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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, *et al.*, Defendants	No. 4:19-cv-5210-RMP DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DOCUMENTS WITHHELD UNDER DELIBERATIVE PROCESS PRIVILEGE

INTRODUCTION

Plaintiffs seek a sweeping ruling from this Court that the deliberative process privilege does not apply, as a matter of law, to any document in this litigation. Such a broad, categorical ruling would be contrary to law. The deliberative process privilege is a critical protection aimed at facilitating effective governmental decisionmaking, and it should not be cast aside solely because of the nature of Plaintiffs' claims—particularly where Plaintiffs have not shown a particularized need for specific documents withheld under the privilege.

BACKGROUND

Discovery in this matter is both extensive and ongoing. The certified administrative record in this case spans over 380,000 pages, and Defendants' document review continues. *See* Report Pursuant to May 13, 2020 Order, ECF No. 257. As of October 16, 2020, Defendants have conducted an initial review of approximately 50,000 documents in connection with this process. *Id.* Defendants have also searched for and produced documents in response to Plaintiffs' requests for production. Defendants' review is ongoing. As part of both reviews, Defendants have produced privilege logs with detailed privilege descriptions. Defendants expect additional documents will be included in future installments of the privilege logs. *See id.* (approximately 8,500 documents undergoing second-level review for privilege determinations).

On September 27, 2020, Plaintiffs informed Defendants that they believe that the deliberative process privilege is inapplicable in this case. Plaintiffs thus asked Defendants to "reconsider" their assertion of the privilege and to produce all documents

withheld on the basis of deliberative process privilege. Kolsky Decl., Ex. A. Defendants expressed their disagreement with that position and explained that a blanket ruling on the deliberative process privilege would be inappropriate, particularly where the information withheld "is not relevant to Plaintiffs' claims." *Id.* The parties were unable to reach agreement regarding this issue. Kolsky Decl. ¶ 8.

Because Plaintiffs have not identified specific documents that they presently seek to compel, the issue before the Court at this time is the "threshold" legal question of whether the deliberative process privilege *per se* applies as a matter of law to any information at issue in discovery in this case.[1] *See* Pl.'s Mot. 1 n.1, ECF No. 255 (describing the motion as "address[ing] the threshold question of the applicability of the deliberative process privilege to Plaintiff States' Equal Protection claim"); *see also* Kolsky Decl., Ex. A (asking Defendants to "reconsider assertion of the deliberative process privilege in the context of discovery in this case").

LEGAL STANDARD

[1] As a result, Defendants are not required to perfect the privilege at this time as to documents or information contained in each of the withheld or redacted documents, as well as information that has been withheld on the basis of the deliberative process privilege in response to other discovery requests, and it would be unreasonable to have expected Defendants to do so when Plaintiffs have not sought to compel specific documents—particularly where Defendants are still reviewing a significant number of documents for privilege determinations.

The deliberative process privilege protects the Government's decision-making process by shielding from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). This privilege serves "to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Assembly of State of Cal. v. Dep't of Com.*, 968 F.2d 916, 920 (9th Cir. 1992).

"Documents must be both 'predecisional' and 'deliberative' to qualify for this privilege." *Hongsermeier v. Comm'r, Internal Revenue*, 621 F.3d 890, 904 (9th Cir. 2010). A "document is predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his decision." *Id.* (citation omitted). A document is "deliberative in nature" if it contains "opinions, recommendations, or advice about agency policies." *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). To overcome the deliberative process privilege, Plaintiffs must show that their particularized need for privileged material outweighs the Government's interest in non-disclosure. *See id.*; *see also United States v. Farley*, 11 F.3d 1385, 1389-90 (7th Cir. 1993). To make this determination, courts consider the *Warner* factors, namely: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the Government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Warner*, 742 F.2d at 1161.

ARGUMENT

I. Plaintiffs Are Wrong As A Matter of Law That The Deliberative

Process Privilege Is Categorically Inapplicable.

Plaintiffs' motion does not challenge whether the documents withheld under the deliberative process privilege are predecisional or deliberative. Instead, Plaintiffs contend that the deliberative process privilege categorically "does not apply to a challenge of an agency's decision-making process." Pl.'s Mot. 5.

