

February 25, 2020

VIA ECF

The Honorable Paul W. Grimm
United States District Court for the District of Maryland
6500 Cherrywood Lane
Greenbelt, MD 20770

Re: *CASA de Maryland, Inc. et al. v. Trump, et al.*
No. PWG 19-cv-2715

Dear Judge Grimm:

We write to inform the Court of a dispute concerning completion of the Administrative Record (AR). The AR produced by Defendants on November 26, 2019, lacks any intra- or interagency communications concerning the Department of Homeland Security (DHS)'s decision to adopt the Public Charge Rule. Plaintiffs contend that such communications are part of the AR absent the assertion of a valid privilege and the production of a privilege log setting forth, with particularity, the basis for the invocation of any such privilege. *See* Ex. A. Defendants maintain that all intra- and interagency communications concerning the Rule are deliberative materials and, therefore, are not part of the AR and need not be documented in a privilege log. Counsel met and conferred concerning this matter on February 13, 2020, *see* Ex. B, but, despite good-faith efforts, were unable to resolve the dispute.¹ Plaintiffs therefore request that the Court schedule a conference to attempt the informal resolution of this dispute and permit Plaintiffs to file a motion to compel the completion of the AR if the dispute cannot be resolved informally.²

Courts review APA claims based on “the full administrative record that was before the [agency] at the time” it made its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). “The whole administrative record includes pertinent but unfavorable information, and an agency may not exclude information on the ground that it did not ‘rely’ on that information in its final decision.” *Outdoor Amusement Bus. Ass’n v. Dep’t of Homeland Sec.*, No. ELH-16-1015, 2017 WL 3189446 (D. Md. July 27, 2017) (quoting *Tafas v. Dudas*, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008)); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (“The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.”); *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (similar).

¹ In response to a request by Plaintiffs, Defendants have produced data referenced or indirectly relied upon in an article published on the U.S. Customs and Immigration Services (USCIS)'s website contemporaneously with the promulgation of the Public Charge Rule. *See* Ex. A. Plaintiffs are currently reviewing that production for completeness.

² Although the Court has not yet ruled on Defendants' Motion for Stay Pending Appeal, ECF No. 84, Plaintiffs request the Court's assistance in resolving the instant dispute because completion of the AR is a prerequisite to subsequent proceedings in this case.

The deliberative process privilege, in limited circumstances, excludes from the AR documents that are (1) “predecisional,” and (2) “deliberative in nature.” *S.C. Coastal Conservation League v. Ross*, 2:18-cv-03326-RMG, 2020 WL 59828, at *3 (D.S.C. Jan. 6, 2020) (quoting *Tafas*, 530 F. Supp. 2d at 800). The privilege does not cover “factual information not otherwise in the record.” *Tafas*, 530 F. Supp. 2d at 794 (quoting *Nat’l Courier Ass’n v. Bd. of Governors*, 516 F.2d 1229, 1242 (D.C. Cir. 1975)). “Any ‘[f]actual portions of documents covered by the deliberative process privilege . . . must be segregated and disclosed unless they are so interwoven with the deliberative material’ that they are not segregable.” *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, Nos. C 17-05211 WHA, 17-05329 WHA, 17-05380 WHA, 2017 WL 4642324, at *5 n.6 (N.D. Cal. Oct. 17, 2017) (alterations in original) (quoting *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008); see also *Stone v. Trump*, 356 F. Supp. 3d 505, 514 (D. Md. 2018) (“Deliberative process privilege does not protect purely factual information unless it is inextricably intertwined with deliberative material.” (citing *City of Va. Beach v. U.S. Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993))).

Defendants contend that all of the factual information that appears in internal DHS communications and those between DHS and other government agencies already is available in the reports, statistics, and analyses cited in the Final Rule and produced in the AR. That claim strains credulity. The Public Charge Rule is a massive, complex, and resource-intensive change to how DHS superintends legal immigration to the United States, with acute consequences for federal, state, and local public-benefit programs. Surely, governmental communications about the Rule contain factual information beyond what DHS unilaterally chose to cite in the Final Rule, even if that factual information is “unfavorable” to DHS or was considered only “indirectly” during rulemaking.

