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; MARK ESPER, in his official capacity as the Secretary of the Army; and the UNITED STATES DEPARTMENT OF DEFENSE, *Defendants*.	NO. 1:18-CV-00641-LMB-IDD

PLAINTIFFS' RESPONSE TO THE GOVERNMENT'S RULE 72 OBJECTIONS TO MAGISTRATE JUDGE'S NON-DISPOSITIVE RULING REGARDING THE DELIBERATIVE PROCESS PRIVILEGE

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INTRODUCTION

Defendants objections to the Magistrate Judge's order regarding the documents that are being withheld under the deliberative process privilege should be overruled. The withheld documents are some of the same documents this Court has said are "absolutely relevant" to Plaintiffs' case. Dkt. 110-4, Dec. 21, 2018 Tr. The Magistrate Judge found the withheld documents go to "the heart" of the case. Dkt. 135-1, Feb. 22, 2019 Tr. 54:19-22. Defendants also fail to mention that some of the same documents they are ordered to produce in this case have been ordered to be produced in other cases over the Defendants' invocation of "deliberative process privilege." These cases include *Stone v. Trump*, 356 F. Supp. 3d 505(D. Md. 2018) and *Karnoski v. Trump*, 328 F. Supp. 3d 1156 (W.D. Wash. 2018).

Defendants have repeatedly asked this Court to afford them great deference for their reasonable military decision-making. *See* Dkt. 43 at 29 (contending that DoD has "reasonably decided" to preclude people living with HIV from commissioning as officers); Dkt. 53 at 17 (arguing that the policies reflect "what DoD has determined is the best way to square that medical reality with the reality of military life"). Defendants argued that Plaintiffs case should be dismissed because they have not shown "purposeful discrimination." Dkt. 53 at 14. And, Defendants have pled that their policies are rationally related to a legitimate government interest, Dkt. 62, Aff. Def. ¶ 3, and denied allegations that they have failed to "account for medical advances and current scientific understanding of HIV in their HIV-related policies," *id.*, ¶ 3. By asking this Court to defer to its supposedly rational, sound military judgments, and by criticizing a lack of evidence of discriminatory intent, Defendants further placed the decision-making process itself at issue. They cannot claim they engaged in thoughtful, sound military decision-making and at the same time refuse to produce anything related to how their decisions unfolded. Thus, the Magistrate Judge's

decisions to find a waiver, to reject the government's use of the privilege as a sword and shield, and to find that the government's intent is at issue are all sound based on the record in this case.

Defendants cannot justify their continued withholding of these documents. First, they say their intent is not at issue. But, as explained above, they have placed their own decision-making process at issue in this case. Defendants are also wrong to conclude that this Court has decided on the appropriate level of scrutiny in *Roe v. Shanahan*, No. 1:18-cv-1565, Dkt. 72. Second, Defendants misunderstand their burden to establish that the deliberative process privilege applies. The Magistrate Judge committed no legal or factual error in concluding that edits or entire documents are not privileged based on the record presented by the parties. Third, the Magistrate Judge was not "dismissive" of the purpose of the privilege. Instead, the Magistrate Judge applied the *Cipollone* factors to conclude that the privilege just did not apply in this case.

ADDITIONAL BACKGROUND

This section responds to certain aspects of Defendants' background with which Plaintiffs do not fully agree or that appear incomplete. First, while Defendants claim that "[t]he parties have completed fact discovery into the claims raised in the Complaint," Dkt. 138 at 2, Plaintiffs have been hamstrung in their ability to fully investigate the facts by Defendants' invocation of the deliberative process privilege. While there are numerous examples (and 330 documents are being withheld), we give two here. Lt.Col. Lute, one of Defendants' declarants, a witness on Defendants' initial disclosures, and 30(b)(6) designee on certain topics wrote a document that stated "[f]or Army HIV policy to remain lawful and relevant, a major revision is required." Ex. 1 (US00025945). When questioned about *why* a "major revision" was needed to remain lawful, defense counsel instructed her not to answer on the basis of deliberative process privilege. Dkt. 110-3, Lute Tr. 139:10-140:25. Additionally, a document regarding Sgt. Harrison's request for an exception to policy ("ETP") has been redacted on the basis of deliberative process privilege.

The email chain starts with "Soldier (enlisted) is requesting ETP for direct commission to JAG Corps." Ex. 2 (US00002432). The Colonel with MEDCOM then notes that while the transition from enlisted into the JAG Corps "is administrative in nature and may seem bureaucratic," it does require an accession review, and the policies preclude a soldier from meeting "standards regardless of their overall state of health. I cannot endorse an ETP knowing it will be denied." *Id.* (US00002431). Clarification was provided that this was a request for an exception to the policy and a request for confirming that the soldier "continues to meet retention standards." *Id.* (US00002430). In response, the Colonel indicates that from a "purely medical standpoint it is possible for someone with HIV to have a normal life expectancy, experience a high quality of life and health, and be productive." *Id.* The Defendants have withheld the remainder of the comments. *Id.* Judge Davis reviewed the redaction *in camera* and said that this document "can be read as partially ***inconsistent*** with the proposed basis for the policy" and "***goes to the heart of this issue***, and they can get this from nowhere else." Dkt. 135-1 Feb. 22, 2019 Tr. 54:2-22 (emphasis added).

These are just two examples of Defendants' invocation of the privilege that has hampered discovery. Plaintiffs have left numerous depositions open subject to the production of the withheld materials and a ruling on the applicability of the privilege.

The Plaintiffs have not delayed in raising this issue with the court. While it is true that Plaintiffs filed their motion to compel on January 25, 2019, Dkt. 138 at 3, after discussions about the privilege dating back to late November 2018, Dkt. 112-1 at 2; Dkt. 112-2 at 3-4; Dkt. 112-3 at 4; Dkt. 112-5 at 7, the issue was ripe for a motion a week earlier but Plaintiffs deferred to accommodate Defense counsel's availability for a hearing on the motion. Dkt. 112-5 at 1.

