The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL DEFENDANTS' DISCOVERY WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE

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In denying summary judgment, the Court focused on two key factual disputes: (1) whether, and to what extent, the Ban is owed any judicial deference and (2) whether Defendants' proffered justifications are constitutionally adequate. Both inquiries require examination of Defendants' deliberative process to assess the robustness of that process and to ferret out Defendants' true motivations or intentions in banning transgender individuals from military service. Under these circumstances, the law leaves no room for Defendants to invoke the deliberative process privilege. At the very least, the privilege must bend to the centrality of this discovery to Plaintiffs' claims, the public importance of this litigation, and its impact on Plaintiffs' constitutional rights. In response, Defendants ask the Court to order Plaintiffs to comb through their thousands of privilege log entries and challenge their privilege claims on a document-by-document basis. But given the sheer breadth of Defendants' reliance on the privilege and the central role these issues play in this case, their proposal is impractical and unreasonable.[1] The Court should make the threshold finding that Defendants cannot rely on the deliberative process privilege and grant Plaintiffs' motion to compel.

A. The deliberative process privilege does not apply because Plaintiffs challenge Defendants' decision-making and intent.

Defendants argue that the Ninth Circuit's approach in *Warner* "requires" use of a balancing test alone instead of also answering the threshold question of whether the privilege applies at all here because Plaintiffs' claims target the government's intent during the decision-making process. (Def's Opp. to Plf's Mot. to Compel ("Opp.") at 3-4, Dkt. 266.) Outside of citing *Warner*, Defendants point to no Ninth Circuit precedent supporting their contention. And, in fact, their own supporting cases recognize there is no binding precedent on this front. *Vietnam Veterans of Am. v. C.I.A.*, 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). Nevertheless, numerous courts invariably recognize that—regardless of the balancing

[1] Beyond invoking the privilege broadly in their discovery responses, Defendants no doubt will invoke it to instruct witnesses not to answer questions in future depositions. They did so in a recent deposition in the *Doe* case, including to fundamental questions such as whether the National Security Council held any meetings concerning the subject of transgender military service.

of interests—the privilege has no application where, as here, the government's intent in formulating a policy is squarely at issue.[2] (Plf's Mot. to Compel ("Mot.") at 5-7, Dkt. 264.) *See Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 135 (D.D.C. 2005) ("Under the government misconduct exception, there is no need to engage in a balancing test because the privilege does not apply at all."); *Jones v. Hernandez*, 2017 WL 3020930, at *3 (S.D. Cal. July 14, 2017) ("In certain circumstances, the Court may deny the protection of the deliberative process privilege, regardless of the balancing test. These circumstances include the following: (1) when there is reason to believe that the documents sought may shed light on government misconduct, and (2) when the agency's decision-making process is itself at issue." (internal citations omitted)). As Plaintiffs' set out in their Motion, this case falls squarely within this well-settled exception.[3] (Mot. at 5-7.)

B. No document after July 26, 2017 is predecisional.

Defendants argue (paradoxically) that documents generated after the July 26, 2017 announcement of the Ban on Twitter were "predecisional for *subsequent* decisions and policies." specifically identifying the August 2017 Presidential Memorandum, the September 2017 Interim Guidance, the so-called panel of experts recommendations, Secretary Mattis's February 2018 memorandum and accompanying DoD report, and the March 2018 Presidential Memorandum. (Opp. at 6.) But the Court has already rejected—*twice*—Defendants' contention that the 2018 Implementation Plan and their actions between July 2017 and March 2018 constitute any new or different policy. (Dkt. 235 at 2; Dkt. 233 at 3 n.1, 11-14.) Beyond reprising their well-worn refrain that the current transgender Ban is different from the President's transgender Ban,

[2] Defendants distinguish *Jones v. City of College Park, Ga.*, 237 F.R.D. 517 (N.D. Ga. 2006) on the grounds that the court used the balancing test, (Opp. at 5), but Defendants fail to acknowledge the court's explicit holding that, "[w]hether this court applies a balancing *or finds that the privilege does not apply*, the undersigned reaches the same result." *Id.* at 521 (emphasis added).

[3] Defendants focus on an irrelevant fork in case law that finds the privilege inapplicable to routine personnel decisions as opposed to deliberations of public policies. (Opp. at 5.) That inquiry is independent from the exception relevant here: Plaintiffs' claims place the government's decision-making process and intent at issue. *See Mitchell v. Fishbein*, 227 F.R.D. 239, 250–51 (S.D.N.Y. 2005) (holding it "not necessary to reach th[e] issue" whether the "decision-making process itself is the subject of the litigation" because plaintiff's claims related to routine agency decision that "cannot qualify for the deliberative process privilege" (internal citation and quotation marks omitted)); *Jones*, 237 F.R.D. at 520; *Scott v. Bd. of Educ. of City of E. Orange*, 219 F.R.D. 333, 337 (D.N.J. 2004).

Defendants do not show any new or different policy decisions were made despite holding the burden to show that the privilege applies. (Mot. at 5.)

Equally problematic, Defendants seek to preclude discovery into their *post-hoc* justifications for the Ban—to which they insist deference must be provided. (Opp. at 9-10, 12; *see also* Dkt. 233 at 25.) Such materials are not predecisional and cannot qualify for the privilege. *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) ("[P]ost-decisional documents . . . justifying a decision already made are not shielded."); *Bergeron v. DOJ*, 2015 WL 3935032, at *3 (D. Nev. June 26, 2015) (same); *Ensco Offshore Co. v. Salazar*, 2010 WL 11538697, at *8 (E.D. La. Sept. 16, 2010) (holding once decisionmaker expressed commitment to specific policy, subsequent communications were non-privileged "after-the-fact justifications for that decision"); *Bell v. Bd. of Educ.*, 2008 WL 4107445, at *3 (D.N.M. Apr. 22, 2008) (privilege does not protect "individual decisions implementing existing policy."

At bottom, Defendants ask the Court to adopt a view of the deliberative process privilege that would "elide any distinction between pre-decisional and post-decisional documents" and ultimately vitiate the predecisional limitation by allowing them to reframe every post-decisional action as the deliberative precursor to a new decision.[4] *Unidad Latina En Acción v. Dep't of Homeland Sec.*, 253 F.R.D. 44, 59 (D. Conn. 2008). That is not the law. Materials created after the President's tweets are post-decisional and fall outside the scope of the privilege.

C. The Ninth Circuit's balancing test favors disclosure.

Even if the Court were to apply *Warner's* balancing test, it tips decisively against the government here. As an initial matter, Defendants are simply wrong that under this test Plaintiffs must prove why "*each and every document*" that has been withheld is relevant to their claims. (Opp. at 8.) Courts—including those on which Defendants rely—routinely apply the balancing analysis on a categorical basis. *See, e.g., Ariz. Dream Act Coal. v. Brewer*, 2014 WL 171923, at *3 (D. Ariz. Jan. 15, 2014) (granting motion to compel on all 174 documents in defendants'

[4] Defendants also argue some documents that post-date July 26, 2017 may reflect pre-decisional deliberations. But they have made no showing with respect to any specific document to substantiate that assertion.

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privilege log withheld solely under deliberative process privilege); *Vietnam Veterans of America*, 2011 WL 4635139, at *10 (assessing whether privilege was overcome for 483 documents falling within 9 categories) (cited in Opp. at 8). Beyond this threshold issue, Defendants also misapply the *Warner* factors and completely ignore the additional factors that Ninth Circuit district courts consider:

Relevance. Defendants argue that Plaintiffs have not demonstrated the relevance of deliberative materials relating to (1) the Carter Policy; (2) the 2017 Presidential Memorandum; and (3) the so-called Panel of Experts and the resulting Implementation Plan.[5] But all three categories of documents bear on whether Defendants' justifications for the Ban are "constitutionally adequate" and "sincerely motivated by compelling state interests, rather than by prejudice or stereotype." (Dkt. 233 at 28; *see also id*. at 25.) While the deliberative materials concerning the Carter Policy pre-date the Ban, documents demonstrating that the same issues and concerns Defendants now cite to support the Ban were previously considered and rejected by military leaders are relevant to Plaintiffs' rebuttal that Defendants' purported justifications are simply *post-hoc* rationalizations sought to justify animus and discriminatory intent.[6] Moreover, fulsome discovery into the deliberations of the Carter Policy would provide evidence for comparing the robustness of those policy considerations to Defendants' purported justifications. This would go to the heart of Defendants' quest for judicial deference to their military judgment.

The relevance of the remaining two categories of documents is self-evident. The Court cannot apply constitutional scrutiny without peering into the Defendants' "intent and purpose in crafting the policy."[7] *Brewer*, 2014 WL 171923, at *3 (holding withheld communications were "highly relevant" because the "Court must consider the actual intent behind Arizona's driver's

[5] Notably absent is any claim that deliberative materials preceding the President's July 2017 tweets are irrelevant. This tacit admission of relevance alone weighs in favor of disclosing those materials.

[6] Indeed, this Court previously found the fact the President's announcement of the Ban contradicted all evidence developed in connection with the Carter Policy was *prima facie* evidence it lacked adequate justification and failed constitutional scrutiny. (Dkt. 103 at 16.)

[7] Nor can the Court assess whether and to what extent Defendants are entitled to judicial deference without examining their deliberative process. (Dkt. 233 at 26. *See infra* Part IV.)

license policy when it considers the merits of this case"); *see also N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1123 (N.D. Cal. 2003). Their only retort is yet again arguing that the Implementation Plan is a new and different policy. But far from being just "Plaintiffs' view," (Opp. at 9), it is the law of the case that the "2018 Memorandum and Implementation Plan are not a 'new policy,'" (Dkt. 235 at 2; see also Dkt. 233 at 3 n.1, 11-14.)

Availability of Other Evidence. Defendants claim their production of 35,000 other documents somehow eliminates Plaintiffs' need for documents Defendants concede are responsive. Needless to say, pointing to the volume of less important documents is no basis to rebut Plaintiffs' need for the core documents illuminating Defendants' intent—the central issue in the case. Indeed, Defendants concede the documents Plaintiffs do *not* have are the ones that reflect the very decision-making Plaintiffs allege was unconstitutional. Nor does the availability of the administrative record negate the need for disclosure, as "evidence of discriminatory intent 'does not typically lay dormant in an administrative record.'" *Academy of Our Lady of Peace v. City of San Diego*, 2011 WL 6826636, at *8 (S.D. Cal. Dec. 28, 2011) (quoting Newport Pac. Inc. v. County of San Diego, 200 F.R.D. 628, 639 (S.D. Cal. 2001)). Plus, the Court already—correctly—rejected Defendants' contention that this case is limited to that record. (Dkt. 235 at 2.)

Risk of Hindering Frank Discussions. Defendants make unsubstantiated claims that disclosure would "potentially lead[] to a direct negative impact to national security" and chill future discussions among military officers. (Opp. at 10-11.) But nothing in Defendants' brief remotely suggests that disclosure here—in these unprecedented circumstances—would inhibit future deliberations. To the contrary, disclosure—which Plaintiffs reasonably believe will lay bare animus and not impartial policymaking—will serve to remind "government agencies acting on behalf of the public at large . . . that they are subject to scrutiny." *Newport*, 200 F.R.D. at 640; *Marilley v. McCamman*, 2012 WL 4120633, at *6 (N.D. Cal. Sept. 19, 2012). Moreover, the Court can mitigate any risk of disclosure of confidential information by a protective order, *see Price v. County of San Diego*, 165 F.R.D. 614, 620 (S.D. Cal. 1996), and Defendants therefore should not be permitted to cover up discrimination with hyperbole.

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Government's Role in the Litigation. Defendants do not dispute "the Government's policy is at issue in this case," (Opp. at 10 n.4), which weighs in favor of compelling disclosure. *Brewer*, 2014 WL 171923, at *3; *North Pacifica*, 274 F. Supp. 2d at 1124.

Other Relevant Factors. Defendants never mention the other factors Ninth Circuit courts consider. *See North Pacifica*, 274 F. Supp. 2d at 1122. Because the issues in this case are of great public importance and bear on federal constitutional rights, "the interest in accurate judicial fact finding is heightened because equal protection rights are at stake." *Id.* at 1123; *Marilley*, 2012 WL 4120633, at *7 (same). As with other factors, these too favor disclosure.

D. Military deference does not preclude constitutional scrutiny of Defendants' deliberative process.

Defendants contend their claim of military deference renders the substance of their deliberative process irrelevant and shields their deliberations from judicial scrutiny as a matter of law. (Opp. at 11-12.) But the Court has already found the opposite, expressly directing the parties to conduct discovery on Defendants' deliberative process to allow it to determine whether, and to what extent, judicial deference is owed. (Dkt. 233 at 26, 31.) Defendants' broad invocation of the deliberative process privilege, however, has stymied Plaintiffs' efforts to obtain this discovery, creating exactly the sort of sword/shield issue courts refuse to countenance. (*See* Mot. at 7-8.)

The Court has likewise rejected Defendants' claim that the deference issue is dispositive: "[E]ven in the event it were to conclude that deference is owed, it would not be rendered powerless to address Plaintiffs' and Washington's constitutional claims, as Defendants seem to suggest." (Dkt. 233 at 27.) Thus, even if deference were owed (and it is not), discovery into the deliberative process would still be necessary to assess whether the Ban survives strict scrutiny.

CONCLUSION

The Court should compel Defendants to produce all information withheld on the basis of the deliberative process privilege.

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Respectfully submitted May 25, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on May 25, 2018.

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