Moreover, in the APA context, the deliberative process privilege does not apply at all to interagency communications regarding an administrative decision.³ *S.C. Coastal*, 2020 WL 59828, at *3 (“As the deliberative process privilege is concerned with an agency’s own internal deliberations, all materials received from outside the agency or shared outside the agency, including to other governmental agencies, are not covered by the privilege.”); *Ctr. for Biological Diversity v. Zinke*, No. 3:18-cv-00064-SLG, 2018 WL 8805325, at *4 (D. Alaska Nov. 16, 2018) (“When an agency obtains and considers materials from outside of that agency, or shares the agency’s documents with others outside the agency, including other governmental agencies, the deliberative process privilege does not apply.”). Accordingly, the privilege does not shield DHS’s interagency communications concerning the Rule from disclosure. That is especially true here because DHS explicitly referenced—but failed to disclose the contents of—interagency communications in justifying the Rule. See Final Rule, 84 Fed. Reg. 41,292, 41,371, 41,460 (Aug. 19, 2019); Proposed Rule, 83 Fed. Reg. 51,114, 51,165 (Oct. 10, 2018).

Even if some of the documents excluded from the AR can fairly be characterized as deliberative, the “[d]eliberative process privilege is not absolute.” *Stone*, 356 F. Supp. 3d at 514. “[E]ach assertion of the privilege must be checked against the details of the deliberative process and the role of the documents to that process.” *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400

³ That is not the case in the FOIA context where Congress, by statute, has extended the common law privilege to interagency communications. See 5 U.S.C. § 552(b)(5).

(table), 1987 WL 36515, at *2 (4th Cir. Feb. 13, 1987). In evaluating the propriety of shielding deliberative materials from disclosure in litigation, courts must assess “(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government’s role (if any) in the litigation; and (4) ‘the extent to which disclosure would hinder frank and independent discussions regarding contemplated policies and decisions.’” *Id.* (quoting *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)). Moreover, the privilege is inapplicable where, as here, “the plaintiff’s cause of action is directed at the government’s intent.” *Stone*, 356 F. Supp. 3d at 515 (quoting *In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998)).

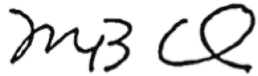
Plaintiffs’ need for the requested documents outweighs any marginal chilling effect that disclosure might have on DHS policy discussions. Intent is the *sin qua non* of Plaintiffs’ equal-protection claim, see *Washington v. Davis*, 426 U.S. 229, 239 (1976), which alleges that “[t]he Public Charge Rule was motivated at least in part by the Trump Administration’s intent to discriminate on the basis of race, ethnicity, and national origin,” Second Am. Compl. ¶ 170, ECF No. 93. Because the Equal Protection Clause is specifically intended to “expose[] government decisionmaking to the light,” the deliberative process privilege’s “raison d’être evaporates” in this case. *In re Subpoena Duces Tecum*, 145 F.3d at 1424. Moreover, the requested documents are highly relevant and indispensable to Plaintiffs’ claim that DHS acted arbitrarily and capriciously by “failing to consider important aspects of the problem before it.” Second Am. Compl. ¶ 160.

Plaintiffs also request that Defendants produce a privilege log that identifies all documents withheld on the basis of the deliberative process privilege or any other privilege and that particularizes the basis for any privilege asserted.⁴ See Order, *Defenders of Wildlife v. U.S. Dep’t of the Interior*, 931 F.3d 339 (4th Cir. Feb. 5, 2019) (ordering production of a privilege log); *S.C. Coastal*, 2020 WL 59828, at *4 (same). The production of a privilege log is essential to the preservation of the Court’s “role in adjudicating whether particular documents are properly withheld from the record on the basis of privilege,” a role that is “consistent with, not contrary to the mandate that courts review the ‘whole record,’ and evaluate whether the agency ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.’” *State v. U.S. Immigration & Customs Enforcement*, No. 19-cv-8876 (JSR), 2020 WL 604492, at *2 (S.D.N.Y. Feb. 9, 2020) (alterations in original) (quoting *Overton Park*, 401 U.S. at 419, and *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).⁵

⁴ In a November 19, 2019, email to Defendants, Plaintiffs requested the production of a privilege log along with the AR, Ex. C, but Defendants did not accede to that request.

