

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

NICHOLAS HARRISON; and OUTSERVE-
SLDN, INC.,

Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as Acting Secretary of Defense; *et*
al.,

Defendants.

No. 1:18-cv-641-LMB-IDD

**OBJECTION TO MAGISTRATE JUDGE’S ORDER GRANTING PLAINTIFFS’
MOTION TO COMPEL DOCUMENTS WITHHELD PURSUANT
TO THE DELIBERATIVE PROCESS PRIVILEGE**

Pursuant to Local Rule 7(F) and Federal Rule of Civil Procedure 72(a), Defendants and the Departments of the Air Force and Navy respectfully submit this memorandum of law in support of their Objections to the presiding Magistrate Judge’s grant of Plaintiffs’ Motion to Compel Documents and Information Withheld on the Basis of the Deliberative Process Privilege (the “March 14 Order”). Dkt. 128.

The March 14 Order is based on fundamental errors of law and fact. At the most basic level, the order relies on the flawed premise that the documents at issue may be relevant to the Government’s intent in adopting the challenged policies, and whether the Government’s expressed reasons are pretextual. But the complaint fails to allege pretext. The central allegation—that plaintiffs are part of a suspect classification and that the policy should be reviewed under heightened scrutiny—was rejected by the Court when it applied rational basis review to the claims

in the related case *Roe v. Shanahan*, No. 1:18-cv-1565, Mem. Op. at 32-35, Dkt. 72. As a matter of law, the Government's intent is not relevant to a rational basis review. For this reason alone, Plaintiffs' motion to compel should have been denied in full.

The March 14 Order also includes equally significant errors in evaluating the deliberative process privilege. It misunderstands what constitutes "deliberative" material, concluding incorrectly, for example, that proposed edits to a document are not part of the deliberative process. The order also assumes that if a document contains some non-deliberative material, the entire document must be disclosed, without considering whether the non-deliberative material can be segregated. The order is dismissive of the well-established purpose of the privilege—to protect the frank discussions of Government officials—and the record evidence of the chilling effect that would be caused by disclosure of the withheld material, especially the materials relating to the Army's ongoing policy review.

For these and the other reasons below, Court should set aside the Magistrate Judge's order compelling production of certain materials because the decision is clearly erroneous and contrary to law.

BACKGROUND

Plaintiff Nick Harrison brings as applied and facial challenges to the two Army and Department of Defense ("DoD") policies, DoDI 6485.01 and AR 600-110 (the "Army and DoD HIV policies"), that the Army relied on in its decision not to commission him as an officer, and Plaintiff OutServe (an organization) brings facial challenges to those same policies. The Court previously denied Plaintiffs' motion for a preliminary injunction and also Defendants' motion to dismiss. Dkt. 60. The parties have completed fact discovery into the claims raised in the Complaint.

On January 25, 2019, Plaintiffs filed a motion to compel production of all documents withheld by Defendants under the deliberative process privilege. Dkt. 107. Plaintiffs primarily argued that the deliberative process privilege should not apply to any documents withheld in this case because their complaint challenged the Defendants' intent in promulgating the challenged regulations. In the alternative, Plaintiffs argued that even if the privilege is applicable, the Plaintiffs' need for the withheld documents outweighed any interest served by the withholding.

At the time of the motion, Defendants were withholding all or part of approximately 1,500 documents. The parties met and conferred to reduce the number of documents at issue several times, and Defendants proposed grouping the documents at issue into 15 separate categories. Dkt. 116 at 3. The hearing on Plaintiffs' motion to compel was also held in abeyance twice after the Magistrate Judge instructed the parties to further reduce the number of contested documents. Dkts. 114, 118, 124. Throughout this process, Defendants withdrew their assertion of privilege over several hundred documents. Dkt. 116 at 3. Plaintiffs also withdrew their challenges to the assertion of privilege over several hundred documents that had been captured by their overbroad discovery requests. At the urging of the Court, the parties agreed to present for *in camera* review a random sample selected from the remaining documents, divided by general category. The March 14 Order applies to 330 documents that currently remain contested between the parties, of which the Magistrate Judge reviewed a sample of 33 documents *in camera*. Dkt. 121 at 1-2.

On March 14, 2019, Magistrate Judge Davis issued an order granting Plaintiffs' motion to compel production of the remaining 330 withheld documents. Dkt. 128. The Magistrate Judge held that the deliberative process privilege does not apply to any of the 330 documents because they do not "reflect a decision-making process." *Id.* at 1. The order also states that even if the documents were deliberative, the balance of the Government's interest in non-disclosure with the Plaintiffs'

interest in obtaining the documents would weigh in favor of the Plaintiffs because the Government's intent is at issue in the case. *Id.* at 2. Finally, the order declares that the Government has "waived" the deliberative process privilege for some of the withheld documents, supposedly because some privileged drafts were similar to the final published versions. *Id.*

APPLICABLE LEGAL STANDARDS

Pursuant to Federal Rule of Civil Procedure 72(a), the district court "must . . . modify or set aside any part of the [Magistrate Judge's] order that is clearly erroneous or is contrary to law." *See also* 28 U.S.C. § 636(b)(1)(A). "A court's 'finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Bruce v. Hartford*, 21 F. Supp. 3d 590, 593–94 (E.D. Va. 2014) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see also Harman v. Levin*, 772 F.2d 1150, 1152 (4th Cir. 1985). "The standard of review for 'contrary to law,' however, is different." *Perez v. Figi's Cos., Inc.*, No. 5:15-CV-13559, 2016 WL 10100742, at *2 (S.D.W. Va. Feb. 26, 2016). "For questions of law, there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and a de novo standard." *Id.* (quotation and alterations omitted); *Bruce*, 21 F. Supp. 3d at 594. The Court therefore "review[s] the factual portions of the Magistrate Judge's order under the clearly erroneous standard, but . . . review[s] legal conclusions to determine if they are contrary to law." *Bruce*, 21 F. Supp. 3d at 594 (citations omitted). "An order is contrary to law 'when it fails to apply or misapplies relevant statutes, case law or rules of procedure.'" *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1327 (M.D. Fla. 2011) (quoting *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 74 (N.D.N.Y. 2000)).

ARGUMENT

The March 14 Order is premised on the misunderstanding that the documents may be necessary to understand the Government’s intent in adopting the challenged policies, and whether the Government’s expressed reasons are pretextual. But the complaint nowhere alleges pretext, and its central thrust—that Defendants’ policies should be reviewed under heightened scrutiny—has been rejected by the Court. As a matter of law, the Government’s intent is not relevant to the Court’s consideration of the Plaintiffs’ claims. The order makes equally significant errors in weighing the remaining considerations for when a plaintiff’s need for deliberative materials outweighs the Government’s interest in frank and independent discussions. Finally, the order is also based on legal error as to what constitutes “deliberative” material, and does not consider whether non-deliberative material can be segregated from privileged material as required by law.

I. The March 14 Order’s Weighing Of The Parties’ Interests Is Contrary To Law.

The March 14 Order incorrectly applies the four factors described in *Cipollone v. Liggett Group, Inc.*, 812 F.2d 1400 (4th Cir. Feb. 13, 1987) (unpublished disposition *available at* 1987 WL 36515), to balance the Government’s need in asserting the deliberative process privilege with the Plaintiffs’ need for disclosure of the withheld information. *Cipollone* directs courts to consider “(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the Government’s role (if any) in the litigation, and (4) ‘the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decision.’” *Id.* at *2 (quoting *FTC v. Warner Commc’ns. Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)).

The Magistrate Judge’s analysis of these factors is clearly erroneous and contrary to law. The March 14 Order’s *Cipollone* balancing analysis is a single paragraph. Dkt. 128 at 2-3. This truncated analysis does not meaningfully or correctly “balanc[e] the public interest in nondisclosure

with the need for the information as evidence.” *Id.* at *2 (quoting *Dowd v. Calabrese*, 101 F.R.D. 427, 431 (D.D.C. 1984)).

A. The March 14 Order’s Conclusion Regarding The First *Cipollone* Factor—Relevance Of The Evidence—Is Contrary To Law.

First, the Court’s conclusion regarding the relevance of the withheld documents is contrary to law. The Court concluded that “the documents provided for the *in camera* review all appear relevant to Plaintiff’s lawsuit” because the requests “are reasonably calculated to lead to the discovery of evidence that may be admissible concerning the Government’s intent.” Dkt. 128 at 2. But the conclusion is contrary to law because (1) the Government’s subjective intent is not relevant as a matter of law, and (2) even if the intent is possibly relevant, the order places undue weight on this factor in the *Cipollone* analysis. .

1. Under Rational Basis Review, The Government’s Subjective Intent Is Not Relevant.

The Magistrate Judge’s conclusion that the Government’s intent is relevant to Plaintiffs’ claims is contrary to law. Plaintiffs’ only constitutional claim, an Equal Protection challenge, is subject to a highly deferential standard of review even outside the military context. The military policies challenged by Plaintiffs do not “impinge[] upon a fundamental right or involve[] a suspect classification, [therefore] a minimal level of scrutiny is applied under the rational basis test.” *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991). Further, it is beyond dispute that the Fourth Circuit has held that claims of discrimination on the basis of HIV status are subject to rational basis review only.¹ *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995); *see*

¹ In a decision granting a preliminary injunction in *Roe v. Shanahan*, the Court stated that rational basis review applied to claims challenging DoD’s personnel policies regarding HIV similar to the claims here. *See* Mem. Op. at 32-35, *Roe v. Shanahan*, No. 1:18-cv-1565, Dkt. 72. The cases cited by Plaintiffs are therefore distinguishable. The district court in *Stone v. Trump*, for example, found in a discovery order that the policy challenged in that case was facially discriminatory. *See* 356 F. Supp. 3d 505, 516 (D. Md. 2018). Even assuming the *Stone* decision is affirmed—that case remains

also Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 486 (4th Cir. 2005) (“classifications based on disability are subject to minimal scrutiny.”).

Under rational basis review, the Court must evaluate Defendants’ regulations to determine if they are rational under any conceivable set of facts regardless of the actual reasons underlying their promulgation. Indeed, the “deference afforded to the government . . . is so deferential that even if the government’s actual purpose in creating classifications is not rational, a court can uphold the regulation if the court can *envision* some rational basis for the classification.” *Guerra*, 942 F.2d at 279. Regardless of the Government’s intent, “[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)); *see also Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (holding that under rational basis review a Government classification “must be sustained if there is any reasonably conceivable state of facts that could provide a rational basis,” and “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” (quotations omitted)).

Moreover, the deference afforded under rational basis review is especially appropriate when, as here, the Government’s decision implicates military personnel policy. Deference to military policy judgments stems from the Supreme Court’s recognition that the Constitution vests control of the armed forces in the Executive and Legislative branches. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Courts “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (quotation omitted). Military deference is thus a constitutionally-mandated

pending—here, there is no basis in the record to find that the challenged policies are facially discriminatory.

prerequisite for an Article III court's review of a decision involving military affairs.² See *Morgan*, 413 U.S. at 10; *Rostker v. Goldberg*, 453 U.S. 57, 65-66 (1981). First, the court looks only at whether the decision at issue involves “the composition, training, equipping, and control of a military force.” *Morgan*, 413 U.S. at 10. If it does, then deference to the military's policy judgments must be applied. See *Winter*, 555 U.S. at 27; cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (a policy implicating national security will be “up[h]eld so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds”).

Plaintiffs' contention appears to be once the intent behind a military policy is challenged, the deliberative process by which that policy was determined can be scrutinized. This contention stands the doctrine of military deference on its head. All military policy judgments, to which deference is owed as a matter of law, are the result of at least some deliberative process. The very notion of deference to military judgment would be eliminated in disregard of its constitutional underpinnings by requiring disclosure of internal deliberations, such as the underlying candid assessments and opinions by military officials prior to the making of the judgment.

² Those principles were recently reaffirmed by the D.C. Circuit. In *Doe 2 v. Shanahan*, the D.C. Circuit emphasized the deference due to military officials' military judgments and vacated the district court's injunction against a DoD personnel policy. 2019 WL 102309 (D.C. Cir. Jan. 4, 2019) (per curiam). Two judges took the opportunity to set out the competing views on the nature of discovery in cases involving military judgments and personnel policies. Judge Williams would have precluded all discovery out “of respect for the judiciary's proper place in our democracy.” *Doe 2 v. Shanahan*, 2019 WL 1086495, at *36 (D.C. Cir. Mar. 8, 2019) (Williams, J., concurring). As Judge Williams's opinion sets out, the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point.” *Id.* (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); see also *id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)). Judge Wilkins disagreed with the categorical bar, but even he would have carefully limited discovery to inquiring “about how military policies operated or what interests they served.” *Id.* at *10 (Wilkins, J., concurring). While Defendants maintain that Judge Williams's approach is both legally correct and better honors the respective roles of the different branches of government, discovery in this case should certainly go no further than what Judge Wilkins contemplates.

Plaintiffs also incorrectly contend that Defendants are using the deliberative process privilege as a sword and a shield. Feb. 1, 2019 Tr. 14:16-15:10, Dkt. 115; Feb. 22, 2019 Tr. 22:18-22, Dkt. 125; Dkt. 135 at 7. The “sword/shield” concept applies when a party seeks to use privileged information to support its claims. But in relying on established law recognizing judicial deference to military judgments, Defendants are not relying on deliberative process information to defend its policy judgments. Rather, Defendants are relying on the outcome of the deliberative process: DoD’s published policies and the 2018 Report to Congress, which provides a detailed explanation for why, in the professional judgment of DoD, these policies are necessary to further military interests. Indeed, it is Plaintiffs who seek to turn reliance on the principle of deference to military judgments into a sword that would eliminate deliberative process protections. There is no support in the law for this sweeping proposition.

For these reasons, evidence of the Government’s intent in promulgating the challenged regulations is not relevant to any of Plaintiffs’ claims and thus cannot justify disregard of the deliberative process as a matter of law.

2. Even Assuming The Government’s Subjective Intent Is Relevant, The March 14 Order’s Weighing Of This Factor Is Contrary To Law And Clearly Erroneous.

Even assuming the Government’s intent has some relevance to Plaintiffs’ claims, the March 14 Order’s conclusion that the withheld documents “appear relevant” because they may “lead to the discovery of evidence that may be admissible” is clearly erroneous and not sufficient as a matter of law. Rather, as noted in *Cipollone* itself, Plaintiffs must demonstrate “a *compelling need* for the materials in its litigation.” 1987 WL 36515 at *3 (emphasis added). Accordingly, “[the] party seeking discovery bears the burden of showing that its need for the documents outweighs the government’s interest.” *Redland Soccer Club v. Dept. of the Army*, 55 F.3d 827, 854 (3rd Cir. 1995). In a similar dispute, in *Scott v. PPG Industries, Inc.*, the district court considered whether

the defendant had “demonstrated a compelling need sufficient to overcome the qualified privilege.” 142 F.R.D. 291, 293 (N.D. W. Va. 1992).

The March 14 Order does not apply the *Cipollone* balancing test in this way. . Nothing in the March 14 Order, or indeed in the record, demonstrates that Plaintiffs have met their burden and established the compelling need necessary to overcome the Government’s assertion of privilege as to any particular policy. *Redland Soccer Club.*, 55 F.3d at 854; *see also Heyer v. BOP*, No. 5:11-CT-03118-D, 2014 WL 4545946, at *6 (E.D.N.C. Sept. 12, 2014).

Plaintiffs rely instead on the bare allegations in their complaint. There are no viable allegations in Plaintiffs’ complaint, however, that support their assertion of disparate treatment, and even if there were, allegations alone are insufficient to overcome the deliberative process privilege. *See Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999) (“[T]he deliberative process privilege does not apply if there is a discrete factual basis for the belief that the deliberative information sought may shed light on government misconduct.” (emphasis added) (citation omitted)). For support of their position, Plaintiffs rely on a single case from the D.C. Circuit, and do not cite to any Fourth Circuit or Supreme Court authority indicating that the deliberative process privilege does not apply when a challenge is to the Government’s intent. *See* Dkt. 108 at 7-8. Similarly, Plaintiffs point to no Fourth Circuit or superior authority holding that a mere allegation of Government misconduct is sufficient to overcome the deliberative process privilege, and indeed their argument to that effect misrepresents both D.C. Circuit and Fourth Circuit law. *See e.g., Heyer*, 2014 WL 4545946, at *4-5 (collecting cases); *Alexander*, 186 F.R.D. at 164. Despite the lack of precedent, the March 14 Order requires the disclosure of *all* deliberative materials, including deliberative materials to policies that are still actively being developed and were not applied to the Plaintiffs.

Put simply, even assuming the materials are relevant, Plaintiffs' showing or any need for the withheld documents is minimal and cannot outweigh Defendants' interest in frank and independent discussions regarding contemplated policies and decisions. *See Cipollone*, 1987 WL 36515, at *2 (quoting *FTC*, 742 F.2d at 1161).

B. The March 14 Order's Conclusion Regarding The Second *Cipollone* Factor Is Clearly Erroneous.

Second, the Magistrate Judge's conclusion that the second *Cipollone* factor weighs in favor of Plaintiff because "Defendants are the only source of the information" is in error. Dkt. 128 at 2. The Court's finding again depends on the conclusion that the Government's intent is relevant to the claims in this case, which as discussed above is contrary to law. Because Plaintiffs' challenges to Defendants' regulations must be assessed under a particularly deferential rational basis standard, the Government's intent in promulgating those regulations is simply irrelevant. Accordingly, the fact that the information is in Defendants' sole possession does not cause this factor to weigh in favor of overcoming Defendants' entitlement to the privilege.

C. The March 14 Order's Conclusion Regarding the Fourth *Cipollone* Factor—That Disclosure Would Not Hinder Frank And Independent Discussions—Is Contrary To Law And Clearly Erroneous.³

Third, the March 14 Order's findings that disclosure of the withheld documents "would not hinder frank and independent discussions because there is a protective order in place that would prevent public disclosure of the documents," and that there is "little, if any, risk of a chilling effect," are contrary to law and clearly erroneous. Dkt. 128 at 3.

As an initial matter, the Court's assessment that frank and independent discussion would not be chilled because a protective order is in place to prevent public disclosure is plainly contrary to the law. Disclosure, even *in camera* to a court, impairs the deliberative process privilege. Indeed,

³ Defendants do not dispute that the role of the government in this case, as a party, is significant.

the Supreme Court has observed that it is “obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even [*in camera*].” *EPA v. Mink*, 410 U.S. 73, 93 (1973) (alteration in original). The Fourth Circuit also acknowledges the “potential damage that disclosure, even to the district court, might have on the deliberative process of an agency.” *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1249 (4th Cir. 1994) (citing *Mink*, 410 U.S. at 93). Disclosure of privileged materials to opposing counsel, as the March 14 Order requires, therefore presents a significant threat of harm to the Defendants regardless of any prohibition on public dissemination. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163–64 (9th Cir. 2010) (overruling a district court order compelling production of privileged and finding that “[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms.”).

Furthermore, the March 14 Order’s direction to disclose the withheld documents undermines the entire purpose of the privilege. It is “[m]anifestly, the ultimate purpose of [the deliberative process] privilege [] to prevent injury to the quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). “The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery.” *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). In addition to the presumption that disclosure of predecisional and deliberative materials will chill the candor of agency decision-makers in the performance of their duties, Defendants submitted the declarations of seven military officials, who each discussed the chilling effect of disclosure of the withheld documents specific to the facts of this case. *See* Dkt. 111-1 (Bahdi Decl. ¶¶ 3-6); 111-2 (Beland Decl. ¶¶ 7-9); 111-3 (Ciminera Decl. ¶¶ 8-12); 111-4 (Huibregtse Decl. ¶¶ 8-10); 111-5 (Melillo Decl. ¶¶ 8-18); 111-6 (Shell Decl. ¶¶ 8-12); 116-2 (Ausprung Decl. ¶¶ 3-7).

Ms. Ausprung, for example, explains that the documents withheld by the Army relate to an ongoing revision of the Army regulation and that, if forced to disclose those documents, the Army's ongoing deliberations would be disrupted and irreparably harmed. Dkt. 116-2 (Ausprung Decl. ¶¶ 6-7).

Plaintiffs offered no evidence to controvert these declarations. The Magistrate Judge did not acknowledge these declarations or make any findings of fact that these declarations were erroneous in any way. Indeed, the March 14 Order was clearly erroneous because it failed to consider this evidence at all.

The March 14 Order's cursory treatment of this factor ignores the well-established purpose of the deliberative process privilege, the presumption of chilling effect, the actual evidence on the record, and the many cases that have found the release of predecisional, deliberative documents and communications to have a detrimental effect on future agency deliberations. *See, e.g., FTC*, 742 F.2d at 1162; *Scott*, 142 F.R.D. at 294; *Judicial Watch of Fla., Inc. v. DOJ*, 102 F. Supp. 2d 6, 14-15 (D.D.C. 2000). Accordingly, for this reason as well, the decision was clearly erroneous and contrary to law.

D. The Order To Disclose Deliberations Regarding The Army's Ongoing Policy Review Is Contrary To Law And Clearly Erroneous.

In addition to the March 14 Order's clear error in not properly considering the chilling effect that disclosure would have on the military's policy deliberations in general, the order further failed to properly weigh the *Cipollone* factors when considering the harm that disclosure would have on the Army specifically. A relatively small volume of withheld documents involve the Army's ongoing revision of AR 600-110—a revision that is “still in a critical stage of development and hasn't been reviewed” by any senior level officials with decision-making authority. Dkt. 116-2 (Ausprung Decl. ¶ 5). The fact that these documents involve an ongoing deliberative process, and

not a final decision or policy, presents unique considerations and constitutional concerns that strongly weigh in favor of the Government's need for continued confidentiality.

Plaintiffs are challenging the current version of AR 600-110 published in 2014. The March 14 Order concluded that all of the documents in dispute were relevant to exploring "the government's intent and/or whether the expressed intent is pretextual in promulgating" the challenged HIV policies. Plaintiffs, however, are not challenging—nor could they challenge—the *forthcoming* revision of the regulation. None of the deliberations concerning the *ongoing* revision could show any alleged animus or intent in the 2014 version that Plaintiffs are actually challenging, nor could they show the existence of any pretextual motivations when the 2014 version was published.⁴

Aside from the flaws in the March 14 Order's reasoning in this respect, the order also impermissibly interferes with an ongoing policy development process by the Army. While not triggered in every case involving the deliberative process privilege, the order here implicates separation of powers concerns because of the extent to which the order inserts the judicial process into an active policy review by an executive agency. *See In re Sealed Case*, 121 F.3d 729, 737 n.4 (D.C. Cir. 1997) (stating the deliberative process privilege can implicate separation of powers principles). The revision to AR 600-110 is still underway, and any judicial intervention into that process before the review is completed is unwarranted.

As to the ongoing policy process for revisions to AR 600-110, the Army's lower-level staff officials have contributed to the review process, *see* Dkt. 111-1 (Bahdi Decl. ¶¶ 4–5), but key senior

⁴ This point illustrates the broader error of ordering *en masse* disclosure of all withheld documents, without any individualized analysis of the role a document played in or its relationship to the development of the policies Plaintiffs are actually challenging. Ordering the disclosure of all documents, no matter how tenuous their nexus to the challenged policies, amounts to a fishing expedition for pretext or animus.

leaders have yet to begin their review. *See* Dkt. 116-2 (Ausprung Decl. ¶ 5). This is a critical stage of the process where senior leaders with strategic-level policy experience will conduct their analysis and grapple with the staff's recommendations and proposals. This strategic-level policy review may reveal new perspectives or points of view that were not previously considered by lower-level officials, which could invariably affect the Army's forthcoming policy. Thus, forcing the Army to reveal its deliberations at this juncture would seriously compromise all future deliberations on the matter. *See Coastal States Gas Corp.*, 617 F.2d at 866 (stating the privilege "protect[s] against premature disclosure of proposed policies before they have been finally formulated or adopted," or "confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action").

As a result, the withheld materials could not provide any meaningful insights into the Army's final, best military judgment as to whether the current version of AR 600-110 should be updated. And because the materials are currently incomplete and present only a portion of the bigger picture, disclosure could misrepresent the Army's final policy judgments and potentially confuse the issues. *See Sears Roebuck & Co.*, 421 U.S. at 151 ("The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground.").

In addition to any other considerations neglected in the March 14 Order, the order unconstitutionally interferes with an ongoing policy development process by a coequal branch of government. The purpose of the deliberative process privilege is not to protect documents themselves, but rather to protect the deliberative process itself. *Cipollone*, 1987 WL 36515, at *1-2.

In the usual case, the Court is asked to retrospectively review the constitutionality of a final executive action or decision and, balancing competing interests, compels the production of materials or witnesses related to the challenged policy. *See, e.g., United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004). Here, in contrast, the Army is in the midst of a substantial policy review, and Plaintiffs are attempting to pierce that process before the Army has a chance to finish it. *See Loving v. United States*, 517 U.S. 748, 757 (1996) (“[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.”).

Enforcing the March 14 Order would effectively insert this litigation into the middle of the Army’s deliberative process at a critical stage. “Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.” *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). If the documents are disclosed, key leaders within the Army will have to conduct their review while Plaintiffs and the Court scrutinize the Army official’s arguments and positions. Second guessing senior leaders’ decisions *as they are making them* will compromise the quality of the Army’s final decision. *See Sears Roebuck & Co.*, 421 U.S. at 151. Not only would disclosure of these materials prove highly disruptive, *cf. Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (cautioning courts to be mindful of the disruption judicial intervention could cause the military), but it could improperly influence the final outcome of the Army’s review. *See* Dkt. 116-2 (Ausprung Decl. ¶¶ 6–7).

In sum, the March 14 Order erred by failing to consider the impermissible disruption that judicial intervention will cause the Army’s ongoing policy review. At minimum, the Court should therefore set the March 14 Order aside as to all deliberative material regarding this ongoing Army policy review.

II. The March 14 Order’s Conclusion That The Withheld Documents Are Not Predecisional And Deliberative Is Contrary To Law And Clearly Erroneous.

The March 14 Order’s holding that Defendants had not established that the withheld documents are predecisional and deliberative is contrary to law and clearly erroneous. The Magistrate Judge erred in two ways: (1) by holding that some of the withheld documents were not deliberative; and (2) by reviewing the documents *en masse* and failing to differentiate privileged from non-privileged information.

A. The March 14 Order’s Holding That The Withheld Documents Were Not Deliberative Is Clearly Erroneous.

The March 14 Order is incorrect in holding that the withheld documents are not deliberative. The materials submitted for *in camera* review—including audio recordings of a meeting of the accessions medical standards working group (“AMSWG”), US00012349, meeting minutes of that same group, US00013841, a spreadsheet containing recommendations regarding the ongoing revision of AR 600-110, US00025923, and working drafts of an unpublished revision to AR 600-110, US00025675, US00026150—are textbook examples of information protected from disclosure by the deliberative process privilege.

The materials relating to the meetings of the AMSWG are plainly deliberative. This group, which is “a forum for developing policy and procedures for medical accession standards,” DoDI 1145.02 at 51, deals with a range of accessions policy matters, not just HIV standards. The recordings and minutes contain statements of opinion and reflect the back and forth that is the hallmark of deliberations. It is beyond doubt that internal deliberations like those reflected in the AMSWG materials show the give-and-take of the consultative process, and are therefore deliberative. *See Coastal States Gas Corp.*, 617 F.2d at 866. Despite this, the March 14 Order does not discuss or analyze the recording or the substantive portion of the meeting minutes.

Likewise, the materials relating to the Army's ongoing revision of AR 600-110 squarely fall within the category of "deliberative" documents. As discussed, this policy is not yet finalized and was not applied to the decision regarding Plaintiff Harrison's accession. In deciding whether the deliberative process privilege applies, courts consider the facts of the case in light of the policies behind the privilege. *See, e.g., Wolfe v. HHS*, 839 F.2d 768, 774 (D.C. Cir. 1988). There are essentially three policy bases for the deliberative process privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy. *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. DOJ*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)). Second, the privilege protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had already been settled upon. *Id.* And third, the privilege "protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decide[,] not for matters they considered before making up their minds." *Id.*

All three bases justify the application of the privilege to the 89 documents withheld by the Army. As Lieutenant Colonel Bahdi explains, the Army documents "record the frank and candid recommendations, proposals, opinions, and suggested courses of action for developing Army policy" of military "personnel directly responsible for reviewing and revising the Army's policies on the military service of personnel infected with HIV." Dkt. 111-1 (Bahdi Decl. ¶ 5). Those communications were provided, according to Lieutenant Colonel Bahdi, with the "expectation that they were confidential and would be protected from disclosure." *Id.* Ms. Ausprung further notes that these documents relate to a revision that has not been issued, and which is "still in a critical stage of development." Dkt. 116-2 (Ausprung Decl. ¶ 5). For these reasons, both Lieutenant Colonel Bahdi and Ms. Ausprung conclude that disclosure of the Army documents would harm

future deliberations concerning Army policy. Dkt. 111-1 (Bahdi Decl. ¶ 5); Dkt. 116-2 (Ausprung Decl. ¶¶ 5, 7). Ms. Ausprung also explains that the Army’s review is ongoing, and the withheld materials have not been approved by a military official with decision-making authority. Dkt. 116-2 (Ausprung Decl. ¶ 5). Because of this, and because the “public is often unacquainted with the realities and challenges of military life and mission requirements,” there is a heightened risk of confusion if the materials are disclosed. Dkt. 116-2 (Ausprung Decl. ¶¶ 4-5). Lastly, Ms. Ausprung describes how Army’s leaders, and the Army’s decision-making process, would lose the benefit of “honest debate without outside intervention or pressure[,]” if the documents are disclosed. Dkt. 116-2 (Ausprung Decl. ¶¶ 5, 7). Based on this record, the Army documents are unquestionably deliberative.

In addition, the March 14 Order erroneously concluded that the draft documents’ “redline comments” were the only portions of the documents that the Government was asserting privilege over. The order presumed that these suggested changes to the drafts as part of the editing process were the only items containing deliberative content. Both the draft documents themselves and proposed edits are, however, an integral part of deliberations. Drafts typically incorporate recommended changes to prior drafts, and recommendations already integrated into the drafts’ text would not appear as redline comments. Thus, the drafts’ deliberative content included not only the redline comments and edits inserted by the various reviewers involved, but also the text that the reviewers left unaltered. The Magistrate Judge also erroneously concluded that the reviewer comments annotating the drafts were not deliberative discussions. Those comments reflect the regular give-and-take of preparing complete and comprehensive regulations. *See, e.g.*, Dkt. 125, Feb. 22, 2019 Hrg. Tr. 19:19 to 20:19. Because the March 14 Order wrongfully presumed which portions of the drafts contained deliberative updates, and therefore failed to account for deliberative

material integrated into the drafts, the order failed to conduct any balancing test for those documents and was contrary to law.

B. The Order Considered The Documents *En Masse* And Did Not Differentiate Privileged From Non-Privileged Information.

The Magistrate Judge also erred by applying to the documents *en masse* and failing to differentiate privileged from non-privileged information. The Magistrate Judge was provided a random selection of 33 documents to review *in camera* as random samples of 15 categories of documents. Dkt. 116 at 3 n.5; Dkt. 121 at 1-2; Dkt. 127. The order analyzes only a small subset of the *in camera* documents.

The “privilege protects ‘recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.’” *Ethyl Corp.*, 25 F.3d at 1248 (quoting *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980)); *see also City of Va. Beach v. United States DOC*, 995 F.2d 1247, 1253 (4th Cir. 1993). “Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position.” *Coastal States*, 617 F.2d at 866. Consequently, the particular contents of any document over which the privilege has been asserted must be assessed to determine whether each individual document is predecisional and deliberative.

Indeed, courts agree that privilege determinations cannot be based on extrapolation from past cases “because the deliberative process privilege is *so dependent upon the individual document* and the role it plays in the administrative process.” *Coastal States*, 617 F.2d at 867; *see also Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2016 WL 6902359, at *14 (N.D. W. Va. July 20, 2016). Similarly “[t]he role played by the documents in issue’ during the process largely determines whether the documents are predecisional and deliberative.” *Jones v. Murphy*, 256

F.R.D. 510, 518 (D. Md. 2008) (quoting *Coastal States*, 617 F.2d at 868); *see also City of Va. Beach*, 995 F.2d at 1254. It is not possible to make the individualized privilege determination required by the case law without reviewing each withheld document, or well-defined categories of documents, and many courts in this Circuit have conducted such a document by document review. *See, e.g., Hugler v. BAT Masonry Co.*, No. 6:15-cv-28, 2017 WL 1207847, at *5-7 (W.D. Va. March 31, 2017); *Murray Energy Corp.*, 2016 WL 6902359, at *6-7; *cf. City of Va. Beach*, 995 F.2d at 1256 (finding that “the court failed . . . to examine the documents closely to prevent [plaintiff] from uncovering any discrepancies between the drafts and the final letters, which would reveal the agency’s deliberations.” (quotations and alterations omitted)).

The parties submitted only a sub-set of the documents *in camera* documents under the Magistrate Judge’s direction. At the initial hearing on Plaintiff’s motion to compel, the Magistrate Judge stated that he would not review each of the withheld documents *in camera*, Dkt. 115, Feb. 1, 2019 Hearing Trans., 5:22-6-12, and instructed the parties to meet and confer to devise a method of reducing the number of documents in dispute, *id.* at 16:9-15. Plaintiffs proposed presenting the Court with a representative sample of the withheld documents to review *in camera*, and subsequent to the Court’s second hearing on the motion to compel the parties submitted sample of 33 documents to review *in camera* out of 330 documents in dispute. *Id.* at 6:5-8; *see also* Dkt. 127 (withdrawing claim of privilege over five Navy documents). The failure to consider the assertions of privilege over each withheld document individually or in well-defined categories was clearly erroneous.

The Magistrate Judge’s failure to differentiate privileged from non-privileged material within documents was also contrary to law. For example, the order states that “document number US00013841, withheld in its entirety, are meeting minutes that contain three pages of all the

attendees at the meeting. This shows no deliberation or discussion: it is a mere list of name, organizations, and emails.” Dkt. 128 at 1. However, the order’s analysis only considers the first three pages of the withheld document and, on that basis, orders the entire document disclosed. The remaining six pages contain accounts of the clearly deliberative discussions that occurred at the meeting—and all but one paragraph of the deliberative material relate to policies discussions not related to HIV. The substantive portion of the meeting minutes, which was properly withheld as predecisional and deliberative, was not taken into account or analyzed by the March 14 Order. The Court should have segregated these two portions between privileged and not-privileged, and not ordered the entire document released. Applying this flawed analysis to the hundreds of withheld documents not reviewed undoubtedly produces results that are clearly erroneous. The Fourth Circuit’s FOIA precedent concerning the deliberative process privilege instructs parties and courts to identify and produce any “reasonably segregable” non-privileged material from otherwise privileged documents while maintaining the confidentiality of the remainder of those documents. *City of Va. Beach*, 995 F.2d at 1256.

III. No Waiver Of Privilege Has Been Effected Except For Specific Documents Or Information That Were Released.

The March 14 Order also incorrectly concludes that “privilege has been waived for some of the withheld documents,” noting that “the final version of publicly available AFI 44-178 is substantially identical to the draft AFI 44-178.” Dkt. 128 at 3. But this conclusion is also in error: there has been (or can be) no waiver here except for specific documents that were released by the Government. Dkt. 128 at 3.

As an initial matter, the documents subject to the “waiver” portion of the analysis in the order are not defined. If the holding is intended to apply to any documents other than the specified draft version of AFI 44-178, then it is contrary to law because waiver in the deliberative process

privilege context must be established by reference to the content of individual documents. *See Murray Energy Corp.*, 2016 WL 6902359, at *5. Unlike in the attorney-client privilege context, “the Government’s release of a document waives the privilege only for the document specifically released, not for related materials.” *Id.* at 16; *see also, e.g., Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 66 (1st Cir. 2007); *In re Sealed Case*, 121 F.3d at 741. Consequently, “there is no subject matter waiver of the deliberative process privilege.” *Murray Energy Corp.*, 2016 WL 6902359, at *5-6; *see also Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 218 (2010).

Moreover, when documents protected by the deliberative process privilege are released, the privilege is waived only as to that particular document. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982); *Blue Lake Forest Prods., Inc. v. United States*, 75 Fed. Cl. 779, 791 n.21 (2007) (citing cases); *Allstate Ins. Co. v. Serio*, No. 97-civ-0620, 1998 WL 477961, at *1 (S.D.N.Y. Aug. 13, 1998). This limited approach to waiver in the executive privilege context is designed to ensure that agencies do not forgo voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents. *See Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989).

Insofar as the March 14 Order does not identify specific documents that the Government has released, the order is clearly erroneous. While the order notes that “the final version of publicly available AFI 44-178 is substantially identical to the draft of AFI 44-178,” this reasoning does not support the breadth of the ordered disclosure. There are more than 110 withheld documents identified as drafts on Defendants’ privilege logs. Only 14 of these documents are predecisional drafts of AFI 44-178. And, because two different drafts of AFI 44-178 were submitted to the Court for *in camera* review, the identity of the draft document referenced in the order is itself unclear.

What is more, neither draft of AFI 44-178 submitted for *in camera* review is identical to the final, publicly released instruction. Rather, both drafts contain, among other things, reviewer comments that were not released in the final, publically released instruction. Deliberative process protection over those pre-decisional comments was not waived once the Air Force issued its final instruction. The protection of the privilege is available to a draft document regardless of whether it differs from its final version. As the Ninth Circuit noted in *Mobil Oil Corp.*, there “is no merit to [the] argument that in order to establish the privileged character of a draft, [an agency] must show to what extent the draft *differs* from the final document.” 879 F.2d at 703. This is so because the release of drafts leads inevitably to the exposure of “what occurred in the deliberative process between the draft’s creation and the final document’s issuance.” *Id.* (citing *Exxon Corp. v. Dep’t of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983)); *see also Russell*, 682 F.2d at 1049 (“a simple comparison between the pages sought and the official document would reveal” an agency decision maker’s judgment).

CONCLUSION

For all the reasons stated above and in Defendants’ opposition to the motion to compel, Dkt. 111, this Court should sustain Defendants’ objections and deny Plaintiffs’ motion to compel.

DATE: March 28, 2019

Respectfully submitted,

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