

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

RICHARD ROE, VICTOR VOE and
OUTSERVE-SLDN, INC.
Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as acting Secretary of Defense;
HEATHER WILSON, in her official capacity as
the Secretary of the Air Force; and the UNITED
STATES DEPARTMENT OF DEFENSE,
Defendants.

NO. 1:18-CV-01565-LMB-IDD

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO
COMPEL THE PRODUCTION OF DOCUMENTS AND INFORMATION
WITHHELD ON THE BASIS OF DELIBERATIVE PROCESS PRIVILEGE**

INTRODUCTION

Plaintiffs' Motion to Compel should be granted. Defendants oppose Plaintiffs' motion on the grounds that (1) no Fourth Circuit authority supports Plaintiffs' argument that the deliberative process is inapplicable where the government's intent is at issue; (2) the government's intent is not at issue in this case; (3) the documents withheld by Defendants satisfy the conditions of the *Cipollone* test; and (4) the remaining 89 documents being withheld by Defendants must be assessed individually. Defendants are wrong. First, Defendants ignore relevant authority that the deliberative process privilege is inapplicable in cases such as this one, where the government's intent is at the heart of Plaintiffs' claims. Second, the government's intent is squarely at issue here, under either heightened review or rational basis. Third, there is no need for a document-by-document analysis under the cases cited by Defendants. Defendants even lump the allegedly privileged documents into categories themselves. Fourth, Defendants incorrectly assert that Plaintiffs bear the burden of showing that the privilege does not apply. Rather, Defendants bear the heavy burden of proving that these documents are privileged, and they have not done so. Finally, Defendants have not conservatively and precisely applied the privilege, as required.

Additionally, Defendants assert that "the only question properly before the Court is whether the deliberative process privilege is entirely unavailable in this case." Dkt. 98, Defs.' Opp. to Pls. Mot. to Compel at 2. Defendants are incorrect on this assertion as well. Although Plaintiffs do assert that the privilege is unavailable because the government's intent is at the heart of the case, Plaintiffs also assert that where the privilege does apply, the *Cipollone* balancing tests favors compelling the production of these documents. See Dkt. 96, Pls.' Mem. in Support of Mot. to Compel at 6, 9-14.

ARGUMENT

I. The Deliberative Process Privilege is Inapplicable Because of the Nature of Plaintiffs' Claims

The Deliberative Process Privilege is not applicable in this case because the government's intent is at the heart of Plaintiffs' claims. Defendants once again, as in *Harrison*, fail to respond to *Stone v. Trump*, No. CV GLR-17-2459, 2018 WL 6305131 (D. Md. Nov. 30, 2018).¹ Furthermore, Defendants incorrectly assert that the government's intent is not at issue because only rational basis analysis applies here. But Plaintiffs have asserted that heightened scrutiny applies to policies singling out individuals living with HIV. *See* Dkt. 1, Compl. at ¶ 98. That issue has not yet been resolved by the District Court, contrary to Defendants' suggestion that it has. Even under rational basis review, however, whether the government had an intent to harm a politically unpopular group or based their policies on unjustified prejudices is still relevant. Finally, Defendants themselves have placed their intent at issue by pleading in their answer to Plaintiffs' complaint that they have a legitimate reason for their policies as an affirmative defense. *See* Dkt. 90, Defs.' Answer at 1.

A. Defendants Once Again Fail to Respond to *Stone v. Trump*

Defendants ignore, as they did in response to Plaintiffs' Motion to Compel in *Harrison*, Dkt. 111, the in-circuit case of *Stone v. Trump*, which states in the clearest of terms: “[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.***” *Stone*, 2018 WL 6305131 at *7. *See also Bethune-Hill v. Virginia State Bd. Of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) (“Unlike other cases,

¹ It is unclear to Plaintiffs whether any of the documents being withheld here are at issue in any other cases and Defendants have not said one way or the other.

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.’”). *Stone v. Trump* is recent, in circuit, and on point. 2018 WL 6305131 at *1. In *Stone*, Plaintiffs challenged the military’s transgender ban and sought allegedly deliberative materials that had been withheld by defendants regarding the transgender service member ban, the implementation plan for the ban, and the DoD’s panel of experts who were conducting studies to inform the implementation plan. *Id.* at *1-2. The Court found that the magistrate judge did not act contrary to law in concluding 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 the case.” *Id.* at *7. This conclusion fits squarely within the rule articulated by numerous courts when presented with this issue. *See* Dkt. 96, Pls.’ Mem. in Support of Mot. to Compel at 6, 9-10. As in *Stone*, the government’s intent is at the heart of the issue in this case, and the deliberative process privilege does not apply.

B. Defendants Incorrectly Assert That The Government’s Intent Is Not At Issue

Although Defendants may wish that the Government’s intent were “beside the point,” Defs.’ Opp. to Pls.’ Mot. to Compel at 7, this assertion mischaracterizes the live issues in this case. Although the District Court analyzed Plaintiffs’ claims at the preliminary injunction stage solely under rational basis review, this was in part because Plaintiffs argued in their motion for preliminary injunction that “[a]lthough Plaintiffs maintain that people living with HIV meet all of the criteria defining a suspect or quasi-suspect class, and that regulations and policies that single them out for disparate treatment should therefore be subjected to heightened scrutiny, that analysis [was] not necessary [for the purposes of a preliminary injunction] . . . because Defendants’ deployment regulations and policies applicable to people living with HIV lack even

a rational relationship to a legitimate government interest.” Dkt. 34, Pls.’ Mot. for Prelim. Inj. at 12-13. In other words, Plaintiffs argued in their motion for preliminary injunction that “Plaintiffs are likely to succeed under any level of review.” *Id.* The District Court ruled that “[P]laintiffs [had] made a strong preliminary showing that the deployment policy applied to asymptomatic HIV-positive service members cannot withstand rational basis review.” Dkt. 72, Mem. Op. Granting Pls.’ Mot. for Prelim. Inj. at 42-43.

Judge Brinkema did not, however, rule at any point that Defendants’ policies *will* be subject to rational basis review at trial. Defendants point to a single footnote from Judge Brinkema’s opinion to argue that the level of scrutiny to be applied to the Government’s policies, and therefore the Government’s intent, is not at issue because Judge Brinkema “*recognized* [that] ‘the Fourth Circuit has broadly stated that classifications based on disability are subject to minimal scrutiny,’ and that ‘HIV is not a suspect classification.’” Dkt. 98, Defs.’ Opp. at 8 (citing Dkt. 72, Mem. Op. at 33 n.31). But Defendants ignore the remainder of Judge Brinkema’s statement. Judge Brinkema continued in the same footnote to say that although “the Fourth Circuit has held . . . in a decades-old opinion [] that HIV status is not a suspect classification . . . [w]hether, given a clean slate, HIV status would qualify as a suspect classification—and, whether Doe would nonetheless require a contrary conclusion—can be left for another day.” Dkt. 72, Mem. Op. at 33 n.31. Thus, even accepting (which Plaintiffs do not, *see infra*) that rational basis makes the government’s intent irrelevant, the Government’s intent is still at issue in this case, because the level of scrutiny to be applied is still at issue.

C. Even If Only Rational Basis Applies, The Government’s Intent Is Still At Issue

Although the government cites numerous cases in support of their assertion that government intent does not matter under rational basis review, they fail to recognize that even

under rational basis review, the government may not make classifications based on “irrational prejudice,” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450, or a “bare . . . desire to harm a politically unpopular group.” *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Whether the government had the intent to harm a politically unpopular group or to act on the basis of irrational prejudice is therefore at the heart of Plaintiffs’ equal protection claim, even under rational basis. Defendants’ arguments to the contrary are quite presumptuous given the District Court’s ruling granting a preliminary injunction. In its Memorandum Opinion, the District Court observed that the service members at issue in this case “face a particularly heinous brand of discharge, one based on irrational application of outmoded policies related to a disease surrounding which there is widespread fear, hostility, and misinformation.” Dkt. 72 at 48. If this irrational and outmoded thinking, or fear, hostility, and misinformation drove policy-related decisions for Defendants, that is highly material to the case, even under rational basis review, as the Court’s preliminary injunction decision shows.

Defendants further assert that rational basis is even more deferential in the military context, such that assessments and opinions cannot be probed even for improper, discriminatory intent. Dkt. 98, Defs.’ Opp. to Pls.’ Mot. to Compel at 9. Defendants again ignore the words of Judge Brinkema, who noted that although the military is entitled to deference on military matter, they “[n]onetheless . . . remain[] a branch of the government,” and are therefore “bound to follow the Constitution and laws of the United States.” Dkt. 72, Mem. Op. Granting Pls.’ Mot. for Prelim. Inj. at 54. Although “[c]ourts must examine questions of military policy with care and humility . . . examine them they must.” *Id.* The sought after discovery will allow the Court to do so on the full record—not some limited record that Defendants have attempted to create with their selective application of the deliberative process privilege.

D. Defendants Themselves Have Placed Their Intent At Issue

Defendants here again try to have both “the sword and the shield.” *Harrison*, Dkt. 125, Transcript of Proceedings Held on 2/22/2019 at 22:18. They at once argue that a legitimate government interest underlies their policies, *see* Dkt. 90, Defs.’ Answ. at 1, yet at the same time attempt to hide behind the deliberative process privilege and “refuse to provide documents to serve [as] the basis of that legitimate . . . purpose because the documents may suggest otherwise.” *Harrison*, Dkt. 125, Transcript of Proceedings Held on 2/22/2019 at 22:18-22.²

Because Defendants have placed the government’s intent at issue, and because intent is relevant regardless of whether rational basis or some heightened scrutiny will ultimately be applied to Defendants’ policies—an open question in this case—the deliberative process privilege does not apply at all.

II. Defendants Bear the Burden to Prove the Privilege Applies

Defendants also mistakenly assert that Plaintiffs carry the burden to show Defendants’ privilege claims are wrong. Dkt. 98, Defs.’ Opp. to Pls.’ Mot. to Compel at 4. But it is Defendants who bear the burden to show that discovery should not be permitted. *Singletary v. Sterling Trasnp. Co.*, 289 F.R.D. 237, 241 (E.D. Va. 2012). In the context of the deliberative process privilege, the executive (in this case the military) bears the “heavy burden of proving” the deliberative process privilege applies and enables them to withhold relevant documents. *Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at *4 (E.D. Va. Sept. 22, 2014). This

² In reviewing the *in camera* submission in *Harrison*, the Court noted that some of the information Defendants are withholding under the deliberative process privilege “*can be read as partially inconsistent with the proposed basis for the policy.*” *Harrison*, Dkt. 125, Transcript of Proceedings Held on 2/22/2019 54:7-8. This underscores the fact the government’s intent is at issue, as their claimed bases for these policies are not the real reasons for the policies, as evidenced by this document from *Harrison*.

placement of the burden makes sense, as Plaintiffs don't have access to these documents—Defendants do. Plaintiffs have access only to the vague descriptions of the purportedly privileged documents that Defendants provided to them. The Court has already 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." *Harrison*, Dkt. 125, Transcript of Proceedings Held on 2/22/2019 30:20-23. Thus, to the extent Plaintiffs provide "only conclusory and unsupported assertions" that the privilege does not apply, *see* Dkt. 98, Defs.' Opp. to Pls.' Mot. to Compel at 2, it is because Plaintiffs must rely solely on the sparse descriptions provided by Defendants in the privilege log.

These descriptions do not reveal sufficient information about the content of the documents to challenge the assertions of privilege over them with any greater precision. For example, the government describes documents as "email discussing draft wording for SAFPC memos" (US00031092), "email chain discussing conflicting policy documents" (US00031435), "email from SAF/MR seeking updates on HIV policy" (US00031475), "email within SAF/MR discussing HIV policy memo" (US00031826), "list of questions for discussion between SAFPC and SAF/MR" (US00031833). These descriptions beg more questions than they answer. For example, what "conflicting policy documents" (US00031435) existed? Was this a discussion of an existing policy? If so, how could a discussion of two existing policies be "predecisional?" As to the "email . . . discussing HIV policy memo" (US00031826), Plaintiffs have no way of knowing what HIV policy memo they were discussing, and what the content of the discussions were. How, then, could Plaintiffs possibly be expected to show that the document is not predecisional or non-deliberative? From Plaintiffs' perspective, this document could just as easily be discussing a "new HIV Policy memo" that already exists as it could be discussing one

in development. This is exactly why *Defendants* have the “heavy” burden of proving that the documents are privileged: the descriptions provide Plaintiffs with essentially no information about the content of these documents with which to challenge Defendants’ assertion of privilege.

Indeed, Defendants prove Plaintiffs’ point by referencing US00031531, which is described as “an email chain within SAF/MR discussing which materials can be presented in considering cases.” *See* Dkt. 98, Defs.’ Opp. to Pls.’ Mot. to Compel at 18. There is no suggestion in Defendants’ privilege log that the document has to do with the formation of some new policy or deliberations on the cases of individual airmen. Plaintiffs categorized this document in their Motion to Compel as a non-deliberative document. *See* Dkt. 96, Pls.’ Mot. to Compel at 15. Based on the description provided by Defendants, Plaintiffs understood this document to address what materials either the Air Force Medical Boards or Personnel Boards—even this is unclear—are permitted to consider under existing policy. Defendants now step outside of their log to assert that this document “concerns deliberations of a board adjudicating a non-party’s case within the Disability Evaluation System.” Dkt. 98, Defs.’ Opp. to Pls.’ Mot. to Compel at 18. Given that Defendants do not provide Plaintiffs with sufficient information to ascertain even the basic content of the withheld documents, under Defendants’ mistaken view about who bears the burden of proof, Plaintiffs would be forced to accept at face value Defendants’ assertions that these documents are privileged and that the *Cipollone* exception does not apply to any of them. That’s not the way that claims of privilege work. Defendants have the obligation to provide accurate, and precise descriptions of the documents, and to prove that the privilege applies to those documents. Defendants failed to do this.

III. Defendants Have Not Precisely And Conservatively Applied The Privilege

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. v. U.S.*

EPA, 25 F.3d 1241, 1248 (4th Cir. 1994) (emphasis added). That did not happen here. Rather, Defendants ignored the Court’s previous admonishment that they should not withhold documents as privileged under the deliberative process privilege “if [they] have not yet gone through each individual document and determined that it falls within the privilege.” *Harrison*, Dkt. 115, Transcript of Proceedings Held on 2/1/2019 at 9:15-18. This is clear from the fact that Defendants have withdrawn their claims on certain documents only after Plaintiffs moved to compel.³ Defendants listed as privileged 18 documents that they have now—only after Plaintiffs asserted that these documents were non-deliberative—withdrawn their assertions of privilege over. Defs.’ Opp. to Pls.’ Mot. to Compel at 18.

IV. There Is No Need For A Document-By-Document Analysis

Defendants contend that “[t]he *Cipollone* balancing test is to be applied on a document-by-document basis.” Defs.’ Opp. at 5, 19-20. However, none of the cases cited by Defendants hold that each document must be evaluated individually by the Court.

First, *Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at *3 (E.D. Va. Sept. 22, 2014), says nothing to imply that evaluating groups of documents is inappropriate. The Court states in *Brown*, in response to the defendant’s assertion that it should not have to produce documents responsive to two of plaintiff’s discovery requests, that the deliberative process privilege must be “*demonstrated on a case-by-case basis by balancing the damage to the*

³ Plaintiffs note that although Defendants have evidently withdrawn their assertions of privilege over 51 documents, this withdrawal was not communicated to Plaintiffs until they received Defendant’s Opposition to their Motion to Compel. Defendants indicated at the time the parties met and conferred on March 20, 2019 that they would be maintaining their assertion of privilege over all documents withheld. It is unclear from Defendants’ Opposition whether these documents have been produced, and if not, when they will be produced. Thus far, an inquiry to Defendants’ counsel about this issue has gone unanswered. Plaintiffs ask that Defendants be ordered to produce these documents by Friday, March 29, 2019 since they should have been produced during the fact discovery period.

executive department or the public interests and the potential harm to plaintiffs from non-disclosure.” *Id.* at *3 (emphasis added). “Case-by-case” does not necessarily mean document-by-document, as Defendants would interpret it. Tellingly, the court in *Brown* concludes that the defendant “failed to meet its heavy burden of proving an executive privilege” without walking through a document-by-document analysis. *Id.* *Brown* therefore does not support Defendants’ assertion that each document must be evaluated individually.

The second case cited by Defendants, *Spell v. McDaniel*, suffers the same weaknesses. 591 F. Supp. 1090, 1116 (E.D.N.C. 1984) (noting only that the privilege “must be *demonstrated* on a case-by-case basis” and failing to perform a document-by-document analysis). In fact, the court in *Spellman* refers in its analysis to categories of documents, including “private citizens’ . . . statements surrounding an investigation,” “police files from confidential informants,” and “supervisory evaluations.” *Id.* Furthermore, as to at least one of these categories, the court was “persuaded that [the category] of supervisory evaluations should not be shielded or edited unless, as to each such assertedly privileged evaluation, *defendants* can make a strong showing that confidentiality is vital to the decision-making process of the municipality.” *Id.* at 1118. This case suggests that a document-by-document analysis is not required as Defendants claim, and to the extent that there *is* any requirement for a document-by-document analysis, the requirement is for *Defendants* to show that each document falls within the privilege.

Finally, *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2016 WL 6902359, at *4 (N.D. W. Va. Nov. 12, 2015), also does not articulate a rule that the movant or the court must address each document individually. The court states only that other deliberative process privilege cases “are of limited help to [the court], because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.” *Id.*

The *Murray Energy* court does not state that each document must be analyzed individually under *Cipollone. Id.*

Furthermore, Defendants' assertion that Plaintiffs and the Court must perform a document-by-document analysis of the documents withheld is belied by the fact that Defendants agreed in *Harrison* to the categorization of documents and a sampling of 5% of the withheld documents, as well as Defendants own description of the 89 documents still withheld. Defendants describe these documents in a strikingly similar manner. For example, Defendants describe 6 documents as "email within SAF/MR discussing Navy HIV policy" or "discussing Army and Navy HIV policy" *See Ex. C to Defs.' Opp. to Pls.' Mot. to Compel* at US00031295; US00031360; US00031425; US00031477; US00031785; US00031786. Defendants refer to another 21 documents as an "email chain discussing a draft of SAF/MR HIV clarification memo" or "policy memo," or "discussing proposals for draft of HIV policy memo." *See id.* at US00031429; US00031430; US00031432; US00031446; US00031778; US00031779; US00031808; US00031809; US00031810; US00031812; US00031813; US00031815; US00031817; US00031819; US00031821; US00031822; US00031824; US00031826; US00031828; US00031829; US00031823. And an additional 11 documents are referred to by Defendants as a "draft HIV clarification memo," "draft HIV disposition memo," or a "draft of airmen with Asymptomatic HIV memo." *See id.* at US00031090; US00031431; US00031811; US00031814; US00031816; US00031820; US00031823; US00033253; US00033265; US00033266. Defendants' own characterizations of their 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.

Because Defendants do not make meaningful distinctions in these descriptions, Plaintiffs' challenge is not deficient because they fail to address each and every document individually. Nor would it be fair to require Plaintiffs to do such individualized analyses where Defendants have neglected to do so themselves, and have thus provided no meaningful information to Plaintiffs so that they can make individualized distinctions between documents.

CONCLUSION

For the foregoing reasons and those set forth in their Memorandum in support of their motion to compel, Plaintiffs request that this Court compel Defendants to produce all documents withheld or redacted on the basis of the deliberative process privilege, to supplement prior responses to discovery requests if necessary, and to offer any witnesses who were instructed not to answer questions on the basis of the privilege to testify as to those matters, and for such further relief as this Court deems just and proper.

Dated: March 28, 2019

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CERTIFICATE OF SERVICE

I certify that, on the 28th day of March, 2019, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: March 28, 2019

Respectfully submitted,

/s/ Andrew R. Sommer
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