federal Rule of Civil Procedure 26(b)(1) permits discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of

[1] In its motion, North Dakota requested the court conduct in camera review of the documents it identified. (Doc. 189, p. 19). Because the court ordered a more circumscribed review, that request is moot.

the case." For documents withheld on the basis of privilege, the withholding party must "expressly make the claim" and "describe the nature of the documents." Fed. R. Civ. P. 26(b)(5)(a). The withholding party—here, the United States—bears the burden of establishing privilege. Corkrean, 2022 WL 18632, at *2.

Under Rule 37(a)(1), a party may move to compel discovery, including a certification the parties conferred in good faith to strive to resolve their dispute without court action. Fed. R. Civ. P. 37(a)(1). Local rules similarly state that "[t]he parties may not file a discovery motion . . . until the parties have conferred . . . to resolve the dispute without involving the court." D.N.D. Civ. L. R. 37.1. If this conferral does not resolve the issue, the parties "must participate[ ] in a telephonic conference with the assigned magistrate judge" before filing a motion to compel. Id. The parties satisfied Rule 37.1 before filing this motion.

Because North Dakota brought its claims under a federal statute, federal law governs application of both the attorney-client privilege and the work product doctrine. Regarding the attorney-client privilege, Federal Rule of Evidence 501 provides "[t]he common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege." Rule 501 also states that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." The FTCA, though a federal statute, relies on state substantive tort law as the basis of liability. See Tolbert v. Gallup Indian Med. Ctr., 555 F. Supp. 3d 1207, 1224 (D.N.M. 2021) (stating under the FTCA, "the United States' liability is coextensive with that of private individuals under the respective states' law."). Even so, federal law governs application of the attorney-client privilege because "where a federal court

chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision . . . and state privilege law would not apply." Id. at 1245 (quoting Fed. R. Evid. 501 advisory committee's note to 1974 amendment).

A. The Attorney-Client Privilege

The attorney-client privilege protects "confidential communications between a client and her attorney made for the purpose of facilitating the rendition of legal services to the client." United States v. Yielding, 657 F.3d 688, 707 (8th Cir. 2011). In other words, the privilege protects both "the giving of professional advice to those who can act on it" and "the clients giving of information to the lawyer to enable [the lawyer] to give sound and informed service." Corkrean, 2022 WL 18632, at *2 (quoting Upjohn Co. v. United States, 449 U.S. 383, 386 (1981)). For a communication to be protected, it must be (1) between an attorney and client, (2) confidential, and (3) for the purposes of obtaining legal services or advice. See Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., No. 15-CV-3183 (ADM/LIB), 2017 WL 9325027, at *4 (D. Minn. May 5, 2017).

Important here, the "client" in the attorney-client relationship may be an organization—including a government agency. United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011) ("The objectives of the attorney-client privilege apply to governmental clients."). Applying the attorney-client privilege to government agencies encourages "governmental attorneys to respond with frank, candid advice." North Dakota v. United States, 64 F. Supp. 3d 1314, 1342 (D.N.D. 2014). That said, the attorney-client privilege applies "only where necessary to achieve its purpose." Fisher v. United States, 425 U.S. 391, 403 (1976).

At a minimum, to be protected by the attorney-client privilege, a communication must be between an attorney and client, confidential, and for the purposes of obtaining legal advice. But the parties offer different tests for determining whether the attorney-client privilege applies. North Dakota argues the five-part test articulated by the Eighth Circuit in Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) applies whenever the client is an organization. (Doc. 189, p. 7 n.4). The United States responds that Diversified addressed factors not relevant to this case and thus the five-part test need not be applied. (Doc. 198, p. 14). To account for issues of waiver of the privilege in the organizational context, the Diversified test considers factors addressing "the circumstances in which employee communications can be classified as the corporate client's communications." Diversified, 572 F.2d at 608. Accordingly, the court will address the application of Diversified when addressing waiver of the privilege.

B. Work Product Doctrine

The work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3). Rule 26(b)(3) protects two types of work product—ordinary work product and opinion work product. Ordinary work product "includes raw factual information" gathered in anticipation of litigation. Baker v. Gen. Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000). Ordinary work product is discoverable only upon a showing of "substantial need for the materials" and inability to obtain a substantial equivalent without "undue hardship." Fed. R. Civ. P. 26(b)(3). Opinion work product is defined as the "mental impressions, conclusions, opinions, or legal theories of a party's attorney." Id. Opinion

work product "enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances."[2] Baker, 209 F.3d at 1054.