The Ninth Circuit has squarely rejected this sort of categorical broadside challenge to the applicability of the deliberative process privilege. Indeed, the Ninth Circuit recently granted the Government's mandamus petition and vacated a district court disclosure order where that court "conducted a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019). There, the *Karnoski* plaintiffs had argued, like Plaintiffs here, that the deliberative process privilege "does not apply where . . . 'plaintiffs challenge the constitutionality of a government decision and allege animus or discriminatory intent.'" *Id.* at 1195 (citing *In re Subpoena Duces Tecum Served on the Office of the Comptroller of Currency*, 145 F.3d 1422, 1423 (D.C. Cir.), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998)).[2] But the Ninth Circuit did not agree. Rather, the court of appeals explained that

[2] Like the *Karnoski* plaintiffs, Plaintiffs argument here relies on nonbinding authority, in particular the D.C. Circuit case *In re Subpoena*, 156 F.3d at 1424. *See* Pl.'s Mot. 5. But the Ninth Circuit has not followed *In re Subpoena*, nor has it held that the deliberative process privilege does not apply as a matter of law when plaintiffs challenge

district courts should not only consider the *Warner* factors "in balancing the deliberative process privilege with Plaintiffs' need for certain information," but that courts should "consider classes of documents separately when appropriate." *Id.* at 1206; *see also Stone v. Trump*, 402 F. Supp. 3d 153, 156-57 (D. Md. 2019) (discussing *Karnoski* before granting in part a motion to reconsider the court's earlier ruling that the "deliberative process privilege does not apply . . . because the government's intent is at the heart of the issue in this case"). Each of the district court cases cited by Plaintiffs predates *Karnoski*.

Even before *Karnoski*, courts in this circuit and beyond recognized that a party's request for deliberative materials calls for a case-by-case approach, rather than a categorical rule. *See, e.g.*, *Thomas*, 715 F. Supp. 2d at 1021 ("adopt[ing] the balancing approach set forth in *Warner* . . . with respect to each individual discovery request");*VVA*, 2011 WL 4635139, at *10 (declining to adopt a categorical rule that the deliberative process privilege is inapplicable when plaintiffs challenge intent); *see also, e.g.*, *In re Delphi Corp.*, 276 F.R.D. 81, 84–85 (S.D.N.Y. 2011) (rejecting plaintiff's argument that the deliberative process privilege does not apply where the litigation involves a question concerning "intent" or the government's "decisionmaking process"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 254 F.R.D. 35, 39-40 (D. Mass. 2008).

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the Government's intent. *See Vietnam Veterans of Am. v. CIA*, No. 09-cv-37 CW, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011) ("This appears to be an open question in the Ninth Circuit"); *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010) (noting a "lack of binding Ninth Circuit authority on the matter").

In fact, another court recently rejected this argument by plaintiffs in another case challenging the Public Charge Rule, holding that "[a] ruling on [the application of the deliberative process privilege] is premature" because "[n]either Plaintiffs nor the Court can assess the applicability of the deliberative process privilege in a vacuum." Order at 2, *New York v. U.S. Dep't of Homeland Sec.*, No. 19-cv-7777 (S.D.N.Y. Oct. 23, 2020).

Just as application of "the deliberative process privilege is . . . dependent upon the individual document and the role it plays in the administrative process," *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), so too is the analysis undertaken in determining whether the privilege is overcome. The deliberative process privilege "require[s] careful consideration by the judiciary." *Karnoski*, 926 F.3d at 1207. But Plaintiffs' suggested approach would effectively render the privilege inert whenever a plaintiff's claim touches on the government's intent or decision-making process, regardless of the strength of that claim. *See In re United States*, 678 F. App'x 981, 990 (Fed. Cir. 2017) ("The privilege would be meaningless if all a litigant had to do was raise a question of intent to warrant disclosure."). And, as explained below, this sort of flat prohibition on the deliberative process privilege is likely to result in disclosure of documents that have little (if any) relevance or import to Plaintiffs' claims.

II. Plaintiffs Cannot Overcome the Deliberative Process Privilege Under the *Warner* Test.

In attempting to skip over the *Warner* balancing factors, Plaintiffs ask the Court to agree that they have met the heavy burden of showing a substantial and particularized need for the documents or information they seek. *VVA*, 2011 WL 4635139, at *10; *see*

also Farley, 11 F.3d at 1389. But Plaintiffs have not identified any particular document for which they have shown a substantial need. Nor have they even attempted to explain why their need for such documents or information outweighs Defendants' interest in non-disclosure. Instead, Plaintiffs have simply reframed their primary request—for a blanket ruling against the privilege—to incorporate the language used in *Warner*. But Plaintiffs' sleight of hand does not lead to a different result.

