

1 Defendants respectfully provide notice that they have submitted documents for *in camera*
2 review in compliance with the Court's Order on Plaintiffs' Motion to Compel Regarding the
3 Government's Withheld Communications with Third Parties, Dkt. 454. In that Order, the Court
4 directed as follows:

5
6 For every individual for whom the Government intends to invoke a privilege
7 under the consultant corollary exception, the Government will provide evidence
8 in camera establishing that:

9 a. The individual identified as a consultant was solicited to aid in the
10 Government's decision-making process (i.e., the letter or email or other
11 communication which solicited the individual's participation),

12 b. The individual identified as a consultant was hired or solicited by the agency to
13 provide neutral advice that did not represent an interest of its own or the interest
14 of any other client upon providing the requested advice,

15 c. The communications are otherwise covered by the deliberative process
16 privilege (e.g., the communications with the consultant were pre-deliberative).

17 This evidence must be provided to the Court no later than March 14, 2020.

18 *Id.* at 2.

19 On Friday, March 13, 2020, Defendants submitted two declarations in support of
20 Defendants' withholding of communications involving individuals who were employed by
21 contractors for the Government. Defendants submitted a declaration from Robert Easton,
22 Director, Office of Litigation Counsel, in the Department of Defense ("DoD") Office of General
23 Counsel, to support Defendants' withholding of documents and emails exchanged among DoD
24 employees and individuals employed by two DoD contractors, RAND Corporation ("RAND")
25 and Kennell and Associates, Inc. ("Kennell"). Mr. Easton attached to his declaration evidence
26 establishing the consultant relationships between DoD and RAND and DoD and Kennell, and
27 explained that these contractors were hired to provide neutral advice that did not represent an
28 interest of their own or the interest of any other client upon providing the requested advice.

Mr. Easton explained that the documents and communications exchanged between the
Department of Defense and the two contractors were withheld under the deliberative process

1 privilege because they are predecisional and deliberative. *See NLRB v. Sears, Roebuck & Co.*,
2 421 U.S. 132, 150 (1975); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

3 Specifically, Mr. Easton explained that DoD's Office of the Undersecretary of Defense
4 for Personnel and Readiness solicited and hired RAND to perform research and provide neutral
5 advice to aid in the Government's decision-making process regarding the Carter Policy.

6 Mr. Easton also explained that DoD solicited and hired Kennell to provide neutral and
7 independent advice on certain healthcare and cost components to assist DoD in forming the
8 Carter Policy and the Mattis Policy. And he noted that the withheld documents and
9 communications exchanged between DoD and Kennell include discussion and analyses
10 performed by Kennell.

11 Finally, Mr. Easton explained that release of DoD's communications with its contractors
12 would have an immediate chilling effect on DoD's future deliberations because DoD's decision-
13 making apparatus relies on open and candid discussions between DoD and its contractors. *See*
14 *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (emphasizing that the potential chilling
15 effect of disclosure "deserves careful consideration, because the military's interest in full and
16 frank communication about policymaking raises serious—although not insurmountable—
17 national defense interests"). The documents and communications between DoD and RAND and
18 between DoD and Kennell are included with Mr. Easton's declaration for *in camera* review.

19 Defendants also submitted a declaration from Andrew Carmichael, Trial Attorney with
20 the Department of Justice ("DOJ"), to support Defendants' withholding of six documents in
21 which a contract law clerk for the Department of Justice sent, received, or was copied on emails
22 exchanged among attorneys for DOJ and DoD. The contract law clerk was employed by Leidos
23 Innovations Corporation ("Leidos") and worked for DOJ pursuant to the contract between DOJ
24 and Leidos.

25 Mr. Carmichael explained that the emails were withheld under the attorney-client
26 privilege because they consist of confidential disclosures made by a client to an attorney to obtain
27 legal advice and attorneys' advice in response to such disclosures. *See United States v.*
28 *Christensen*, 828 F.3d 763, 802 (9th Cir. 2015). Specifically, Mr. Carmichael explained that in

1 the withheld emails, DoD attorneys sought legal advice from DOJ attorneys concerning the
2 compilation of the administrative record, and DOJ attorneys provided legal advice to DoD
3 attorneys concerning the compilation of that record. Mr. Carmichael further explained that the
4 law clerk was copied on those emails because she assisted the attorneys with ministerial tasks
5 associated with compiling the administrative record and interacted with DoD attorneys at the
6 direction of DOJ attorneys concerning the compilation of the that record. The contract law clerk
7 was thus acting as an agent of the DOJ attorneys. *See Christensen*, 828 F.3d at 802–03
8 (recognizing that the attorney-client privilege extends to agents). Mr. Carmichael further
9 explained that these emails were withheld under the attorney work product doctrine because they
10 were prepared during this litigation by attorneys or their agents and contain mental impressions
11 and opinions of attorneys concerning the compilation of the administrative record. *See Hickman*
12 *v. Taylor*, 329 U.S. 495, 510–11 (1947). The communications to which the contract law clerk
13 was a party, as well as the contract (including modifications to that contract) between DOJ and
14 Leidos for law clerk services, are included with Mr. Carmichael’s declaration for *in camera*
15 review.

16 Dated: March 13, 2020

17 Respectfully submitted,

18 JOSEPH H. HUNT
19 Assistant Attorney General

20 DAVID M. MORRELL
21 Deputy Assistant Attorney General

22 ALEXANDER K. HAAS
23 Branch Director

24 ANTHONY J. COPPOLINO
25 Deputy Director

26 /s/ Matthew Skurnik
27 MATTHEW SKURNIK (NY 5553896)
28 JAMES R. POWERS
ANDREW E. CARMICHAEL
Trial Attorneys
United States Department of Justice

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Telephone: (202) 616-8188
Email: matthew.skurnik@usdoj.gov

Counsel for Defendants