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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a federal agency, et al.

Defendants.

NO. 4:19-cv-05210-RMP

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL

Plaintiff States respectfully submit the recently issued Opinion and Order in *New York v. United States Immigration and Customs Enforcement*, No. 19-cv-8876 (S.D.N.Y. Feb. 9, 2020), as supplemental authority in support of their pending Motion to Compel (ECF No. 195). The Opinion and Order is attached here as Exhibit 1 and also reported at 2020 WL 604492.

After briefing was complete on Plaintiffs' pending Motion to Compel (ECF No. 195), Judge Rakoff of the U.S. District Court for the Southern District of New York issued the attached Opinion and Order directing federal defendants "to produce a privilege log identifying deliberative materials withheld from the administrative record." Ex. 1 at 9. In granting the New York plaintiffs' motion to compel, the Court rejected many of the same arguments that Defendants have made here in opposition to Plaintiffs' Motion.

First, the Court did not accept the position that, because privileged materials are not part of the administrative record, an agency need not produce a log of documents withheld from the record on the basis of privilege. Ex. 1 at 3–4; *see also* ECF No. 198 at 10–14. Although the Court acknowledged that "genuinely" privileged documents are not part of the administrative record, "[i]t does not follow from this premise . . . that courts should not have a role in reviewing whether this privilege was properly invoked and applied to particular documents so withheld." Ex. 1 at 4. To the contrary, "[c]ourts routinely make determinations of privilege in other contexts, and . . . . [t]here is no reason why

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courts cannot make identical determinations in APA lawsuits." *Id.* Otherwise, a defendant agency would have "sole, unreviewable authority to decide which documents properly comprise the administrative record." *Id.* at 1.

Second, the Court rejected the argument that compelling an agency to provide a privilege log would undermine the limited nature of judicial review in APA actions. Ex. 1 at 4–6; *see also* ECF No. 198 at 11–12. Instead, the Court explained that the opposite is true: "a court that allowed an agency to withhold documents wrongly marked as deliberative would not be performing judicial review in the exacting manner prescribed by the Supreme Court." Ex. 1 at 5. The Court concluded that requiring a privilege log does not improperly expand the scope of the record or the Court's review, but rather "simply allows the Court to have some oversight of the agency's assertions of privilege, the same role it would assume with respect to any other litigant." *Id.* at 9.

Plaintiffs respectfully request that the Court consider the attached Opinion and Order as supplemental authority in support of their Motion.

RESPECTFULLY SUBMITTED this 11th day of February 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 11th day of February 2020, at Seattle, Washington.

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Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiffs,

-v-

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.,

Defendants.

19-cv-8876(JSR)

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

In a lawsuit arising under the Administrative Procedure Act (APA), judicial review is generally limited to review of the administrative record. See 5 U.S.C. § 706; Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). But a defendant agency cannot have sole, unreviewable authority to decide which documents properly comprise the administrative record and which do not. Indeed, excluding courts from this determination would "impede [them] from conducting the 'thorough, probing, in-depth review' of the agency action with which [they are] tasked." In re Nielsen, No. 17-3345 (2d Cir. Dec. 27, 2017), Slip Op. at 2 (quoting Overton Park, 401 U.S. at 415. For this reason, the Court grants plaintiffs' motion to compel defendants to produce a log of deliberative documents withheld from the administrative record on the basis of asserted privilege.

In the underlying civil action, plaintiffs the State of New York and the Kings County District Attorney bring suit under the APA to challenge the decision by U.S. Immigration and Customs Enforcement (ICE) to implement a Directive that allows ICE agents to conduct civil immigration arrests in and around state courthouses.[1] Compl. ¶¶ 1-12 (Sept. 25, 2019), Dkt. 1. The Court, after denying defendants' motion to dismiss, directed defendants to produce the administrative record by no later than January 3, 2020. Opinion and Order at 35 (Dec. 19, 2019), Dkt. 51. On January 3, defendants filed a 170-page record. Dkt. 55. On January 23, plaintiffs filed the instant motion to compel defendants to produce a privilege log identifying materials withheld from the administrative record. Notably, while this motion was pending, plaintiffs informed the Court that they had identified potential gaps in the administrative record that are not attributable to claims of privilege. Defendants conceded that some documents may have inadvertently been omitted from the record, and at a court conference on January 31, the Court ordered defendants to supplement the record by no later than February 14.