⁵ But see *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (declining to compel production of a privilege log where, unlike here, the government’s intent was not at issue and there was no showing that the agency had withheld interagency communications or intra-agency communications containing factual information); *Tafas*, 530 F. Supp. 2d at 802 (plaintiff “must first show that documents that belong in the administrative record are missing” before seeking a privilege log).

Sincerely,

A handwritten signature in black ink, appearing to read "MB McCord".

Mary B. McCord
Legal Director and Visiting Professor of Law
Institute for Constitutional Advocacy and Protection
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 661-6607
mbm7@georgetown.edu

A handwritten signature in blue ink, appearing to read "Andre M. Davis".

Andre M. Davis
Baltimore City Solicitor
Baltimore City Department of Law
City Hall, Room 109
100 N. Holliday Street
Baltimore, MD 21202
(443) 388-2190
andre.davis@batimorecity.gov

Cc: All counsel of record (via ECF).

EXHIBIT

A

February 6, 2020

VIA Email

Josh Kolsky
Civil Division – Federal Programs Branch
U.S. Department of Justice
1100 L Street NW
Washington, DC 20005
Joshua.kolsky@usdoj.gov

Re: *CASA de Maryland, Inc. et al. v. Trump, et al.*
No. PWG 19-cv-2715

Dear Mr. Kolsky:

I write concerning the Administrative Record produced to Plaintiffs in connection with this case on November 26, 2019. Having reviewed the Administrative Record, we believe that it fails to include documents that were before the U.S. Department of Homeland Security (DHS) as it promulgated the Public Charge Rule. Accordingly, we request that you complete the record by producing the documents identified below by February 21, 2020.

Courts review APA claims based on “the full administrative record that was before the [agency] at the time” it made its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). “The whole administrative record includes pertinent but unfavorable information, and an agency may not exclude information on the ground that it did not ‘rely’ on that information in its final decision.” *Outdoor Amusement Bus. Ass’n v. Dep’t of Homeland Sec.*, No. ELH-16-1015, 2017 WL 3189446 (D. Md. July 27, 2017) (quoting *Tafas v. Dudas*, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008)); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (“The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.”); *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (similar).

The Administrative Record lacks any intra-agency communications regarding DHS’s development of the Public Charge Rule. Moreover, no interagency communications concerning the Rule appear in the Administrative Record, despite both the Final Rule and the Notice of Proposed Rulemaking that preceded it referencing such communications. *See* 84 Fed. Reg. at 41,371 (Department of Defense (DOD)); *id.* at 41,460 (U.S. Department of Health and Human Services (HHS), U.S. Department of Agriculture (USDA), U.S. Department of Housing and Urban Development (HUD)); 83 Fed. Reg. at 51,165 (HHS and HUD). These communications were before DHS when it decided to adopt the Public Charge Rule and were therefore considered either directly or indirectly during the rulemaking process. Accordingly, they should be included in the Administrative Record.

We request that Defendants complete the Administrative Record by producing and lodging with the Court the following:

1. Interagency and intra-agency communications related to the Rule, including the corrections made to the Rule on October 2, 2019, including but not limited to memoranda, letters, emails, assessments, impact analysis, briefing materials, communications, edited versions of the Rule, meeting logs, tracking sheets, calendars, and deadlines from federal agencies including but not limited to the U.S. Departments of Agriculture, Defense, Education, Health and Human Services (including, but not limited the Centers for Disease Control and Prevention and the Centers for Medicare and Medicaid Services), Homeland Security (including, but not limited to the U.S. Customs and Immigration Services), Housing and Urban Development, Justice, Labor, State, and Veteran Affairs; the Internal Revenue Service; the Social Security Administration, and the Office of Management and Budget (including but not limited to the Office of Information and Regulatory Affairs).
2. Communications of the Executive Office of the President and its subdivisions related to the Rule, including records that predate the drafting of the Rule by DHS and its constituent components through the publication of corrections made to the Rule on October 2, 2019.

Separately, we request that the following data that was before DHS when it decided to adopt the Public Charge Rule be produced and lodged with the Court:

3. The data referenced in the article published on the U.S. Customs and Immigration Services' website contemporaneously with the promulgation of the Public Charge Rule,¹ including Immigration & Naturalization Service, DHS, and State Department data related to applications for admission, adjustment of status, and all other immigration benefits that can be denied on public-charge grounds, even if the article does not cite or directly rely upon that data.

To the extent Defendants contend that any of the above-described materials may be withheld or redacted based on the deliberative process or any other privilege, we request that Defendants produce a privilege log that identifies all such documents, includes dates, author, recipients, number of pages, and subject matter of each document, and states the basis for the claimed privilege for each document. To the extent materials described herein can be produced in a redacted form to preserve a claimed privilege, please produce them in a redacted form and include them on the privilege log.² See Order, *Defenders of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339 (4th Cir. Feb. 5, 2019) (ordering completion of the record and the production of "a

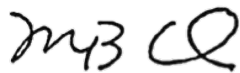
¹ U.S. Customs & Immigration Servs., *Public Charge Provisions of Immigration Law: A Brief Historical Background* (last updated Aug. 14, 2019), <https://www.uscis.gov/history-and-genealogy/our-history/public-charge-provisions-immigration-law-a-brief-historical-background>.

² In a November 19, 2019, email to Defendants, Plaintiffs requested the production of a privilege log along with the Administrative Record. Defendants did not produce a privilege log along with the Administrative Record.

privilege log in the event the Government withholds any documents under the guise of the deliberative process privilege (or any other privilege)"); *S.C. Coastal Conservation League v. Ross*, No. 2:18-cv-03326-RMG, 2020 WL 59828, at *4 (D.S.C. Jan. 6, 2020) (ordering the production of intra-agency communications containing "factual information" and all interagency and third-party communications that were considered directly or indirectly by the agency, as well as the production of a privilege log).

We would like to speak with you about this request as soon as possible. We have availability on February 12 and 13. Please let us know what dates and times work for you.

Sincerely,



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EXHIBIT

B



Jonathan Backer <jb2845@georgetown.edu>

CASA de Maryland, Inc. v. Trump - Request to Complete AR

Kolsky, Joshua (CIV) <Joshua.kolsky@usdoj.gov>

Tue, Feb 11, 2020 at 11:42 AM

To: Jonathan Backer <jb2845@georgetown.edu>

Cc: "Lynch, Jason (CIV)" <Jason.Lynch@usdoj.gov>, Amy Marshak <as3397@georgetown.edu>, Mary McCord <mbm7@georgetown.edu>, Joshua Geltzer <jg1861@georgetown.edu>, "Sangree, Suzanne" <Suzanne.Sangree2@baltimorecity.gov>, "Lewis, Jane" <Jane.Lewis@baltimorecity.gov>, "Davis, Andre M." <andre.davis@baltimorecity.gov>

Yes, that's fine with us.

From: Jonathan Backer <jb2845@georgetown.edu>

Sent: Tuesday, February 11, 2020 9:23 AM

To: Kolsky, Joshua (CIV) <jkolsky@CIV.USDOJ.GOV>

Cc: Lynch, Jason (CIV) <jalynch@CIV.USDOJ.GOV>; Amy Marshak <as3397@georgetown.edu>; Mary McCord <mbm7@georgetown.edu>; Joshua Geltzer <jg1861@georgetown.edu>; Sangree, Suzanne <Suzanne.Sangree2@baltimorecity.gov>; Lewis, Jane <Jane.Lewis@baltimorecity.gov>; Davis, Andre M. <andre.davis@baltimorecity.gov>

Subject: Re: CASA de Maryland, Inc. v. Trump - Request to Complete AR

Hi Josh,

Thanks for getting back to us. 4pm on February 13 would work better on our end. Would that time work for you?

All the best,

Jonathan

On Mon, Feb 10, 2020 at 12:45 PM Kolsky, Joshua (CIV) <Joshua.kolsky@usdoj.gov> wrote:

Hi Jonathan,

We are available for a call on February 13. Would 3:00 work on your end?

Regards,

Josh

From: Jonathan Backer <jb2845@georgetown.edu>

Sent: Thursday, February 6, 2020 5:07 PM

To: Kolsky, Joshua (CIV) <jkolsky@CIV.USDOJ.GOV>

Cc: Lynch, Jason (CIV) <jalynch@CIV.USDOJ.GOV>; Amy Marshak <as3397@georgetown.edu>; Mary McCord <mbm7@georgetown.edu>; Joshua Geltzer <jg1861@georgetown.edu>; Sangree, Suzanne <Suzanne.Sangree2@baltimorecity.gov>; Lewis, Jane <Jane.Lewis@baltimorecity.gov>; Davis, Andre M. <andre.davis@baltimorecity.gov>

Subject: CASA de Maryland, Inc. v. Trump - Request to Complete AR

Hi Josh,

Attached, please find a letter requesting completion of the Administrative Record in *CASA de Maryland, Inc. v. Trump*, No. 19-2715 (D. Md.). The letter requests that the identified documents be produced and lodged with the Court on or before February 21, 2020. We would like to discuss this request with you and your team as soon as possible, and we have availability on February 12 and 13. Please let us know if there are any times on those days that would work for you to meet and confer over the phone.

All the best,

Jonathan

--

Jonathan Backer

Counsel

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The information contained in this email message may be privileged and is intended for the personal and confidential use of the recipient(s) named above. If you have received this communication in error, please notify me by email, and delete the original message.

--

Jonathan Backer

Counsel

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The information contained in this email message may be privileged and is intended for the personal and confidential use of the recipient(s) named above. If you have received this communication in error, please notify me by email, and delete the original message.

EXHIBIT C



Jonathan Backer <jb2845@georgetown.edu>

CASA de Maryland v. Trump -- service of AR

Amy Marshak <as3397@georgetown.edu>

Tue, Nov 19, 2019 at 6:18 PM

To: "Lynch, Jason (CIV)" <Jason.Lynch@usdoj.gov>

Cc: "Cholera, Kuntal (CIV)" <Kuntal.Cholera@usdoj.gov>, "Kolsky, Joshua (CIV)" <Joshua.kolsky@usdoj.gov>, "Soskin, Eric (CIV)" <Eric.Soskin@usdoj.gov>, Mary McCord <mbm7@georgetown.edu>, Jonathan Backer <jb2845@georgetown.edu>, Joshua Geltzer <jg1861@georgetown.edu>, "Berman, Keri L. (CIV)" <Keri.L.Berman@usdoj.gov>

Hi Jason,

Thanks for reaching out about the production of the Administrative Record (AR) in *CASA de Maryland, Inc. v. Trump*. We have no objection to production of the AR through a website. Could you please make the access account in my name (Amy Marshak, as3397@georgetown.edu, 718-360-XXXX)?

As your team prepares the AR for production, we would like to make a few requests based on the size of the record, the timeframe under which this case is proceeding, and the law concerning the production of electronically stored information. We request that the following protocols govern the production of the AR:

1. All pages of the AR should be bates-stamped;
2. All documents should be produced in OCR format;
3. A single file should be produced per document, containing all of the document's pages;
4. To the maximum extent possible, the Department should produce an index listing individual documents. Where listing individual documents would be unduly burdensome, the index should identify categories of documents.
5. The Department should provide notice as to whether it is withholding any documents on the basis of privilege, and, if so, it should provide a general description of the documents or categories of documents withheld and the relevant privilege asserted.

We are happy to discuss if you have any issues with these proposed protocols. Please let us know if you agree to them.

Best,
Amy

[Quoted text hidden]