For a document to be classified as work product, it must have been prepared "in anticipation of litigation." Fed. R. Civ. P. 26(b)(3). The test of whether a document was prepared in anticipation of litigation is whether "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Diversified, 572 F.2d at 604. But, even if litigation is a prospect, "there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation." Id. In the Eighth Circuit, the work product doctrine extends to documents prepared in anticipation of unrelated, terminated litigation. See In re Murphy, 560 F.2d 326, 334 (8th Cir. 1977) ("The work product privilege would be attenuated if it were limited to documents that were prepared in the case for which discovery is sought.").

2. Review of Documents

As stated above, North Dakota asserts the United States claims privilege over documents in three categories which are protected by neither the attorney-client privilege nor work product doctrine. (Doc. 189, p. 4). After the court's order directing in camera review, North Dakota selected twenty representative documents for in camera review: six documents from category one, five documents from categories two and three, and four documents asserted to be "so heavily redacted no judgment can be made about Defendant's privilege claims." (Doc. 197, p. 2).

[2] Those rare circumstances, such as an "attorney engaged in illegal conduct or fraud," are not relevant here. See Baker, 209 F.3d at 1054.

The first two categories include only documents the United States withheld on the basis of the attorney-client privilege. North Dakota describes documents in the first category as containing "[c]ommunications where counsel was included in an email chain but did not respond." (Doc. 189, p. 4). North Dakota argues those documents are unprotected because "it is difficult to identify any explicit request for legal advice" and, even though an attorney may have been copied, "rarely has the attorney ever provided a response." Id. at 9. The United States labels this group of documents as "requests for legal advice" and asserts the communications "were made to lawyers acting in a legal capacity." (Doc. 198, p. 8). North Dakota identifies the second category as "[c]ommunication between non-attorneys" and asserts those documents appear to be "routine communications among agency employees" not protected by the attorney-client privilege. (Doc. 189, pp. 4, 12). The United States characterizes the documents as containing "communications among non-attorneys repeating legal advice," which "repeat[ ] advice provided by attorneys or discuss[ ] review provided by attorneys." (Doc. 198, p. 11). Because categories one and two share overlapping considerations, the court addresses them together.

Two principles are particularly relevant to the court's consideration of the category one and two documents. First, to be privileged, the communication must be made "for the purpose of securing legal advice." Martinez v. Cnty. of Antelope, Neb., No. 4:15CV3064, 2016 WL 3248241, at *7 (D. Neb. June 13, 2016), objections overruled, No. 4:15-CV-3064, 2016 WL 4094864 (D. Neb. Aug. 1, 2016). In the Eighth Circuit, "a matter committed to a professional legal adviser" is presumed to be made for the purpose of securing legal advice absent a clear showing to the contrary. See Diversified,

572 F.2d at 609. That said, attorney-client communications devoid of any purpose to secure legal advice are not privileged. See Bartholomew v. Avalon Cap. Grp., Inc., 278 F.R.D. 441, 448 (D. Minn. 2011) ("It is well established that a party cannot make a communication privileged simply by including an attorney in the communication."). The presumption of privilege is often applied when a communication contains an apparent mix of legal and non-legal advice. See In re Bieter Co., 16 F.3d 929, 939 n.9 (8th Cir. 1994) (noting presumption applies to communications involving political, business, and land use topics, as well as legal matters); see also Williams v. Herron, No. 8:09CV201, 2011 WL 555127, at *6 (D. Neb. Feb. 8, 2011) (applying presumption to communications involving facts relating to both an internal investigation and legal advice).

A second important principle is that a communication is privileged only if its disclosure would "directly or inferentially" reveal the content of a confidential, attorney-client communication. See Diversified, 572 F.2d at 611 (determining corporate minutes would reveal contents of privileged communications). Thus, neither the "fact a legal consultation took place" nor its "broad subject matter" are protected by the attorney-client privilege. Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 100 (2013). When such general information is disclosed in compliance with Rule 26 and does not reveal—directly or inferentially—the actual content of a confidential communication it is not protected by privilege. See 1 Paul Rice, Attorney-Client Privilege in the United States § 6:22 (2021) ("The general nature of the services performed must be identified with sufficient particularity to permit an assessment of the substantive nature of the activity, but not so specific that the substance of confidential communications are directly or indirectly revealed."). Communications not between an attorney and client, like a

client's notes or a corporation's meeting minutes, may be protected to the extent they "reflect the substance" of an attorney-client communication. Bailey v. Oakwood Healthcare, Inc., No. 15-11799, 2017 WL 427714, at *1 (E.D. Mich. Feb. 1, 2017).