[1] Plaintiffs also assert a cause of action under the Tenth Amendment, Compl. ¶¶ 135-42, to which the discussion in this Opinion is not relevant.

The Court now also grants plaintiffs' motion to compel defendants to produce a privilege log. Defendants primarily rely on out-of-circuit cases supporting the proposition that – because privileged, deliberative materials are not part of the administrative record – an agency ordinarily need not produce a log of documents withheld from the record on the basis of privilege. E.g., Oceana, Inc. v. Ross, 920 F.3d 855, 865 (D.C. Cir. 2019) ("[P]redecisional and deliberative documents are not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record.") (internal quotation and citations marks omitted); Great Am. Ins. Co. v. United States, No. 12-cv-9718 (SF), 2013 WL 4506929 (N.D. Ill. Aug. 23, 2013); see also Tafas v. Dudas, 530 F. Supp. 2d 786, 802 (E.D. Va. 2008) ("Before [plaintiff] can demand that the [agency] produce a privilege log substantiating any claims of privilege, he must first show that documents that belong in the administrative record are missing.").

But these cases are not binding on the Court,[2] and the Court does not find their argument persuasive. It is uncontested that

[2] The Supreme Court's decision in In re United States, 138 S. Ct. 443 (2017), to vacate and remand a district court's discovery order in an APA case is, of course, binding on the Court, but its facts are easily distinguished. See Nielsen, Slip Op. at 4-5. The discovery order in that case was far broader than the one plaintiffs seek here. Not least, the Supreme Court in United States appeared concerned that the order would "compel the Government to disclose . . . document[s] that the Government

intra-agency materials that genuinely fall under the deliberative process privilege are not part of the administrative record. Comprehensive Cmty. Dev. Corp. v. Sebelius, 890 F. Supp. 2d 305, 312 (S.D.N.Y. 2012). It does not follow from this premise, however, that courts should not have a role in reviewing whether this privilege was properly invoked and applied to particular documents so withheld. Courts routinely make determinations of privilege in other contexts, and they are expert at doing so. As to the deliberative process privilege specifically, federal courts are often asked in FOIA litigation, for example, to determine whether this privilege applies. See 5 U.S.C. § 552(b)(5); Am. Civil Liberties Union v. Nat'l Sec. Agency, 925 F.3d 576, 592 (2d Cir. 2019). There is no reason why courts cannot make identical determinations in APA lawsuits in order to determine the proper scope of the administrative record.

Moreover, defendants' concern that compelling them to produce a privilege log would undermine the limited nature of

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believes is privileged without first providing the Government with the opportunity to argue the issue." 138 S. Ct. at 445. Here, in contrast, plaintiffs merely seek production of a privilege log. Moreover, the Court in United States observed that the district court had ordered extensive discovery before ruling on the defendant agency's motion to dismiss on reviewability and jurisdiction grounds, id.; here, in contrast, this Court has already rejected such arguments. Opinion and Order (Dec. 19, 2019).

judicial review in APA actions is misplaced. Allowing courts a role in adjudicating whether particular documents are properly withheld from the record on the basis of privilege is consistent with, not contrary to, the mandate of the courts to review the "whole record," Overton Park, 401 U.S. 419, and evaluate whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Without a privilege log, "the District Court would be unable to evaluate the Government's assertions of privilege," Nielsen, Slip Op. at 3, and therefore unable to determine whether an assertedly-privileged document was properly excluded from the record. And a court that allowed an agency to withhold documents wrongly marked as deliberative would not be performing judicial review in the exacting manner prescribed by the Supreme Court in Overton Park and State Farm. "Indeed, judicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record." United States, 138 S. Ct. 371, 372 (Mem.) (2017) (Breyer, J., dissenting). On the other hand, were a court satisfied that all of the documents listed on a privilege log were in fact deliberative, it would not need to

inquire into those documents any further.[3] Nothing about a privilege log, therefore, violates the general requirement that judicial review and discovery in an APA action be limited to the administrative record. See Nat'l Audubon Soc. v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (citing Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985)); Sharkey v. Quarantillo, 541 F.3d 75, 92 n.15 (2d Cir. 2008).

The primary Second Circuit authority on this question is clearly supportive of plaintiffs' position. In Nielsen, the Second Circuit, in an unpublished summary order, denied a petition for a writ of mandamus to stay the district court's order compelling the defendant agency to produce a privilege log to plaintiffs. Slip Op. at 1. Although the decision rested in part on the extraordinarily high standard for a writ of mandamus, Slip Op. at 1-2; see Balintulo v. Daimler AG, 727 F.3d 174, 186 (2d Cir. 2013), its reasoning suggests that the court would also have upheld the district court's order on the merits. In particular, the Second Circuit noted that the district court's order compelling the agency to produce a privilege log

[3] Of course, even those documents that are properly protected by the deliberative process privilege may be, under certain circumstances, included within the administrative record, as the privilege is not absolute. See Nielsen, Slip Op. at 3 (quoting Suffolk Cty. v. Sec'y of the Interior, 562 F.2d 1368, 1384 (2d Cir. 1977)). But any argument to that effect as to the deliberative documents at issue here is premature.

was appropriate because, without a privilege log, the agency's assertions of privilege would be effectively unreviewable. Slip Op. at 3.

Indeed, that logic suggests that district courts should grant motions to compel production of a privilege log in APA actions as a matter of course, and at least one other court in this district has effectively so held. State of N.Y. v. Dep't of Commerce, 18-cv-2921 (JMF), Argument Tr. 78:10-14 (S.D.N.Y. July 3, 2018), Dkt. 205 ("The first issue whether defendants need to produce a privilege log is easily resolved. Put simply, defendants' arguments are, in my view, squarely foreclosed by the Second Circuit's December 17, 2017 rejection of similar arguments [in] In re Nielsen.")

But even if such a broad requirement did not apply as a matter of course, two case-specific factors that the court in Nielsen viewed as weighing in favor of compelling defendants to produce a privilege log are also present here. First, in Nielsen, the plaintiffs had identified to the district court specific materials that appeared to be missing from the administrative record. Slip Op. at 2-3. Here, similarly, the defendants acknowledge they may have inadvertently omitted certain documents from the record. While there is no suggestion that they did so in bad faith, the earlier omission further justifies some involvement by plaintiffs and the Court in

determining what must be included in the administrative record. Second, the court in Nielsen also noted that the number of documents in question was sufficiently small that it would not pose an undue burden for the Government to produce a privilege log. Slip Op. at 3-4. Here, the administrative record is very brief, only 170 pages in length, which leads the Court to believe that there are correspondingly few deliberative documents that would need to be listed on a privilege log, and that the burden would consequently be small.

A case cited by defendants, Comprehensive Community Development Corp. v. Sebelius, 890 F. Supp. 2d 305 (S.D.N.Y. 2012), does not provide a compelling rationale for a contrary result. In that case, another court in this district denied plaintiffs' motion to compel the defendant agency to expand the administrative record (as opposed to providing a privilege log), reasoning that "an agency's designation of the administrative record is generally afforded a presumption of regularity," id. at 309 (internal quotation marks omitted), and that "a court may review extra-record evidence only where 'there has been a strong showing in support of a claim of bad faith or improper behavior on the part of the agency decision-maker . . . ,'" id. (quoting Hoffman, 132 F.3d at 14). But to the extent that the "presumption of regularity" due to ICE is not already undermined by the conceded omissions from the record, a privilege log is

not necessarily inconsistent with this presumption. Production of a privilege log does not give the Court any occasion to expand the administrative record to encompass any document not properly included; it simply allows the Court to have some oversight of the agency's assertions of privilege, the same role it would assume with respect to any other litigant.

For the foregoing reasons, the Court grants plaintiffs' motion and directs defendants to produce a privilege log identifying deliberative materials withheld from the administrative record by no later than February 28, 2020.

SO ORDERED.

Dated: New York, NY
February 9, 2020

JED S. RAKOFF, U.S.D.J.