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 DEFENDANTS' DELIBERATIVE PROCESS PRIVILEGE CLAIMS

NOTE ON MOTION CALENDAR:
May 5, 2020

PLAINTIFFS' OPENING STATEMENT

Plaintiffs are the moving party for this submission. Pursuant to Federal Rule of Civil Procedure 26 and 53, and Local Rule 37, Plaintiffs request that the Court order the Special Master to conduct an *in camera* review of a random sample of 350 documents withheld solely on the basis of the deliberative process privilege and identify any documents as to which he believes the Government erroneously claimed privilege.[1] The parties have met and conferred in good faith several times over the course of many months in an attempt to resolve their disputes about the Government's deliberative process privilege claims. The parties remain at an impasse over whether the Government's privilege claims are impermissibly overbroad and asserted as to documents for which there is no colorable claim of privilege. Thus, this dispute is ripe for resolution by the Court and Special Master. Plaintiffs respectfully request that the Court grant Plaintiffs' motion.

A. Procedural History

Over the course of two years, the parties have spilled substantial ink—and the Court has invested a substantial amount of its time—addressing the Government's assertion of the deliberative process as a basis to withhold tens of thousands of responsive documents. (*See* Dkt. Nos. 245, 266, 273, 299, 364, 380, 385, 394, 398, 399, 408, 410, 434, 454, 469, 476.) As Plaintiffs have chipped away at certain aspects of the Government's privilege claims and finally seen some of the documents the Government has been withholding based on deliberative process privilege, they have grown increasingly concerned that the Government has been broadly misapplying the privilege to documents for which there is no colorable claim of privilege.

The Government recently produced over 300 documents previously withheld on the basis of the deliberative process privilege. (Dkt 472.) After reviewing those documents, Plaintiffs identified dozens of documents for which no colorable claim of privilege exists, because the documents are post-decisional, non-deliberative, or both. This includes numerous communications about news articles covering transgender military service that do not contain

[1] Plaintiffs' discovery vendor can utilize Relativity's randomization algorithm to pull a sample of 350 documents from the Government's privilege logs that have been withheld solely on the basis of the deliberative process privilege.

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any conceivable policy deliberations (*e.g.*, Dkt. 473, Exs. 1–10); talking points or preparation notes for teleconferences, interviews, or confirmation hearings that do not reflect policymaking (*e.g.*, *id.*, Exs. 11–18); post-decisional and nondeliberative documents about the Carter Policy (*e.g.*, *id.*, Exs. 19–25); and emails/invitations regarding speeches and events (*e.g.*, *id.* Exs. 26–27).

On April 9, 2020, the Court appointed retired United States Magistrate Judge James P. Donohue as Special Master to "assist the Court in reviewing Defendants' privilege assertions" and "identify to the Court those documents over which he believes the Defendants erroneously made privilege assertions." (Dkt. 479 at 3-4.)

B. Legal Standard

"Like all evidentiary privileges that derogate a court's inherent power to compel the production of relevant evidence, the deliberative process privilege is narrowly construed." *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000). "The initial burden of establishing the applicability of the privilege is on the government." *Id.*; *accord Thomas v. Cate*, 715 F. Supp. 2d 1012, 1019 (E.D. Cal. 2010); *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003).

"A document must meet two requirements for the deliberative process privilege to apply. First, the document must be predecisional—it must have been generated before the adoption of an agency's policy or decision." *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). "Material which predates a decision chronologically, but did not contribute to that decision, is not predecisional in any meaningful sense." *Assembly of State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992). "Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. Purely factual material that does not reflect deliberative processes is not protected." *Warner*, 742 F.2d at 1161 (internal citation omitted). "The key inquiry in determining whether particular information is 'deliberative' is whether disclosure of the information would expose the decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Thomas v. Cate*, 715 F. Supp. 2d at 1019. Moreover,

"the deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must." *Karnoski v. Trump*, 926 F.3d 1180, 1204 (9th Cir. 2019).

Last week, Magistrate Judge Copperthite in *Stone v. Trump* ordered the Government to produce nearly the same categories of documents that this Court ordered produced in February, and in doing so, explained the metes and bounds of the deliberative process privilege:

> The takeaway from the language here is that it is the deliberative process itself that is being protected, not the documents which are a byproduct of that process. Further, the privilege covers opinions, it does not cover facts. In application, it is not how the opinion was formed that is protected (the facts). It is the generated opinion itself. The facts relied upon as well as the facts regarding the process are not protected by the privilege. So by way of example, the factual information provided to the decisionmakers along with how those facts came to exist and how they were applied (absent the opinion itself) remain outside the scope of the privilege. Did the President tweet his ban without factual support? Were there truly no Generals or experts consulted? Did the President give his own "marching orders" or in this case, non-marching orders to deny transgender service? What was relied upon and what was the true impetus of the ultimate ban? These are critical areas that are of great value in determining the outcome of these constitutional challenges.

Stone v. Trump, No. CV GLR-17-2459, 2020 WL 1820082, at *3 (D. Md. Apr. 9, 2020) (internal citations omitted). Plaintiffs believe the Government has misapplied these standards and improperly withheld a significant volume of documents from production.

PLAINTIFFS' ARGUMENT

The Government bears the burden to demonstrate that the deliberative process privilege applies to each responsive document it has withheld from production. *See, e.g.*, *Greenpeace*, 198 F.R.D. at 543. But as its recent production of previously-withheld documents confirm, it has misapplied the privilege in many instances, including to plainly non-privileged information, such as news reports and post-decisional explanations of policies. Further inquiry is therefore warranted and indeed necessary to test the Government's exceptionally broad—and now suspect—privilege claims.

Where, as here, the government has asserted the deliberative process privilege over a large volume of documents, courts frequently rely on an *in camera* review of a random sample of

documents to determine whether the privilege has been appropriately invoked. *See, e.g.*, *Harrison v. Shanahan*, No. 118CV641LMBIDD, 2019 WL 2216474, at *1 (E.D. Va. May 22, 2019) (conducting an "*in camera* review of a random selection" of documents withheld under the deliberative process privilege and finding the government had "asserted the privilege to at least some documents and portions thereof in an undifferentiated and untailored manner"); *Coleman v. Schwarzenegger*, No. C01-1351 TEH, 2008 WL 4415324, at *3 (N.D. Cal. Sept. 25, 2008) (affirming magistrate judge's *in camera* review of a "randomly-drawn sample" of 313 documents withheld under the deliberative process privilege).

That approach is appropriate here. Plaintiffs respectfully move the Court to issue an Order:

1. Directing the Special Master to conduct an *in camera* review of a random sample of 350 documents from the Government's privilege logs withheld solely on the basis of the deliberative process privilege. Plaintiffs will use a Relativity randomization algorithm to select the documents and will identify them for the Government within two business days of the Court's Order, should it grant this Motion.
2. Within three business days of receiving the list of 350 documents from Plaintiffs, the Government shall produce the documents to the Court and Special Master *in camera.*
3. Following his review, the Special Master shall recommend to the Court (1) a list of those documents for which he finds the privilege has been improperly invoked (*List 1*), and (2) a list of those documents for which he finds the Government has validly asserted the privilege (*List 2*).
4. Each party shall have one week (seven calendar days) to file objections to the Special Master's recommendations, and the opposing party will have three business days to respond
5. Consistent with the Court's appointment of the Special Master (Dkt. 479), the Court shall review the Special Master's determinations *de novo*. For those documents in List 2—those which the Government has validly asserted the privilege—the Court shall separately determine if the privilege has been overcome pursuant to the *Warner* factors.

6. The Court shall issue an Order identifying (a) those documents for which the deliberative process privilege has been improperly invoked, (b) those documents for which the privilege has been overcome pursuant to the *Warner* factors, and (c) those documents that are properly withheld pursuant to the privilege.
7. Each party shall have one week (seven calendar days) to file a motion to reconsider the Court's ruling and/or object to the production of any document the Court finds should be produced, and the opposing party shall have three business days to respond.
8. The Government shall produce all documents, if any, which the Court orders produced within one week after the Court's initial Order or Order on a motion to reconsider, whichever is later.

If this review confirms Plaintiffs' fears that the Government has been improperly invoking the privilege over documents to which it does not apply, the Court's orders above could provide the basis for a further motion (and order) that the Government promptly review its privilege claims as to the remaining documents withheld solely on the basis of the deliberative process privilege and, on a rolling basis, produce any documents as to which the privilege is no longer claimed, with the Special Master to conduct an *in camera* review of any documents as to which the Government continues to claim the privilege. Plaintiffs respectfully submit that the above process will efficiently assess the Government's broad application of the deliberative process privilege and bring this long-lasting dispute to an end.

DEFENDANTS' OPENING STATEMENT[2]

Plaintiffs have made no showing that Defendants are "broadly misapplying" the deliberative process privilege. Pls.' Statement 1. To the contrary, throughout this case, Defendants have properly applied the privilege in conducting its review of documents. Plaintiffs contend otherwise only by taking an overly constricted view of the privilege that misreads or ignores applicable case law.

Plaintiffs point to a set of documents that they assert were improperly withheld. Pls.'

[2] The expedited procedures of Local Rule 37(a)(2) for resolving discovery disputes are only available upon "agreement" of the parties. Defendants have not given their consent to the expedited procedures and reiterate their objection to Plaintiffs' use of Local Rule 37(a)(2) without their consent.

Statement 1–2. But case law demonstrates that most of the documents identified by Plaintiffs in fact *were* properly withheld as deliberative. There is no need to review a random sample when Plaintiffs' own handpicked examples do not show systematic discovery errors. And even if Plaintiffs were correct that their chosen documents should not have been withheld in the first instance (they are not), those documents amount to only a handful of the more than 1,500 deliberative documents that have been produced over the past year. After nearly two and a half years of discovery, the evidence Plaintiffs proffer of a purportedly misapplied privilege instead demonstrates that sampling and *in camera* review are neither necessary nor appropriate.

In any event, the Ninth Circuit has issued an administrative stay of the Court's prior orders, which required production of nearly all deliberative documents still withheld in this case. To now conduct *in camera* review and potentially order production of nearly the same documents would circumvent the Ninth Circuit's stay. Plaintiffs request that this Court disregard the Ninth Circuit's stay should be rejected and Plaintiffs' motion should be denied.

DEFENDANTS' ARGUMENT

I. Defendants Have Properly Applied the Deliberative Process Privilege.

Contrary to Plaintiffs' contention, Defendants have not broadly misapplied the deliberative process privilege. Pls.' Statement 1. Rather, throughout this case, Defendants have endeavored to apply the privilege correctly according to applicable standards. Plaintiffs, on the other hand, have taken a cramped view of the privilege that is inconsistent with the case law in this and other circuits. As a result, Plaintiffs have failed to establish why a sampling review by this Court is warranted.

a. Plaintiffs Misread or Ignore Applicable Case Law.

In support of their argument that Defendants have consistently misapplied the deliberative process privilege, Plaintiffs point to 27 documents recently produced in discovery. *See* Dkt. 473, Exhs. 1–27. Out of these 27 documents, 26 were documents that Defendants previously withheld pursuant to the deliberative process privilege but subsequently disclosed.[3] Plaintiffs' assertion

[3] Plaintiffs incorrectly assert that USDOE00132843_001 was previously withheld on the basis of the deliberative process privilege. *See* Dkt. 473, Exh. 27. That document, which contains a digital map screenshot showing the location of a foreign official's residence, was previously withheld for non-responsiveness, not for privilege.

that there is "no colorable claim of privilege" as to these documents is rooted in an incorrect understanding of applicable case law. Pls.' Statement 1.

"To fall within the deliberative process privilege, a document must be both 'predecisional' and 'deliberative.'" *Carter v. Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002). A "predecisional" document is one that was "prepared in order to assist an agency decisionmaker in arriving at his decision." *Id* (citations omitted). Such documents may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* (citations omitted). A predecisional document is "deliberative" if disclosure of the document "would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* (citations omitted).

In applying these standards, the Ninth Circuit employs a "process-oriented" or "functional" test, in which a document need not be deliberative in itself "in the sense that [it] make[s] nonbinding recommendations on law or policy" to be subject to the privilege. *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988). The Ninth Circuit thus rejects a strict distinction between "factual" materials and "deliberative" materials. *Id.* Instead, any document that is "a part of the *deliberative process*" and whose disclosure would expose that process is covered by the privilege, even if the information contained therein is factual or otherwise does not contain a "recommendation."[4] *See id.* at 1118–19. Plaintiffs' misunderstand this case law in several ways.

First, Plaintiffs fail to appreciate that draft documents and communications concerning draft documents are core to the Ninth Circuit's understanding of the deliberative process

[4] Plaintiffs cite a recent Magistrate Judge decision in the related case *Stone v. Trump*, 2020 WL 1820082 (D. Md. Apr. 9, 2020), as evidence of the "metes and bounds" of the privilege. Pls.' Statement 3. But the Magistrate Judge in *Stone* relied on a distinction between factual and deliberative information that is inconsistent with the approach taken in the Ninth Circuit. *Compare id* at *3 ("[T]he privilege covers opinions, it does not cover facts"); *with Nat'l Wildlife Fed'n*, 861 F.2d at 1119 (holding that application of the privilege "should not turn on whether we label the contents of a document 'factual' as opposed to 'deliberative'"). In addition, the Government has moved to stay the *Stone* Magistrate Judge's decision and has filed objections with the district court. *Stone v. Trump*, No. CV GLR-17-2459 (D. Md.), Dkts. 301–302.

privilege. The Ninth Circuit specifically holds that the deliberative process privilege covers "all recommendations, *draft documents*, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency, as well as documents which would inaccurately reflect or prematurely disclose the views of the agency." *Nat'l Wildlife Fed'n*, 861 F.2d at 1118–19 (emphasis added) (citation omitted). This includes draft documents containing "line edits, marginal comments, or other written material that expose [] internal agency discussion." *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 1017 (9th Cir. 2019). Several of the 26 documents identified by Plaintiffs contain drafts that unquestionably are covered by the deliberative process privilege. *See, e.g.*, Dkt. 473, Exhs. 19–21, 23.

Plaintiffs assert that these documents are "post-decisional." Pls.' Statement 1–2. But a draft document, by its very nature, precedes the final version of the document at issue. *See Agility Public Warehousing Co. v. DoD*, 110 F. Supp. 3d 215, 221 (D.D.C. 2015) ("[D]raft documents, by their very nature, are typically predecisional and deliberative." (citation omitted)). Drafts also reflect the agency's editorial judgments about the document in question—judgments which are squarely deliberative. *See Nat'l Wildlife*, 861 F.2d at 1122 ("To the extent that [the requester] seeks through its [] request to uncover any discrepancies between the findings, projections, and recommendations between the draft[s] prepared by lower-level [agency] personnel and those actually adopted, . . . it is attempting to probe the editorial and policy judgments of the decisionmakers."); *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987) ("[T]he disclosure of editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis—would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work."). Defendants' application of the deliberative process privilege to documents containing drafts was proper.

Second, Plaintiffs incorrectly attempt to draw a distinction between deliberations directly relating to "policy" or "policymaking," and other types of deliberations, such as "communications about news articles" or "talking points or preparation notes for teleconferences, interviews, or confirmation hearings." Pls.' Statement 2. The case law, however,

expressly rejects this distinction. A document need not directly concern development of agency "policy" in order to be covered by the privilege. *See Nat'l Wildlife Fed'n*, 861 F.2d at 1118 (rejecting argument that deliberations had to contain "non-binding recommendations on law or policy" in order to be protected by the privilege); *Ctr. for Biological Diversity v. Norton*, 2002 WL 32136200, at *2 (D. Ariz. July 24, 2002) (holding that argument that the "privilege is limited to protecting only agency processes in which 'policy' is formulated, is inconsistent with Ninth Circuit precedent"). As just one example, in *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089 (9th Cir. 1997), the Ninth Circuit upheld the withholding of "portions of a letter from" an official accused of "illegal and unethical management" of a Forest Service office, who was "respond[ing] to the allegations that triggered the inquiry." *Id.* at 1091. The document was deliberative, even though the official was not offering recommendations directly concerning a "policy" matter (such as management of national forests). Instead, he was "fighting to preserve his job and reputation" by offering his "candid and confidential responses . . . to the head of his agency in order to rebut the charges made against him." *Id.* at 1095.

Other courts similarly conclude that documents are protected where they do not directly relate to so-called "policy" matters, and instead concern matters such as how best to advocate for a legislative proposal before Congress, how to manage public opinion, or how to respond to a media report. *See, e.g.*, *Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (memorandum contributing to the agency's study of how to "shepherd [a] bill through Congress" was part of a protectable decisionmaking process); *Nielsen v. U.S. Bureau of Land Mgmt.*, 252 F.R.D. 499, 522 (D. Minn. 2008) (protecting documents involving "how to address the possible public perception" of certain contemplated agency actions); *CREW v. DOL*, 478 F. Supp. 2d 77, 83 (D.D.C. 2007) (email conversation regarding possible response to media article was predecisional and deliberative).

Indeed, a litany of judicial decisions hold that briefing materials and talking points to prepare agency officials for interactions with the press, public, and/or Members of Congress are squarely covered by the privilege, whether in draft or final form. *See, e.g.*, *Protect Democracy Project, Inc. v. DoD*, 320 F. Supp. 3d 162, 176–77 (D.D.C. 2018) (concluding that talking points

"designed to assist Executive Branch officials in responding to inquiries from the press and from Congress" were "predecisional and deliberative" because "[r]evealing their contents would expose the process by which agency officials crafted a strategy for responding to the press and to Congress"); *Competitive Enter. Inst. v. EPA*, 12 F. Supp. 3d 100, 120 (D.D.C. 2014) (holding that internal agency communications discussing "*how* to communicate with members of Congress . . . and *how* to prepare for potential points of debate" are privileged (citation omitted)); *ACLU v. DHS*, 738 F. Supp. 2d 93, 112 (D.D.C. 2010) ("talking points" are pre-decisional and deliberative; the "document itself suggests that a public statement was anticipated at the time of its creation, and given that no official statement has yet been made, the talking points remain ripe recommendations that are ready for adoption or rejection by the Department").

Further, it is immaterial whether the talking points or briefings concern a policy that has already been decided or promulgated, because such materials still precede the agency's decision about how to interact with the press, public and/or legislators. *See Protect Democracy Project*, 320 F. Supp. 3d at 177 ("[C]ourts have generally found that documents created in anticipation of press inquiries are protected even if crafted after the underlying event about which the press might inquire"). *Judicial Watch, Inc. v. DHS*, 880 F. Supp. 2d 105, 111–12 (D.D.C. 2012) (holding that "discussions relating to how to respond to press inquiries are covered by the deliberative process privilege" even where the "documents are created after the underlying policy they discuss is finalized" because they "are generated as part of a continuous process of agency decision making, viz., how to respond to on-going inquiries.").

Many of the 26 documents identified by Plaintiffs contain opinions about how to interact with members of the press or congress, or briefing materials or talking points. *See, e.g.*, Dkt. 473, Exhs. 2–7, 9–13, 18, 25. Although these documents do not contain so-called "policy" recommendations, they nonetheless fall comfortably within the scope of the privilege.

Third, Plaintiffs appear to contend that documents post-dating the release of either the Carter policy or Mattis policy cannot be pre-decisional. Pls.' Statement 2. But "documents dated after [a decision was made] may still be predecisional and deliberative with respect to other, nonfinal agency policies[.]" *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006);

see also Judicial Watch, Inc. v. DHS, 841 F. Supp. 2d 142, 162 (D.D.C. 2012) "(E]ven documents dated after a decision has been made may still be eligible for protection under the deliberative process privilege."). For example, deliberations postdating a particular policy can relate to later decisions about how to execute or modify that policy, and thus can be protected. *See Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009) ("[A]n agency's issuance of a 'final decision' with respect to a particular issue does not necessarily preclude the agency from withholding documents prepared in a subsequent evaluation of the question . . ."); *Bloche v. DoD*, 279 F. Supp. 3d 68, 83 (D.D.C. 2017) (concluding that DoD's discussion of "how [a] current policy is implemented and potential recommendations for changes are properly characterized as predecisional and deliberative").

In addition, documents post-dating a decision also properly fall under the deliberative process privilege "when they recount or reflect pre-decisional deliberations." *Judicial Watch*, 841 F. Supp. 2d at 163. In such instance, although the document itself may post-date the decision, the deliberations recounted or reflected within the document are considered "pre-decisional" because they took place prior to the decision at issue. *See, e.g.*, *North Dartmouth Properties, Inc. v. HUD*, 984 F. Supp. 65, 68 (D. Mass. 1997) (holding that email that "essentially re-state[d]" discussions had prior to the agency's final decision were properly withheld despite the email post-dating the decision). In light of the above principles, Plaintiffs are incorrect that documents post-dating the release of either the Carter policy or Mattis policy cannot be privileged.

In short, there is no basis to conclude that defendants have misapplied the deliberative process privilege. Instead, it is Plaintiffs who misapprehend the proper scope of the privilege in protecting confidential agency deliberations. Plaintiffs request for *in camera* review of a sample of deliberative documents should thus be denied.

b. Plaintiffs Assert A Negligible Error Rate.

Even if, *arguendo*, Plaintiffs were correct that Defendants misapplied the privilege as to the 26 documents they identify, that still would not demonstrate any systematic error on the part of Defendants. Due to court orders and Defendants' voluntary waivers of privilege, Defendants

have produced a significant number of documents that they previously withheld pursuant to the deliberative process privilege, including more than 1,500 such documents over the past year. The fact that Plaintiffs purport to have identified 26 errors out of more than 1,500 documents does not show a widespread misapplication of the privilege. At best, it would demonstrate an error rate of approximately 1.74%—an acceptable rate of error in a case involving tens of thousands of documents. *See Hunton & Williams LLP v. EPA*, 346 F. Supp. 3d 61, 69 (D.D.C. 2018) (declining to order reprocessing of documents "due to the low rate of error observed" by the court); *Schoenman v. FBI*, 763 F. Supp. 2d 173, 188 (D.D.C. 2011) (court not aware of authority providing that 12.9% error rate was sufficient to trigger duty to reprocess documents); *CREW v. DOJ*, 48 F. Supp. 3d 40, 52 (D.D.C. 2014) ("Two mistakes out of 168 documents, []—an error rate of just over one percent—does not come close to the kind of error rate that has prompted courts to require further disclosures.").

In any case, for the reasons discussed above, many of the documents Plaintiffs identify in fact were properly withheld as privileged. At most, only three of the 26 documents chosen by Plaintiffs were not properly subject to the privilege.[5] After nearly two and a half years of discovery, that is the sum total of Plaintiffs' evidence that Defendants have broadly misapplied the privilege—three documents. These three documents comprise approximately 0.2% of the more than 1,500 deliberative documents that have been disclosed in the past year. Considering Plaintiffs themselves concede that "errors occur during document review," Pls.' Response to Special Master Notice 3, Dkt. 472, an error rate of 0.2 % is not cause for further review or sampling of deliberative documents.

II. Plaintiffs' Request Would Circumvent the Ninth Circuit's Administrative Stay.

The Court has already ordered disclosure of nearly all documents still withheld solely on the basis of the deliberative process privilege, including the vast majority of the documents Plaintiffs now seek to have sampled and reviewed. *See* Hr'g Tr. 40–41 (holding that deliberative

[5] One document should not have been withheld because it simply contained a news article. *See* Dkt. 473, Exh. 8. One document should not have been withheld because it was a finalized policy guidance document. *Id.*, Exh. 22. And one should not have been withheld because it was simply a meeting invitation. *Id.*, Exh. 26. Any such errors likely were the result of Defendants being required to review voluminous amounts of documents on short timelines.

process privilege had been overcome as to all Carter Policy working group deliberative documents); Order 7, Dkt. 401 (holding that deliberative process privilege had been overcome as to all documents "relating or referring" to the Department of Defense's Report and Recommendations); Order 5, Dkt. 413 (clarifying that Defendants are required to produce even deliberative documents "never seen or reviewed" by the Panel of Experts). The Ninth Circuit has issued an administrative stay of those orders. *See* Order, Dkt. 415 (staying "[t]he district court's December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in th[e mandamus] petition.").

Nonetheless, Plaintiffs request that the Court review a sample of nearly the very same documents and potentially order their production, and that it do so as a predicate to a possible "further motion (and order)" concerning review and potential production of all deliberative documents. Pls.' Statement 5.In doing so, Plaintiffs ask the Court to initiate a process that would effectively circumvent the Ninth Circuit's stay order.

Moreover, as part of that process, Plaintiffs ask the Court to "determine if the privilege has been overcome pursuant to the *Warner* factors." Pls.' Statement 5. But the question whether the *Warner* factors permit such disclosure is now pending before the Ninth Circuit *See* Defs.' Pet. for Writ of Mandamus 5, Dkt. 414-1 (seeking an "order that plaintiffs are not entitled to any further deliberative documents" from RFPs Nos. 15 and 29 "given plaintiffs' inadequate showing of need"). Where the Ninth Circuit has issued a stay and may address the matter shortly, the Court should refrain from further action with respect to the same documents at issue.

Plaintiffs assert that courts "frequently" rely on *in camera* review and random sampling to "determine whether the privilege has been appropriately invoked." Pls.' Statement 3–4. But this argument misses the point. Here Plaintiffs ask the Court to review samples of documents after they have already ordered disclosure of nearly all of the documents at issue and those orders have been stayed by the Court of Appeals. *See id.* at 4 (citing no case involving prior disclosure order of the same material). And for purposes of the Ninth Circuit's stay, it makes no difference that the Court's prior orders compelled disclosure of broad categories of documents, while Plaintiffs' current proposal involves review and possible disclosure of individual documents. The

documents at issue are largely the same, and as to each of those documents the effect of a production order would be the same.

In any case, if Plaintiffs believe the Ninth Circuit's stay would permit such a review and potential disclosures, the proper recourse is to ask the Ninth Circuit for relief, as it is better positioned to interpret the breadth of its own stay order. In the meantime, this Court should not order review and possible disclosures when production of those same documents has been stayed and is subject to further proceedings before the Court of Appeals.

III. Conclusion

In sum, Defendants have appropriately applied the deliberative process privilege according to applicable case law. Among the documents Plaintiffs handpick as demonstrating a supposed broad misapplication of the privilege, all but three in fact were properly withheld. At best, Plaintiffs have shown that on rare occasions, the privilege did not apply to a particular document. But "the Federal Rules of Civil Procedure do not require perfection," *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 191 (S.D.N.Y. 2012), and Plaintiffs themselves concede that "errors occur during document review," Pls.' Response to Special Master Notice 3, Dkt. 472. Here, the documents at issue amount to a negligible rate of error in a case involving thousands of documents. They simply do not provide a basis to order sampling or *in camera* review. And even if the Court were inclined to order such review, doing so would circumvent and disregard the Ninth Circuit's administrative stay. Accordingly, Plaintiffs' motion should be denied. [6]

[6] Plaintiffs' counsel has represented to Defendants that, if their motion is granted, they will generate the sample of documents by applying the Fisher-Yates shuffle algorithm in the document review platform Relativity, which is that platform's randomization algorithm. Plaintiffs represent that they will apply this algorithm in Relativity to generate a randomly selected list of 350 documents from the universe of documents comprised solely of documents withheld only under the deliberative process privilege (as opposed to documents also withheld under one or more other privileges). However, if the Court determines that sampling and *in camera* review should take place (it should not for the reasons stated above), it should be Defendants who construct the randomized sample, not Plaintiffs. The documents, after all, are in Defendants' possession, and Defendants have the most accurate information about which documents are still being withheld. Plaintiffs' erroneous reliance on a document that was never even withheld for privilege, *see supra*, n.3, demonstrates that Defendants are better situated to provide information about their own documents.

PLAINTIFFS' REPLY[7]

The Government's opposition advances three arguments, all of which lack merit. ***First***, the Government's attempt to meet its burden of defending its privilege claims on the merits fails. For eight of these documents, its only response is agreement with Plaintiffs or else silence. It expressly concedes its privilege claims had no basis for three documents (Exs. 8, 22, and 26), and does not even mention at least five others—Exhibits 1, 14, 15, 16, and 17. It is not difficult to discern why: the privilege claims as to those documents are likewise indefensible. Exhibits 14 and 15, for example, contain talking points drafted and disseminated by the Australian and British governments, respectively.

As to the documents the Government actually purports to defend, it fails to show how or why the privilege applies to any of the documents at issue. Instead, it asserts broad principles without demonstrating that those principles actually apply to the specific documents at issue. Most fundamentally, the Government argues that the Ninth Circuit's adoption of a "functional" approach to the privilege in *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988), somehow extends the scope of the privilege to any deliberations on any decision with the effect that any document that relates to any government decision in any way is privileged. Opp. at 7. But Judge Pregerson explicitly warned against the Government's overbroad reading of *National Wildlife*'s holding in his concurrence, explaining that the adoption of a "functional" test should not be read to confer "unrestrained discretion" to resist disclosure based on the incorrect notion that "nearly everything an agency generates is somehow related to the deliberative process." 861 F.2d at 1124 (Pregerson, J., concurring). Courts have heeded that warning and uniformly rejected the overly broad reading the Government advances. *See, e.g.*, *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 544–45 (W.D. Wash. 2000) ("[A] 'functional' analysis does not obviate the need to determine whether agency policymaking is implicated in the first instance. . . . That simply is not the case here where the process itself is

[7] Plaintiffs anticipate the Government may (as it has done before) move to strike this reply for exceeding one-half page in length. (*See* Dkts. 443, 452.) As in prior cases where the Court rejected this argument, the issues raised in this motion concern numerous discovery requests and Plaintiffs' total contribution to the brief is within LCR 37's 12-page limit. (*See* Dkt. 454 at 3.)

unrelated to any discretionary policy-making."); *Nw. Envtl. Advocates v. U.S. EPA*, 2009 WL 349732, at *6 (D. Or. Feb. 11, 2009) ("Applying the privilege to all documents which precede a governmental decision risks expanding the privilege beyond its purpose, to a point where it protects all documents which precede a governmental action.").

Nevertheless, the Government applies its overbroad view of the privilege to three specific categories of documents. Moreover, it again misstates the law and likewise fails to explain with any specificity how the documents at issue are privileged.

Draft Documents. The Government broadly asserts that "draft documents" are at the "core" of the privilege such that all drafts "unquestionably are covered by the privilege." Opp. at 7-8. But the law is to the contrary: the Ninth Circuit has rejected a *per se* rule that drafts are privileged, and courts recognize that draft documents are *not* privileged where they do not reveal the author's deliberative opinions, the agency's decisionmaking, or policy formulation. *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 1018 (9th Cir. 2019) (holding "draft" opinions not privileged where they did not reveal agencies' "internal deliberative processes"); *First Resort, Inc. v. Herrera*, 2014 WL 988773, at *4 (N.D. Cal. Mar. 10, 2014) (compelling production of draft press release because it was "not deliberative in that it would expose only a description of the legislation and quotes from Supervisor Cohen, not any decision-making process"). Thus, Exhibits 19 and 21, which the Government cites as examples, are not privileged simply because they are draft documents containing marginal, non-deliberative comments. Those comments do not reveal the "deliberative process" with respect to any agency policy or decision. This makes them readily distinguishable from the draft materials found privileged in the Government's supporting authorities. For example, *National Wildlife* involved draft documents that were themselves statements of agency policy (a "Forest Plan" and "Environmental Impact Statement"). Even then, the privilege was limited to pages that discussed draft plans that included "a particular proposed course of action" as well as a "comparison of alternative plans." 861 F.2d at 1121–22.

Talking Points and Briefing Materials. The same flaws pervade the Government's sweeping assertion that the privilege protects all documents that contain talking points or

briefing materials. Opp. at 10. Where, as here, such documents do not disclose deliberations concerning substantive agency policies or decisions, the privilege does *not* apply. *See, e.g.*, *ACLU of Mass., Inc. v. U.S. ICE*, 2020 WL 1429882, at *6 (D. Mass. Mar. 24, 2020) (compelling disclosure of three versions of "draft talking points"); *Herrera*, 2014 WL 988773, at *5 (holding communications to "prepare for an interview" were not intended to "assist an agency decisionmaker in arriving at a decision' contemplated by the deliberative process privilege." (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975))); *Fox News Network, LLC v. U.S. Dep't of Treasury*, 911 F. Supp. 2d 261, 276 (S.D.N.Y. 2012) ("[C]ommunications concerning how to present agency policies to the press or public, although deliberative, typically do not qualify as substantive policy decisions protected by the deliberative process privilege."). And once again, the Government offers no explanation how its broad legal assertion means the privilege applies to the documents it cites as examples. Opp. at 10. Exhibit 7 simply summarizes and reprints verbatim media coverage after the announcement of the Carter Policy on June 30, 2016, and Exhibit 2 contains generic comments on a media article and nothing that borders on revealing agency decisionmaking. Even taking the Government's position at face value, the Government makes no effort to square the substance of these documents with the authorities it cites. Its principal case on this point—*Maricopa Audubon Society*—found privileged communications from an official accused of misconduct to the Chief of the Forest Service that were sent to aid in the agency's official response to the misconduct allegations. Nothing of that sort is presented in the documents the Government claims are privileged here.

Post-Decisional Documents. Lastly, the Government takes issue with an argument Plaintiffs do not make—that "documents post-dating the release of either the Carter policy or Mattis policy cannot be privileged," Opp. at 11—and does not explain how it bears on any of the documents at issue. Plaintiffs do not dispute that a document that chronologically post-dates an agency decision *may* qualify as privileged under certain circumstances. But the Government carries the burden of identifying "a specific decision to which the document is predecisional" and showing the discussions reveal the deliberative process. *Maricopa v. Audubon Soc'y v. U.S.*

Forest Serv., 108 F.3d 1089, 1094 (9th Cir. 1997); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (holding it "would be a serious warping of the meaning of the word" to deem "predecisional" documents that "discuss established policies and decisions" in an "ongoing audit process" of a policy).

At bottom, the Government has the burden to establish that these documents are privileged, and nothing in its response comes close. Fortunately, the Court need not take either party's word for it, because these 26 documents speak for themselves—and speak volumes about the Government's approach to deliberative process privilege in this case. Put simply, the Government's attempt to defend its retracted privilege claims does not withstand scrutiny and only underscores that it is the Government—not Plaintiffs—who "misapprehend[s] the proper scope of the privilege." Opp. at 11.

Second, the Government argues that *in camera* review is unwarranted and unnecessary because Plaintiffs have identified only a "negligible" misapplication of the privilege. But that assertion rests on a fundamental distortion of the facts that leads to incorrect (and ultimately meaningless) calculations. For one, the Government argues that these are the only documents that Plaintiffs could identify out of "more than 1,500 deliberative documents that have been produced over the past year." But Plaintiffs did not purport to identify every previously-withheld document they believe was improperly claimed as privileged. Rather, as stated clearly in their submission regarding the appointment of the Special Master, the examples cited are from the Governments' recent production of approximately 300 documents, which prompted this motion. (Dkt. 472 at 2.) Thus, the Government's denominator is wrong by a factor of five, making its error rate "calculation" incorrect from the outset.

Moreover, the Government's numerator is also wrong—it treats the documents that Plaintiffs referenced as exhaustive when Plaintiffs made clear all along that these exhibits were merely illustrative. Plaintiffs' submission explained that they believed the "***vast majority*** had no colorable claim of privilege in the first place" and provided examples. *Id.* (emphasis added). The Court should disregard the Government's back-of-the-napkin math that purports to derive an error rate. And more to the point, if the Government is confident that it made only a negligible

number of errors in its privilege review, it should have nothing to fear from *in camera* review of a random sample of 350 documents, which would only confirm the correctness of their privilege determinations.

Third, the Government asserts that Plaintiffs' requested relief "circumvents" the Ninth Circuit's administrative stay relating to the Government's pending mandamus petition ("Petition"). Not so. Both the Petition and the Ninth Circuit's order—which is administrative only at this point and does not address the merits of the Government's stay request—applies only to this Court's orders that the privilege claims as to documents responsive to two of the Plaintiffs' document requests (RFP Nos. 15 and 29) were overcome under *Warner*. The stay does not purport to stay other discovery or this Court's continued jurisdiction to consider other issues, including the separate question whether the privilege even applies and was properly invoked, with respect to the thousands of responsive documents withheld by the Government.

Moreover, the Government's concerns are entirely theoretical and premature at this point. The stay would not even arguably come into play unless and until the Court orders production of documents that are responsive to RFP Nos. 15 and 29. And, in any event, Plaintiffs' proposed framework provides a process whereby the Government can raise such concerns, and invoke the stay, should this hypothetical concern materialize. Plaintiffs' proposed framework provides that, if the Court orders any documents produced, the Government will have seven days to raise any objection to such production, including that a document is responsive to RFP Nos. 15 and 29 and subject to the stay.

In short, the Government's pending Petition challenges only the Court's finding that Plaintiffs overcame the Government's privilege claims under the *Warner* factors for documents responsive to RFP Nos. 15 and 29. Moreover, even as to documents responsive to RFP Nos. 15 and 29, the application of *Warner* that the Government challenges in their Petition presupposed the privilege applies, meaning the threshold question whether the Government is properly invoking the privilege is not before Ninth Circuit. That issue can and should be considered by the Special Master and the Court without encroaching on the Ninth Circuit's administrative stay. Moreover, even as to the *Warner* factor analysis, the Government's complaint in its Petition is

that the Court did not assess the *Warner* factors on a sufficiently "granular" basis. *See* Pet. at 5, 32; Pet. Reply at 6. But Plaintiffs' motion proposes the most "granular" review possible—a document-by-document review under *Warner* of any documents the Court finds properly fall within the privilege, to determine whether the privilege is overcome. The Government should not be permitted to blockade the very type of relief it is seeking from the Ninth Circuit, nor claim to be prejudiced by receiving it. The Court should grant Plaintiffs' motion and address Plaintiffs' concerns about production of any documents the Government claims are subject to the Ninth Circuit's administrative stay if and when those now hypothetical concerns materialize.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move the Court pursuant to Federal Rule of Civil Procedure 26 and Local Rule 37 for entry of the following Order:

1. The Special Master shall conduct an *in camera* review of a random sample of 350 documents from the Government's privilege logs withheld solely on the basis of the deliberative process privilege. Plaintiffs will use a Relativity randomization algorithm to select the documents and will identify them for the Government within two business days of the Court's Order.

2. Within three business days of receiving the list of 350 documents from Plaintiffs, the Government shall produce the documents to the Court and Special Master *in camera.*

3. Following his review, the Special Master shall recommend to the Court (1) a list of those documents for which he finds the privilege has been improperly invoked (*List 1*), and (2) a list of those documents for which he finds the Government has validly asserted the privilege (*List 2*).

4. Each party shall have one week (seven calendar days) to file objections to the Special Master's recommendations, and the opposing party will have three business days to respond.

5. Consistent with the Court's appointment of the Special Master (Dkt. 479), the Court shall review the Special Master's determinations *de novo*. For those documents in List 2—those which the Government has validly asserted the privilege—the Court shall separately determine if

the privilege has been overcome pursuant to the *Warner* factors.

6. The Court shall issue an Order identifying (a) those documents for which the deliberative process privilege has been improperly invoked, (b) those documents for which the privilege has been overcome pursuant to the *Warner* factors, and (c) those documents that are properly withheld pursuant to the privilege.

7. Each party shall have one week (seven calendar days) to file a motion to reconsider the Court's ruling and/or object to the production of any document the Court finds should be produced, and the opposing party shall have three business days to respond.

8. The Government shall produce all documents, if any, which the Court orders produced within one week after the Court's initial Order or Order on a motion to reconsider, whichever is later.

Respectfully submitted, May 4, 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 May 4, 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 DEFENDANTS' DELIBERATIVE PROCESS PRIVILEGE CLAIMS

NOTE ON MOTION CALENDAR:
May 5, 2020

This matter comes before the Court on the foregoing LCR 37 Joint Submission Regarding Defendants' Deliberative Process Privilege Claims (the "Joint Submission"). The Court, having considered the parties' arguments and finding good cause therefore, GRANTS Plaintiffs' portion of the Joint Submission.

IT IS HEREBY ORDERED:

1. The Special Master shall conduct an *in camera* review of a random sample of 350 documents from the Government's privilege logs withheld solely on the basis of the deliberative process privilege. Plaintiffs will use a Relativity randomization algorithm to select the

documents and will identify them for the Government within two business days of the Court's Order.

2. Within three business days of receiving the list of 350 documents from Plaintiffs, the Government shall produce the documents to the Court and Special Master *in camera.*

3. Following his review, the Special Master shall recommend to the Court (1) a list of those documents for which he finds the privilege has been improperly invoked (*List 1*), and (2) a list of those documents for which he finds the Government has validly asserted the privilege (*List 2*).

4. Each party shall have one week (seven calendar days) to file objections to the Special Master's recommendations, and the opposing party will have three business days to respond.

5. Consistent with the Court's appointment of the Special Master (Dkt. 479), the Court shall review the Special Master's determinations *de novo*. For those documents in List 2—those which the Government has validly asserted the privilege—the Court shall separately determine if the privilege has been overcome pursuant to the *Warner* factors.

6. The Court shall issue an Order identifying (a) those documents for which the deliberative process privilege has been improperly invoked, (b) those documents for which the privilege has been overcome pursuant to the *Warner* factors, and (c) those documents that are properly withheld pursuant to the privilege.

7. Each party shall have one week (seven calendar days) to file a motion to reconsider the Court's ruling and/or object to the production of any document the Court finds should be produced, and the opposing party shall have three business days to respond.

8. The Government shall produce all documents, if any, which the Court orders produced within one week after the Court's initial Order or Order on a motion to reconsider, whichever is later.

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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