The Magistrate Judge carefully considered what was at issue here. In addition to the briefing submitted by the parties, he held three hearings, Dkt. 114, 118, 135-1, and conducted an *in camera* review of a sample of documents, Dkt. 121—the latter being a procedure that the Defendants agreed to employ. *Id.*

LEGAL STANDARDS

I. THE DELIBERATIVE PROCESS PRIVILEGE

The deliberative process privilege is a qualified one. *Stone v. Trump*, 356 F. Supp. 3d 505, 514-15 (D. Md. 2018) (quoting *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400, 1987 WL 36515 (4th Cir. 1987) (unpublished table decision)). To properly invoke the privilege, the Defendants "must show that, 'in the context in which the materials are used,' the documents are both predecisional and deliberative." *City of Virginia Beach v. United States Dept. of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (quoting *Wolfe v. Dept. of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988)). A "predecisional" document is one that is "prepared in order to assist an agency decisionmaker in arriving at his decision." *City of Virginia Beach*, 995 F.2d at 1253 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). A "deliberative" document is one that reveals the "'give-and-take of the consultative process' . . . by revealing the manner in which the agency evaluates possible alternative policies or outcomes." *City of Virginia Beach*, 995 F.2d at 1253 (quoting *Costal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

The deliberative process privilege must "be construed narrowly, and the burden rests upon the government to be precise and conservative in its privilege claims." *Ethyl Corp.*, 25 F.3d at 1248. Documents "peripheral to actual policy formation" are not protected. *Id.* Nor is information that is "essentially technical and facilitative." *Am. Bird Conservancy v. U.S. Fish & Wildlife Serv.*, No. 1:13-CV-723, 2014 WL 12662300, at *5 (E.D. Va. June 24, 2014).

The deliberative process privilege does not protect factual materials, compilations of facts, or documents that are "merely peripheral to actual policy formation . . . ." *Ethyl Corp. v United States Envt'l Protection Agency*, 25 F.3d 1241, 1248 (4th Cir. 1994). The privilege protects only opinions, not facts. "One possible corollary of the fact/opinion distinction is that 'informational dialogue' such as that between the scientists who collaborated on [reports] is not covered by the privilege at all." *Cipollone*, 1987 WL 36515 at *3. The identity of the position of the "author and any recipients of the document, along with the places of those persons within the decisional hierarchy" is an important consideration in determining whether the government has carried its burden to show the privilege applies. *Ethyl Corp.*, 25 F.3d at 1248.

II. REVIEW OF THE MAGISTRATE JUDGE'S ORDER

Objections to a magistrate judge's nondispositive discovery order must overcome a high standard, as it is "extremely difficult to justify" alteration of the magistrate judge's nondispositive actions by the district judge." *Carlucci v. Han*, 292 F.R.D. 309, 312 (E.D. Va. 2013) (quoting 12 Charles A. Wright, Arthur R. Miller, et al. *Federal Practice and Procedure Civil* § 3069 (2d ed.)). "It is not the function of objections to discovery rulings to allow wholesale relitigation of issues resolved by the magistrate judge." *Buchanan v. Consol. Stores Corp.*, 206 F.R.D. 123, 124 (D. Md. 2002). Rather, "[o]nly if a magistrate judge's decision is 'clearly erroneous or contrary to law' may a district court judge modify or set aside any portion of the decision." *Id.*

"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.'" *Carlucci*, 292 F.R.D. at 312. "The 'contrary to law' standard ordinarily suggests a plenary review of legal determinations, but many courts have noted that decisions of a magistrate judge concerning discovery disputes and scheduling should be afforded 'great deference.'" *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 470 (E.D. Va. 2010).

ARGUMENT

Defendants raise a litany of interrelated issues in their Objections. And while the Defendants take issue with the brevity of the Magistrate Judge's Order, the record shows that the Magistrate Judge analyzed the issues after several hearings, and *in camera* review. As we show below, Defendants' objections should be overruled.

I. THE MAGISTRATE JUDGE PROPERLY PERFORMED THE BALANCING REQUIRED BY *CIPOLLONE*

The Magistrate Judge properly applied *Cipollone*. Defendants show no clear error in his evaluation of the facts. *Cipollone* identifies four factors to balance when considering production of deliberative process documents: "(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 decisions." *Cipollone*, 1987 WL 36515 at *2. These factors were properly applied.

A. The Magistrate Judge Properly Evaluated the Relevance of the Evidence

The Magistrate Judge properly determined that the withheld information is relevant, regardless of the standard of review that is applied.[1] That is because Defendants have squarely

[1] Defendants incorrectly say that the Court decided in *Roe v. Shannahan* that rational basis review applies. *See* Dkt. 138 at 1-2, 6 n.1. That is not what the Court's opinion states. Instead, it says that the question of the standard for review "can be left for another day." *See Roe v. Shannahan*, No. 1:18-cv-1565, Dkt. 72, Mem. Op. at 33 n.31 ("Plaintiffs are correct that ***answering those questions 'is not necessary here,'*** . . . because they have demonstrated a likelihood of success even assuming that rational basis review applies to their equal protection claim." (emphasis added)). Moreover, Plaintiffs will seek to put on evidence that heightened scrutiny should be applied. Thus, even if Plaintiffs were incorrect that *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995) does not control in this case, an appeal on a complete record can be taken on the matter. This is still a live issue in this case, and for this additional reason, the Defendants' subjective intentions in promulgating and maintaining the various policies at issue here is plainly an issue for discovery. *See* Dkt. 26 at 9-19; *United States*

and repeatedly placed the soundness of their decisions at issue in this case. Dkt. 43 at 29 (contending that DoD has "reasonably decided" to preclude people living with HIV from commissioning as officers); Dkt. 53 at 17 ("what DoD has determined is the best way to square that medical reality with the reality of military life"); Dkt. 53 at 14 (contending that there is an absence of evidence of "purposeful discrimination"); Dkt. 62, Aff. Def. ¶ 3 & Ans., ¶ 3 (pleading rational basis as an affirmative defense and denying Defendants failed to "account for medical advances and current scientific understanding of HIV in their HIV-related policies"). Defendants continue to seek deference in their objections. Dkt. 138 at 7. But deference should not suffer irrationality.

