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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 PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL DOCUMENTS WITHHELD UNDER DELIBERATIVE PROCESS PRIVILEGE Noted for: Without Oral Argument

I. INTRODUCTION

Despite a Court Order (ECF No. 210) expressly permitting Plaintiffs to pursue discovery related to their Equal Protection claim, Defendants are broadly withholding evidence of deliberations by relevant decisionmakers under vague and unsupported deliberative process privilege claims. This effort should fail. First, the very invocation of the privilege makes little sense in this case where, like others, Plaintiffs have plausibly alleged discriminatory animus in the government's decisionmaking, as numerous courts in the Ninth Circuit and others have ruled. Defendants misstate supposedly key authorities, ignore the vast majority of others, and fail to show why the deliberative process privilege should apply when claims are directed at the government's subjective motivation. Second, all *Warner* factors support disclosure. Defendants' insistence that Plaintiffs specifically articulate the relevance of individual documents they have not seen, requiring the Court to engage in a time-consuming and distorted review process, is nonsensical in a discrimination case where factfinders routinely draw inferences of discriminatory intent from the "totality" of evidence. The burden is on Defendants, not Plaintiffs, to establish sufficient justification to withhold evidence of government decisionmaking, and Defendants have failed.

The Court should grant Plaintiffs' Motion, order Defendants to produce materials withheld thus far under the deliberative process privilege, and prevent Defendants from continuing to wrongfully withhold evidence of Defendants' intent in their decisionmaking process and deliberations.

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II. ARGUMENT

A. The Deliberative Process Privilege Does Not Shield Evidence of Discriminatory Intent

Plaintiffs' argument, echoed in numerous jurisdictions throughout the country including the Ninth Circuit, is that the deliberative process privilege "has no place . . . in a constitutional claim for discrimination." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998). Unlike APA claims, constitutional claims require a categorically different analysis on whether documents can be withheld. "When a party challenges agency action as arbitrary and capricious the reasonableness of the agency's action is judged in accordance with its stated reasons." *Subpoena*, 156 F.3d at 1279 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). "Agency deliberations not part of the record are deemed immaterial . . . because the actual subjective motivation of agency decisionmakers is immaterial as a matter of law." *Id*. at 1279-80 (emphasis added). Accordingly, "the ordinary APA cause of action does not directly call into question the agency's subjective intent." *Id*. at 1280. By contrast, "the deliberative process privilege is unavailable" where "the cause of action is directed at the agency's subjective motivation." *Id*.

As explained in Plaintiffs' Motion, numerous courts in the Ninth Circuit and elsewhere have thus held that the deliberative process privilege "evaporates" when "a plaintiff's cause of action turns on the government's intent," and has "no

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place" in a "constitutional claim for discrimination." *See* ECF No. 255 at 5-7. This is for good reason: "if . . . the Constitution . . . makes the nature of governmental officials' deliberations the issue, the privilege is a non sequitur." *Subpoena*, 145 F.3d at 1424. It is difficult to imagine how plaintiffs could find any support for claims of discriminatory intent behind a decision without unearthing evidence of the decisionmaker's deliberations. Permitting defendants to permanently shield this evidence by invoking the deliberative process privilege, as defendants seek here, essentially defeats these claims at the outset. *Cf. Grossman v. Schwarz*, 125 F.R.D. 376, 381 (S.D.N.Y.1989) ("In a civil rights action where the deliberative process of State or local officials is itself genuinely in dispute, privileges designed to shield that process from public scrutiny must yield to the overriding public policies expressed in the civil rights laws.").

Defendants do not address or contest this litany of authorities cited by Plaintiffs that support this proposition, other than to note that "[e]ach of the district court cases cited by Plaintiffs predates *Karnoski*." Opp. at 5. In doing so, Defendants wrongly suggest that a Ninth Circuit decision, *Karnoski v. Trump*, 926 F.3d 1180, 1195 (9th Cir. 2019), somehow rejected the reasoning echoed in *Subpoena* and elsewhere. *Id*. The Ninth Circuit did no such thing. In *Karnoski*, the Ninth Circuit Court of Appeals considered an appeal of a district court's decision to grant a motion to compel in a case involving both APA and constitutional claims, overriding defendants' invocation of the deliberative