Applying these principles, a communication claimed to be a request for legal advice must be made "for the purpose of securing legal advice" and not for another purpose. See Oasis Int'l Waters, 110 Fed. Cl. at 98. The request must be sufficiently detailed such that it goes beyond revealing the "fact a legal consultation took place" and its "broad subject matter." Id. Similarly, a communication among non-attorneys that demonstrates "[an] intent to seek legal advice about a particular issue" may be privileged because it directly or inferentially reveals the content of a later client to attorney communication. United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1077 (N.D. Cal. 2002). But a mere "passing reference to the possibility of speaking with an attorney" would not be privileged because it does not directly or inferentially reveal the content of a confidential communication. Id. For example, a cursory request that an attorney review a document neither establishes that the purpose of the communication was to secure legal advice nor reveals the content of a confidential communication. See Sanimax USA, LLC v. City of S. St. Paul, No. 20-CV-1210 SRN/ECW, 2021 WL 4846364, at *10 (D. Minn. Oct. 18, 2021) ("While legal counsel is copied on the email, and the email invites questions or comments, [the sender] was not seeking advice regarding any legal issue.").

The same principles apply to the repetition of legal advice. Information that directly or inferentially reveals the content of a confidential communication is privileged. Thus, agents of a client—here, government officials—"may discuss legal

advice sought and given without losing the privilege, even when an attorney is not an author or recipient of the communication." In re 3M Combat Arms Earplug Prod. Liab. Litig., No. 3:19-MD-2885, 2020 WL 1321522, at *5 (N.D. Fla. Mar. 20, 2020). That said, vague communications repeating legal advice that reveal only the "fact a legal consultation took place" or the "broad subject matter" of a confidential communication are not privileged. See Oasis Int'l Waters, 110 Fed. Cl. at 100 (2013).

A. Category One Documents—Requests for Legal Advice

Document 6: The privilege log identifies Document 6 as an "[e]mail chain among USACE individuals, reflecting request for legal advice regarding draft request for federal law enforcement assistance." (Doc. 187-2, p. 3). General Scott Spellmon sent the email to a number of officials including an attorney for the Corps, Jason DeRosa. Id. The redacted portion of the email contains a request from General Spellmon that a Corps official confer with DeRosa. Because the redacted portion of the email reveals only the "fact a legal consultation took place" and its "broad subject matter," the email is not protected by the attorney-client privilege. See Oasis Int'l Waters, 110 Fed. Cl. at 100.

Document 25: According to the privilege log, Document 25 is an email "reflecting request for legal advice in the form of review of draft response to Chairman Frazier's letter." (Doc. 187-2, p. 7). The redacted portion of the email contains a general request for comments from Colonel John Henderson to several Corps officials, including at least one Corps attorney. While an attorney was a recipient, the email contains no specific request for legal advice, and thus the United States does not establish the communication was made for the purpose of securing legal advice. See Sanimax, 2021

WL 4846364, at *10 ("While legal counsel is copied on the email, and the email invites questions or comments, [the sender] was not seeking advice regarding any legal issue.").

Document 106: The privilege log describes Document 106 as emails relating to a "request for legal advice regarding review of draft newsletter." (Doc. 187-2, p. 26). The redacted portion of the email contains a request that a Corps attorney review a document before distribution. But the request is only "a passing reference to the possibility of speaking with an attorney," and the document therefore is not privileged. See Corkrean, 2022 WL 18632, at *4.

Document 135: According to the privilege log, Document 135 is an email reflecting a "request for legal advice regarding response to trespassing on federal land." (Doc. 187-2, p. 32). The redacted portion of the email is addressed to a Corps attorney and contains a request for legal advice concerning specific matters. Additional emails provided by the United States include the attorney's response to this request. See id. at 153 (Ref. 632).[3] Disclosure of the redacted portion of the email would directly reveal the content of a confidential communication beyond its broad subject matter. Thus, the redacted portion of the document is privileged.

Document 251: According to the privilege log, Document 251 is a request for legal advice "in the form of review and comment of draft right of entry and map for USACE-managed lands." Id. at 61. This communication invites an attorney for the Corps along with other, non-attorney officials, to edit a draft document. Like Document 25, the email contains no specific request for legal advice and thus does not establish it was written

[3] As used in this order, "Ref." denotes the reference number assigned to a document on the United States' December 10, 2021 privilege log.

for the purpose of securing legal advice. See Sanimax, 2021 WL 4846364, at *10 ("While legal counsel is copied on the email, and the email invites questions or comments, [the sender] was not seeking advice regarding any legal issue."). For those reasons, Document 251 is not privileged.

Document 428: According to the privilege log, Document 428 is an email containing a request for "legal advice regarding status of special use permit." (Doc. 187-2, p. 111). The redacted portion of the email contains a question to a Corps attorney about legal issues concerning a special use permit. Id. Additional emails provided by the United States include the attorney's detailed response and additional questions from Corps officials. See id. at 41 (Ref. 169). Thus, the redacted portion of the document is privileged.