Relevance of the evidence: Rather than identifying specific documents, Plaintiffs assert that *all* documents "describing Defendants' deliberations" are relevant to their equal-protection claim. Pl.'s Mot. 8. But this generalized assertion is far from the "strong showing of relevance" required to overcome the privilege for *each and every* withheld document. *VVA*, 2011 WL 4635139, at *10. The mere fact that a document is deliberative does not imply that it "would shed light on whether discriminatory animus motivated [the] enactment of the Public Charge Rule." Pl.'s Mot. 8. Defendants' privilege descriptions reveal that many of the withheld documents do not address the agency's intent in enacting the Public Charge Rule, but instead relate to collateral matters of no relevance to Plaintiffs' equal-protection claim. For example, the administrative record privilege log includes a number of email communications regarding the timelines associated with the Public Charge Rule. *See, e.g.*, Sprung Decl., Ex. A at 6 (AR_00380307), ECF No. 256-1; *id.* at 7 (AR_00380314); *id.* at 14 (AR_00380350). Additionally, the discovery request privilege log lists a number of "[p]re-decisional, deliberative draft[s] of the public charge rule." *See, e.g.*, Sprung Decl., Ex. E at 1, ECF No. 256-5. While these documents relate to the agency's deliberations, Plaintiffs have

made no attempt to explain how such documents might "shed light on" the agency's motivations. Thus, Plaintiffs have not established any need for these documents, let alone a "substantial need sufficient to overcome the deliberative process privilege." *VVA*, 2011 WL 4635139, at *12. Indeed, Plaintiffs' nonspecific claim of need for *all* deliberative documents—even those with no relevance to their claims—demonstrates exactly why a single deliberative process privilege analysis is inappropriate.

Availability of other evidence: Aside from failing to show a particularized need for any document or information, Plaintiffs have available to them ample discovery and other information including a lengthy administrative record of supporting documentation for that policy. And Defendants continue to review documents for possible production. Because Plaintiffs have not shown that any withheld documents are relevant to their claim, the availability of other evidence does not tip the balance in their favor.[3]

The extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions: This factor strongly weighs against blanket waiver of the deliberative process privilege, particularly without any effort to compel, or any showing of need for, particular documents. The deliberative process privilege serves to "encourage the candid and frank exchange of ideas in the agency's decisionmaking process." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014). As such, it reflects the understanding that "[i]f agencies were to operate in a fishbowl, the

[3] The third factor in the *Warner* balancing test is the role of the Government in the litigation. There is no dispute that the Government's policy is at issue in this case.

frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." *Id.* (internal quotation marks omitted); *see also NLRB*, 421 U.S. at 150-51.

Wholesale disclosure of deliberative documents covering a range of government deliberations—regardless of their relevance to the claims at issue—plainly risks chilling future discussions on these sensitive topics that require free and frank communications. *See Nat'l Sec. Archive*, 752 F.3d at 464 ("Premature release of material protected by the deliberative process privilege would have the effect of chilling current and future agency decisionmaking because agency officials . . . would no longer have the assurance that their communications would remain protected."). Risk of disclosure could also disrupt DHS's ability to reach out to others in the Executive Branch, depriving the agency of unique input and expertise that enhances DHS's decisionmaking process. *See, e.g.*, Sprung Decl., Ex. A at 20 (listing communications with personnel from other agencies). And without such candid discussion, both within and across agencies, agency decisionmaking would suffer.

Plaintiffs do not directly address these risks, claiming only that any such risk "could be mitigated by the existence of a protective order." Pl.'s Mot. 10. But a protective order is not a panacea. If it were, the deliberative process privilege would offer little protection. Thus, even where a protective order is contemplated, courts should still determine whether the *Warner* factors warrant disclosure before setting the terms of that disclosure. *See, e.g.*, *Thomas*, 715 F. Supp. 2d at 1044 (reserving final judgment on the harm from disclosure until the court conducts an *in camera* review, rather than requiring

disclosure under a protective order); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 2009 WL 10672284, at *6 (C.D. Cal. Dec. 21, 2009) (upholding an order allowing defendants to claim deliberative process privilege notwithstanding plaintiffs' argument that a protective order would sufficiently protect the documents from public disclosure).

Plaintiffs cite only one case in support of their protective order argument, and that case assessed "the generally asserted governmental interest in confidentiality of [law enforcement] performance evaluations," not deliberative documents underlying important federal policy decisions.[4] *Rodriguez v. City of Fontana*, 2017 WL 4676261, at *4 (C.D. Cal. Oct. 17, 2017). Given the high-profile policy interests at stake in this case, disclosure of deliberative documents—even under a protective order—could chill future agency communications. In the face of that risk, this Court should reject Plaintiffs' request for a blanket ruling on the deliberative process privilege and require Plaintiffs to move to compel specific documents, after meeting and conferring, that they contend have been improperly withheld.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to compel all deliberative process information withheld, as a *per se* legal matter, should be denied.

[4] Although *Rodriguez* mentioned the deliberative process privilege, its analysis focused primarily on the official information privilege, to which it applied a "balancing approach that is moderately pre-weighted in favor of disclosure." 2017 WL 4676261 at *3. By contrast, the *Warner* factors do not suggest "pre-weighting" in Plaintiffs' favor.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

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