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process privilege. *Karnoski*, 926 F.3d at 1194-97. The district court explicitly did *not* determine if the *Subpoena* logic applied, instead applying only *Warner*. *See Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1161 (W.D. Wash. 2018), *mandamus granted, order vacated*, 926 F.3d 1180 (9th Cir. 2019) (noting *Subpoena* but deciding "[f]or purposes of this motion, the Court assumes, without deciding, that applying the balancing test set forth in *Warner*[] is appropriate."). The Ninth Circuit mentioned *Subpoena* once, and only to note that the plaintiffs cited it in their motion to compel before the district court, but did not address or render a decision on plaintiffs' arguments. *Id.* at 1195. The Ninth Circuit instead determined that the district court applied the *Warner* test incorrectly, and vacated the order. *Karnoski,* 926 F.3d at 1195. Moreover, *Karnoski* differs importantly from the present case because *Karnoski* did not distinguish between discovery into plaintiffs' constitutional and APA claims; in this case, the Court already rejected Defendants' conflation of the two claims. *Id*. at 1206; ECF No. 210.

The other out of circuit authority cited by Defendants is neither controlling nor compelling, especially given that this Court has specifically authorized discovery for Plaintiffs' equal protection claim. Opp. at 5-6, ECF. No. 210. These cases concern different contexts and explicitly did *not* reach the *Subpoena* issue. *See, e.g., Vietnam Veterans of Am. v. C.I.A.*, No. 09-CV-0037 CW JSC, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011) ("Plaintiffs allege that the privilege does not apply where a plaintiff's cause of action is directed at the government's

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intent"; court found "it is unnecessary to decide this issue"); *In re Delphi Corp,* 276 F.R.D. 81, 86 (S.D.N.Y. 2011) (in a revenue ruling challenge, motion to compel denied because the plaintiff "[was] not challenging the decision-making process"). They are certainly less compelling than cases involving equal protection and discrimination claims. *See, e.g., United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 525-28 (N.D. Ind. 2005) (privilege did not apply in case brought under the Fair Housing Act alleging that agencies unlawfully discharged employees and denied zoning permission for racial reasons); *Anderson v. Cornejo*, No. 97 C 7556, 2001 WL 826878, at *1-4 (N.D. Ill. July 20, 2001) (document reflecting deliberations on racial targeting policy was subject to disclosure because it shed light on the subjective intent of a commissioner).

Ultimately, this case is precisely the type of situation where the *Subpoena* approach is best. The Court specifically permitted Plaintiffs to seek discovery related to their equal protection claim, including evidence of discriminatory intent by Defendants as government decisionmakers. ECF No. 210. Defendants have resisted producing *any* evidence of decisionmakers' deliberations, applying the deliberative process privilege to even seemingly innocuous documents such as reactions to news articles, offering little justification. ECF 256-5 at 5-6. No authority permits Defendants to prematurely defeat viable discrimination claims by claiming as privileged seemingly every document that potentially implicates

deliberations. In this case, the government's "deliberative process" is at the heart of the States' claim that discriminatory intent motivated the Rule's promulgation.

B. *Warner* Factors Favor Disclosure

Even if the privilege applied, the Plaintiff States' need for information outweighs any interest in maintaining total secrecy. Defendants' arguments for why *Warner* favors withholding evidence of decisionmaker intent all fail.

Relevance: Given that Defendants produced the documents in response to Plaintiffs' document requests, the documents Defendants have already withheld are categorically relevant to Plaintiffs' constitutional claim. At the outset, records describing Defendants' deliberations would shed light on whether discriminatory animus motivated the Rule's enactment. As such, the records are clearly relevant to Plaintiffs' claims that Defendants violated the Equal Protection Clause. *Cf. N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1124 (N.D. Cal. 2003) ("motive and intent of City Council members" was "highly relevant to [plaintiff's] equal protection claim"). At the very least, these withheld 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 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). This Court has already determined there is "public-record evidence" of "anti-immigrant animus"

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by officials like Kenneth Cuccinelli and Stephen Miller, who are among the very decisionmakers whose documents and communications Plaintiffs seek. ECF No. 210 at 17. Each document Defendants have withheld fits these criteria; these deliberations by relevant decisionmakers provide the very best evidence of the intent behind the enactment of the Public Charge Rule.

