UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,
Plaintiffs
v.
DONALD J. TRUMP, *et al.*,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(April 23, 2018)

Plaintiffs contacted chambers on April 20, 2018, to notify the Court of a discovery dispute.[1] Specifically, Plaintiffs e-mailed the Court to request a teleconference to discuss Defendants' clawback of two documents on the basis of the deliberative process privilege.

The first document is an October 2, 2017 presentation to the Transgender Personnel Policy Working Group. According to Plaintiffs, this document has been produced by various Defendants with different degrees of redaction (ranging from fully redacted to partially redacted to fully unredacted). Plaintiffs apparently used a partially redacted version of this document last week at the deposition of Col. Mary Krueger, during which they questioned Col. Krueger about the document's content. Defense counsel apparently did not object to the use of the partially redacted version of the document (although counsel did apparently clawback a fully unredacted copy of the document on the record).

After the deposition, Defendants sought to clawback even the partially redacted version of the document. Defendants now contend that the entire document is protected by the deliberative process privilege. Plaintiffs argue that the document is not protected by privilege in the first instance, but the Court has already explained that it will not consider the parties' numerous disputes about the applicability of privileges until after certain of Defendants' pending motions have been resolved. The Court will, however, consider Plaintiffs' alternative contention that Defendants have waived any privilege with respect to the partially redacted version of the document by allowing its use without objection at Col. Krueger's deposition. This represents a narrow exception to the Court's decision to otherwise hold privilege issues in abeyance. The Court is only considering this issue because it relates to Defendants' potential waiver of privilege at Col. Krueger's deposition, and because Plaintiffs seek to use this document in an upcoming filing.

The Court is preliminarily inclined to agree with Plaintiffs that Defendants have waived privilege. *See Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp.*, 218 F. Supp. 3d 197, 202 (E.D.N.Y. 2016) (holding that party "waived privilege and work-product protection for [certain exhibits] by failing to seek to preclude their introduction and use at the

[1] Plaintiffs' e-mail is attached to this Order as Exhibit A.

[a] deposition"); *Sidney I. v. Focused Retail Prop. I, LLC*, 274 F.R.D. 212, 218 (N.D. Ill. 2011) ("Plaintiffs waived the privilege when, despite ample opportunity, they failed to raise a privilege objection at Pilot's deposition.").

By no later than **April 24, 2018** at **8:00 a.m.**, Defendants shall file on the record a brief response to Plaintiffs' e-mail that (1) indicates whether the facts set forth therein (and summarized above) about the production and use of the October 2, 2017 presentation are accurate, and (2) provides the Court with any authority Defendants have for the proposition that a party that allows the use of a document at a deposition without objecting or asserting privilege does not waive privilege with respect to that document.

The Court understands that Plaintiffs also dispute the purported clawback of a December 8, 2017 e-mail. However, it appears that the dispute about this document is not whether privilege may have been waived by Defendants' failure to object to its use in this litigation, but instead primarily whether the document warrants protection under the deliberative process privilege in the first instance. As the Court has already explained, such disputes will be resolved at a later time.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

Exhibit A

Doe v. Trump, Case No. 17-01597: Clawback Dispute

McFadden, Daniel L to: Kollar-Kotelly_Chambers@dcd.uscourts.gov 04/20/2018 05:00 PM

Cc: "Parker, Ryan (CIV)", "Carmichael, Andrew E. (CIV)", "Enlow, Courtney D. (CIV)", "Laporte, Claire", "Alan Schoenfeld", "Wolfson, Paul", "Norway, Robert M. (CIV)"

History: This message has been forwarded.

Chambers of Judge Kollar-Kotelly,

I am counsel for Plaintiffs in Doe v. Trump, No. 17-01597. Defendants' counsel is included on this email.

I am writing pursuant to the Court's Scheduling and Procedures Order (Docket No. 71) and paragraph III(5) of the Court's Fed. R. Evid. 502(D) Order (Docket No. 85) (the "Rule 502(D) Order") to request a teleconference concerning a clawback dispute that has arisen among the parties, in part during the recent deposition of Col. Mary Krueger. I recognize that the Court has indicated its intent to defer resolution of the parties' privilege disputes until after certain substantive matters are decided. However, we had expected to use at least one of the documents at issue (the October 2, 2017 presentation to the Transgender Personnel Policy Working Group) in our upcoming briefing in opposition to the Defendants' motions to dissolve the preliminary injunction and to dismiss, as well as in upcoming depositions. Additionally, we are presenting the dispute now to ensure our clients' rights are preserved, recognizing that resolution of the dispute may come at a later time.

