The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

LCR 37 JOINT SUBMISSION REGARDING THE GOVERNMENT'S WITHHELD COMMUNICATIONS WITH THIRD PARTIES

NOTE ON MOTION CALENDAR:
February 27, 2020

PLAINTIFFS' STATEMENT

Plaintiffs are the moving party for this submission. Pursuant to Federal Rules of Civil Procedure 26, 34, and 37, and Local Rule 37, Plaintiffs request an order compelling Mark Esper, in his official capacity as Secretary of Defense, and the United States Department of Defense ("DoD") (together, "the Government") to produce third-party communications that the Government is improperly withholding pursuant to certain privileges. The parties have met and conferred telephonically numerous times over the past four-and-a-half months in good faith to resolve this dispute, but the Government continues to use shell game delay tactics, and accordingly, Plaintiffs request the Court's intervention.

The Government—despite its obligation under the Federal Rules to describe withheld communications with sufficient particularity to enable Plaintiffs to assess the Government's privilege claims—refuses to produce communications with third parties that have been withheld wrongfully under claims of Attorney-Client Privilege and Deliberative Process Privilege ("DPP"). The Government itself has conceded in other court filings related to this litigation that DPP does not apply to communications with third parties. As such, Plaintiffs ask the Court to order Defendants to review the list of potential third parties provided by Plaintiffs in their December 13, 2019 letter (*see, e.g.*, February 27, 2020 Declaration of Vanessa Barsanti ("Barsanti Decl.").") ¶ 2, Ex. 1.), and by March 13, 2020 (1) produce all communications with individuals who are confirmed to be third parties, or, in the alternative, should the Court adopt the consultant corollary theory, (a) require the Government to amend its privilege logs and serve a declaration attesting to the elements of the consultant corollary doctrine with respect to each third party for whom it continues to withhold communications, and (b) produce communications with all other third parties; (2) for individuals confirmed to be government employees, amend its privilege log entries to identify the employer and job title for each individual as of the date of the communication.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs offer the below brief history of the parties' dispute over third-party communications in order to provide the Court a full understanding of how the parties reached

their current posture. In the spring of 2018, after the Government had objected to producing documents in response to each and every one of Plaintiffs' then-issued RFPs on the basis of DPP, Plaintiffs began serving third parties with Rule 45 subpoenas directly. On May 3, 2018, Plaintiffs issued a subpoena to third party Center for Military Readiness ("CMR") and were subsequently forced to move to compel production of these documents on July 3, 2018 in the U.S. District Court for the Eastern District of Michigan.[1] *See Karnoski, et al. v. Trump, et al.*, Case No. 2:18-mc-51013 (E.D. Mich.) ("CMR Dkt."). The Government subsequently intervened in the subpoena enforcement action in an attempt to shield production. The Government primarily argued that its communications with CMR were irrelevant, despite substantial similarities between CMR's July 2017 report titled "The President, Defense Department & Military Services Should Revoke Problematic Transgender Policy Directives and Instructions" and Secretary of Defense James Mattis' September 2017 memorandum to the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff (*see* CMR Dkt. No. 45, at 8–9), and argued only in a passing footnote that its communications with CMR could be "*potentially* subject to privilege." (CMR Dkt. No. 29, at 9 n.2 (emphasis added).) Indeed, the Government *conceded* that "as a general matter revealing privileged information to non-governmental third-parties can waive the deliberative process privilege . . . ." (*Id.*) Plaintiffs argued that the Government waived DPP by communicating with third parties. (*See* CMR Dkt. No. 31, at 4–7.)

On November 6, 2018, Magistrate Judge Stafford agreed with Plaintiffs, holding that "[s]ince CMR is a private organization, documents reflecting communication between it and the government do not enjoy an executive or deliberative process privilege."[2] (CMR Dkt. No. 34, at 28–29 (citing *In re Sealed Case,* 121 F.3d 729, 741–42 (D.C. Cir. 1997); *UnitedHealthcare Ins. Co. v. Azar*, 316 F. Supp. 3d 339, 349 (D.D.C. 2018); *In re Grand Jury Proceedings Oct. 12,*

[1] CMR is a lobbying organization whose public materials and statements contain numerous examples of hostility towards LGBT people. *(See e.g.*, CMR Dkt. No. 1, at 3, 6; CMR Dkt. No. 31, at 15.) Subsequent discovery has determined that CMR communicated with and distributed its policy suggestions regarding excluding transgender service members directly to members of the Trump Campaign, the Office of the President and Vice President, and high level officials and other employees at the DoD. (Barsanti Decl. ¶ 3, Ex. 2, CMR-0000176.)

[2] The court also found that "[t]he government asserted at the hearing that this privilege applies to its communication with anyone from whom it sought advice. The controlling precedent states otherwise." (CMR Dkt. No. 34, at 29.)

1995, 78 F.3d 251, 254 (6th Cir. 1996)).) On September 28, 2019, District Judge Edmunds affirmed the order, explaining that "[t]he Court . . . reviewed the Ninth Circuit's opinion and agrees with Plaintiffs that the Magistrate Judge correctly concluded the deliberative process privilege does not apply here." (CMR Dkt. No. 62, at 18.) Neither CMR nor the Government appealed this decision.

On August 22, 2018, Plaintiffs served a subpoena on Dr. Paul McHugh, a Professor of Psychiatry and Behavioral Sciences at Johns Hopkins University School of Medicine.[3] On October 3, 2018, Plaintiffs moved to compel the production of documents responsive to the subpoena in the U.S. District Court for the District of Maryland. *See Karnoski, et al. v. Trump, et al.*, Case No. 1:19-mc-00674 (D. Md.) ("McHugh Dkt."). On July 10, 2019, the Government stated that it would consider "waiv[ing]" (and later did waive) its DPP objection with respect to communications with McHugh. (Barsanti Decl. ¶ 4, Ex. 3.) On or around August 6, 2019, Plaintiffs received communications between the Government and McHugh that were previously withheld under DPP. These documents revealed that William Bushman of the Office of the Undersecretary of Defense consulted with McHugh regarding the Ban in February 2018—*after* the so-called "Panel of Experts" (the "Panel") had finished deliberating—and sought additional written sources of information regarding transgender healthcare[4] and additional witnesses with whom to speak regarding transgender military service. (*See id.* ¶ 6, Ex. 5.) At least some of the articles provided by McHugh were cited in Secretary Mattis' February 23, 2018 Memorandum and the accompanying DoD Report and Recommendations, even though Dr. McHugh never presented or provided information to the Panel. Dr. McHugh recommended that Bushman also speak with Drs. Thomas Wise and Chester Schmidt. (*See id.*)

On August 23, 2019, Plaintiffs sent a letter to the Government requesting that the Government produce all communications with Drs. Paul McHugh, Thomas Wise, and Chester

3 McHugh is a well-known critic of lesbian, gay, bisexual, and transgender issues, and whose views on medical treatment of transgender people have been widely discredited by the medical community, including his own co-workers. (*See* McHugh Dkt. No. 3, at 5–6.)