Additionally, Defendants seemingly contend that it is Plaintiffs' burden to specifically articulate the relevance of any particular document claimed withheld under the deliberative process privilege. *Id.* at 7-8. This is inapposite for multiple reasons. First, "the deliberative process privilege is narrowly construed" and Defendants bear the burden of establishing its applicability, not Plaintiffs. *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000). Second, the "relevance" of any singular document to Plaintiffs' claim cannot be determined in isolation, as evidence of discriminatory animus typically does not reveal itself in a single "smoking gun"; as is common in discrimination cases, an "invidious discriminatory purpose may often be inferred from the totality of the relevant facts" and does not require smoking-gun allegations. *Washington v. Davis*, 426 U.S. 229, 242 (1976). Plaintiffs are entitled to examine the "totality" of the evidence to determine relevance; they are not required to specifically articulate the relevance of each individual withheld document. Rather, Defendants are required to articulate the reasons why the privilege applies, which they have failed to do. *See Washington v. U.S. Dep't of State*, No.

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C18-1115RSL, 2019 WL 1254876, at *2 (W.D. Wash. Mar. 19, 2019) ("The deliberative process privilege protects only certain types of documents and, as with all privileges, the burden of proving its applicability lies with the party seeking to avoid production. An agency may not simply declare that it has withheld privileged documents without disclosing their existence, identifying the privilege asserted, or providing plaintiffs and the Court with enough information to test the assertion."). Defendants' vague explanations give little means by which to test the legitimate applicability of the privilege. In the two privilege logs Defendants have produced thus far, about 73 of 99 line items contain deliberative process privilege withholdings. In discovery involving what Defendants claim amounts to tens of thousands of documents, *see* Opp. at 1, it makes little sense to require the Plaintiffs and this Court to blindly sift through slip sheets of conclusory privilege claims to determine relevance on a case-by-case basis. *See generally* ECF No. 259-5. Defendants likewise have not provided submission from any agency head to clarify why the privilege is appropriate for the dozens of documents withheld. Were this Court to adopt Defendants' view on the privilege, Defendants would be able to make unilateral determinations of which documents are "relevant," defeating the entire purpose of granting discovery on the States' equal protection claims.

Availability of Other Evidence: This factor still favors Plaintiffs. Defendants' analysis here mainly faults Plaintiffs for "failing to show a

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particularized need for any document or information," and claiming that the documents and administrative record already produced provide "ample" discovery for Plaintiffs' needs. Opp. at 8. As noted above, while Plaintiffs are not required to show a "particularized need" or "relevance" for any specific document, Plaintiffs have argued for the categorical relevance of records of decisionmaker deliberations. Moreover, as Plaintiffs have made clear, Plaintiffs are unable to access evidence of Defendants' intent through other means, as the "evidence sought is primarily, if not exclusively, under [the government's] control, and the government . . . is a party to and the focus of the litigation." *Karnoski*, 926 F.3d at 1206. As Plaintiffs have explained, only internal communications can truly indicate the direct evidence of the extent to which animus motivated the policy change. *See Vill. of Arlington Heights*, 429 U.S. at 266 (determining whether invidious discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

Government's Role in Litigation: Defendants concede that this factor favors Plaintiffs. Opp. at 8, n.3. Despite the footnoted treatment, this factor is of far more importance than Defendant appear to realize. The fact that Defendants are the governmental actors, whose intent at issue goes to the heart of the Equal Protection claim, strongly supports disclosure. *See N. Pacifica*, 274 F. Supp. 2d at 1124 (government's role favored disclosure because "the decision-making

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process of the City Council [was] by no means collateral to" plaintiff's equal protection claim).

Hindering frank and independent discussion: Defendants speak vaguely and generically about the danger of disclosing "[w]holesale disclosure of deliberative documents covering a range of government deliberations." Opp. at 8-10. However, Defendants say nothing about the impacts of disclosing the documents withheld under the deliberative process privilege in *this litigation*. When the government seeks to withhold documents under the deliberative process privilege, a declaration or affidavit from an agency head is submitted to buttress the importance of maintaining the secrecy of the specific documents in question to maintaining frank and open discussion. *See United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998) (privilege "exists only when raised by a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer"). Defendants have provided no such submission, and have argued only vaguely about the dangers of disclosure. The burden was on Defendants to justify withholding responsive and relevant documents, and they have failed to do so.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be **GRANTED**. The Court should order Defendants to produce the material withheld pursuant to the deliberative process privilege without redactions.

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RESPECTFULLY SUBMITTED this 4th day of November 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 4th day of November 2020 at Seattle, Washington.

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