Pursuant to the Rule 502(D) Order, we are prepared to submit the documents at issue under seal for the Court's inspection and to brief the matter under seal on a schedule convenient to the Court.

The first document at issue is an October 2, 2017 presentation to the Transgender Personnel Policy Working Group, which supported the Panel of Experts. The various Defendants have produced many copies of this document with varying redactions, ranging from fully redacted to partially redacted to fully unredacted. During the deposition earlier this week of Col. Mary Krueger, Plaintiffs' counsel marked a partially redacted version of the presentation and questioned the witness concerning its content, all without any objection from Defendants' counsel to the use of the document. Plaintiffs' counsel subsequently marked an unredacted copy. Defendants' counsel clawed back the unredacted copy on the record, but only to the extent that it disclosed information beyond the partially redacted version (about which there had already been extensive testimony).

The next day, Defendants' counsel sent a letter that purports to claw back not only the

unredacted copy, but also the partially redacted copy that had been the subject of testimony (as well as an apparently identical document produced elsewhere), and also a single slide from the presentation that had been produced as a separate document. These documents are Bates Nos. Army_10004597.0001/USDOE00109420, Navy_00040984/USDOE00063224, Navy_00041020/USDOE00063260, and Army_10000291/USDOE00099200. Defendants assert that the documents are shielded by the deliberative process privilege.

Plaintiffs contest these clawbacks. Defendants waived any privilege over the partially redacted presentation by permitting its use in the deposition. *See, e.g.* , *Certain Underwriters at Lloyd's, London v. AMTRAK* , 218 F. Supp. 3d 197, 202-03 (E.D.N.Y. 2016); *United States v. Wells Fargo Bank, N.A.* , 2015 U.S. Dist. LEXIS 113546, at *11 (S.D.N.Y. Aug. 26, 2015); *Luna Gaming – San Diego, LLC v. Dorsey & Whitney, LLP* , 2010 U.S. Dist. LEXIS 3188, at *13-15 (S.D. Cal. Jan. 13, 2010). Additionally, certain of the clawed-back content is not deliberative in nature and therefore does not satisfy the elements necessary to trigger the deliberative process privilege. Further, Plaintiffs contend that, in the context of this case, the deliberative process privilege either is not applicable to the purported deliberations that preceded Secretary Mattis's communications dated February 22, 2018 and President Trump's March 23, 2018 Memorandum or has been overcome for the reasons stated in my email to the Court of April 13, 2018, from which I quote below (that email is also attached for ease of reference):

> "Defendants have placed these deliberations and communications squarely at issue in the litigation, including by asserting (contrary to Secretary Mattis's own written order creating the Panel) that the Panel's deliberative process constituted an exercise of 'professional, independent judgment' rather than an 'implementation' of the President's policy. *See, e.g.* , Mot. to Dissolve Inj. (Docket No. 96) at 1. There is no way to fairly test Defendants' assertion without reviewing the Panel's actual deliberations and communications. In such circumstances, the deliberative process privilege does not apply. *See In re Subpoena* , 145 F.3d 1422, 1424 (D.C. Cir. 1998) (deliberative process privilege does not apply where 'the nature of the governmental officials' deliberations [is] the issue,' including in constitutional claims for discrimination); 6 Moore's Federal Practice – Civil Sec. 26.52[5] ('[T]he deliberative process privilege does not apply when the decision-making process itself is the subject of the litigation, such as in cases alleging discriminatory hiring practices.'); *see also Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.* , 129 F.3d 143, 151 (D.C. Cir. 1997) (even attorney-client privilege is implicitly waived when 'the client places otherwise privileged matters in controversy'). Further, even if the qualified deliberative process privilege did apply, the Defendants' assertion would create a need sufficient to overcome it. *See, e.g.* , *In re Sealed Case* , 121 F.3d 729, 737 (D.C. Cir. 1997)."

The second document at issue is an email dated December 8, 2017 (Bates No. AF_00000595/USDOE00005253). It has been clawed back pursuant to an assertion of the deliberative process privilege. Plaintiffs contest the clawback because (1) the content is not deliberative in nature, is post-decisional, and/or has already been largely made public through Defendants' disclosures; and (2) the deliberative process privilege is not applicable for the

reasons set forth in the preceding paragraph.