4 Indeed, one of the articles McHugh forwarded Bushman was from 1995 and titled "Witches, multiple personalities, and other psychiatric artifacts." (Barsanti Decl. ¶ 5, Ex. 4.)

Schmidt. (*Id.* ¶ 7, Ex. 6.) On September 13, 2019, the Government responded that it would waive its DPP arguments and produce the withheld communications. (*Id.* ¶ 8, Ex. 7.)

One of these documents produced by the Government contained a January 29, 2018 exchange between retired Lieutenant General Greg Newbold and Secretary James Mattis. [redacted] (*Id.* ¶ 9, Ex. 8.) [redacted] (*id.*)[6] On September 20, 2019, Plaintiffs requested that the Government produce all communications with Greg Newbold and Woody Woodruff, as those communications could not be properly withheld under DPP as they involve third parties. (*Id.* ¶ 11, Ex. 10.) After almost a month of delay, on October 18, 2019, the Government agreed to "waive" its DPP arguments and later produced these communications. (*Id.* ¶ 12, Ex. 11.)

After discovering that the Government had improperly withheld many communications with third parties subject to claims of DPP and learning how critical these wrongfully withheld documents were to Plaintiffs' claims, Plaintiffs requested that the Government produce *all* communications with third parties still being withheld on the basis of privilege. On October 7, 2019, Plaintiffs sent a letter to the Government explaining that their communications with third parties were not subject to DPP, and that the Government's privilege logs failed to provide enough information for Plaintiffs to ascertain whether the individuals listed on the logs were third parties. (*Id.* ¶ 13, Ex. 12.) Plaintiffs attached to this letter a list of names for whom, based on *the Government's* privilege logs, insufficient information was provided for Plaintiffs to assess whether the Government had waived applicable privileges by communicating with third parties. The names identified by Plaintiffs either: (1) did not contain an email address or job title on the privilege log, thus making it impossible for Plaintiffs to determine if an individual was a third

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5 Notably, Woody Woodruff is counsel for CMR in its subpoena dispute against Plaintiffs.

6 Defendants' communications with Woodruff indicate that [redacted] (*Id.* ¶ 10, Ex. 9, USDOE00285187.) Woodruff never presented to the Panel and these communications occurred *after* the Panel finished deliberating.

party; or (2) were associated with third-party email addresses, indicating that the communication was sent outside of the DoD and federal government.[7] (*Id.* at Ex. A to the letter.) Plaintiffs' list contained approximately 825 names of *potential* third parties, demonstrating the scope of the Government's inadequate log entries.

Three weeks later, during an extensive meet and confer on October 29, 2019 regarding this and other discovery issues, the Government agreed to review Plaintiffs' list of potential third parties and provide additional information regarding who was a third party. (*Id.* ¶ 14, Ex. 13.) On November 4, the Government responded and reversed course. According to the Government, because a handful of the 825 names were government employees, "Defendants need not undertake a burdensome review of the hundreds of entries in Exhibit A where Plaintiffs appear not to have . . . determine[d] whether the individuals they have supposed are third parties are, in fact, employees or officials of the Department of Defense or Military Services." (*Id.*) In addition, the Government refused to produce the communications containing the hundreds of remaining third-party names that were not and were never government employees. (*Id.*)

Despite it being *the Government's* burden to sufficiently identify the recipients of its communications on its privilege logs, Plaintiffs attempted to re-review the list of compiled names to eliminate those that Plaintiffs could determine were government employees. Plaintiffs spent many hours comparing individual names from interrogatory and other discovery responses to the names in their letter, ultimately reducing the list from 825 to 487 names. On December 13, 2019, Plaintiffs sent another letter to the Government reiterating that while the burden remains on the Government to adequately describe their privilege bases to shield against production, Plaintiffs significantly narrowed its list of potential third parties and requested that the Government produce all wrongfully withheld third-party communications. (*Id.* ¶ 2, Ex. 1.)

On December 19, 2019, the Government stated that it would review the list of names in Plaintiffs' December 13 letter and provide "additional identifying information" by January 17, 2020. (*Id.* ¶ 15, Ex. 14.) On January 17, 2020, more than three months after Plaintiffs' first letter

[7] Many of these privilege log entries contained email address domains belonging to private universities, hospitals, and corporations, and also included popular public email domains such as gmail.com, hotmail.com, and yahoo.com.

and one month after Plaintiffs' second letter, the Government once again reversed course and refused to provide additional information as promised. (*Id.* ¶ 16, Ex. 15.) Although the Government's letter made apparent that it did in fact review Plaintiffs' narrowed list, rather than agree to produce withheld documents from custodians who were *clearly* third parties or agree to further refine the list by excluding government employees, the Government refused to update its privilege logs or produce improperly withheld documents.[8] (*Id.*) Instead, the Government *again* attempted to shift the burden of providing sufficient privilege bases to Plaintiffs by bizarrely arguing that *Plaintiffs* have not provided an adequate list of third parties. And, although the Government previously agreed to produce wrongfully withheld communications with Paul McHugh, Thomas Wise, Chester Schmidt, Greg Newbold, and Woody Woodruff by name, and in this letter agreed to produce communications with eight other individuals mentioned by name, the Government stated that it could not produce additional communications without reference to *specific* privilege log entries. (*Id.*)

After four months of string-a-long delay tactics, Plaintiffs now respectfully ask the Court to compel the Government to review the list of potential third parties provided by Plaintiffs in their December 13, 2019 letter (Barsanti Decl. ¶ 2, Ex. 1 at Ex. A.) and by March 13, 2020 (1) provide information indicating whether each person is a third party or a government employee; (2) produce all communications with individuals who are confirmed to be third parties, or, in the alternative, should the Court adopt the consultant corollary theory, (a) require the Government to amend its privilege logs and serve a declaration attesting to the elements of the consultant corollary doctrine with respect to each third party for whom it continues to withhold communications, and (b) produce communications with all other third parties; and (3) for individuals confirmed to be government employees, amend its privilege log entries to identify the employer and job title for each individual as of the date of the communication.

[8] Defendants agreed to produce communications for eight of the hundreds of names listed on Exhibit A to Plaintiffs' December 13, 2019 letter. Defendants did not explain why documents for these eight individuals, but no others, would be produced. The Government produced these communications on February 21, 2019. Two of these communications are attached to the Barsanti Decl. ¶¶ 17-18, Exs. 16 & 17.

LEGAL STANDARD

"The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Brown v. Warner*, No. C09-1546RSM, 2015 WL 630926, at *1 (W.D. Wash. Feb. 12, 2015) (citation omitted). Under Rule 26, a party who withholds discoverable information due to privilege has the burden to "expressly make the claim; and describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." FED. R. CIV. P. 26(b)(5)(A)(i–ii)); *see also Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) ("As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it."); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543, 545 (W.D. Wash. 2000) ("The initial burden of establishing . . . the [deliberative process] privilege is on the government.").

The Government has previously conceded in court filings related to this litigation that "as a general matter revealing privileged information to non-governmental third-parties can waive the deliberative process privilege, *see In re Sealed Case,* 121 F.3d 729, 741–42 (D.C. Cir. 1997); *UnitedHealthcare Ins. Co. v. Azar*, 316 F. Supp. 3d 339, 349 (D.D.C. 2018) . . . ." (CMR Dkt. No. 29, at 9 n.2.) Indeed this is true, as attorney work product, attorney-client privilege, and DPP do not apply to communications with third parties. *See Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) (noting that disclosure of attorney client and attorney work product information to third parties results in waiver); *Friends of the Earth v. U.S. Army Corps of Eng'rs*, 374 F. Supp. 3d 1045, 1052 (W.D. Wash. 2019) ("[I]f a document is not an 'agency' document, an agency may not withhold it regardless of whether it reflects the deliberative process of the agency, attorney work-product, or is an attorney-client communication. . . . [d]isclosure may also be required . . . if the government agency waives its right to the exemption by voluntarily sharing the document with third parties.") (citing *Mobil Oil Corp. v. U.S. EPA*, 879 F.2d 698, 700–01 (9th Cir. 1989)); *Lucaj v. FBI*, 852 F.3d 541, 548 (6th Cir. 2017) (noting the Supreme Court

clearly limited disclosure of deliberative process privilege documents to only "inter-agency or intra-agency" communications) (citation omitted); *In re Subpoena of Ctr. for Military Readiness*, No. MC 18-51013, 2019 WL 4733602, at *9 (E.D. Mich. Sept. 28, 2019) (holding the magistrate judge "correctly concluded the deliberative process privilege does not apply" to the communications with third party Center for Military Readiness); *see also In re Subpoena of Ctr. for Military Readiness*, No. MC 18-51013, 2018 WL 6722247, at *10 (E.D. Mich. Nov. 6, 2018) ("Since [the Center for Military Readiness] is a private organization, documents reflecting communication between it and the government do not enjoy an executive or deliberative process privilege.").

ARGUMENT

The Government's deficient privilege logs fail to establish that communications with third parties are appropriately covered by privilege. Plaintiffs created a list of potential third parties and provided that list to the Government—twice. This list was created by identifying names in Government privilege logs entries that either: (1) did not contain an email address or job title on the privilege log, thus making it impossible for Plaintiffs to determine if an individual was a third party; or (2) were associated with third-party email addresses, indicating that the communication was sent outside of the DoD and federal government. Because communications with third parties are not privileged, the Government should be compelled to review this list of individuals and produce its communications with those confirmed to be third parties and amend its privilege log information for those confirmed to be government employees.

A. The Government's privilege log entries that do not readily identify a custodian as a government employee do not establish that all recipients of the communications were properly covered by privilege.

Because communications with third parties are not privileged, the burden is on the Government to demonstrate that it was *not* communicating privileged information to third parties. Numerous of the Government's privilege log entries contain names without an email address, employment information, or any other information that would establish the recipient of the communication as a government employee. Therefore, these entries either do or may contain third parties and the Government has failed to meet its burden of establishing that the withheld

communications are privileged. *See Bess v. Cate*, No. 2:07-cv-1989, 2008 WL 5100203, at *2 (E.D. Cal. Nov. 26, 2008) (holding that failure to serve an adequate privilege log waives privilege) (citing *Burlington N. & Santa Fe Ry. Co. v. Kapsner*, 408 F.3d 1142, 1149 (9th Cir. 2005)).

The names without sufficient information are included in Exhibit A to Plaintiffs' December 13, 2019 letter *without highlight.* (Barsanti Decl. ¶ 2, Ex. 1 at Ex. A). These names are associated with privilege log entries that do not provide email addresses, employment information, or other information to establish that the custodian is a government employee. As such, the Government has not satisfied its burden of demonstrating that these individuals *are not* third parties. The Government should be ordered to either produce these documents if the communication involves third parties, or supplement its privilege logs to identify the individual's employer and job title as of the date of the communication. *Bess*, 2008 WL 5100203, at *5 ("Because defendants failed to provide a privilege log, lodged blanket and dilatory objections, and unreasonably delayed discovery, this court finds they have waived any such privilege.") (citing *Ritacca v. Abbott Labs.*, 203 F.R.D. 332, 336 (N.D. Ill. 2001) (finding the defendant's five-month delay in providing adequate privilege logs "a clear case of foot-dragging; and [defendants'] cavalier attitude towards discovery, an attitude we sharply discourage, warrants a finding of waiver.")).

B. Privilege log entries that clearly contain third-party names or email addresses are not privileged and must be produced.

With respect to privilege log entries that contain third-party email domains, the face of the Government's privilege logs alone evidence that the Government was communicating with a third party. The entries excerpted from the Government's privilege logs that contain third-party email domain names—such as @gmail.com, @deloitte.com, @aol.com, @univplastics.com, @nycbar.com, and @NMMI.edu, among others—are those that were *highlighted* in Plaintiffs' Exhibit A. (Barsanti Decl. ¶ 2, Ex. 1 at Ex. A). These domain names demonstrate that the communications are with third parties, are not privileged, and must be produced.

DEFENDANTS' STATEMENT

After months of refusing to take basic steps to narrow this dispute, Plaintiffs now file an unnecessary and legally untenable motion for production of *all* of DoD's communications with third parties, despite clear case law demonstrating that such communications can be privileged. As with their prior discovery motions, rather than focus on particular documents or privilege log entries, Plaintiffs ask this Court to order blanket disclosure of privileged material without any particularized or granular analysis.

And they do so with arguments that are entirely threadbare. Plaintiffs assert that Defendants have "conceded" that their communications with third parties are not privileged. But Defendants have made no such concession. To the contrary, Defendants have repeatedly and consistently maintained in this and the related litigation that their confidential communications with non-government third parties are privileged, pursuant to the "consultant corollary" doctrine. That doctrine—which is regularly applied by courts in this circuit—provides that when the Government solicits third parties to aid in its decision making process, its communications with those third parties are privileged. *See, e.g.*, *All. for the Wild Rockies v. Pena*, 2017 WL 8778579, at *4–5 (E.D. Wash. Dec. 12, 2017). Plaintiffs assert Defendants have "conceded" something different only by cherry-picking a single clause of a single sentence from a single brief, reading it wholly out of context, and ignoring the very next clause of the very same sentence.

In other words, when subjected to only the lightest scrutiny, Plaintiffs' sole argument that DoD must produce its third-party communications collapses. Plaintiffs do not offer any other explanation for why the consultant corollary would not apply in this case to protect DoD's communications with third parties. Nor do they explain how production of all third-party communications could be proper when at least some of those communications are responsive to RFP Nos. 15 or 29, and thus at issue in Defendants' mandamus petition and the subject of the Ninth Circuit's administrative stay.

Finally, Plaintiffs assert that Defendants have improperly refused to review lists of hundreds of names and/or email addresses and provide Plaintiffs with more information about which individuals are third parties. But that also is incorrect. What Plaintiffs leave out is that the lists

they have provided reflect no serious effort to narrow the dispute, given that they contain numerous individuals who obviously *are* government officials, such as the current Secretary of Defense and one of the currently serving Plaintiffs herself. While Defendants bear the burden of justifying any claim of privilege, they are not required to spend hours providing information that Plaintiffs already know or can easily determine. Nevertheless, in the interest of expediting resolution of this dispute, and to avoid the need for any further extensions of the discovery schedule, Defendants agree to complete their review of Plaintiffs' most recent list of purported third parties, and to provide Plaintiffs with additional information by March 13, 2020.

Accordingly, there is only one live question before the Court: whether, for those individuals whom Defendants ultimately identify as third parties, all communications between them and DoD must be produced. For the reasons set forth herein, the answer plainly is no. Plaintiffs' motion should be denied.[9]

FACTUAL AND PROCEDURAL HISTORY

A. Prior Disputes Unrelated To The Instant Motion

Plaintiffs' statement discusses several prior disputes between the parties that largely have already been resolved and for which Plaintiffs do not seek relief in this motion. Nevertheless, in their discussion of these prior disputes, Plaintiffs mischaracterize Defendants' positions and the relevance of the materials Defendants produced. Below, Defendants correct the record.

1. The CMR Subpoena

Since May 2018, Plaintiffs have served at least a dozen Federal Rule of Civil Procedure 45 subpoenas on individuals and organizations not party to this case, seeking essentially any communications those individuals and organizations may have had with the Government related to transgender individuals and policies regarding transgender individuals.

[9] Local Civil Rule 37(a)(2) provides that the parties may "by agreement" decide to resolve discovery disputes through an expedited joint motion procedure. Plaintiffs requested that Defendants agree to utilize this expedited procedure, but given the importance of this case in challenging a national military policy and Defendants' desire to build a fully developed record, Defendants declined to consent to those procedures. Nevertheless, without obtaining Defendants' consent, the Court, on February 3, 2020, issued an oral ruling that the parties must utilize the L.C.R. 37(a)(2) joint motion procedures for all future discovery motions in this case. *See* Hr'g Tr. (Feb. 3, 2020) at 68:9–19. Defendants respectfully object to the Court's ruling, but will of course adhere to it, as they do here.

In July of 2018, Plaintiffs moved in the Eastern District of Michigan to compel compliance with a Rule 45 subpoena served on the Center for Military Readiness ("CMR"), a non-profit organization. (CMR Dkt. No. 1.) Defendants participated in the subpoena enforcement action, repeatedly arguing, among other things, that any communications between CMR and the Government were potentially subject to government privileges under the consultant corollary doctrine. (*See* CMR Dkt. No. 29 at 9 n.2; CMR Dkt. No. 37 at 13–14; CMR Dkt. No. 47 at 8–10.)

Notwithstanding Defendants' consistent position, Plaintiffs state that Defendants have "conceded" that "DPP does not apply to communications with third parties." *Supra*, p. 1. That assertion is flatly incorrect. Plaintiffs point to Defendants' statement in the CMR litigation that "as a general matter revealing privileged information to non-governmental third-parties can waive the deliberative process privilege." *Supra*, p. 2 (quoting CMR Dkt. No. 29 at 9 n.2). But Plaintiffs omit *the very next clause of the very sentence they quote*, where Defendants state that, nevertheless, "under the consultant corollary the privilege itself extends to communications with non-governmental entities where the entity aids the agency's decision-making process, . . ." CMR Dkt. 29 at 9 n.2 (citations omitted). Only by isolating a single clause from a single sentence and reading it out of context do Plaintiffs conclude that Defendants somehow concede "DPP does not apply to communications with third parties." *Supra*, p. 1. Quite the opposite, Defendants have consistently (and correctly) maintained in this and the related cases that their communications with third parties can be protected by privilege. (*See, e.g.*, CMR Dkt. No. 37 at 13 ("It is true that, as a general matter, when the Government voluntarily discloses privileged information to non-governmental third parties, such disclosure can result in waiving privilege. But that general rule yields to specific exceptions. For example, under the 'consultant corollary' doctrine, Government privileges like the presidential communications privilege extend to communications with non-governmental third parties when such communications 'aid the agency's decision-making process.'") (citations omitted).) Plaintiffs' mischaracterization of Defendants' position should be rejected outright.

Ultimately, the district court in the CMR subpoena dispute ordered CMR to produce its communications with the Government. (CMR Dkt. No. 62.) Although Defendants disagreed with that decision, they did not pursue relief in the Sixth Circuit.

2. The McHugh Subpoena

In addition to the subpoena directed to CMR, Plaintiffs also sought to enforce a subpoena in the District of Maryland served on Dr. Paul McHugh, a professor of psychiatry and behavioral sciences at Johns Hopkins University. In an attempt to resolve that subpoena without further litigation, DoD ultimately withdrew its objection to Dr. McHugh producing his communications with DoD. Defendants, however, specifically maintained that they "d[id] not concede that those communications are not subject to the deliberative process privilege." (Barsanti Decl. ¶ 4, Ex. 3, Email from Skurnik to Barsanti (July 29, 2019).) Moreover, Defendants maintained their objection to Dr. McHugh producing his communications with the White House, which are potentially subject both to the deliberative process privilege and the presidential communications privilege.[10] (*Id.*)

Plaintiffs appear to suggest that DoD's communications with Dr. McHugh call into question its decision making process and provide a basis for further discovery into Defendants' communications with other third parties. But setting aside the fact that, as noted, such communications can be privileged, DoD's consultations with Dr. McHugh merely reflect the agency's efforts to consider input from medical professionals with a variety of views as part of its policy process. Indeed, Plaintiffs ignore that DoD considered the opinions and studies of multiple experts, including Plaintiffs' own expert, Dr. George Brown, *see* Defs.' Interrog. Resps., Dkt. No. 373 at 9–10, as well as military mental health specialists, surgeons, endocrinologists and general practitioners from the Army, Navy and Air Force who had collectively advised on more than 250 transgender service member medical treatment plans, *see* AR 002830-5, Dkt. No. 381-2. There is nothing nefarious or indicative of bad faith about

[10] Plaintiffs' miscellaneous action regarding Dr. McHugh's remaining communications—any between him and the White House—was subsequently transferred to this district and consolidated with this case. *See* Order, Dkt. 367. That dispute, however, is not at issue here. Dr. McHugh's communications with the White House are not raised in this motion, nor are any White House communications with purported third parties. *See supra*, p. 1.

receiving input from experts with differing views. *See Gibson v. Collier*, 920 F.3d 212, 220, 222 n.6 (5th Cir. 2019) (citing Dr. McHugh among other medical experts in finding that "there is robust and substantial good faith disagreement dividing respected members of the expert medical community" concerning the necessity and efficacy of sex reassignment surgery). This is underscored by the fact that another of Plaintiffs' own experts, retired Major General Margaret Wilmoth, recommended that the Carter Transgender Working Group ("TGWG") speak with Dr. McHugh. (*See* Dkt. No. 381-8, Wilmoth email of Oct. 15, 2015 (recommending Dr. McHugh and stating "I would rather [the TGWG] get to a decision knowing how we got there by hearing from all sides of this important decision rather than just hearing from advocates").)

Nor does it matter that a DoD official consulted with Dr. McHugh after the Panel completed its deliberations. *See supra*, p. 3. As Plaintiffs admit, DoD's 44-page Report and Recommendations reflects the pertinent information Dr. McHugh provided. *See id.* In any event, Secretary Mattis adopted the Panel's recommendations in full, *see* Defs.' Mot. for Clarification 8–9, Dkt. No. 405, so it is not as if consultations with Dr. McHugh somehow changed the policy. Accordingly, the prior dispute concerning Dr. McHugh's communications has no bearing on the instant motion, and certainly does not provide a basis for blanket disclosure of privileged third-party communications without regard to time period or topic.

3. Communications With McHugh, Newbold, and Woodruff

In response to inquiries from the Plaintiffs, Defendants have elected to waive the deliberative process privilege over certain communications between DoD and several non-government individuals, including Dr. McHugh himself, retired Lieutenant General Greg Newbold, and William Woodruff.[11] Defendants' decision to waive privilege over these communications is consistent with the general approach they have taken across the related cases—namely, that where Plaintiffs have identified particular documents for which they believe they have a particularly strong need, Defendants have considered whether to waive privilege over the documents, and in many cases have done so. Indeed, every time Plaintiffs have

[11] In response to Plaintiffs' inquiry, Defendants also conducted a search for communications between DoD and Dr. Thomas Wise and Dr. Chester Schmidt, but did not identify any such communications.

requested that Defendants provide DoD's communications with a specific third-party individual, Defendants ultimately have agreed to waive the deliberative process privilege over DoD's communications with that individual. *See, e.g.*, Barsanti Decl. ¶ 8, Ex. 7, Letter from Carmichael to Barsanti (Sept. 13, 2019).

However, Defendants' decision to waive privilege over particular documents does not amount to an admission that those documents were not subject to privilege in the first place. Nor can Defendants' waiver of privilege with respect to communications with certain third parties act as a waiver of communications with *all third parties*, as Plaintiffs' focus on Defendants' "waivers" appears to suggest. The case law on this point is crystal clear: the subject matter waiver concept has no applicability to the deliberative process privilege. *See Agility Public Warehousing Co. K.S.C. v. DoD*, 110 F. Supp. 3d 215, 222 n.4 (D.D.C. 2015) (holding that "there is no authority for applying the broad, subject-matter waiver rule to [the deliberative process] privilege; indeed, the cases suggest that the rule does *not* apply in this context") Rather, the "release of a document only waives [executive] privileges for the document or information specifically released, and not for related materials." *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997); *cf. Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700 (9th Cir. 1989) (disclosure of documents does not waive Government's ability to assert FOIA exemption 5—which encompasses the deliberative process privilege—as to "related documents").

B. Current Dispute Before The Court

Defendants turn now to the dispute that is the subject of Plaintiffs' motion, which centers on Defendants' communications with additional individuals Plaintiffs allege are third parties.

1. Plaintiffs' First List Of Purported Third Parties

On October 7, 2019, Plaintiffs provided Defendants with a list of approximately 824 names, email addresses, or name and email address combinations, that they claimed belonged to non-government third parties, and requested that Defendants produce all communications with these individuals within eight days. (Barsanti Decl. ¶ 13, Ex. 12, Letter from Barsanti to Carmichael (Oct. 7, 2019).) Plaintiffs stated that they had created this list of names and email addresses based on Defendants' privilege logs. Importantly, however, Plaintiffs did not identify

any particular privilege log entries to which they objected to Defendants' invocation of privilege. Plaintiffs just provided a long list of names and email addresses—without even a citation to where on the logs they were located.

Nevertheless, in an effort to resolve the dispute, Defendants agreed to review the list and provide Plaintiffs with additional information about whether it contained non-government third parties. Upon beginning that review, however, it quickly became apparent that Plaintiffs had made no serious effort to narrow the dispute in formulating their list. The list contained, for example:

- The current and most recent former confirmed Secretaries of Defense ("Esper, Mark T." and "Jim Mattis");
- Two DOJ former counsel of record in this case ("Brinton Lucas" and "Ryan Parker"); and
- Numerous attendees at meetings of the Panel of Experts, all of whom have been previously identified in Defendants' discovery responses.

A cursory review of the list would have revealed to Plaintiffs that it was replete with government officials, not third parties. As Defendants explained to Plaintiffs, they were not required to undertake a burdensome review of the hundreds of entries in Plaintiffs' list where Plaintiffs appeared not to have made even a passing effort to review the names themselves. Indeed, apart from obvious names like that of the Secretary of Defense, even for less obvious entries on the list, in many cases a simple Google search or glance at Defendants' responses to Plaintiffs' interrogatories would demonstrate that the particular name in fact belonged to a government official. Defendants informed Plaintiffs that given the nature of the list, they would not devote the significant attorney time and resources necessary to review it and provide additional information. *Id.* ¶ 14, Ex. 13, Letter from Carmichael to Barsanti (Nov. 4, 2019).

2. Plaintiffs' Second List Of Purported Third Parties

In response, Plaintiffs removed more than 300 entries from their list, reducing it in size from approximately 824 names and/or email addresses down to approximately 487. *Id.* ¶ 2, Ex. 1, Letter from Barsanti to Carmichael (Dec. 13, 2019). In doing so, Plaintiffs essentially confirmed Defendants' objection—that the initial list included numerous obvious government officials and did not represent a serious effort to narrow the dispute. Defendants agreed to

review Plaintiffs' second list and provide additional information about whether the listed individuals were government officials.

However, after devoting numerous attorney hours to reviewing approximately half of the entries on Plaintiffs' second list, it again became apparent that Plaintiffs still had not made a serious effort to narrow the dispute. The second list of purported third parties still contained, for example:

- At least two references to Plaintiff Lindsey Muller, who Plaintiffs allege in their complaint is a member of the Armed Forces, and thus a government official;
- References to numerous individuals who hold or previously held senior Executive Branch positions, including former Deputy Secretary of Defense Robert Work, former Secretary of Homeland Security and DoD General Counsel Jeh Johnson, retired Army General Carter F. Ham, and DoD Deputy General Counsel Ryan Newman.[12]
- Entries corresponding to numerous employees of the federal government whose email addresses indicate that fact.

Once again, Plaintiffs failed to detect names of persons—including their own client—that obviously were not third parties. Accordingly, Defendants informed Plaintiffs that they would not continue to undertake the burdensome task of reviewing Plaintiffs' second list. *Id.* ¶ 16, Ex. 15, Letter from Powers to Barsanti (January 17, 2020). Plaintiffs to date have not agreed to provide a list reflecting a serious effort to narrow this dispute.

ARGUMENT

A. To Expedite Resolution Of This Dispute, Defendants Agree To Complete Their Review Of Plaintiffs Second List Of Names.

As set forth above, this is not a dispute about whether Defendants bear the burden to claim privilege over third-party communications, but whether Plaintiffs should make a reasonable effort to identify the names of persons they could reasonably contend may be third parties. To date they have not done so. In such circumstances, Defendants are not obligated to devote hours

[12] Although some of these individuals are no longer government officials, because Plaintiffs have insisted on conferring over a context-free list of names rather than actual entries on Defendants' privilege logs, the parties' meet and confer efforts have not involved discussions of whether any particular official was in government service at the time of any particular communication.

to providing Plaintiffs with information they already know, should know, or could know with minimal efforts. Indeed, this dispute likely could have been resolved or substantially narrowed months ago if Plaintiffs would have simply identified particular privilege log entries, or provided a reasonable list of purported third parties.

Plaintiffs are thus incorrect that Defendants have not sufficiently justified their claims of privilege. Defendants do not have to specify to Plaintiffs that Mark T. Esper is in fact a government official for Plaintiffs to know that he is the Secretary of Defense and a named Defendant, and that his deliberative and pre-decisional communications are privileged. Defendants' privilege logs contain information on the date, author, recipient, title/description, privilege, and privilege basis of withheld documents. Defendants accordingly have provided more than sufficient information to satisfy Rule 26's requirements. *See* FED. R. CIV. P. 26(b)(5)(A).

Nonetheless, in order to expedite resolution of this dispute and avoid any need for further extensions of the discovery schedule, Defendants will agree to complete their review of Plaintiffs' second list of individuals, and to do so by March 13, 2020. By that date, Defendants will provide Plaintiffs with additional information about the individuals on the list, including whether or not the individuals listed are government officials. Accordingly, the Court need not order any relief as to whether the Defendants must complete their review of Plaintiffs' list of purported third parties—Defendants already have agreed to do so.

Finally, private email accounts should not be used as a proxy to determine third parties, as Plaintiffs suggest. *See supra*, p. 9–10. Government officials occasionally will use private email accounts for official business, as they are permitted to do under federal records laws so long as they also forward or copy relevant documents and communications to their official email accounts. *See* 44 U.S.C. § 2911. But using a private email address cannot transform a government official into a non-government third party. For example, one of the @gmail.com addresses on Plaintiffs' lists belongs to Sasha N. Baker, who served as a Deputy Chief of Staff to former Secretary of Defense Ashton Carter. Just because Ms. Baker may have forwarded a document or communication to her private email address does not mean that she herself was not

a government official or that the document or communication she may have forwarded is not privileged. In any event, Defendants have agreed to review Plaintiffs' list and identify which of the entries belong to third parties, so there is no need to attempt that same inquiry based on private email addresses.

B. Communications Between Defendants And Third Parties Are Privileged Where Those Communications Are Solicited And Aid Defendants' Decision Making Process.

In light of Defendants' agreement to complete review of Plaintiffs' second list of purported third parties, the Court need address only one question: whether, for any individuals Defendants ultimately identify as non-government third parties, DoD may in certain cases withhold its communications with those individuals.

The answer plainly is yes. Although as a general matter, the Government's voluntary disclosure of privileged information can result in waiving privilege, *see, e.g.*, *In re Sealed Case*, 121 F.3d at 741–42, under the "consultant corollary" doctrine, communications between the Government and third parties are privileged where the Government solicits them in order to "aid the agency's decision-making process,"[13] *Judicial Watch, Inc. v. DoT*, 950 F. Supp. 2d 213, 218–19 (D.D.C. 2013). This doctrine is well-established, and has been applied by numerous courts in this circuit. *See, e.g.*, *All. for the Wild Rockies v. Pena*, 2017 WL 8778579, at *6 (E.D. Wash. Dec. 12, 2017) (communications between Forest Service and private subcontractor were properly withheld as deliberative pursuant to consultant corollary); *Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1191–92 (N.D. Cal. 2006) (documents authored by non-government consultants hired by EPA properly withheld as deliberative pursuant to consultant corollary); *Friends of the Earth v. Army Corps of Engineers*, 374 F. Supp. 3d 1045, 1053–54 (W.D. Wash. 2019) (applying the consultant corollary doctrine but concluding that document at issue did not come within its protections); *Ctr. for Biological Diversity v. Office of U.S. Trade Representative*, 450 F. App'x 605, 609 (9th Cir. 2011) (unpublished memorandum disposition) (noting the existence of

[13] The consultant corollary doctrine is also restricted to situations where the third-party does not have "an outside interest in obtaining a benefit that is at the expense of competitors," but that condition is not at issue in this litigation. *Judicial Watch, Inc.*, 950 F. Supp. 2d at 218–19; *see Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001).

consultant corollary and remanding for further factual development on the relationship between third party and the agency).

The consultant corollary is particularly important in a case like this, where the Government hired an outside consultant (the RAND Corporation) as part of its policy development process (for the Carter policy). Unsurprisingly, Plaintiffs' lists of purported third parties include multiple individuals with RAND email addresses, including Agnes Schaefer, RAND's lead researcher on its study of service by transgender individuals. *See* RAND Report, Dkt. 144-2. While RAND itself may be subject to examination as to the basis for its conclusions, its actual communications with the Government are protected as privileged. *See Nat'l Inst. of Military Justice v. DoD*, 512 F.3d 677, 685 (D.C. Cir. 2008) ("[T]he expectation that communications will remain confidential is crucial to eliciting candid and honest advice from outside consultants."); *Ryan v. DoD*, 617 F.2d 781, 789–90 (D.C. Cir. 1980) ("[C]onsultations [with temporary consultants] are an integral part of [an agency's] deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.").[14]

Indeed, it would be one thing if Plaintiffs argued that particular communications were not in fact solicited as part of Defendants' decision making process, and thus did not come within the consultant corollary doctrine. But Plaintiffs instead act as if the doctrine does not exist *at all*, by requesting production of *every* third-party communication. Their motion does not even mention the consultant corollary, let alone explain why it would not apply to DoD's communications with consultants. Nor does it explain how production of all third-party communications could be proper when at least some of those communications are responsive to RFP Nos. 15 or 29, and thus at issue in Defendants' mandamus petition and the subject of the Ninth Circuit's administrative stay. *See* Order, Dkt. 415. Finally, Plaintiffs do not even try to argue that their

[14] Although DoD here paid RAND to conduct its study, a third party need not be paid or have a formal consulting relationship with the Government in order for the Government's communications with the third party to be protected. It is sufficient that the communications at issue were solicited for the purpose of aiding the Government's decision making process. *See Nat'l Inst. of Military Justice*, 512 F.3d at 683 ("[A]lthough the individuals DoD consulted are . . . private citizens rather than government employees or paid contract consultants, we see no reason why the absence of a contract or compensation should differentiate them from the 'typical' outside agency consultants.").

need for certain third-party communications has overcome the deliberative process privilege. *See FTC v. Warner Comm'ns Inc.*, 742 F.2d 1156 (9th Cir. 1984). To the contrary, in Plaintiffs view, they simply should get everything, with little argument or analysis.

The Court should reject this overbroad and legally incorrect approach. Instead, consistent with case law in this and other circuits, the Court should conclude that DoD may withhold as privileged its communications with third parties where they were solicited to aid in the agency's decision making process.

Finally, if the Court disagrees with Defendants' position and orders production *en masse* of communications with third parties, in no event should it extend its ruling to third party communications with the President or his close advisors. Plaintiffs have not requested production of such communications in their motion, *see supra*, p. 1 (requesting an order compelling "Mark Esper, in his official capacity as Secretary of Defense, and the United States Department of Defense ('DoD') (together, 'the Government') to produce third-party communications"), and to order their production at this stage would raise serious separation-of-powers concerns, *see Karnoski*, 926 F.3d at 1205.

CONCLUSION

Defendants will complete their review of Plaintiffs' second list of purported third parties and provide Plaintiffs with additional information by March 13, 2020. As to DoD's communications with third parties, the Court should hold that DoD may properly withhold such communications as privileged where they were solicited and aid in the agency's decision making process. Accordingly, Plaintiffs motion should be denied.

PLAINTIFFS' REPLY

The Government's attempts to shift its discovery burden as a tactic to delay and obstruct the discovery process should be tolerated no more. The Government has repeatedly refused to cooperate with Plaintiffs throughout the meet and confer process and has done nothing to cure its deficient privilege log entries, *even after* it "devot[ed] numerous attorney hours to reviewing approximately half of the entries on Plaintiffs' second list… of purported third parties." Def's. Stmnt. at 17, *supra*. Only now, after imposing a substantial burden on Plaintiffs and the Court to

resolve a dispute that could have been resolved between the parties months ago, has the Government finally agreed to Plaintiffs' initial October 7, 2019 ask to review Plaintiffs' list of potential third parties. The Government has had sufficient time to review this list (and indeed has already reviewed half), and any further delay severely prejudices Plaintiffs.

Third-party communications are not subject to DPP, as the Ninth Circuit has never adopted the consultant corollary theory. But, even if it had, the Government's deficient privilege log entries do not justify that its communications are protected by this theory. Beyond that, the Government's extreme and unjustified delay in remedying its deficient privilege log entries warrants a finding that any meritless privilege claims over these documents have been waived.

A. The consultant corollary theory does not protect the Government's third-party communications.

The Government's argument that the consultant corollary exception protects its third-party communications from production fails for at least three reasons. *First*, the Court need not apply the consultant corollary exception to waiver because it has never been adopted by the Ninth Circuit. *See Rojas v. Fed. Aviation Admin.*, 927 F.3d 1046, 1054 (9th Cir. 2019), *reh'g en banc granted*, No. 17-55036, 2020 WL 520853 (9th Cir. Jan. 30, 2020) ("We have yet to adopt the consultant corollary in this Circuit . . ."). [15] None of the Government's cited case law regarding consultant corollary theory is controlling on this Court.

Second, even if the Court found that the consultant corollary doctrine could *potentially* apply to the Government's third-party communications, the Government has done nothing to support the application of that doctrine here. The burden to establish consultant corollary protection is high. The Government must prove not only that the "consultant" (1) was solicited to "aid the agency's decision-making process . . .," Def's Stmnt. at 19, *supra*, but also that it (2) was "hired or solicited by the agency to provide neutral advice" that "does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it,"

[15] The Government attempted to argue that consultant corollary theory prevented waiver of DPP over its communications with CMR before Judges Edmunds and Stafford. The Sixth Circuit—like the Ninth Circuit—never adopted the consultant corollary theory and both judges declined to apply that exception to waiver over Defendants' communications with CMR.

such that the "private individual was acting just as a government employee would be expected to do," *Friends of the Earth*, 374 F. Supp. 3d at 1053-54 (internal quotations, alterations, and citations omitted), before proving (3) that the communications are covered by DPP, for example, that they are indeed deliberative and pre-decisional. The Government has woefully failed to meet this burden by never formally invoking consultant corollary theory prior to this filing. Indeed, its privilege log entries never indicate that it claims "consultant corollary" over any particular communications or even attempt to establish the theory's strict legal requirements. (*See* Barsanti Decl. ¶¶ 19-21.)

Neither has the Government met the consultant corollary theory's strict legal requirements for claiming protection over documents with RAND Corporation. For example, although RAND's report was published and the Carter policy was announced on June 30, 2016, rendering documents after this date no longer deliberative or pre-decisional, the Government has withheld documents with RAND members after this date without explanation or justification. (*Id.* at ¶ 20.)

In addition, Government communications with third party individuals or interest groups are not protected when they appear to receive preferential treatment relative to other members of the public. *Friends of the Earth*, 374 F. Supp. 3d at 1055. The Government's originally-withheld but now produced communications with *at least* Greg Newbold, Woody Woodruff, Paul McHugh, and CMR demonstrate that these individuals received preferential treatment when communicating their own self-interests or the interests of anti-transgender advocacy groups to the Government, such that these communications were never properly subject to DPP. The remaining withheld documents also likely contain self-interested communications, too.

In fact, the Government's recent production of third-party documents previously withheld under the guise of DPP further emphasizes its inappropriate and overbroad application of DPP, even if the consultant corollary theory applied. Included within its recent de-designation production were, for example, an email from a reporter [redacted] and an [redacted] email from the head of the New York City Bar Association's Military Affairs and Justice Committee [redacted]

[redacted]. (Barsanti Decl. ¶¶ 17-18, Exs. 16-17.) Neither is deliberative, and both were improperly withheld.

Third, as discussed *supra*, the Government's extreme and unjustified delay in remedying its deficient privilege log entries warrants a finding that any meritless privilege claims over these documents has been waived. *E.g., Bess*, 2008 WL 5100203, at *5*; Ritacca*, 203 F.R.D. at 336.

B. The Government's mandamus petition does not apply here.

The Government's argument that third-party communications are tied up in its mandamus petition is a red herring. At issue in that petition is whether Plaintiffs have overcome the Government's claims of DPP with respect to certain categories of documents. Here, Plaintiffs need not *overcome* DPP with respect to these third-party communications because DPP *does not apply* to third-party communications. And, even if DPP *could* apply, the Government has not met their burden to show that it *does*. Thus, the issues in the mandamus petition have no bearing on this dispute, the requested third-party communications are not subject to the Ninth Circuit's administrative stay, and Plaintiffs need not establish the *Warner* factors over these documents.

CONCLUSION

In light of the Government's inexcusable delay and refusal to meaningfully cooperate in discovery, combined with its continued failure to support its privilege assertions, Plaintiffs request the Court order the Government to review the list of potential third parties provided by Plaintiffs, and by March 13, 2020 (1) provide information indicating whether each person is a third party or a government employee; (2) produce all communications with individuals who are confirmed to be third parties, or, in the alternative, should the Court adopt the consultant corollary theory, (a) require the Government to amend its privilege logs and serve a declaration attesting to the elements of the consultant corollary doctrine with respect to each third party for whom it continues to withhold communications, and (b) produce communications with all other third parties; and (3) for individuals confirmed to be government employees, amend its privilege log entries to identify the employer and job title for each individual as of the date of the communication.

CERTIFICATION

I certify that the full response by the responding party has been included in this submission, and that prior to making this submission the parties conferred to attempt to resolve this discovery dispute in accordance with LCR 37(a).

Respectfully submitted, February 27, 2020

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on February 27, 2020.

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The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

[PROPOSED] ORDER GRANTING LCR 37 JOINT SUBMISSION REGARDING THE GOVERNMENT'S WITHHELD COMMUNICATIONS WITH THIRD PARTIES

NOTE ON MOTION CALENDAR:
February 27, 2020

This matter comes before the Court on the foregoing LCR 37 Joint Submission Regarding the Government's Withheld Communications with Third Parties (the "Joint Submission"). The Court, having considered the parties' arguments and finding good cause therefor, GRANTS the Joint Submission.

IT IS HEREBY ORDERED:

1. By March 13, 2020, the Government must review Plaintiffs' list of potential third parties, attached as Ex. A to Ex. 1 to the Declaration of Vanessa Barsanti in Support of the Joint Submission, and provide information indicating whether each person is a third party or a government employee.

2. By March 13, 2020, the Government must produce all communications with individuals who are confirmed to be third parties.

3. [IN THE ALTERNATIVE] By March 13, 2020, for all communications with individuals who are confirmed to be third parties, the Government must:

a. Amend its privilege logs to adequately assert the consultant corollary doctrine and serve a declaration attesting to the elements of the consultant corollary doctrine with respect to each third party for whom it continues to withhold communications;

b. Produce all withheld communications with all other third parties.

4. By March 13, 2020, for individuals confirmed to be government employees, the Government must amend its privilege log entries to identify the employer and job title for each individual as of the date of the communication.

IT IS SO ORDERED.

Dated this _____ day of _____, 2020.

_____
The Honorable Marsha J. Pechman
United States District Court Judge

Presented by:
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