

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

RICHARD ROE, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:18-cv-1565 (LMB/IDD)
	)	
RICHARD V. SPENCER, Acting Secretary of	)	
Defense, <u>et al.</u> ,	)	
	)	
Defendants.	)	

ORDER

On July 12, 2019, plaintiffs filed a Motion to Compel Documents and Information Withheld on the Basis of Deliberative Process Privilege (“Motion to Compel”), in which they seek the production of “eight emails to and from senior officials regarding the Air Force’s decision to refer asymptomatic HIV-positive Airmen into the Disability Evaluation System and to separate them from service.” [Dkt. 185]. On August 1, 2019, following briefing but before the Motion to Compel could be resolved, all proceedings in this action were stayed pending the outcome of defendants’ interlocutory appeal of the Court’s entry of a preliminary injunction. [Dkt. 244]. On March 3, 2020, after the preliminary injunction was affirmed, the formal mandate was returned. [Dkt. 253]. On March 5, 2020, during a telephone conference with attorneys for all parties present, the parties confirmed that the Motion to Compel was ripe for resolution and that no further briefing was necessary. [Dkt. 260].

The Court has previously explained, in a related civil action, that the following legal framework governs motions to compel information withheld on the basis of deliberative process privilege.

The law affords a qualified privilege to documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. This deliberative process privilege rests on the notion that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

The deliberative process privilege is limited in two relevant ways. First, as a threshold matter, it applies only to those portions of documents that are predecisional and deliberative in nature. For instance, it does not shield statements about a policy after the policy has been finalized, and it does not protect purely factual information, unless it is inextricably intertwined with deliberative material. Second, when a party seeks agency materials, the validity of the privilege depends upon a balancing of the public interest in nondisclosure with the need for the information as evidence. In striking this balance, the common law of discovery has developed a number of factors for the court to consider, including: (1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.

In assessing plaintiffs' motion to compel, the Court must answer two distinct questions. The first is whether the deliberative process applies to the documents in dispute . . . . If the privilege applies, the Court must then assess those documents to which the privilege applies to determine whether it is overcome.

[Harrison v. Spencer, Case No. 18-cv-641, Dkt. 175, at 7–9 (internal citations, quotations, and alterations omitted)]. Defendants have submitted the eight emails at issue for in camera review. [Dkt. 255]. Having reviewed the emails, plaintiffs' Motion to Compel will be denied.

With regard to the first question, the deliberative process privilege plainly applies to the eight emails. They are predecisional, in that all of them predate and were prepared in order to assist in the drafting of at least one of Major General LaBrutta's three memoranda, dated October 11, 2017, June 6, 2018, and September 26, 2018, respectively, regarding the retention of Airmen with asymptomatic HIV. See City of Va. Beach v. U.S. Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993) They are also deliberative, in that all of them reflect the Air Force's

consultative process, including the recommendations of various interested parties. See id. Plaintiffs do not appear to contend otherwise; rather, they focus their arguments on the second question.

With regard to the second question, the balance of the four public interest factors weighs in favor of nondisclosure. First, although plaintiffs argue that the emails are related to the defendants' stated and conceivable justifications for their policies regarding the retention of Airmen with asymptomatic HIV, the Court finds that these emails shed little if any light on that issue. Second, although plaintiffs argue that defendants are the only source of this information, they have already sought and received a vast amount of information, including deliberative information, through over two dozen depositions and thousands of pages of document production. Third, it is undisputed the government is involved in this litigation, which weighs in favor of disclosure. Lastly, although plaintiffs argue that a protective order preventing public disclosure of the emails minimizes any hinderance to open communication, disclosure in litigation can still chill such communication, and there is a significant risk that chilling the communications of senior military officials will have a negative impact on the military's policy-making process.

For these reasons, it is hereby

ORDERED that plaintiffs' Motion to Compel [Dkt. 184] be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this <sup>th</sup>27 day of March, 2020.

Alexandria, Virginia

  
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Leonie M. Brinkema  
United States District Judge