Respectfully submitted,
Daniel L. McFadden

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----- Message from "McFadden, Daniel L" <DMcFadden@foleyhoag.com> on Fri, 13 Apr 2018 19:35:16 +0000 -----

To: "Kollar-Kotelly_Chambers@dcd.uscourts.gov" <Kollar-Kotelly_Chambers@dcd.uscourts.gov>
cc: "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>, "Carmichael, Andrew E. (CIV)" <Andrew.E.Carm <Courtney.D.Enlow@usdoj.gov>, "Laporte, Claire" <CLL@foleyhoag.com>, "Alan Schoenfeld" <A <Paul.Wolfson@wilmerhale.com>
Subject: Doe v. Trump, Case No. 17-01597: Request for Teleconference re: Discovery Disputes

Chambers of Judge Kollar-Kotelly,

I am counsel for Plaintiffs in *Doe v. Trump* , No. 17-01597. Defendants' counsel is included on this email. I write pursuant to the Court's Scheduling and Procedures Order (Docket No. 71) to request a teleconference with the Court concerning certain discovery disputes that have arisen among the parties. In summary, the disputes are:

1. Plaintiffs are seeking documents and information concerning the deliberations of the Panel of Experts created to advise the senior leadership

of the Department of Defense and the Panel's communications with those leaders. *See, e.g.* , Doc. Reqs. 4, 20, 21, & 22. Defendants have placed these deliberations and communications squarely at issue in the litigation, including by asserting (contrary to Secretary Mattis's own written order creating the Panel) that the Panel's deliberative process constituted an exercise of "professional, independent judgment" rather than an "implementation" of the President's policy. *See, e.g.* , Mot. to Dissolve Inj. (Docket No. 96) at 1. There is no way to fairly test Defendants' assertion without reviewing the Panel's actual deliberations and communications. In such circumstances, the deliberative process privilege does not apply. *See In re Subpoena* , 145 F.3d 1422, 1424 (D.C. Cir. 1998) (deliberative process privilege does not apply where "the nature of the governmental officials' deliberations [is] the issue," including in constitutional claims for discrimination); 6 Moore's Federal Practice – Civil Sec. 26.52[5] ("[T]he deliberative process privilege does not apply when the decision-making process itself is the subject of the litigation, such as in cases alleging discriminatory hiring practices."); *see also Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.* , 129 F.3d 143, 151 (D.C. Cir. 1997) (even attorney-client privilege is implicitly waived when "the client places otherwise privileged matters in controversy"). Further, even if the qualified deliberative process privilege did apply, the Defendants' assertion would create a need sufficient to overcome it. *See, e.g.* , *In re Sealed Case* , 121 F.3d 729, 737 (D.C. Cir. 1997). Nevertheless, Defendants are maintaining their claim that all information concerning the Panel of Experts should be withheld as privileged, except for the strictly factual information considered by the Panel.

2. Plaintiffs seek the Court's assistance in resolving the deliberative process privilege issue they first raised in February. Specifically, in a letter to the Court dated February 12, 2018, Plaintiffs disputed Defendants' assertion of deliberative process privilege over "documents concerning military service of transgender individuals between the date the President announced his decision to ban transgender individuals from service, July 26, 2017, and his issuance of implementing guidance in a presidential Memorandum on August 25, 2017," which appear to be post-decisional. Pursuant to the Court's instructions, Plaintiffs provided Defendants with a list of disputed documents on February 14, 2018 (and a short supplemental list on February

17, 2018). On February 16th, the Court ordered Defendants to "review those documents and consult with Plaintiffs next week [*i.e.* , by February 23rd] to discuss whether they are willing to release some or all of those documents, or at least provide Plaintiffs with more information about the documents so that Plaintiffs can consider the appropriateness of Defendants' assertions of privilege." The parties conferred on February 23rd and, and at Defendants' request, agreed that, by March 2nd, Defendants would report for each document whether the assertion of privilege was withdrawn or, if not, whether Defendants would provide any supplemental information to justify the assertion of privilege. Defendants subsequently requested an extension of time until March 6th for certain groups of documents, and Plaintiffs agreed. Plaintiffs have repeatedly reminded Defendants of these agreements. Nevertheless, even today, more than a month after the agreed deadline, it appears that Defendants have provided their position concerning only about 34 of the roughly 300 documents challenged in February. Plaintiffs are requesting that the Court set a date certain for Defendants to provide the agreed responses as to all documents challenged in February and to produce any documents as to which the claim of privilege is withdrawn. Further, Plaintiffs have raised additional challenges since February (as Defendants have continued to produced privilege logs and redacted documents) and seek a concrete timeline for Defendants' responses.

3. Plaintiffs seek the Court's assistance in establishing a concrete timeline for the completion of Defendants' document production. The parties had originally agreed that Defendants would produce all documents by February 2nd. That has not occurred. Defendants have now informed Plaintiffs that their rolling document productions will not be complete until at least the end of May. The uncertainty regarding the completion of Defendants' production makes discovery planning extremely difficult. Plaintiffs ask the Court to set a date certain for the completion of Defendants' production, preferably by early May.

Respectfully submitted,
Daniel L. McFadden

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