Even assuming the documents at issue are properly withheld as being pre-decisional and deliberative,[2] Defendants cannot conceal documents regarding a decision while seeking deference for those very same decisions. As the Western District of Washington has ruled as to at least one of the items at issue in this motion, "[d]efendants may not simultaneously claim that deference is owed to the [transgender ban] because it is the product of 'considered reason [and] deliberation,'

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v. Virginia, 518 U.S. 515, 535–36 (1996) ("In cases of this genre [equal protection cases applying heightened scrutiny], our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."); *Califano v. Goldfarb*, 430 U.S. 199, 212–13 (1977) (engaging in an "'inquiry into the actual purposes' of the discrimination. . .") (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

[2] Defendants have not properly established the applicability of the privilege at all in that they have not shown whether any of the documents are simply informative, discuss past policy decisions rather than forthcoming ones, were relied upon in the decision-making process as opposed to being collateral to it, or that any agency decision-maker has ever seen these documents. This alone is enough to order the production of the withheld materials. And, many of Defendants' arguments in their objections presuppose they have carried this burden and that the documents are properly privileged. *See* Dkt. 138 at 9-10 (suggesting that the Magistrate's order requires "all deliberative materials" be disclosed).

'exhaustive study,' and 'comprehensive review' by the military. . .while also withholding access to information concerning these deliberations, including whether the military was even involved." *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1161–62 (W.D. Wash. 2018).

Even if one were to accept Defendants argument that rational basis review applies, inequitable treatment "motivated by an improper animus or purpose" is still unconstitutional. *Windsor v. United States*, 570 U.S. 744, 770 (2013). In analyzing a challenged policy under rational basis review, "the disadvantage imposed" on a discrete group of individuals may not be "born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634. To prove such animus and improper purpose, Plaintiffs must have discovery directed at Defendants' intent when crafting and implementing the regulations at issue here. The Court understood this when it ordered that Plaintiffs are entitled to discovery "to prove that the reasons that [Defendants] are saying they use are not justified and [do] not have a legitimate basis, [and] are only pretextual." Dkt. 85-8, Nov. 30 Hr'g at 18:23-25. This encompasses discovery regarding the evolution of the regulations at issue, including the information considered and the intent and reasons for the decisions that were made during the creation or amendment of those regulations. *See id.* at 31:24-32:22. Thus, the sought-after and withheld evidence is material to Plaintiffs' claims.

As one example, Judge Davis's review of documents *in camera* revealed that the document pertaining to Sgt. Harrison's ETP is inconsistent with the Defendants' claim of rationality. He said that the withheld information "can be read as partially ***inconsistent*** with the proposed basis for the policy" and "***goes to the heart of this issue***, and they can get this from nowhere else." Dkt. 135-1, Feb. 22, 209 Tr. 54:2-22 (emphasis added). Documents that show proposed justifications for policy are not rational undermine the very deference that Defendants have repeatedly sought for military decision-making.

Therefore, Defendants have it wrong when they say that their intent is not germane to the case. Regardless of which standard of review applies, intent is something that can, and should be, considered by the Court in this context. *Windsor v. United States*, 570 U.S. 744, 770 (2013); *Romer v. Evans*, 517 U.S. 620, 634 (1996). The Magistrate Judge did not clearly err when determining that the documents Plaintiffs seek are relevant[3] to the case.[4]

B. The Magistrate Judge Properly Determined That There Is No Alternative Source of The Proof Sought by Plaintiffs

The Magistrate Judge did not clearly err in finding that "alternative evidence is not available because Defendants are the only source of the information." Dkt. 128 at 2. Indeed, Defendants appear to admit as much. Dkt. 138 at 11 ("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."). Instead, Defendants rehash their argument about intent and ask this Court to re-balance the factors in its favor. But, they have offered no basis to weigh this factor any differently than the Magistrate Judge did.

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[3] To the extent the Government argues that more than relevance is required under *Cipollone*, the Magistrate Judge found during the third hearing that the documents "go[] to the heart of whether or not the policy or purpose of the policy was legitimate, important, or compelling." Dkt. 135-1, Feb. 22, 2019 Tr. 54:19-22.

[4] Additionally, while not explicitly relied upon by the Magistrate Judge in his order, there is ample authority that the deliberative process privilege does not apply when the Government's intent is at issue in a case. *See Stone*, 356 F. Supp. 3d at 515 ("[D]eliberative process privilege does not apply to the documents Plaintiffs requested [including documents relating to Transgender Service Member Ban] because the government's intent is at the heart of the issue in this case.").

C. Defendants Have a Significant Role In This Case—Their Policies Are Said to Violate the U.S. Constitution

The Government does not argue clear error as to the Magistrate Judge's determination that it "has a significant role in this litigation" because it is a party and its entities "proposed and enforced the policies that are subject to this matter." Dkt. 128 at 2-3. It has thus waived this argument. Nevertheless, it is a factor to be considered in the balancing test and must be addressed. Defendants' disregard for this factor is telling.