B. Category Two Documents—Repetition of Legal Advice

Document 94: The privilege log describes Document 94 as an email "reflecting legal advice from DOJ regarding community support resources." Id. at 21. The redacted portion of the email relays an offer of assistance from the Department of Justice's "Customer Relations" service.[4] It is unclear whether the Department's "Customer Relations" service provided legal advice. Even if it did, the redacted portion of the document reveals only the fact a legal consultation might have occurred, not the content

[4] The court assumes the email's reference to the Department of Justice's "Customer Relations" service was intended to refer to the Department's "Community Relations" service, which aids "communities facing conflict based on actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion, or disability." See Department of Justice, https://www.justice.gov/crs/about (last visited July 8, 2022).

of any confidential communication. See Oasis Int'l Waters, 110 Fed. Cl. at 100 (2013). Thus, the redacted portion is not privileged.

Document 166: According to the privilege log, Document 166 is an email "reflecting request for legal advice and advice provided by counsel, regarding jurisdictional issues and archaeological site visit." (Doc. 187-2, p. 39). In the email, General Spellmon references information he learned through counsel and identifies potential legal issues. Disclosure of the redacted portion would reveal, directly and inferentially, confidential communications between General Spellmon and Corps attorneys. Thus, the redacted portion of this document is privileged.

Document 194: According to the privilege log, Document 194 is an email "incorporating and reflecting legal advice regarding jurisdiction and law enforcement authority on federal land." Id. at 49. The redacted portion of Document 194 is a summary and direct quotation of a detailed legal opinion from the Corps' chief counsel. See id. at 47 (Ref. 188). Accordingly, the redacted portion of this document is privileged.

Document 222: The privilege log describes Document 222 as an email "incorporating and reflecting legal advice and request for legal advice regarding law enforcement jurisdiction, tactics, and request for assistance." Id. at 54. Document 222 includes three redactions. The two shorter redactions, like other documents submitted for in camera review, contain requests that Corps attorneys review a draft document but make no explicit request for legal advice nor repeat legal advice such that disclosure would reveal the content of a confidential communication. Thus, these requests are not privileged, and the redactions are improper. The third, longer redaction, however, includes a summary of a conversation between Colonel Henderson and government

attorneys regarding jurisdictional issues. That communication is privileged and the redaction therefore is proper.

Document 231: According to the privilege log, Document 231 is an email "incorporating and reflecting legal advice in the form of counsel's review and comment on draft statement regarding meeting with protest leaders and ongoing agency DAPL-related decision-making." Id. at 56. Among the redacted portions of the document is a request for Corps counsel to review a draft statement and a copy of the draft statement itself. None of the redacted portions reveal directly or inferentially the content of any protected attorney-client communication. See Oasis Int'l Waters, 110 Fed. Cl. at 100 (2013). An attorney may have reviewed the draft statement, but it is not evident from Document 231 what that review may have entailed or whether the attorney gave any advice concerning the draft statement. See Calvin Klein Trademark Tr. v. Wachner, 124 F. Supp. 2d 207, 210 (S.D.N.Y. 2000) (finding draft press release not privileged because it did not disclose "confidential client communications made for the purpose of seeking legal advice.").

C. Category Three Documents—Work Product

North Dakota describes the third category as "[c]ommunications not prepared by counsel" that "appear to be nothing more than emails prepared in the ordinary course of business." (Doc. 189, pp. 4-5). The United States asserts the documents contain ordinary and opinion work product. (Doc. 198, p. 12).

North Dakota identified five documents for review in this category. The United States asserted only the work product doctrine to four of the five documents and

asserted both the work product doctrine and the attorney-client privilege as to the fifth document. (See Doc. 187-2).

For a document to be protected as work product, it must have been prepared "in anticipation of litigation." Fed. R. Civ. P. 26(b)(3). North Dakota notes "the documents claimed as work product were largely created in 2016 and 2017," before North Dakota filed its notice of claim with the Corps. (Doc. 189, p. 13). The United States responds that North Dakota "cites no authority to support its suggestion that work product-protection applies only to materials prepared in anticipation of this litigation, as opposed to other litigation." (Doc. 198, p. 13). The Eighth Circuit has held the work product doctrine applies to documents created in anticipation of unrelated, terminated litigation. In re Murphy, 560 F.2d at 334. The court reasoned that policies underlying the doctrine support a "perpetual protection for work product, one that extends beyond the termination of the litigation for which the documents were prepared." Id. Thus, the work product doctrine extends to documents created by the United States in anticipation of prior, unrelated litigation. The court now turns to the five documents asserted to be protected under the work product doctrine which were submitted for in camera review.

