

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

NICHOLAS HARRISON, ET AL.,

Plaintiffs,

v.

PATRICK M. SHANAHAN, ET AL.,

Defendants.

NO. 1:18-CV-00641-LMB-IDD

**PLAINTIFFS' MOTION TO COMPEL DOCUMENTS AND INFORMATION  
WITHHELD ON THE BASIS OF DELIBERATIVE PROCESS PRIVILEGE**

Pursuant to Fed. R. Civ. P. 37 and the Local Rules of the U.S. District Court for the Eastern District of Virginia, Plaintiffs Nicholas Harrison and OutServe-SLDN, Inc. (collectively, "Plaintiffs") hereby move to compel the production of documents and information withheld on the basis of the deliberative process privilege.

Defendants are currently withholding approximately 1,500 documents on the sole basis of deliberative process privilege. As detailed in the accompanying Memorandum in Support of Plaintiffs' Motion, the deliberative process privilege is inapplicable in this case because the government's intent is at issue in this case and government misconduct is alleged. Alternatively, the balancing test laid out in *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400, 1987 WL 36515 (4th Cir. 1987) (unpublished table decision), still compels production of these documents given the information requested is highly relevant, Defendants are the only source of information, the government is integral to the case, and disclosure of this information would not hinder frank and independent discussion regarding the discriminatory policies disputed in this case. Accordingly,

Defendants should be required to produce all documents and information that have been withheld on the bases of deliberative process privilege.

Pursuant to Local Rule 37(E), Plaintiffs hereby certify they have made a good faith effort to resolve this dispute with counsel for Defendants.

Dated: January 25, 2019

Respectfully submitted,

/s/ Andrew R. Sommer

Andrew R. Sommer  
Virginia State Bar No. 70304  
ASommer@winston.com  
Cyrus T. Frelinghuysen (pro hac vice)  
CFrelinghuysen@winston.com  
John W.H. Harding  
Virginia State Bar No. 87602  
JWHarding@winston.com  
WINSTON & STRAWN LLP  
1700 K St., NW  
Washington, DC 20006  
T: (202) 282-5000

Scott A. Schoettes (pro hac vice)  
SSchoettes@lambdalegal.org  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
105 W. Adams, Suite 2600  
Chicago, IL 60603  
T: (312) 663-4413

Anthony Pinggera (pro hac vice)  
APinggera@lambdalegal.org  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
4221 Wilshire Blvd, Suite 280  
Los Angeles, CA 90010  
T: (213) 382-7600

Peter E. Perkowski (pro hac vice)  
PeterP@outserve.org  
OUTSERVE-SLDN, INC.  
P.O. Box 65301  
Washington, DC 20035-5301  
T: (800) 538-7418

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of January 2019, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: January 25, 2019

Respectfully submitted,

/s/ Andrew R. Sommer  
Andrew R. Sommer