In *Stone* the district court found that "in weighing the government's role, some courts have held that the deliberative process privilege does not apply where 'the plaintiff's cause of action is directed at the government's intent.'" 356 F.3d at 515; *see also*, *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) ("Unlike other cases, where the deliberative process privilege or the legislative privilege may be employed to 'prevent [the government's] decision-making process from being swept up unnecessarily into the public domain,' this is a case where the decisionmaking process 'is the case.'"). A number of courts across the country have reached this conclusion. *See In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (holding that the deliberative process privilege only applies when the government's decision making process is "collateral" to the claim and not "when a cause of action is directed at the government's intent"); *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (the deliberative process privilege is "simply inapplicable" where government intent is "at the heart of the issue in this case"); *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) ("[T]he deliberative process privilege simply does not apply in civil rights cases in which the defendant's intent to discriminate is at issue."); *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) ("It is certainly true that this privilege yields when the lawsuit is directed at the government's subjective motivation in taking a particular

action."). This finding is not in tension with *Cipollone* as that case dealt with a Rule 45 Subpoena. 1987 WL 36515 at *1. In fact, the *Cipollone* court noted that the balancing test was only necessary "when a party to a *separate lawsuit* seeks agency material." 1987 WL 36515 at *2 (emphasis added). The Government relies heavily on cases dealing with FOIA requests in their objections—citing twelve such cases. But the FOIA context, like a Rule 45 subpoena, is a very different scenario than when a constitutional challenge is brought against the government related to one of its own policies.

While the Magistrate Judge did not adopt this intent argument, it would not be contrary to law, based on the significant case law and lack of binding precedent in the Fourth Circuit, to conclude that the deliberative proves privilege is not at issue here. *See Stone*, 356 F. Supp. 3d at 15 (finding that both *In re Subpoena Duces Tecum* and *Cipollone* "provide legal authority to support the USMJ's conclusion" that the deliberative process privilege "does not apply to the documents Plaintiffs requested because the government's intent is at the heart of the issue in this case.").

D. The Magistrate Judge Properly Determined That Disclosure Would Not Significantly Hinder Discussions

1. Defendants Overstate the Impact of Disclosure In This Case, Which Can be Made Subject to a Protective Order

This is not a case in which information is being sought under the Freedom of Information Act, though many of the cases Defendants cite are precisely that type of case.[5] In light of the context of this particular case and these particular documents, the Magistrate Judge did not clearly err when finding that "disclosure of the documents would not hinder frank and independent

[5] Defendants' proffered declarations discuss concerns about how the public might react to the decision-making process, but as explained above, this is not highly relevant here because the materials, if sensitive, may be produced pursuant to the protective order in this case.

discussions because there is a protective order in place that would prevent public disclosure of the documents." Dkt. 128 at 3. This reasoning is directly supported by the Fourth Circuit's reasoning in *Cipollone* where the Court noted that "the materials will not be released to the public under a protective order already entered in the New Jersey litigation." 1987 WL 36515 at *3. And, even if there was some chilling effect on certain discussions as the district court found in *Stone*, the first three factors can outweigh the risk that disclosure will chill future policymaking decisions. 356 F. Supp. 3d at 15.

The affidavits Defendants provide in support of their assertion of the chilling effect the production of the withheld information would have, like the privilege log, merely use "coined phrases" (Dkt. 135-1, Feb. 22, 2019 Tr. 30: 20-23). It is not improper to give them little or no weight as the Court in *Cipollone* did. 1987 WL 36515 at *3 ("The government offered only conclusory allegations concerning any likely repercussions to any 'deliberative process' involved in preparing the Annual Reports, and its assertion that disclosure would chill frank discussion by future participants in the Reports was undermined by the prior disclosure of all the documents underlying the 1964 Surgeon General's Report.").

2. There is No Basis To Treat Documents Regarding the Allegedly Ongoing Policy Review Differently From Other Withheld Documents

According to Lt.Col. Lute, AR 600-110 is reexamined quite often.[6] Dkt. 110-3, Lute Dep. Tr. 101:7-102:3. It is highly implausible that any discussion about a *future policy* would not at least in part discuss *current policy*—policies for which decisions were already made. Certainly, the Defendants have not demonstrated that the documents they claim relate to a future policy do

[6] Though, it changes little.

not include any discussions of current policies or facts—neither of which would be subject to a privilege claim. *Am. Bird Conservancy*, 2014 WL 12662300, at *5; *Ethyl Corp.*, 25 F.3d at 1248.

The evidence in this case underscores the need for the withheld information. As discussed above, when Lt. Col. Lute was being deposed, she was asked why she wrote that "for Army HIV policy to remain lawful and relevant, a major revision [or Ar600-110] is required."). Dkt. 110-3, Lute Tr. 139:15-28. She was precluded from answering because Defendants instructed her not to answer on the basis of the deliberative process privilege. *Id.* 139:18-23. Lt. Col. Lute's belief that the *current* Army policies must be updated to remain "lawful" and "relevant" is absolutely relevant to the issues in this case and whether those policies are even rationally related to some legitimate government interest. It is Plaintiffs' contention they are not because medicine and science has changed since these policies were put in place many years ago, but the policies have not kept up. Dkt. 1, Compl. at 2. Like *Stone*, the need here overcomes the potential chilling effect production would have. It is not clearly erroneous to order production of documents relating to the ongoing revisions of AR 600-110.

II. THE MAGISTRATE JUDGE PROPERLY CONCLUDED THAT DEFENDANTS HAD NOT ESTABLISHED THAT ALL WITHHELD MATERIALS WERE DELIBERATIVE AND PREDECISIONAL

The Magistrate Judge did not clearly err when he determined that at least some documents were not predecisional or deliberative in nature. Defendants must shoulder this "heavy burden". *Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at *4 (E.D. Va. Sept. 22, 2014); *see also Singletary v. Sterling Trasnp. Co.*, 289 F.R.D. 237, 241 (E.D. Va. 2012).

In evaluating Plaintiffs' motion to compel, Magistrate Judge Davis noted the insufficiency of Defendants' privilege descriptions: "every one of these privileged bases said nothing except it was pre-decisional and deliberative. That says nothing to me. That is a coined phrase." Dkt. 135-1, Feb. 22, 2019 Tr. 30: 20-23. The Magistrate Judge further emphasized, "You can't just use

buzzwords: It's pre-decisional and deliberative. It doesn't work. You have to say: Discussions concerning why this policy -- discussions between so-and-so and so-and-so and so-and-so discussing the purpose of enacting that would strongly recommend to the Court that those are deliberative process privilege. . .” *Id.* 35:15-23.