Document 138: The privilege log identifies Document 138 as an email reflecting "material prepared in connection with [Standing Rock Sioux Tribe (SRST)] litigation document preservation in connection with that litigation." (Doc. 187-2, p. 33). The redacted portion of the document merely refers to the existence of a ligation hold. The content of a litigation hold memorandum may be privileged. See Pearlstein v. BlackBerry Ltd., No. 13CV07060CMKHP, 2019 WL 1259382, at *19 (S.D.N.Y. Mar. 19,

2019) ("[A] litigation hold, just like any other communication with counsel, may constitute or contain legal advice and work product."). But a brief reference to the existence of a litigation hold is neither "raw factual information" nor attorney "mental impressions" protected by the work product doctrine. See Baker, 209 F.3d at 1054. Accordingly, this document is not protected under the work product doctrine.

Document 172: According to the privilege log, Document 172 is an email "reflecting materials prepared in connection with ongoing SRST litigation; specifically, discussion regarding administrative record in that case." (Doc. 187-2, p. 44). The redacted portion of the document is a single sentence referencing the due date for completion of an administrative record. This brief reference is not protected by the work product doctrine because it is not itself "raw factual information" or attorney "mental impressions" but rather an incidental reference to pending litigation. See Baker, 209 F.3d at 1054.

Document 178: The privilege log describes Document 178 as "reflecting attorney mental impressions and materials prepared in context of ongoing SRST litigation, regarding site visit and [Clean Water Act] compliance." (Doc. 187-2, p. 46). The document, withheld in its entirety, is a site report completed by a Corps official. Emails provided by the United States add context to the report and make clear the site visit was conducted in connection with then-pending litigation. See id. at 46 (Ref. 177). The work product protection extends to information gathered by an attorney or an attorney's agent. See Moore v. R.J. Reynolds Tobacco Co., 194 F.R.D. 659, 662 (S.D. Iowa 2000). This gathering of "raw factual information" is ordinary work product, and North Dakota

has not demonstrated a substantial need for its disclosure. See Baker, 209 F.3d at 1054. Thus, this document is protected.

Document 313: According to the privilege log, Document 313 is an email "reflecting material prepared in connection with ongoing SRST litigation, regarding drafting declarations for that litigation." (Doc. 187-2, p. 78). The redacted portion of the email contains a reference to efforts of Corps counsel and employees to prepare for other pending litigation. But the brief reference itself is not "raw factual information" or attorney "mental impressions" protected by the work product doctrine. See Baker, 209 F.3d at 1054.

Document 466: The United States asserts Document 466 is protected by both the attorney-client privilege and work product doctrine. As to the attorney-client privilege, the United States describes the document as "incorporating request for legal advice and legal advice, regarding draft easement and related decision-making." (Doc. 187-2, p. 120). As to the work product doctrine, the United States asserts the email reflects "attorney mental impressions and material prepared in context of ongoing and anticipated litigation, regarding a draft easement and decision-making process." Id. The emails describe internal deliberations and legal advice provided by Corps counsel, and disclosure of the email would directly reveal the contents of confidential communications. Thus, the redacted portions of this document are privileged under both the attorney-client privilege and work product doctrine.

D. Heavily Redacted Documents

In addition to documents in the three categories discussed above, North Dakota identified four documents as "so heavily redacted no judgment can be made about

Defendant's privilege claims." (Doc. 197, p. 2). The United States asserts both the attorney-client and work product doctrine as the basis for withholding these documents.

Document 48: According to the privilege log, Document 48 is a "draft letter to protestors, attached to email communication among USACE individuals, for which legal advice in the form of review and comment [was] sought." (Doc. 187-2, p. 12). The United States asserts this document is protected by the attorney-client privilege. Id. Draft documents may be privileged based on "the premise. . . the draft reflects legal advice as to the drafting . . . as opposed to simple editorial changes." Scalia v. Reliance Tr. Co., No. 17-CV-4540 (SRN/ECW), 2020 WL 2111368, at *6 (D. Minn. May 4, 2020). The United States provided the emails to which the draft document was attached for in camera review. (See Doc. 187-2, p. 2 (Ref. 47)). Reviewing the draft document in light of those emails, it is apparent a Corps attorney revised the draft documents. The emails discussing the draft document reference certain portions added by the Corps attorney. See id. Thus, Document 48 "reflects legal advice as to the drafting," see Scalia, 2020 WL 2111368, at *6, and is privileged.

Document 107: The privilege log describes Document 107 as a "draft newsletter" about which legal advice was sought, and the United States asserts it is protected by the attorney-client privilege. (Doc. 187-2, p. 26). Even if an attorney reviewed the document, it is not clear from the draft what that review entailed. In other words, the document does not "reflect. . . the legal advice and opinions of attorneys" such that disclosure would reveal the content of a confidential communication. See Scalia, 2020 WL 2111368, at *6. Thus, the document is not privileged.

Document 131: In the privilege log, the United States asserts Document 131 is protected by the work product doctrine because it is an email communication "reflecting material prepared in connection with filing of suit by Yankton Sioux Tribe." (Doc. 187-2, p. 31). The redacted portion of the email merely informed Colonel Henderson that the Yankton Sioux Tribe had filed suit. This does not constitute "raw factual information" or attorney "mental impressions" within the meaning of the work product doctrine. Baker, 209 F.3d at 1054. Accordingly, this document is not protected as work product.

Document 181: According to the privilege log, Document 181 consists of emails "incorporating request for legal advice and request for and provision of information necessary to provide legal advice." (Doc. 187-2, p. 47). The United States asserts the document is protected by the attorney-client privilege. The redacted portion of the emails contains a discussion among Corps officials regarding a variety of legal issues, including specific requests for legal advice from Corps counsel. Additional emails provided by the United States include responses from Corps counsel regarding similar issues. See id. at 48 (Ref. 188). Disclosure of Document 181 would directly or inferentially reveal the content of confidential communications. Thus, the redacted portions of this document are privileged.

E. United States' Selected Documents

The United States selected documents for in camera review, in addition to those selected by North Dakota. These documents provided additional context to documents selected by North Dakota, and the United States asserts its selected documents are protected by either the attorney-client privilege or the work product doctrine.

Document 47: The United States asserts Document 47 is protected by the attorney-client privilege and describes it as emails "reflecting request for legal advice, in the form of review and comment on draft letters to protestors." Id. at 13. The redacted portion of the document includes communications from a Corps attorney referencing his edits to a draft document. Accordingly, the redacted portion of the document is privileged.

Document 169: According to the privilege log, Document 169 consists of emails "reflecting request for legal advice and provision of legal advice, regarding status of special use permit and communications strategy." (Doc. 187-2, p. 41). The United States asserts the document is protected by the attorney-client privilege. Id. The redacted portion of the document contains both questions from a Corps official regarding legal issues and a detailed response from Corps counsel. Thus, the redacted portion of the document is privileged.

Document 177: The United States asserts Document 177 is protected by the work product doctrine. Document 177 is identified on the privilege log as "reflecting attorney mental impressions and materials prepared . . . regarding site visit and [Clean Water Act] compliance." Id. at 46. Document 177 consists of emails discussing Document 178, an inspection report the court has found to be protected by the work product doctrine. See id. at 46 (Ref. 178). The emails include a summary of the report and other details surrounding the site visit. Thus, Document 177 is protected by the work product doctrine.

Document 184: The United States asserts Document 184 is protected by the attorney-client privilege and describes it as emails "reflecting request for legal advice

and legal advice, regarding USACE jurisdiction on federal government property." Id. at 48. The redacted portion of the emails contain both a detailed request for legal advice and a detailed response from a Corps attorney. Thus, the redacted portion of the document is privileged.

Document 188: According to the privilege log, Document 188 consists of emails "reflecting request for legal advice and legal advice, regarding USACE jurisdiction on federal government property." Id. A redacted portion of an email contains detailed legal advice from a Corps attorney. This response was quoted by a non-attorney in a document selected by North Dakota, which the court found to be protected by the attorney-client privilege. See id. at 49 (Ref. 194). The other redacted portions of Document 188 contain detailed requests for legal advice and responses from Corps counsel. Accordingly, the redacted portions of Document 188 are privileged.

Document 632: The United States asserts Document 632 is protected by the attorney-client privilege and describes it as consisting of emails "reflecting request for legal advice and provision of legal advice regarding response to trespassing on federal land." Id. at 153. The redacted portion of the document contains a question from Colonel Henderson to Tom Tracy, the Corps' chief legal counsel. The communication from Colonel Henderson to Attorney Tracy is privileged. Attorney Tracy's response, however, contains both legal and non-legal advice. The first paragraph of Attorney Tracy's response contains legal advice and is protected by the attorney-client privilege. Thus, that redaction is proper. But the second paragraph of Tracy's response is "general policy or political advice" unprotected by the attorney-client privilege. See In re Cnty. of Erie, 473 F.3d 413, 423 (2d Cir. 2007). Accordingly, that redaction is improper.

F. Clawed-back Documents

In April 2022, the United States "clawed-back" a document it asserted was protected by the attorney-client privilege and had been erroneously disclosed. In its motion, North Dakota asserted it was "unable to ascertain any privileged information being transmitted within the communications." (Doc. 189, p. 3). North Dakota submitted the clawed-back document as an exhibit to its memorandum, (Doc. 189-1), and the United States submitted a document that provided context to the clawed-back document.

Document 1: Document 1 is the clawed-back document attached as Exhibit C to North Dakota's motion. According to the privilege log, the document includes emails "reflecting request for legal advice and provision of information necessary to provide legal advice, regarding law enforcement jurisdiction." (Doc. 187-2, p. 1). The United States contends the document is protected by the attorney-client privilege. Id. The redacted portion of the document contains a summary of a request for legal advice concerning jurisdictional matters, and its disclosure would directly reveal the content of attorney-client communications. Accordingly, the redacted portion of the document is privileged.

USACE 115076: The United States provided a document numbered 115076, though it does not appear to be on the United States' December 10, 2021 privilege log. The redacted portion of the document includes a portion of the email chain included in Document 1 as well as a detailed response from Corps counsel. Accordingly, the redacted portion of this document is protected by the attorney-client privilege.

3. Sufficiency of Detail on the United States' Privilege Log

In addition to its arguments regarding the documents in three categories, North Dakota argues the United States has not provided sufficient detail on its privilege log. (Doc. 189, p. 16). North Dakota asserts the United States' privilege log omits information needed to assess its claims of privilege and repeats "a handful of conclusive phrases" as justification for withholding documents. Id. More specifically, North Dakota argues this court's decision in Families Advocate LLC v. Sanford Clinic North requires the United States to disclose, among other things, the "identity and position" of each sender or recipient of a document identified on its privilege log. No. 3:16-CV-114, 2019 WL 10910868, at *5 (D.N.D. Jan. 9, 2019).

The United States responds that North Dakota did not attempt to confer about this issue and failed to request additional information regarding the United States' privilege log prior to filing its motion. (Doc. 198, p. 17). The United States also argues no formal rule governs the required level of detail on a privilege log and asserts its privilege log meets the standards set out in Rule 26(b)(5). Id. at 18.

Rule 26(b)(5) requires a party withholding documents on the basis of privilege to "expressly make the claim" and "describe the nature of the documents." To comply with Rule 26(b)(5), parties often agree to serve privilege logs. See Bartholomew, 278 F.R.D. at 447 ("The privilege log is a convention of modern legal practice designed to conform with the requirements" of Rule 26(b)(5)). There is no rule governing the particular details required on a privilege log, though a court may direct a party to add detail in order to bring a privilege log into compliance with the general mandate of Rule 26(b)(5). See Families Advocate, 2019 WL 10910868, at *5.

In November 2020, the court adopted a stipulation of the parties that clarified privilege log entries for withheld emails "may identify the author, recipient(s), subject, dates and times." (Doc. 61, p. 13). Both parties have followed this procedure, resulting in privilege logs with similar levels of detail.[5] (Doc. 198-1; Doc. 187-2). North Dakota has also requested, and received, additional information regarding the United States' privilege log. In a January 2021 email, in response to questions from North Dakota, the United States identified the positions of certain individuals who were senders or recipients of documents claimed to be privileged. (Doc. 198-2).

Having reviewed the United States' privilege log, the court finds it adequately describes the nature of withheld documents as required by Rule 26(b)(5). North Dakota was able to challenge documents on the United States' privilege log based on the descriptions, and the court has found those descriptions accurately reflect the substance of the underlying documents. Additionally, the United States has not redacted email signature blocks, which can aid North Dakota in identifying the position of a sender or recipient. To the extent North Dakota seeks additional information, it may request the United States to further supplement its privilege log with the positions of a reasonable number of Corps officials in a manner similar to the United States' January 14, 2021 email.

[5] In fact, North Dakota's privilege log includes the same information provided by the United States: (1) the email's subject, (2) the date sent, (3) the sender, (4) the recipient, (5) any individuals copied or blind copied, (5) whether the document was partially redacted or withheld in full, and (6) the privilege asserted and its asserted justification. (See Doc. 198-1).

4. Waiver of the Attorney-Client Privilege

North Dakota's also argues the United States waived the attorney-client privilege with respect to any communication that was disseminated to a person whose title and position was not disclosed. (Doc. 189, p. 18). North Dakota's waiver argument proceeds in two steps. First, North Dakota argues the United States is required to meet all five requirements of the Eighth Circuit's Diversified test to establish the attorney-client privilege. Id. at 17. In that case, Diversified, a large corporation, hired a law firm to conduct an internal investigation into potentially unlawful behavior and to present the board of directors with a report containing recommendations for possible courses of action. Diversified, 572 F.2d at 607. As a part of its investigation, the law firm "interviewed several employees of Diversified, including some who were not in a position to control or take a substantial part in a decision the corporation might make based on the law firm's advice." Id. at 607-08. The question for the Eighth Circuit was "the circumstances in which employee communications can be classified as the corporate client's communications." Id. at 608. The court settled that question by adopting a five-part test:

> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. at 609.

North Dakota further argues the court should apply Diversified as set out in Inline Packaging. There, the plaintiff, Inline Packaging, brought a motion to compel

production of documents withheld on the basis of privilege by the defendant Graphic Packaging, a corporation. Inline Packaging, 2017 WL 9325027, at *2. The court ordered in camera review of certain documents, which consisted "largely of email communications between multiple individuals." Id. at *7. Applying Diversified, the court noted it was Graphic's responsibility to demonstrate why employees who received the emails had a "need to know." Id. at *9; see also Diversified, 572 F.2d at 609 (to remain privileged, a communication must not be "disseminated beyond those persons who, because of the corporate structure, need to know its contents."). After review of the documents submitted and other record evidence, the court identified several individuals who received emails claimed to be privileged but who Graphic had failed to identify. Graphic's failure to identify those individuals meant it did not carry its burden of showing the communications were kept confidential among employees who had a need to know. For that reason, the court held the privilege was waived as to emails that included an unidentified person. Inline Packaging, 2017 WL 9325027, at *9.

The United States argues Diversified's requirements are limited to circumstances where there is "a difficult question as to whether an attorney-client relationship exists" due to the use of outside counsel for internal investigations or other situations where "a low-level corporate employee [is] communicating with corporate counsel." (Doc. 198-2, p. 15). By contrast, the United States argues, an attorney-client relationship between agency counsel and agency officials "plainly exists" and the unredacted signature blocks "identified the relevant agency or agencies whose officials were involved in each of the communications." (Doc. 198, p. 15 n.4).

The five-factor Diversified test fits imperfectly with this case, which involves the federal government's response to a quickly changing scenario. For example, the requirements in Diversified that "the employee making the communication did so at the direction of his corporate superior" and "the superior made the request so that the corporation could secure legal advice" are sensible in the context of a corporate internal investigation but unduly restrictive in the context of this case. In this court's opinion, the United States is not required to "establish all five elements" of the Diversified test as North Dakota asserts.[6] (Doc. 189, p. 17). Rather, the United States must establish the traditional elements of the attorney-client privilege, which require a communication to be (1) between an attorney and client, (2) confidential, and (3) for the purposes of obtaining legal services or advice. See e.g., Cnty. of Erie, 473 F.3d at 419 (applying three-part test to Erie County). Factors four and five of the Diversified test, however, state the general rule of confidentiality and therefore apply to the United States' claims of attorney-client privilege.

To be privileged, attorney-client communications must be kept confidential. When the client is an organization, the communications may be distributed to multiple individuals within the organization. But in order to maintain confidentiality, distribution must be limited to those employees who "need to know its contents" and

[6] As the United States points out, (Doc. 198, p. 14), the two examples cited by North Dakota that apply the five-factor Diversified test to a government defendant involve the use of a non-governmental contractor for purposes of an internal investigation or other unique purpose. See Sanimax, 2021 WL 4846364; Crutcher-Sanchez v. Cnty. of Dakota, Neb., No. 8:09CV288, 2011 WL 612061, at *6 (D. Neb. Feb. 10, 2011).

the subject matter of the communication must be "within the scope of the employee's . . . duties." See Diversified, 572 F.2d at 609. In the context of government agencies, courts have stated a communication is kept confidential even if it involves "employees at varying levels of seniority." Jud. Watch, Inc. v. U.S. Dep't of Treasury, 802 F. Supp. 2d 185, 203 (D.D.C. 2011).

As the United States points out, unredacted signature blocks show dissemination of the communications at issue was limited to federal agency employees. (See Doc. 187-2). The role of the attorney-client privilege applied to government agencies is to facilitate "candid legal advice" because "public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority." Cnty. of Erie, 473 F.3d at 419; see also North Dakota, 64 F. Supp. 3d at 1342. Given that the document senders and recipients identified on the United States' privilege log are all government officials, it is likely those officials had a need to know the "judicial and statutory limitations on their authority." Id. Accordingly, the court finds the United States has not waived the attorney-client privilege with respect to every communication that was disseminated to a person whose title and position was not disclosed. If North Dakota wishes to obtain information regarding particular senders or recipients, it may request the United States to identify the positions of those persons in a manner similar to the United States' January 14, 2021 email. (See Doc. 198-2).

Conclusion

In its motion, North Dakota identified documents in three categories it claimed were not protected by the attorney-client privilege or work produced doctrine and provided "examples of these types of documents." (Doc. 189, p. 4). The court directed

the parties to submit a representative sample of documents in each of three categories. Having reviewed the documents in camera, the court finds some of the United States' assertions of privilege were improper. The United States will be directed to disclose some of the documents over which it asserted privilege.

Within **seven days of today's date**, the United States is directed to produce the documents, or portions of documents, this order has identified as not protected by the attorney-client privilege or the work product doctrine. Within **twenty-eight days of today's date**, the United States must review all other documents over which it has asserted privilege to identify any additional documents which do not meet the standards described in this order and must produce any documents which do not meet the standards of this order to North Dakota.

North Dakota's motion to compel, (Doc. 187), is **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.

Dated this 8th day of July, 2022.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge