

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
WILLIAM D. HYSLOP
United States Attorney
ALEXANDER K. HAAS
Branch Director
ERIC J. SOSKIN
Senior Trial Counsel
KERI L. BERMAN
KUNTAL V. CHOLERA
JOSHUA M. KOLSKY, DC Bar No. 993430
JASON C. LYNCH
ALEXANDRA R. SASLAW, DC Bar No. 1618175
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE**

STATE OF WASHINGTON, *et al.*,

Plaintiffs.

V.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, *et al.*,

Defendants

No. 4:19-cv-5210-RMP

DECLARATION OF JOSHUA M.
KOLSKY IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO
COMPEL DOCUMENTS
WITHHELD UNDER
DELIBERATIVE PROCESS
PRIVILEGE

1 I, Joshua M. Kolsky, declare as follows:

2 1. I am over the age of 18, competent to testify as to the matters herein, and
3 make this declaration based on my personal knowledge.

4 2. On September 27, 2020, Plaintiffs' counsel sent an email expressing their
5 belief that the deliberative process privilege does not apply in this matter and
6 requesting that Defendants produce documents withheld on the basis of that
7 privilege.

8 3. On October 2, 2020, I responded to Plaintiffs' counsel and explained that
9 Defendants do not agree that the deliberative process privilege is inapplicable.

10 4. On October 5, 2020, Plaintiffs' counsel stated that Plaintiffs planned to
11 move to compel the production of documents withheld under the deliberative
12 process privilege.

13 5. I exchanged additional emails with Plaintiffs' counsel on this topic
14 between October 5 and October 7, 2020.

15 6. Attached as Exhibit A is an email chain beginning with Plaintiffs'
16 counsel's September 27, 2020 email, and concluding on October 7, 2020.

17 7. During my conversations with Plaintiff's counsel regarding the
18 applicability of the deliberative process privilege, I also communicated with
19 Plaintiffs' counsel regarding other discovery issues related to specific documents.

20 8. On October 8, 2020, I met and conferred with Plaintiffs' counsel by
21 telephone regarding their position on the deliberative process privilege, along
22 with other discovery issues. During that call, I confirmed Defendants' view that

1 the deliberative process privilege is applicable in this case. The parties were
2 unable to resolve this issue during that conversation.

3 I declare under penalty of perjury under the laws of the State of Washington and
4 the United States that the foregoing is true and correct.

5 DATED this 28th day of October 2020, in Washington, D.C.

6 /s/ *Joshua M. Kolsky*
7 JOSHUA M. KOLSKY, DC Bar No. 993430
8 Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Exhibit A

From: [Kolsky, Joshua \(CIV\)](#)
To: [Coates, Spencer W. \(ATG\)](#); [Sprung, Jeff T \(ATG\)](#)
Cc: [Boes, Andy \(ATG\)](#); [Bays, Nathan K. \(ATG\)](#); [RHARDY@OAG.STATE.VA.US](#); [Cearley, Sara M \(ATG\)](#); [Williams, Jennah D \(ATG\)](#)
Subject: RE: Washington, et al. v. U.S. Department of Homeland Security, et al., No. 19-cv-05210 (W.D. Wash.)
Date: Wednesday, October 7, 2020 7:11:00 PM

Sure, let's plan on 11:00 Pacific, 2:00 Eastern.

From: Coates, Spencer W. (ATG) <Spencer.Coates@atg.wa.gov>
Sent: Wednesday, October 7, 2020 7:09 PM
To: Kolsky, Joshua (CIV) <jkolsky@CIV.USDOJ.GOV>; Sprung, Jeff T (ATG) <jeff.sprung@atg.wa.gov>
Cc: Boes, Andy (ATG) <andy.boes@atg.wa.gov>; Bays, Nathan K. (ATG) <Nathan.Bays@ATG.WA.GOV>; RHARDY@OAG.STATE.VA.US; Cearley, Sara M (ATG) <sara.cearley@atg.wa.gov>; Williams, Jennah D (ATG) <jennah.williams@atg.wa.gov>
Subject: RE: Washington, et al. v. U.S. Department of Homeland Security, et al., No. 19-cv-05210 (W.D. Wash.)

Thank you, Josh. Would a time between 11 AM – 12 PM PDT (2 PM – 3 PM EDT) tomorrow work for you?

Thanks,

Spencer

From: Kolsky, Joshua (CIV) <Joshua.kolsky@usdoj.gov>
Sent: Wednesday, October 7, 2020 12:53 PM
To: Coates, Spencer W. (ATG) <Spencer.Coates@atg.wa.gov>; Sprung, Jeff T (ATG) <jeff.sprung@atg.wa.gov>
Cc: Boes, Andy (ATG) <andy.boes@atg.wa.gov>; Bays, Nathan K. (ATG) <Nathan.Bays@ATG.WA.GOV>; RHARDY@OAG.STATE.VA.US; Cearley, Sara M (ATG) <sara.cearley@atg.wa.gov>; Williams, Jennah D (ATG) <jennah.williams@atg.wa.gov>
Subject: RE: Washington, et al. v. U.S. Department of Homeland Security, et al., No. 19-cv-05210 (W.D. Wash.)

[EXTERNAL]

Spencer,

I disagree that the documents are relevant but I'm happy to discuss. I'm going to respond to Andy's email on similar topics later today and I am available to discuss all of these issues tomorrow or Friday afternoon. Please let me know what day and time works best on your end.

Thanks,
Josh

From: Coates, Spencer W. (ATG) <Spencer.Coates@atg.wa.gov>
Sent: Tuesday, October 6, 2020 12:36 PM
To: Kolsky, Joshua (CIV) <jkolsky@CIV.USDOJ.GOV>; Sprung, Jeff T (ATG) <jeff.sprung@atg.wa.gov>
Cc: Boes, Andy (ATG) <andy.boes@atg.wa.gov>; Bays, Nathan K. (ATG) <Nathan.Bays@ATG.WA.GOV>; RHardy@oag.state.va.us; Cearley, Sara M (ATG) <sara.cearley@atg.wa.gov>; Williams, Jennah D (ATG) <jennah.williams@atg.wa.gov>
Subject: RE: Washington, et al. v. U.S. Department of Homeland Security, et al., No. 19-cv-05210 (W.D. Wash.)

Josh,

At the very least, these documents concern intent because they provide “historical background of the decision,” illustrate the “specific sequence of events leading up” to the Rule’s promulgation, and offer an opportunity for the States to determine if there were any “[d]epartures from the normal procedural sequence” that evince discriminatory intent. *Vill. Of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977). The search terms we have agreed upon tailor the production to documents and “contemporary statements” by DHS and Trump administration policymakers who constitute the “decisionmaking body.” *Id.* at 268.

The Court also recognized the relevance of these documents when it granted discovery on our constitutional claim. Judge Peterson indicated that there was sufficient “public-record evidence” of “anti-immigrant animus” by officials like Kenneth Cuccinelli and Stephen Miller. ECF No. 210 at 17. These are the very decisionmakers whose documents and communications we seek.

As for your second point, our proposal was to have a meet-and-confer on the specific issue of the applicability of the DPP on Thursday, October 7. It would seem possible to us to have both this meet-and-confer and your response to my colleague Andy’s previous discovery email on the same day, but please correct me if I’m wrong. If you have a different suggestion for the ordering of the response and meet-and-confer, please let us know.

Thanks,

Spencer W. Coates

Assistant Attorney General
Complex Litigation Division
800 Fifth Ave., Suite 2000
Seattle, WA 98104
Email: spencer.coates@atg.wa.gov
Phone: 206-287-4173
Cell: 206-572-9895

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

Sent: Monday, October 5, 2020 5:46 PM

To: Coates, Spencer W. (ATG) <Spencer.Coates@atg.wa.gov>; Sprung, Jeff T (ATG) <jeff.sprung@atg.wa.gov>

Cc: Boes, Andy (ATG) <andy.boes@atg.wa.gov>; Bays, Nathan K. (ATG) <Nathan.Bays@ATG.WA.GOV>; RHardy@oag.state.va.us; Cearley, Sara M (ATG) <sara.cearley@atg.wa.gov>; Williams, Jennah D (ATG) <jennah.williams@atg.wa.gov>

Subject: RE: Washington, et al. v. U.S. Department of Homeland Security, et al., No. 19-cv-05210 (W.D. Wash.)

[EXTERNAL]

Spencer,

What is your basis for saying that these documents concern the government's intent?

Also, I'm confused by your email because you ask for a call on October 7, yet your colleague Andy Boes separately emailed me about various DPP assertions, and asked for a response by October 7. Is there a reason you're proposing that we have a call before I have responded to Andy's email?

Regards,

Josh

From: Coates, Spencer W. (ATG) <Spencer.Coates@atg.wa.gov>

Sent: Monday, October 5, 2020 7:55 PM

To: Kolsky, Joshua (CIV) <jkolsky@CIV.USDOJ.GOV>; Sprung, Jeff T (ATG) <jeff.sprung@atg.wa.gov>

Cc: Boes, Andy (ATG) <andy.boes@atg.wa.gov>; Bays, Nathan K. (ATG) <Nathan.Bays@ATG.WA.GOV>; RHardy@oag.state.va.us; Cearley, Sara M (ATG) <sara.cearley@atg.wa.gov>; Williams, Jennah D (ATG) <jennah.williams@atg.wa.gov>

Subject: RE: Washington, et al. v. U.S. Department of Homeland Security, et al., No. 19-cv-05210 (W.D. Wash.)

Josh,

My name is Spencer Coates, and I'm an AAG for the State of Washington. I am assisting Jeff, Nathan, and Andy in this case and this issue, and I'll be submitting an NOA shortly.

As our prior e-mail indicated, the State does not agree with your assessment of the applicability of the deliberative process privilege. We also disagree with your assertion that these documents are "not relevant." Documents concerning the government's intent are plainly relevant to equal protection claims, which center squarely on the governmental intent in enacting a challenged policy. Your response also indicates no consideration of the other *Warner* factors in assessing the privilege, all of which favor disclosure. Moreover, *Karnoski's* vacatur of a district court's improper application of the *Warner* factors does not, as you suggest, dispense with the reality that the privilege "evaporates" when "a plaintiff's cause of action turns on the government's intent," such as Plaintiff's "constitutional claim for discrimination." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998).

It appears from your response that Defendants are not changing their position of any of the deliberative process privilege redactions or withholdings. We accordingly plan to move to compel the production of the documents withheld under the deliberative process privilege this week.

We are happy to discuss this or any other pending issue discovery issue with you, and we would propose this Wednesday, October 7 between 11 am and 1:30 pm PT if you would like a call.

Thanks,

Spencer W. Coates

Assistant Attorney General
Complex Litigation Division
800 Fifth Ave., Suite 2000
Seattle, WA 98104
Email: spencer.coates@atg.wa.gov
Phone: 206-287-4173
Cell: 206-572-9895

From: Kolsky, Joshua (CIV) <Joshua.kolsky@usdoj.gov>
Sent: Friday, October 2, 2020 3:28 PM
To: Sprung, Jeff T (ATG) <jeff.sprung@atg.wa.gov>
Cc: Coates, Spencer W. (ATG) <Spencer.Coates@atg.wa.gov>; Boes, Andy (ATG) <andy.boes@atg.wa.gov>; Bays, Nathan K. (ATG) <Nathan.Bays@ATG.WA.GOV>; RHardy@oag.state.va.us; Cearley, Sara M (ATG) <sara.cearley@atg.wa.gov>; Williams, Jennah D (ATG) <jennah.williams@atg.wa.gov>
Subject: RE: Washington, et al. v. U.S. Department of Homeland Security, et al., No. 19-cv-05210 (W.D. Wash.)

[EXTERNAL]

Jeff,

We disagree that the deliberative process privilege does not apply in this case, and it is clear that courts should not make blanket rulings finding the privilege inapplicable simply based on the nature of the case. In fact, last year, the Ninth Circuit granted mandamus relief to the government where a district court “conducted a single deliberative process privilege analysis covering all withheld documents[.]” *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019). As you note, the privilege is qualified, but I see no reason why the privilege should not apply to the information withheld on these grounds here, especially because the information is not relevant to Plaintiff’s claims. Indeed, I suspect there may be a misunderstanding about which documents were deemed to be responsive to Plaintiffs’ document requests and why. I know that your office recently raised questions about specific withholdings in another email, so I will respond to that next week and then perhaps we can have a call to discuss.

Regards,
Josh

From: Sprung, Jeff T (ATG) <jeff.sprung@atg.wa.gov>
Sent: Sunday, September 27, 2020 2:06 PM
To: Kolsky, Joshua (CIV) <jkolsky@CIV.USDOJ.GOV>
Cc: Coates, Spencer W. (ATG) <Spencer.Coates@atg.wa.gov>; Boes, Andy (ATG) <andy.boes@atg.wa.gov>; Bays, Nathan K. (ATG) <Nathan.Bays@ATG.WA.GOV>; RHardy@oag.state.va.us; Cearley, Sara M (ATG) <sara.cearley@atg.wa.gov>; Williams, Jennah D (ATG) <jennah.williams@atg.wa.gov>
Subject: Washington, et al. v. U.S. Department of Homeland Security, et al., No. 19-cv-05210 (W.D. Wash.)

Josh: Defendants' response to the Plaintiff States' first requests for production of documents include many documents withheld on the basis of the deliberative process privilege. However, this privilege does not apply to a challenge, as here, to an agency's decision-making process, such as a race or national origin discrimination claims. Further, even if the deliberative process privilege applied, it is qualified, and the factors listed in *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), tip heavily in favor of disclosure.

We ask that Defendants reconsider assertion of the deliberative process privilege in the context of discovery in this case and produce the documents withheld and eliminate redactions made on the basis of this privilege. Please advise us by October 2 if Defendants will reconsider assertion of the privilege, as reflected on the partial privilege log produced in connection with Plaintiffs' first requests for production. Thanks very much. Jeff

Jeff Sprung | Assistant Attorney General
Office of the Washington Attorney General
800 Fifth Ave Suite 2000 - Seattle, WA 98101
Direct: [\(206\) 326-5492](tel:(206)326-5492) | jeff.sprung@atg.wa.gov
Mobile: [\(206\) 348-4737](tel:(206)348-4737)