Further, after *in camera* review, the Magistrate Judge concluded that many of the documents did not reflect a “decision making process.” Dkt. 128. For example, the Court noted that many of the redline comments in draft documents were not deliberative—they don’t reflect opinions of the authors—but were rather non-deliberative proofreading edits. For example, when reviewing a draft document, the Magistrate Judge stated there was nothing deliberative about the comment “What AFI?” Dkt. 135-1, Feb. 22, 2019 Tr. 19: 21-20:19. Similarly, there was nothing deliberative about the comment “IAW” which stood for “in accordance with.” Dkt. 135-1, Feb. 22, 2019 Tr. 39:7-22. In the Opinion, the Magistrate Judge likewise noted that three pages listing the attendees at a meeting that were part of the overall meeting minutes were also not deliberative because “it is a mere list of names, organization, and emails.” Dkt. 128 at 1. None of these decisions is clearly erroneous and speak to the problems with Defendants’ proofs and the over breadth of their privilege claims.

Defendants criticize the Magistrate Judge’s Order by suggesting that not every document was mentioned and there are some that are supposedly “textbook examples” of predecisional and deliberative documents. Dkt. 138 at 17. Even if this were true, and the Defendants had established the applicability of the privilege for those documents, those documents should nevertheless be produced based on the *Cipollone* balancing test as the Magistrate Judge properly concluded. *See infra*. The Magistrate did not find every document on the log non-deliberative or not predecisional. The Magistrate Judge merely found that, “*in part*, Defendants have not demonstrated that the

withheld or redacted documents are deliberative." Dkt. 128 at 2 (emphasis added). There is no error, let alone clear error, in that determination.

III. THE MAGISTRATE JUDGE'S METHODOLOGY FOR DECIDING PLAINTIFFS' MOTION WAS NOT IMPROPER

Defendants' argument that the Magistrate Judge clearly erred by not "consider[ing] the assertions of privilege over each withheld document individually or in well-defined categories" (Dkt. 138 at 21) is misguided. *First*, in essence, the Defendants contend that they can withhold hundreds of documents by providing little more description of the withheld materials than the words "predecisional" and "deliberative" and then require a court to ferret through every document to test the veracity of the invocation of the privilege. Defendants turn their burden on its head. None of the cases cited by Defendants hold that each document must be analyzed individually to perform the balancing of needs under *Cipollone*. Indeed, their arguments about why the materials should not be produced all follow the same pattern—these documents relate to discussions about the Defendants' HIV regulations and should not be produced because they are "deliberative" and "predecisional." Defendants have done little to show how any of the documents are properly deliberative materials as opposed to materials that are on the periphery of the decision-making process. *See Ethyl Corp.*, 25 F.3d at 1248. Further, the cases that the Government does cite where a document-by-document review occurred all included relatively few documents and none are like this case where Defendants have put their decision-making squarely at issue in a constitutional case. *See Hugler v. Bat Masonry Co., Inc.*, No. 6:15-CV-28, 2017 WL 1207847 (W.D. Va. Mar. 31, 2017) (24 documents); *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2016 WL 6902359 (N.D.W. Va. July 20, 2016) (137 documents); *City of Virginia Beach, Va. v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1252 (4th Cir. 1993) (30 documents).

Furthermore, Defendants' assertion that Plaintiffs and the Court must perform a document-by-document analysis of the documents withheld is belied by their treatment of the documents in their privilege log and affidavits, which generally describe categories of documents. For example, of the remaining documents at issue, the Government describes twenty-eight entries as "DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110." Dkt. 126-1. An additional twenty-one documents are described as "Working draft of an unpublished version of AR 600-110, with edits included." *Id.* The Government's own characterization of its documents belie any need (or ability) to perform a "document-by-document" analysis. With these documents being described so similarly, their privilege claims should stand and fall together. [7]

Because the Government does not make meaningful distinctions in these descriptions, it was not contrary to law for the Magistrate Judge to rule based on a sampling of documents. Nor would it be fair to require the court to do such individualized analyses where the Government has neglected to do so itself, and have thus provided no meaningful information to Plaintiffs so that they can make individualized distinctions between documents.

IV. THE MAGISTRATE JUDGE PROPERLY FOUND THAT PUBLICLY AVAILABLE INFORMATION WAS NOT PRIVILEGED

The Magistrate Judge's additional conclusions regarding waiver merely provided an additional basis to order the production. (Dkt. 128 at 3.) There is no need to address this aspect

[7] If the Government is suggesting that the Magistrate's Order is contrary to law because not every *in camera* document is listed in the Order, the Government has cited no precedent for that position. The Magistrate Judge had several weeks after the third hearing to carefully review the submission. There is nothing in the Order to suggest that the Magistrate Judge did not review every *in camera* submission. Dkt. 128.

of the Magistrate Judge's opinion because its other determinations in ordering the production of the withheld information fully support the Order.

CONCLUSION

For the foregoing reasons, the Government's objections should be denied and the Government should be ordered to produce the documents promptly so that witnesses may be re-deposed, experts can revise their reports as needed, and this case can be finally prepared for trial.

Dated: April 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April 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: April 3, 2019

Respectfully submitted,

/s/ *Andrew R. Sommer*
Andrew R. Sommer

EXHIBIT 1

(UNCLASSIFIED)

ARMY STAFFING FORM
For use of this form, see DA Memo 25-52; the proponent agency is AASA.

