

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

NICK HARRISON and	.	Civil Action No. 1:18cv641
OUTSERVE-SLDN, INC.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	February 1, 2019
	.	11:48 a.m.
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.	.	
	.	
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE IVAN D. DAVIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	JOHN W.H. HARDING, ESQ. Winston & Strawn LLP 1700 K Street, N.W. Washington, D.C. 20006 and SCOTT A. SCHOETTES, ESQ. Lambda Legal Defense and Education Fund, Inc. 105 West Adams, Suite 2600 Chicago, IL 60603
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FOR THE DEFENDANTS:	KIMERE KIMBALL, AUSA U.S. Attorney's Office 2100 Jamieson Avenue Alexandria, VA 22314
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(APPEARANCES CONT'D. ON PAGE 2)

(Proceedings recorded by electronic sound recording, transcript produced by computerized transcription.)

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APPEARANCES:

FOR THE DEFENDANTS:

ROBERT M. NORWAY, Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001

ALSO PRESENT:

SGT. NICK HARRISON

THE TRANSCRIBER:

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P R O C E E D I N G S

THE CLERK: Civil Action No. 18cv641, Nick Harrison, et al. v. James Mattis, et al. Will counsel please come to the podium and state your name for the record.

MS. KIMBALL: Good morning, Your Honor. I'm Kimere Kimball from the U.S. Attorney's Office here today on behalf of the federal government. With me is Robert Norway from the Department of Justice. Mr. Norway will be arguing the motion.

THE COURT: Good morning.

MR. HARDING: Good morning, Your Honor. John Harding from the law firm of Winston & Strawn. With me today is Scott Schoettes and Sgt. Harrison, the plaintiff in this action.

THE COURT: Good morning.

This matter is before the Court on the plaintiffs' motion to compel documents and information withheld by the defendants on the basis of the deliberate process privilege. The Court has had an opportunity to review the motion, the memorandum in support of the motion, the opposition to the motion, and the reply to that opposition.

Is there anything the plaintiff would like to add to your motion at this time?

MR. HARDING: Just briefly, Your Honor. Your Honor, we believe this is a relatively straightforward motion. Instead of producing approximately 1,500 documents defendants considered and relied on when developing its policies regarding

1 soldiers living with HIV and the congressional reports
2 explaining those policies, defendants withheld those documents,
3 asserting that they are protected by the deliberative process
4 privilege.

5 Defendants further in a deposition instructed their
6 witness not to answer a question on the basis of the
7 deliberative process privilege about proposed changes that the
8 Army is currently considering that that witness believes are
9 necessary to -- for that regulation to, quote, remain lawful.

10 In both contexts, Your Honor, defendants are mistaken
11 about the appropriate application of the deliberative process
12 privilege. As other courts in this circuit have held, the
13 deliberative process privilege does not apply when the
14 government's intent is at the heart of the issues in this case.
15 Because the, the defendants' intent in creating the policies,
16 singling out individuals living with HIV for disparate
17 treatment are central to this case, the documents should be
18 produced here, and the witness who was ordered not to -- who
19 was instructed not to answer at the deposition should be
20 re-deposed.

21 Your Honor, this case is on all fours with the
22 recently decided case, *Stone v. Trump*, in the District of
23 Maryland. That case deals with the transgender ban in the
24 military, and there plaintiff sought similar materials that we
25 seek here. The magistrate judge there, relying on D.C. Circuit

1 law and other cases within this circuit, found that the
2 deliberative process privilege did not apply because the
3 government's intent was at the heart of the case.

4 The, the district court when reviewing the
5 magistrate's order further went on to hold that even if the
6 magistrate judge at the time had used the balancing test that
7 the Fourth Circuit has used in the past, the *Cipollone* test,
8 that there those factors still would have weighed in favor of
9 producing the documents.

10 So we believe whether you apply the per se test that
11 the magistrate judge applied in *Stone* or whether you apply the
12 four-factor balancing test of *Cipollone*, that the documents
13 that we request are, are -- should be produced.

14 Sorry, Your Honor. Further, we've identified another
15 category of documents that we believe regardless of whether the
16 privilege applies or not, these documents just simply do not
17 fall into the deliberative process privilege for a variety of
18 reasons. They're peripheral to the actual policy decision,
19 they provide only technical or facilitative information, or
20 they are entirely factual and not actually deliberative in
21 nature.

22 And we've identified those documents for Your Honor
23 in an annotated privilege log. We don't think Your Honor needs
24 to go and review those documents because we think the
25 deliberative process privilege does not apply to this case at

1 all because the government's intent is at the heart of the
2 case, and further, the government's -- we have alleged
3 misconduct because of the constitutional challenge -- the
4 violation of the Constitution in this case, and so we believe,
5 Your Honor, that you don't need to go to those categories, but
6 if you do, a sampling is -- would be ideal. We don't believe
7 Your Honor needs to go and review 1,500 documents on a
8 document-by-document basis.

9 THE COURT: Oh, that wasn't going to happen.

10 MR. HARDING: Okay. I just wanted to -- the
11 defendants have requested that, and so I wanted to, to address
12 that.

13 I'll turn it over to defendants, Your Honor.

14 MR. NORWAY: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. NORWAY: 1,907 documents, those are the number of
17 documents that have been challenged by the plaintiffs in this
18 case that have been withheld or redacted on the basis of
19 deliberative process only. 1,907.

20 711 of those documents are in the second category
21 that my colleague on the other side mentioned just at the end,
22 that are factual of nature or technical. So I wanted to get
23 those numbers up front because they are different numbers than
24 plaintiffs are saying.

25 And it's important, I think, to, to, to emphasize

1 that the government's initial burden here is simply to provide
2 enough factual information for the Court and the other side to
3 decide whether or not something is pre-decisional and
4 deliberative in nature. That's the initial burden. Once the
5 government has met that burden, the burden shifts to the
6 plaintiffs to show particularized need using the *Cipollone*-type
7 balancing test.

8 We've done that. We've created very detailed
9 privilege logs for all of these documents. Also, attached to
10 our opposition, there are six declarations that explain what
11 the documents are at issue. They break down examples of the
12 deliberative documents in those -- that were withheld, and
13 those declarants walk through why they're deliberative in
14 nature.

15 So the government has met its initial burden showing
16 that documents that are on the privilege logs that were
17 withheld or redacted are deliberative in nature.

18 Now, the plaintiffs rely a lot on the *Stone v. Trump*
19 case. That case, number one, is currently being reviewed by
20 the district court there; but two, there was in that case a
21 definitive finding that the constitutional claims brought were
22 subject to a heightened scrutiny. So we're looking at -- that
23 case is different --

24 THE COURT: I don't deal with scrutiny here. That's
25 for trial.

1 MR. NORWAY: Right. That is one of the, the
2 differences there. And also, Your Honor, also, the *Stone* case
3 misapplies the controlling Fourth Circuit precedent, and that,
4 and that precedent is the *City of Virginia Beach* case, and we
5 have it cited in our, in our briefs, and in that case, the
6 Fourth Circuit had a very similar incident or very similar
7 circumstances of, of allegations of, of, of misconduct, and the
8 Fourth Circuit did not look at those documents en masse. It
9 looked at them one by one. It looked for a particularized
10 need. They analyzed the documents individually.

11 And, in fact, if you look at the, this is another
12 case that is cited in our brief, *Christian Coalition*, Judge
13 Friedman --

14 THE COURT: Well, that was something the parties were
15 supposed to do in a good faith meet and confer to narrow the
16 dispute.

17 MR. NORWAY: And we --

18 THE COURT: Why do we get the Court involved to have
19 to look at documents one by one?

20 MR. NORWAY: And we've been --

21 THE COURT: The parties -- you as the defendant
22 should not have marked the documents as subject to the
23 privilege until you had looked at them one by one to determine
24 whether they fell under that privilege. If you believe that
25 all 1,700 documents fell under that privilege, then you say so;

1 they object; then we get together in good faith meet and
2 confers. You explain to them why you believe they fall under
3 that privilege. They then explain to you whether or not they
4 believe you've waived the privilege to certain documents or
5 whether certain of those documents fall under any exceptions to
6 the privilege. The parties or counsel battle it out and out.
7 We narrow that 1,700 number of documents to a lesser number of
8 documents. Then we still can't agree. Then we file a motion
9 concerning the smaller number.

10 MR. NORWAY: And we --

11 THE COURT: That's how the process works.

12 MR. NORWAY: And we've, we've recommended --

13 THE COURT: You don't --

14 MR. NORWAY: Yes, Your Honor.

15 THE COURT: -- mark hundreds, nay, almost thousands
16 of documents to a privilege if we have not yet gone through
17 each individual document and determined that it falls within
18 the privilege.

19 MR. NORWAY: Your Honor, the government did go
20 through every document.

21 THE COURT: And did you then meet and confer with
22 them and explain to them why you believe that each one of those
23 documents fell within the privilege, or did you just make a
24 blanket statement and said all of these documents are
25 pre-decisional and deliberative?

1 MR. NORWAY: The parties had a number of meet and
2 confers, Your Honor, over the broad --

3 THE COURT: And in the meet and confers, did you
4 explain why each one of those documents fell under the
5 privilege, or did you make a blanket statement that says: It
6 is our opinion that these 1,700 documents are pre-decisional
7 and deliberative and therefore fall within the privilege?

8 MR. NORWAY: Your Honor, we addressed every document
9 that they brought to our attention individually, so if they
10 identified a document, then we addressed it in those meet and
11 confers.

12 THE COURT: Addressed it how?

13 MR. NORWAY: We, we explained to them why it was
14 privileged or why it wasn't privileged, and we also brought
15 those, those, those challenges back to our clients.

16 THE COURT: And what was their response?

17 MR. NORWAY: They maintained their challenge against
18 those documents.

19 THE COURT: So out of 1,700 documents, the parties
20 couldn't agree to even one of them should be produced?

21 MR. NORWAY: That's actually not --

22 THE COURT: That seems hard to believe.

23 MR. NORWAY: So the, the government did look at
24 several of the documents that they challenged, Your Honor, and
25 my clients were, were willing to withdraw the claim of

1 privilege on, on some documents, and in particular, there are
2 comments matrix to these policies.

3 THE COURT: So have, have we withdrawn the privilege
4 to those documents and provided them?

5 MR. NORWAY: We have, Your Honor.

6 THE COURT: All right. Then why did we mention
7 1,700? We're not talking about 1,700 anymore then, are we? So
8 how many documents were provided, and how many remain disputed?

9 MR. NORWAY: I, I believe about 1,700, Your Honor.

10 THE COURT: You started with 1,700. You said some
11 documents have been provided.

12 MR. NORWAY: So there are 1,907 documents on our
13 privilege logs, Your Honor. There were a small number that
14 were provided. My client has identified about 200 spreadsheets
15 with non-deployability data on it. The spreadsheets are
16 deliberative in nature. They're pre-decisional. My client has
17 decided to withdraw the privilege claims on those 200
18 spreadsheets.

19 THE COURT: Why?

20 MR. NORWAY: They've, they've decided to, to, to not
21 maintain the privilege over those.

22 THE COURT: Out of the kindness of their hearts or
23 the fact that they believe that the privilege didn't apply?

24 MR. NORWAY: No, the privilege does apply, Your
25 Honor. It's a very close issue. The spreadsheets

1 themselves --

2 THE COURT: What do those spreadsheets encompass?
3 Spreadsheets usually are the result of a compiled information
4 from other sources.

5 MR. NORWAY: Right, Your Honor. And, and this
6 actually --

7 THE COURT: So is those spreadsheets the compiled
8 information from individual documents remaining in the 1,700
9 that have not been produced?

10 MR. NORWAY: No, Your Honor. They're, they're,
11 they're data points, the number of non-deployable personnel,
12 and they are -- it's a matrix of each service on the top, and
13 we have -- we've provided blanks of these, and we're currently
14 in the process of --

15 THE COURT: Give me an example of a document that has
16 been -- that has not been produced that you believe falls
17 within the deliberative process privilege that you believe
18 there's not been a waiver and there are no exceptions to the
19 privilege.

20 MR. NORWAY: Sure. And that is, you can go to
21 Commander Beland's declaration attached to it. There is a
22 document, a Navy document that was identified as being factual
23 in nature, said it's a coordination sheet. It's actually
24 mentioned in our brief.

25 At the very end, it identifies it as a

1 recommendation. That document is a recommendation from the
2 Navy to --

3 THE COURT: No, the recommendation is a
4 recommendation. The factual information upon which the
5 recommendation is based is factual. That document should have
6 been produced in redacted form redacting the recommendation.
7 The rest of it is not deliberative. It provides no opinions or
8 the reasons for those opinions. The factual information upon
9 which it is based is not part of the deliberative process.

10 MR. NORWAY: No, Your Honor.

11 THE COURT: That's just -- that's the law.

12 MR. NORWAY: There, there are cases, Your Honor, that
13 talk about facts, how facts get intertwined with the
14 deliberative process, with the deliberative system, and
15 the organization --

16 THE COURT: Yes. And if you include those in the
17 opinion and they're so interrelated and intertwined that if you
18 take those facts out, you have the -- the opinion cannot be
19 supported, the Court would agree, but generally speaking,
20 that's why you noted that the recommendation was at the end of
21 the report. Generally speaking, everything that is before the
22 recommendation or section-cited opinion is fact.

23 MR. NORWAY: So, Your Honor, I, I'm sorry, I don't
24 think I was very clear in how I was describing these two
25 categories of documents. The spreadsheets that are --

1 THE COURT: No, no, I'm not -- I'm talking about the
2 one document --

3 MR. NORWAY: Right.

4 THE COURT: -- that I told you to give me an example
5 of.

6 You just said this is a document under the Navy to
7 this right here and at the end of that document is a
8 recommendation. Generally speaking, under current state of
9 case law, the recommendation section would be a deliberative
10 process.

11 MR. NORWAY: Correct.

12 THE COURT: And falls within the privilege. Any and
13 all factual information that precedes that recommendation would
14 not.

15 MR. NORWAY: Correct. That --

16 THE COURT: Even the recommendation section could be
17 excepted to the deliberative process. Deliberative process is
18 not full. It does not encompass all set of circumstances.
19 There are exceptions. It's the old sword and shield. You
20 can't say, well, we're going to rely on this to defend our
21 case, but we're not going to provide that same information to
22 opposing counsel in order to fulfill their theory of the case.

23 You can't hide the information and then intend to use
24 it only to support your theory. The law doesn't authorize
25 that. If you're going to utilize that information to support

1 your theory or to defend against their complaint, they are
2 required to get access to it.

3 If your position is that we had a legitimate or
4 important or a compelling government interest to discriminate
5 in the way we did against individuals with HIV, that
6 legitimate, important, or compelling government interest must
7 be non-pretextual. They have the right to discover information
8 to determine whether your representations of legitimacy,
9 importance, or compelling is pretextual or not. That is where
10 the intent comes in.

11 The document could say -- and they don't know and
12 we're not at trial, so we're not talking about the
13 admissibility from the purpose of a deliberative process
14 privilege. We're talking about discoverable information. They
15 may not be able to use it at trial, but they have the right
16 under certain circumstances to see it to determine whether they
17 do have the ability to use it at trial.

18 The, the opinion or deliberation could say: We know
19 we have absolutely no basis to enact this statute or this
20 regulation. We are doing so because we believe that
21 individuals that have HIV are all parts of the LGBTQ community,
22 and we just don't want any of them in our military.

23 That information is not only discoverable but would
24 be admissible at trial. That shows that the intent set forth
25 by the government to prove legitimacy, importance, or

1 compelling is pretextual and therefore does not stand muster.

2 This is not a hide-and-seek game in federal court.
3 We do not play hide the ball. All privileges have exceptions,
4 even the most pronounced privilege of all, the attorney-client
5 privilege. You can't simply say it's -- it meets the
6 definition of "deliberative process" and therefore we are not
7 required to turn it over. That is not the state of the law.

8 MR. NORWAY: Thank you, Your Honor.

9 THE COURT: With that bit of information, would the
10 parties like the Court to rule right now, or would the parties
11 take the Court's suggestion that we meet and confer again
12 considering the Court's comments and try to narrow the area of
13 disputes?

14 MR. NORWAY: Your Honor, I think we can meet and
15 confer about it.

16 THE COURT: I would hope that would have been your
17 answer.

18 MR. HARDING: Thank you.

19 MR. NORWAY: Thank you, Your Honor.

20 THE COURT: Do the parties believe -- well, the
21 parties will file no later than close of business this upcoming
22 Wednesday the 6th a notice to this Court whether or not the
23 issues have been resolved; if they have not all been resolved,
24 setting forth the disputes that have not been resolved. We
25 will reconvene if they have not all been resolved this matter

1 next Friday the 8th at 10 a.m. for resolution of this motion.

2 MR. HARDING: Thank you, Your Honor.

3 MR. NORWAY: Thank you.

4 THE COURT: There appearing nothing further, this
5 Court stands adjourned.

6 (Which were all the proceedings
7 had at this time.)

8

9 CERTIFICATE OF THE TRANSCRIBER

10 I certify that the foregoing is a correct transcript from
11 the official electronic sound recording of the proceedings in
12 the above-entitled matter.

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14

/s/

Anneliese J. Thomson

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