1. TRACKING NUMBER	2. TODAY'S DATE (YYYYMMDD)	3. SUSPENSE DATE (YYYYMMDD)
	20180917	20190422

4. LEAD STAFF AGENCY
G-1

5. SUBJECT
Army-wide Review for Major Revision of AR 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus

6. ROUTING:
(*ECC USE ONLY*)

		Initial	Date
	SA		
	CSA		
	USA		
	VCSA		
	AASA		
	DAS		
	SMA		
	DUSA		
	VDAS		

ECC POC *(Initial)*	ECC *(Rank, Name, Phone No.)*	DIR, ECC *(Initial)*

COMMENTS:

7. ORIGIN: Requirement from - ☐ SA ☐ CSA ☐ USA ☐ VCSA ☐ Staff Initiated ☐ OSD ☐ Congress ☐ CJCS/JS ☐ Other _____

Meeting/Forum/Other:

8. WHAT IS IN THIS PACKET?
TAB A: Army Resiliency Directorate (ARD) memorandum requesting review and comment AR 600-110
TAB B: PDF copy of current AR 600-110, dated 22 April 2014 TAB D: DA Form 5669 modification
TAB C: DA Form 2028, Recommended Changes to Publications and Blank Forms

9. ACTION SEEKS SENIOR LEADER ☒ Signature ☒ Approval ☐ Guidance ☐ Information Only ☐ Other _____
Recommendation to senior leader: Review ARD memo and this Form 5 and affix signature in block 14 granting approval to proceed with Army-wide staffing as indicated in basic memo.

10. KEY AREAS IMPACTED: ☐ Funding ☐ Equipment ☐ Personnel ☐ Training ☐ Strategy ☐ Policy ☐ Congressional ☐ Legal ☐ Other _____

11. KEY POINT(S) THE SENIOR LEADERS SHOULD GET FROM THIS ACTION:
- Medical advancements in the field of Human Immunodeficiency Virus (HIV) detection and treatment are occurring rapidly, potentially impacting Soldier and unit readiness to deploy
- For Army HIV policy to remain lawful and relevant, a major revision is required

12. ADDITIONAL INFORMATION:
AR 600-110 proponent within Army Resiliency Directorate (ARD) is LTC LTC Lisa M. Lute, DSN 865-1918, commercial (703) 545-1918; lisa.m.lute.mil@mail.mil. Requested suspense is 26 October 2018 for return of comments and other input documented within a properly completed DA Form 2028, Recommended Changes to Publications and Blank Forms. All recommendations, comments and input must be endorsed by an O6 or GS-15 or equivalent and emailed to LTC Lute along with meeting your local organization's task tracking system requirements.

13. SENIOR LEADER/DECISION/COMMENTS:
APPROVED _____ DISAPPROVED _____ NOTED _____ SEE ME _____ COMMENT _____

14. LEAD AGENCY STAFF COORDINATION		LEAD STAFF AGENCY: G-1	TRACKING NO.:
TITLE	INITIAL	TYPE OR PRINT NAME	DATE (YYYYMMDD)
Chief, Strategy Division		COL Javier C. Soria	
Chief, Ops and Trng Divisi		COL Gregory V. Stokes	
Chief, Assessment Div		Randall C. Lane	
PRINCIPAL ONLY		Major General Tammy S. Smith, Assistant Deputy CoS	
ACTION OFFICER (Signature) (Name/Title/Phone No./Email/Office Symbol)		LTC Lisa M. Lute, HPO (703)545-1918, lisa.m.lute.mil@mail.mil, DAPE-AR	
SACO (Signature) (Name/Title/Phone No./Email)		Ms Cheryl A. Barron, SACO, (703)5717265, cheryl.a.barron.civ@mail.mil	

RECOMMENDATION FOR STAFF PRINCIPAL:
Review basic memo and the Form 5 submission and affix signature for approval of Army-wide staffing action.

15. STAFF COORDINATION

CONCUR	NON-CONCUR	AGENCY	NAME (TITLE, LAST NAME)	PHONE (XXX) XXX-XXXX	DATE (YYYYMMDD)	REMARKS
		OGC				
		OTJAG				
☐	☐	AASA				
☐	☐	ACSIM				
☐	☐	ANMC				
☐	☐	ASA(ALT)				
☐	☐	ASA(CW)				
☐	☐	ASA(FMC)				
☐	☐	ASA(IEE)				
☐	☐	ASA(MRA)				
☐	☐	CAR				
☐	☐	CCH				
☐	☐	CIO/C-6				
☐	☐	CLL				
☐	☐	CNGB				
☐	☐	COE				

16. REMARKS BY ECC:

INSTRUCTIONS

PARENTHESES AT TOP AND BOTTOM OF FORM: Select a classification (UNCLASSIFIED or FOUO) from the drop down menu. If for the Army's senior leadership (SA, CSA, USA and VCSA), use a minimum classification of FOUO (default). If using a classified SIPRnet system, select a classification (FOUO, CONFIDENTIAL or SECRET).

Block 1. TRACKING NUMBER:

a. If the action has been assigned a tracking number by ECC/OJDA, enter that number.

b. If the action has been assigned a tracking number by the activity Staff Action Control Office (SACO), enter that number along with the ECC/OJDA tracking number (if applicable).

c. When this form is being used as a read ahead coversheet, select from the drop down list "READ AHEAD COVERSHEET" in lieu of a tracking number.

Block 2. TODAY'S DATE: Enter today's date. The Army standard date format is YYYYMMDD (for example, 20150130). This allows for HQDA Tracking System searches by a calendar date.

Block 3. SUSPENSE DATE: The format is YYYYMMDD.

a. If the action is responding to an external suspense, enter the date of the assigned suspense.

b. If the suspense date is established internally, enter that date.

Block 4. LEAD STAFF AGENCY: Select from the drop down menu the office responsible for generating the response to the requested action.

Block 5. SUBJECT: Enter the primary subject line of the action. The subject on the HQDA Form 5 should match the subject used in the HQDA Tracking System (use upper and lower case).

Block 6. ROUTING: (ECC USE ONLY) or (OJDA USE ONLY): The ECC POC or OJDA POC will complete the routing block. Select whether this action is to be routed through the ECC or OJDA from the drop down menu. This selection will also affect: **ECC/OJDA POC and DIR, ECC** as well as block 16.

Block 7. Origin: Requirement from: Select only one block indicating the individual or organization prompting the submission of this HQDA Form 5.

Meeting/Forum/Other: Examples: Directed by the CSA at the 26 Apr XX Morning Update; the SA asked for this information at the 26 Apr XX GA update.

Block 8. What is in the packet? List all enclosures/TABs. Explain what is included within the packet. If none, state N/A (for example, TAB A: Memorandum for SA signature. TAB B: DOD tasking and ECC tasking).

Block 9. Action seeks senior leader: Select the most appropriate box defining the desired action by the final approval authority. Two lines are provided to clearly state/indicate the recommendation to the final approval authority and indicate where the senior leader should sign or initial (for example, to obtain the SA's signature on the memorandum at TAB A; approve this action by initialing in block 13 at the bottom of this page).

Block 10. Key areas impacted: Check all boxes that apply. If "other" is checked, specify accordingly.

Block 11. Key point(s) the senior leaders should get from this action: The key points are the salient information that the SA, CSA, USA and VCSA need to take away from the action and are written at the Army senior leaders' level. These are the key points your Principal Official or Deputy wants to convey to the Army's senior leaders. Each key point area allows essentially two lines to express your key point with a maximum of two key points.

Block 12. Additional information: Summarize the information and provide a current status, if applicable. Why are you telling this to the senior leader? What should the senior leader know and discuss? Describe the task, origin of the action, issue and the requirement. Provide fact-filled background and comment. This discussion should tell the "story" on an action without "begging questions." The final approval authority should fully understand why this action is necessary.

Block 13. Senior Leader/Decision/Comments: This space allows the SA, CSA, USA and VCSA to approve, disapprove or comment on the action.

Block 14. LEAD AGENCY STAFF COORDINATION *(Lead Staff Agency Use Only)*: These blocks are designated for the internal approval chain within a Staff. Possible entries could include Branch, Division, Director and Deputy. The appropriate releasing authority should electronically sign and date the action once they have released/approved for forwarding to the next appropriate office for disposition. The Staff Principal will electronically sign and date. His or her electronic signature represents concurrence with the contents of the HQDA Form 5 and the final product to be submitted to ECC/OJDA for the Army's senior leaders to review. **Note: ONLY THE PRINCIPAL will sign in this space.** If the Principal Official is not available, the next most senior individual will initial in the space immediately above the "Principal Only" space and indicate "FOR" and clearly enter his or her name and title.

ACTION OFFICER *(Name/Title/Phone No./Email/Office Symbol)*: Enter the responsible action officer's name, rank and/or position title, office phone number and Email address. This information is especially important to ensure any questions related to the action can be quickly directed to the appropriate point of contact avoiding delay in processing the action. Action Officer will electronically sign.

SACO *(Name/Title/Phone No./Email)*: Enter the responsible SACO's name, rank and/or position title, office phone number and Email address. This information is especially important to ensure any questions related to the action can be quickly directed to the appropriate POC avoiding delay in processing the action. SACO will electronically sign.

RECOMMENDATION FOR STAFF PRINCIPAL: This block allows for recommendations to the Staff Principal (for example, G-3/5/7 approves the memorandum at TAB A by electronically signing block 14).

Block 15. STAFF COORDINATION: When staffing an action for review and comment, include each office and POC information that the action is being staffed with and include instructions for the addressees to indicate their concurrence by checking the appropriate block and returning to the originator. If concurrence indicates "concur with comments," then include comments at appropriate tab. OGC and OTJAG are allocated special spaces because their offices do not concur/non-concur with actions, but rather provide legal reviews. These boxes are not meant to indicate that legal review is required for all staff actions.

Block 16. REMARKS BY ECC *(ECC use only)*: *or* SERVICES COORDINATION *(OJDA selection)*: The ECC POC will complete the **REMARKS BY ECC** block. Lead Agency Action Officers will complete the **SERVICES COORDINATION** block.

EXHIBIT 2

From: FONTAINE, Laurie A CIV USARMY HQDA (US)
To: Lawrence, Marguerite Anne LTC USARMY HQDA DCS G-1 (US)
Subject: RE: ETP Harrison (UNCLASSIFIED)
Date: Tuesday, January 5, 2016 9:31:39 AM

Classification: UNCLASSIFIED
Caveats: NONE

Happy New Year Ma'am.

I am trying to obtain a final recommendation from COL Thomas. I have sent him another request today.

Thank you for your additional information in assisting with his inquiries. I will try to get something finalized today !

V/r,

Laurie Fontaine (CIV)
Health Standards Specialist
OTSG - G37 Readiness
BB: (571) 278-4057

-----Original Message-----
From: Lawrence, Marguerite Anne LTC USARMY HQDA DCS G-1 (US)
Sent: Tuesday, January 05, 2016 9:18 AM
To: FONTAINE, Laurie A CIV USARMY HQDA (US)
Subject: FW: ETP Harrison (UNCLASSIFIED)

Good Morning Ms Fontaine,

Just following up to see if a medical recommendation can be provided regarding the subject line.

Thank you

R,

Marguerite A. Lawrence LTC, GS
Chief, Health Promotions Policy
Office of the Deputy Chief of Staff, G1
Tele: 703.545.1918
email: Marguerite.A.Lawrence.mil@mail.mil

-----Original Message-----
From: Lawrence, Marguerite Anne LTC USARMY HQDA DCS G-1 (US)
Sent: Monday, December 28, 2015 8:06 AM
To: Thomas, Stephen J COL USARMY MEDCOM WRAIR (US)
<stephen.j.thomas3.mil@mail.mil>; FONTAINE, Laurie A CIV USARMY HQDA (US)
<laurie.a.fontaine.civ@mail.mil>
Cc: Williams, Brenda V CIV (US) <brenda.v.williams2.civ@mail.mil>; Bigelman,
Kevin A COL USARMY HQDA DCS G-1 (US) <kevin.a.bigelman.mil@mail.mil>
Subject: RE: ETP Harrison (UNCLASSIFIED)

COL Thomas,

Good Morning and Happy New Year!

Thank you for the information below. Indeed, the timeliness of the revision of AR 600-110 is relevant.

As in the past, I request my colleagues at MEDCOM to please review the exception to policy request (reattached) for patient noted on the subject line. The written medical opinion regarding the subject line is invaluable to the G-1, LTG McConville to formulate his decision to support/deny the request.

I am in the office this week and available to discuss any specific questions/concerns regarding the ETP.

Thank you again

M Lawrence

R,

Marguerite A. Lawrence LTC, GS
Chief, Health Promotions Policy
Office of the Deputy Chief of Staff, G1
Tele: 703.545.1918
email: Marguerite.A.Lawrence.mil@mail.mil

-----Original Message-----
From: Thomas, Stephen J COL USARMY MEDCOM WRAIR (US)
Sent: Thursday, December 24, 2015 7:04 AM
To: Lawrence, Marguerite Anne LTC USARMY HQDA DCS G-1 (US)
<marguerite.a.lawrence.mil@mail.mil>; FONTAINE, Laurie A CIV USARMY HQDA
(US) <laurie.a.fontaine.civ@mail.mil>
Cc: Williams, Brenda V CIV (US) <brenda.v.williams2.civ@mail.mil>; Bigelman,
Kevin A COL USARMY HQDA DCS G-1 (US) <kevin.a.bigelman.mil@mail.mil>
Subject: RE: ETP Harrison (UNCLASSIFIED)

Thanks for the clarification.

From a purely medical standpoint it is possible for someone with HIV to have a normal life expectancy, experience a high quality of life and health, and be productive. [redacted]

Does this make sense?

Stephen

-----Original Message-----
From: Lawrence, Marguerite Anne LTC USARMY HQDA DCS G-1 (US)
Sent: Wednesday, December 23, 2015 8:42 AM
To: FONTAINE, Laurie A CIV USARMY HQDA (US); Thomas, Stephen J COL USARMY MEDCOM WRAIR (US)
Cc: Williams, Brenda V CIV (US); Bigelman, Kevin A COL USARMY HQDA DCS G-1 (US)
Subject: RE: ETP Harrison (UNCLASSIFIED)

Good Morning

According to AR 600-110 (Identification, Surveillance, and Administration of Personnel Infected with HIV) the G-1 has authority to approve ETP, however, the office requests MEDCOM to review if the Soldier continues to meet retention standards, continues to maintain evaluations by ID provider, status of the infection etc. The officer in this position, does not have access to AHLTA and cannot confirm information provided by the Soldier's primary care manager etc.

Thank you,

M Lawrence

R,

Marguerite A. Lawrence LTC, GS
Chief, Health Promotions Policy
Office of the Deputy Chief of Staff, G1
Tele: 703.545.1918
email: Marguerite.A.Lawrence.mil@mail.mil

-----Original Message-----
From: FONTAINE, Laurie A CIV USARMY HQDA (US)
Sent: Wednesday, December 23, 2015 8:19 AM
To: Thomas, Stephen J COL USARMY MEDCOM WRAIR (US)
<stephen.j.thomas3.mil@mail.mil>
Cc: Lawrence, Marguerite Anne LTC USARMY HQDA DCS G-1 (US)
<marguerite.a.lawrence.mil@mail.mil>
Subject: RE: ETP Harrison (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Sir - the policy that you are speaking of is why they have to come and request a waiver in order to assume the requested position.

I have cc'd the requestor here who may be able to provide additional insight/information.

V/r,

Laurie Fontaine (CIV)
Health Standards Specialist
OTSG - G37 Readiness
BB: (571) 278-4057

-----Original Message-----
From: Thomas, Stephen J COL USARMY MEDCOM WRAIR (US)
Sent: Tuesday, December 22, 2015 5:17 PM
To: FONTAINE, Laurie A CIV USARMY HQDA (US)
Subject: RE: ETP Harrison (UNCLASSIFIED)

Laurie

I have seen this request before I believe. The concept under discussion has been discussed in larger circles as well. Although the transition from one status to another within the military is administrative in nature and may seem bureaucratic, it does require an accession review and the policy currently states those with HIV do not meet standards regardless of their overall state of health. I cannot endorse an ETP knowing it will be denied.

Am I missing some nuance here?

Stephen

-----Original Message-----
From: FONTAINE, Laurie A CIV USARMY HQDA (US)
Sent: Tuesday, December 22, 2015 1:47 PM
To: Thomas, Stephen J COL USARMY MEDCOM WRAIR (US)
Subject: ETP Harrison (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Sir,

This is a National Guard Direct Commission ETP request.

Please let me know of any questions.

V/r,

Laurie Fontaine (CIV)
Health Standards Specialist
OTSG - G37 Readiness
BB: (571) 278-4057

-----Original Message-----
From: Lawrence, Marguerite Anne LTC USARMY HQDA DCS G-1 (US)
Sent: Tuesday, December 22, 2015 11:32 AM
To: FONTAINE, Laurie A CIV USARMY HQDA (US)
Subject: ETP: Harrison

Good Morning

I have attached scanned documents for the subject line

Soldier (enlisted) is requesting ETP for direct commission to JAG Corps

Thank you and happy Holidays!

R,

Marguerite A. Lawrence LTC, GS
Chief, Health Promotions Policy
Office of the Deputy Chief of Staff, G1
Tele: 703.545.1918
email: Marguerite.A.Lawrence.mil@mail.mil

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE