

The Honorable Marsha J. Pechman

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**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

**PLAINTIFFS’ OPPOSITION TO THE
GOVERNMENT’S MOTION TO STAY
COMPLIANCE WITH JULY 15, 2020
COURT ORDER**

NOTE ON MOTION CALENDAR:
July 31, 2020

1 Since the filing of the Government’s second mandamus petition, this Court has had the
2 opportunity to “look under the hood” of the Government’s privilege claims and, for the first
3 time, review a significant number of documents *in camera* that the Government has withheld
4 pursuant to the deliberative process privilege. The result of that *in camera* review was telling: the
5 Court found that the Government had no colorable claim of privilege over the vast majority of
6 documents submitted for review, and in the words of the Court, “the Government has been
7 overbroad in its privilege assertions, straying far outside the bounds of the deliberative process
8 privilege.” (Dkt. No. 522 at 5.) The Court explained that “[t]his blanket assertion of privilege
9 without close analysis or articulated rationale must stop” and that “[t]he Government can and
10 should do better.” (*Id.* at 3, 5.) The Government’s litigation strategy is now clear: over-assert the
11 deliberative process privilege over tens of thousands of documents to overwhelm the Court and
12 discourage document-by-document review of baseless privilege assertions, while at the same
13 time demanding that only a document-by-document review will suffice to test those privilege
14 claims.

15 After completing its *in camera* review of the latest batch of documents withheld by the
16 Government pursuant to the deliberative process privilege (“DPP”), the Court issued a ruling on
17 July 15, 2020 setting forth a straightforward discovery management tool that establishes two pre-
18 decisional timeframes related to the two policies at issue in the case: the Carter policy and the
19 Mattis policy. If a document falls within either of those timeframes, the document is
20 presumptively subject to the deliberative process privilege and need not be produced; if the
21 document falls outside those timeframes, the document is presumptively not privileged and must
22 be produced. The order merely creates a presumption of privilege: if the Government contends a
23 document falling outside the two pre-decisional timeframes is privileged, it can still seek relief
24 from the Court or claw back the document under the protective order.

25 Yet despite it being this Court’s province to manage discovery, the Government filed a
26 motion to stay the Court’s order pending disposition of the pending mandamus petition by the
27 Ninth Circuit. The mandamus petition, however, relates to the entirely separate issue of whether
28 Plaintiffs overcame the deliberative process privilege under *Warner* with respect to documents

1 responsive to Request for Production Nos. 15 and 29, *not* whether any of those documents met
2 the threshold deliberative and pre-decisional requirements for a *prima facie* assertion of the
3 deliberative process privilege. The Government’s desperate attempt to stay compliance with this
4 Court’s July 15, 2020 Order should be denied and seen for what it is: abuse of the civil discovery
5 process to frustrate Plaintiffs’ ability to seek justice and relief from the Government’s facially
6 discriminatory policy.

7 PROCEDURAL HISTORY

8 **A. This Court’s prior deliberative-process rulings and the Government’s repeated** 9 **refusals to comply.**

10 Plaintiffs will not repeat in detail the long history of the Government’s sweeping assertion
11 of the deliberative process privilege and this Court’s many prior rulings compelling the
12 Government to produce certain documents withheld on that basis. (*See* Dkt. Nos. 245, 266, 273,
13 299, 364, 380, 385, 394, 398, 399, 401, 408, 410, 413, 434, 454, 469, 476, 514, 522, 545, 549.)
14 In short, Plaintiffs initially filed a motion to compel the production of documents withheld
15 pursuant to DPP over two years ago in May 2018 (Dkt. No. 245), which this Court granted in
16 July 2018, finding that Plaintiffs had overcome the privilege under the balancing test set forth in
17 *F.T.C. v. Warner Communications*, 742 F.2d 1156, 1161 (9th Cir. 1984). (Dkt. No. 299.) The
18 Government sought relief from the order in a mandamus petition filed with the Ninth Circuit,
19 which, in June 2019, ruled that the second and third *Warner* factors “favors Plaintiffs,” but
20 remanded to this Court to perform additional analysis on the other two factors — “to evaluate the
21 relevance of all of the requested information, at least in terms of balancing production of
22 materials against the military’s countervailing confidentiality interest.” *Karnoski v. Trump*, 926
23 F.3d 1180, 1206 (9th Cir. 2019). The Ninth Circuit did “not mandate any particular course of
24 action” on remand, and instead, placed the burden on the Government to “persuasively argue”
25 for “a more granular analysis” if appropriate for certain categories of documents. *Id.*

26 Plaintiffs renewed their motion to compel in August 2019 (Dkt. No. 364), and the Court
27 thereafter embarked on a meticulous process of separately evaluating each of Plaintiffs’ RFPs
28 under *Warner*’s balancing test. As part of this process, Plaintiffs identified their top-priority

1 RFPs, including RFP 29, which seeks documents relating to the 44-page February 2018 DoD
2 Report & Recommendation (the “DoD Report”) and Panel Working Groups, and RFP 15, which
3 seeks documents relating to the Carter policy. On December 10, 2019, the District Court heard
4 extensive argument on these requests, and thereafter issued a written order noting that the
5 Government had agreed to produce documents responsive to RFP 15 and compelling the
6 production of documents responsive to RFP 29 because the Government’s DPP assertion had
7 been overcome. (Dkt. No. 401.) More than a month later, and after failing to comply with the
8 Court’s order, the Government filed motions for “clarification” and to stay. (Dkt. No. 405.) At a
9 status conference on February 3, 2020, the Court expressed serious concerns that “the
10 government is delaying and stalling,” noting that at the hearing on December 10, 2019, the
11 Government’s counsel “never indicated that he did not understand” the Court’s order or needed
12 clarification. (Dkt. No. 412 at 4:15–5:1.) The Court nonetheless granted the Government’s
13 requested clarification on February 7, 2020, confirming Defendants were obligated to produce
14 responsive documents from working groups and relating to the DoD Report. (Dkt. No. 413.)

15 The Government again refused to follow the Court’s order and filed a second mandamus
16 petition with the Ninth Circuit. The Government’s petition seeks the following relief:

17 This Court should reverse the district court’s orders of December 18, 2019,
18 February 3, 2020, and February 7, 2020, and order that plaintiffs are not
19 entitled to any further deliberative documents from the two requests for
20 production (RFPs) at issue in these orders—RFP 29 and RFP 15—given
21 plaintiffs’ inadequate showing of need under the proper standard for
22 overcoming the deliberative process privilege. In the alternative, this Court
should vacate the district court’s orders and order the district court to conduct a
more granular analysis that properly considers plaintiffs’ purported need for
the deliberative documents and the government’s interest in confidentiality.

23 (Dkt. No. 414-1 at 5.) This second mandamus petition has been fully briefed since March and the
24 parties await a decision from the Ninth Circuit.

25 **B. This Court’s *in camera* review of the Government’s withheld documents.**

26 While the Government’s second mandamus petition has been pending, Plaintiffs have
27 pressed for the disclosure of other documents withheld by the Government, including those
28 withheld on grounds of DPP. *First*, Plaintiffs moved to compel the production of documents the

1 Government had originally withheld as non-responsive, but were part of “families” of documents
2 containing other privileged documents. (Dkt. No. 449.) The Court granted Plaintiffs’ motion and
3 ruled that entire “families” of documents must be produced, including non-responsive family
4 members. (Dkt. No. 454). The Government thereafter informed the Court that certain of the non-
5 responsive documents were, in fact, privileged and therefore could not be produced. The Court
6 *sua sponte* ordered those documents produced for *in camera* review by March 27, 2020. (Dkt.
7 No. 464 at 2; *see also* Dkt. No. 487.) After a document-by-document review, the Court
8 determined that of the 113 documents submitted *in camera* that were deemed relevant and not
9 subject to other privileges, the Government erroneously withheld 96 documents as subject to
10 DPP, or **85% of the total documents submitted**. (Dkt. No. 522.) The Court determined that “the
11 Government has been overbroad in its privilege assertions, straying far outside the bounds of the
12 deliberative process privilege,” explaining that “[t]his blanket assertion of privilege without close
13 analysis or articulated rationale must stop” and that “[t]he Government can and should do
14 better.” (*Id.* at 3, 5.)

15 **Second**, Plaintiffs moved for the production of third-party communications that the
16 Government withheld pursuant to the deliberative process privilege, on grounds that the privilege
17 generally does not apply to the Government’s communications with third parties. (Dkt. No. 438.)
18 The Court granted Plaintiffs’ motion, and in compliance with that order, the Government
19 produced 307 documents to Plaintiffs on March 13, 2020. The Court also requested that
20 approximately 1500 pages of documents exchanged with the RAND Corporation and Kennell &
21 Associates be produced *in camera*, and after review, found only **one document** properly
22 withheld pursuant to the deliberative process privilege. (Dkt. No. 509.)

23 When Plaintiffs reviewed the 307 third-party documents that the Court had ordered
24 produced, they found that as to many, if not most, no colorable claim of privilege existed,
25 because the documents were post-decisional, non-deliberative, or both. This finding further
26 contributed to Plaintiffs’ concern that the Government has been broadly misapplying the
27 privilege to documents that never should have been withheld in the first place. To test their
28 suspicion, Plaintiffs filed a motion to compel the production of 350 randomly selected

1 documents withheld solely on the basis of DPP for *in camera* review. (Dkt. No. 497.) The Court
2 granted Plaintiffs’ motion, finding that “Plaintiffs have raised significant and legitimate concerns
3 that Defendants are improperly withholding documents where no colorable claim of privilege
4 exists.” (Dkt. No. 514 at 3.)¹ After reviewing those documents, the Court found that “Defendants
5 have inappropriately asserted the privilege over many of the submitted documents” and ordered
6 the Government to produce an additional 500 randomly selected documents withheld solely on
7 the basis of DPP for *in camera* review so the Court could “assess the extent of Defendants’
8 assertion of the privilege and to provide guidance to Defendants on any patterns of erroneous
9 assertion of the privilege....” (Dkt. No. 536 at 3.) Based on this review, on July 15, 2020, the
10 Court found that “Defendants have broadly over-asserted the privilege” (Dkt. No. 545 at 11) and
11 issued a two-part ruling (the “July 15 Order”).

12 First, the Court individually ruled on the 850 documents submitted *in camera* and found
13 that 88% *were not privileged*, and ordered those documents produced. Second, as a discovery
14 management tool, the Court ruled that documents falling outside the deliberative timeframes for
15 the two policies at issue in the litigation are presumptively not privileged. Specifically, the Court
16 ordered that the Government must produce all documents that fall outside the date ranges of July
17 13, 2015 to June 30, 2016, relating to the Carter policy, and September 14, 2017 to January 11,
18 2018, relating to the Mattis policy, as well as all documents or portions of documents that are
19 purely factual. (Dkt. No. 545, *as amended* Dkt. No. 549.) For documents relating to these
20 policies within the referenced deliberative timeframes, the documents are presumptively
21 privileged and the Government was ordered to produce an updated privilege log reflecting those
22 documents. Importantly, the Court only ruled that documents outside these timeframes are
23 *presumptively* not privileged, but “if it turns out that some documents falling outside the
24 predecisional and post-decisional date ranges are properly the subject of DPP, specific
25 documents can be brought to the Court’s attention on subsequent motion.” (Dkt. No. 545 at 6-7.)
26

27 ¹ On April 9, 2020, the Court appointed retired United States Magistrate Judge James P. Donohue as Special Master
28 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. No. 479 at 3-4.) Special Master
Donohue is volunteering his time to assist in this case.

1 Further, “all documents produced will still be subject to the protective order in place,” which
2 “includes a claw-back provision for documents produced erroneously.” (*Id.*) The Court also
3 explained that “[t]his Order does not reach the issue of whether Plaintiffs can overcome
4 Defendants’ privilege assertions under the factors described in *Warner*.” (*Id.* at 11.) Five days
5 later, the Government once again refused to comply and moved to stay compliance with the
6 Court’s order. (Dkt. No. 547.)

7 ARGUMENT

8 While the Government’s repeated motions to stay this Court’s discovery orders might
9 suggest otherwise, a stay pending appeal is not a matter of right. It is an extraordinary measure,
10 taken only if “irreparable injury might otherwise result.” *Washington v. Trump*, 847 F.3d 1151,
11 1164 (9th Cir. 2017) (citation omitted). In deciding whether such extraordinary circumstances
12 exist, the Court must consider whether the Government “has made a strong showing that [it] is
13 likely to succeed on the merits, (2) whether the [Government] will be irreparably harmed absent
14 a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the
15 proceeding; and (4) where the public interest lies.” *Id.* (citation omitted). For the reasons set forth
16 below, the Government does not satisfy any of these requirements.

17 **A. The Government’s pending mandamus petition is irrelevant to this Court’s July 15** 18 **Order.**

19 As a threshold matter, the Government’s stay motion should be denied because it is based
20 on a false premise: that the Ninth Circuit’s decision on the Government’s pending mandamus
21 petition will provide “guidance” on the issues addressed in the Court’s order. However, the
22 mandamus petition concerns this Court’s orders that the Government’s privilege claims as to
23 documents responsive to RFP Nos. 15 and 29 were overcome under *F.T.C. v. Warner*
24 *Communications*, 742 F.2d 1156. The underlying orders challenged in the mandamus petition did
25 not rule on the threshold issue of whether those documents were *prima facie* subject to the
26 privilege. The mandamus petition presupposed that DPP applied to the disputed documents,
27 turning its attention instead to whether the Court’s *Warner* analysis was sufficiently granular.
28 (See Dkt. No. 414-1 at 14-15.) By contrast, the July 15 Order addresses the threshold question of

1 whether the Government properly asserted DPP in the first place. Reviewing over a thousand
2 documents *in camera*, the Court determined that the Government had broadly misapplied the
3 privilege to withhold documents, as described above. The Court expressly stated that “[t]his
4 Order does not reach the issue of whether Plaintiffs can overcome Defendants’ privilege
5 assertions under the factors described in *Warner*.” (Dkt. No. 545 at 11.) As such, the Ninth
6 Circuit’s decision on the mandamus petition, which concerns the application of *Warner*, is no
7 basis to stay compliance.

8 The Government also broadly asserts that the District Court’s approach to the pre-
9 decisional prong of the DPP analysis is “likely to conflict with any Ninth Circuit guidance.”
10 (Dkt. No. 547 at 8.) Putting aside the fact that the standard for whether a document qualifies as
11 pre-decisional is not before the Ninth Circuit, the Government misconstrues both the law and the
12 July 15 Order. To assert DPP, the Government bears the burden of identifying the “specific
13 decision to which the document is predecisional.” *Maricopa v. Audubon Soc’y v. U.S. Forest*
14 *Serv.* 108 F.3d 1089, 1094 (9th Cir. 1997). This requirement was not abrogated by *National*
15 *Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1120 (9th Cir. 1988). (See
16 Dkt. 547 at 7). Nor did the Ninth Circuit hold that all drafts are subject to DPP. There, the
17 documents at issue were drafts of the very governmental policies and decisions in question (a
18 “Forest Plan” and “Environmental Impact Statements,” and “previews” that included
19 “comments, criticisms, and recommendations” concerning those policies), which revealed and
20 were part of the deliberative process at issue in the litigation. *Nat’l Wildlife*, 861 F.2d at 1114-15.

21 The specific policies at issue in this case are (1) the Carter Policy and (2) the Mattis Policy.
22 The Court correctly focused on these policies in determining the documents to which DPP is
23 *prima facie* applicable, and the Government’s contention that the Court was wrong to do so
24 makes no sense. Of course the Government may possess documents related to other policies not
25 at issue in this litigation, but the discovery in question largely concerns these specific policies. If
26 there is pre-decisional material related to a policy not contemplated by the Court’s July 15 Order,
27 the Government has recourse, discussed further below. For example, an email containing a
28 recommendation regarding an unrelated military personnel policy (such as the July 24, 2017

1 email to Secretary Mattis regarding an unrelated discussion with the National Security Advisor,
2 *see* Dkt. No. 547 at 8), could be redacted to account for any non-responsive privileged material.
3 The July 15 Order does not hold that there are no circumstances under which a document falling
4 outside of the two pre-decisional timeframes cannot be privileged, and even provides a process
5 to address documents outside these time periods that the Government nonetheless claims are
6 privileged. But the Court was reasonable in rooting its analysis in the two specific policies at
7 issue and creating a discovery management process that attempts to rectify the Government's
8 wide-scale misassertion of the privilege. Had the Government not "broadly over-asserted the
9 privilege" (Dkt. No. 545 at 11), creating presumptions of privilege based on timeframes may not
10 have been necessary, but the process set forth in the July 15 Order is entirely reasonable given
11 the Government's gross abuse of DPP to shield itself from basic discovery obligations.

12 Finally, the Government provides no explanation whatsoever as to why it cannot produce
13 the 751 documents (out of 850) reviewed by the Court *in camera* that were determined not to be
14 privileged. (*See* Dkt. Nos. 545, 551.) There is no reason to further delay production of these
15 documents.

16 **B. A stay will harm Plaintiffs and further delay this proceeding, which has already been**
17 ***significantly* delayed by the Government.**

18 Plaintiffs are entitled to "the just, speedy, and inexpensive determination" of this action.
19 Fed. R. Civ. P. 1. At each turn, the Government has misasserted the deliberative process
20 privilege and stone-walled the production of critical documents in the face of numerous orders
21 overruling their privilege assertions. The Government, of course, has an incentive to delay. By
22 delaying production, the Government avoids producing documents that would further evidence
23 its baseless privilege claims and allow Plaintiffs to test the Government's assertion that the
24 Mattis Policy was unrelated to and developed completely separately from the President's Ban
25 and August 25, 2017 directive. Moreover, the longer the delay, the longer the Government's
26 discriminatory policy remains in force, since the preliminary injunction is no longer in place. The
27 Government even acknowledges the harm caused by the absence of a preliminary injunction
28 (Dkt. No. 547 at 6), but nonetheless claims Plaintiffs face no harm because they did not oppose

1 pushing back the October 2020 trial date. But that was due to the many delays in discovery and
2 the Government's efforts to force this case to trial before Plaintiffs' challenges to the
3 Government's massive DPP claims were resolved. These delays are entirely of the Government's
4 making: two mandamus petitions, numerous stays, and a complete disregard of this Court's
5 discovery management and rulings.

6 Also baseless is the Government's argument that Plaintiffs are not harmed because "it is
7 likely that the Ninth Circuit will decide the petition in short order." (Dkt. No. 547 at 4.) This
8 speculative argument has no basis in reality, and the Ninth Circuit took ten months to decide the
9 Government's first mandamus petition. Plaintiffs should not yet again be forced to further delay
10 their day in court, all the while suffering from the very real effects of a facially discriminatory
11 military policy.

12 **C. The Government will not suffer irreparable harm by complying with this Court's**
13 **July 15 Order.**

14 A further, essential prerequisite for a stay is a showing that, absent a stay, the movant will
15 be irreparably harmed. *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012); *Leiva-Perez v.*
16 *Holder*, 640 F.3d 962, 970 (9th Cir. 2011). The Government does not, and cannot, show such
17 irreparable harm here. As an initial matter, compliance with the July 15 Order will not result, as
18 the Government suggests, in the "irretrievable disclosure of thousands of privileged documents."
19 (Dkt. No. 547 at 3.) Privilege determinations are routinely made at the district court without an
20 immediate right to appeal, and such decisions can be rectified on appeal after judgment if an
21 error was made. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 101 (2009) ("Appellate
22 courts can remedy the improper disclosure of privileged material in the same way they remedy a
23 host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for
24 a new trial in which the protected material and its fruits are excluded from evidence.").

25 Moreover, the Court's July 15 Order is only a discovery management tool that creates a
26 *presumption* that documents are or are not subject to the deliberative process privilege. The
27 Court explained that "if it turns out that some documents falling outside the pre-decisional and
28 post-decisional date ranges are properly the subject of the DPP, specific documents can be

1 brought to the Court’s attention on subsequent motion. The Order includes a claw-back provision
2 for documents produced erroneously.” (Dkt. No. 545 at 6-7.) The Court found this presumption
3 reasonable given the Government’s broad misapplication of the privilege after reviewing over a
4 thousand documents *in camera*. And, of course, the Government can redact any privileged
5 information regarding unrelated and non-responsive military policies.

6 Plaintiffs suggest, however, that the Government’s concerns could be entirely assuaged if
7 the Court clarified two aspects of its July 15 Order. **First**, although the Court ruled that
8 documents falling outside of the two pre-decisional timeframes can be brought to the Court’s
9 attention on further motion, Plaintiffs suggest that the Court make clear in its order that the
10 Government can submit any documents it claims are nonetheless privileged for *in camera* review
11 in lieu of production and without separate motion practice. Such a process cures any concern that
12 properly privileged documents will be inadvertently produced. To avoid overwhelming the Court
13 or encouraging misuse of this process, Plaintiffs propose that the Court require the Government
14 to make a *prima facie* showing of DPP when it submits a document for review, namely, by
15 identifying the specific policy at issue, the name of the Government employee deliberating the
16 policy, and the general subject matter being deliberated. Plaintiffs further suggest that the Court
17 remind the Government of its good faith obligations under Rule 37 and the potential for
18 sanctions if those obligations are violated.

19 **Second**, Plaintiffs suggest that the Court order the Government immediately produce for *in*
20 *camera* review the withheld documents dated January 11, 2018 to February 22, 2018, so that the
21 Court can assess whether DPP was properly asserted with regard to these documents, rather than
22 taking the Government’s word that these documents are pre-decisional. The Government’s
23 primary objection to the Court’s two pre-decisional timeframes is that the January 11, 2018 end
24 date for the Mattis policy omits the timeframe between that date and February 22, 2018, when
25 the Department of Defense issued its unsigned 44-page Report & Recommendation. According
26 to the Government, “[i]n shaving off those crucial months, the Court purported to strip the
27 privilege from some of the most sensitive documents in this case....” (Dkt. No. 547 at 8.) This
28 argument is squarely at odds with prior representations by the Government’s lawyers, who

1 conceded at the December 10, 2019 status conference that the “final decision” had already been
2 made by January 11, 2018, and Secretary Mattis had “accepted the decision” before drafting of
3 the DOD Report, and further, that “drafts” of the DoD Report “aren’t deliberative process,”
4 explaining that the drafts concerned “how you’re going to write a particular paragraph.” (Dkt.
5 No. 402 at 26:5–27:25.)

6 Ordering the *in camera* review of documents between January 11, 2018 and February 22,
7 2018 will permit the Court to assess which of the Government’s statements regarding this
8 timeframe are correct (since they both cannot be true), while also resolving the DPP dispute for
9 documents that both parties agree fall within a critical timeframe and thus moving the case
10 forward. Since the pending mandamus petition does not relate to the threshold issue of whether
11 DPP has been properly asserted in the first instance (as opposed to whether the privilege has
12 been overcome under the *Warner* test), the administrative stay does not bar the production of
13 such documents *in camera*.

14 With both of these additional safeguards in place, the Government has no plausible claim
15 of harm from the July 15 Order.

16 **D. The public interest lies with ensuring compliance with the Court’s order.**

17 Finally, the Government bears the burden of showing “where the public interest lies,” *Nken*
18 *v. Holder*, 556 U.S. 418 (2009), and here they do not carry it. To the contrary, the public interest
19 favors enforcing compliance with the Court’s order for at least two reasons. First, the
20 Government’s attempt to stay enforcement unnecessarily delays the Court’s ability to obtain
21 information that is indispensable to the performance of its core Article III responsibilities to
22 evaluate and vindicate Plaintiffs’ constitutional rights. *See Cheney v. U.S. Dist. Court for D.C.*,
23 542 U.S. 367, 385 (2004) (noting that the “availability of certain indispensable information” may
24 impair a “court’s ability to fulfill its constitutional responsibility to resolve cases and
25 controversies within its jurisdiction”); *United States v. Nixon*, 418 U.S. 683, 707 (1974). Without
26 this discovery, the District Court cannot perform the searching judicial inquiry that heightened
27 scrutiny requires.
28

1 Second, the public interest lies with upholding the nation’s “historic commitment to the
2 rule of law,” and ensuring that even the Government is not above the law. *Nixon*, 418 U.S. at
3 708-09 (“The very integrity of the judicial system and public confidence in the system depend on
4 full disclosure of all the facts, within the framework of the rules of evidence.”). That includes
5 complying with court orders. *See United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d
6 1365, 1370 (9th Cir. 1980) (“The public interest requires not only that Court orders be obeyed
7 but further that Governmental agencies which are charged with the enforcement of laws should
8 set the example of compliance with Court orders.”) (citation omitted); *see also Berne Corp. v.*
9 *Virgin Islands*, No. 2000-141, 2008 WL 4371518, at *6 (D.C.V.I. 2008) (“[T]he public interest
10 disfavors such deliberate contumacy by the very government that expects compliance with its
11 laws.”). The public interest does not lie in allowing the Government to repeatedly dodge its
12 discovery obligations and the discovery orders of this Court.

13 CONCLUSION

14 The Government’s request for a stay is yet another delay tactic and should be denied. But,
15 in order to address the Government’s concerns (however baseless they may be), Plaintiffs
16 respectfully request the Court clarify its July 15 Order in two ways. **First**, if the Government
17 contends any documents falling outside of the two pre-decisional timeframes are, in fact,
18 privileged, it shall submit those documents for *in camera* review before production to Plaintiffs.
19 Such documents should be accompanied by a privilege log establishing a *prima facie* assertion of
20 the deliberative process privilege, including identification of the policy at issue, the Government
21 employee deliberating the policy change, and a description of the change being discussed. The
22 Government should be reminded of its obligation under Rule 37 to have a good faith basis for
23 asserting the privilege, and should the obligation not be honored, sanctions may be ordered.
24 **Second**, the Government should be ordered to produce withheld documents falling within the
25 time period from January 11, 2018 to February 22, 2018 for *in camera* review so that the Court
26 can determine whether such documents are pre-decisional and deliberative as the Government
27 now claims.
28

1 Dated: July 29, 2020

2 Respectfully submitted,

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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 July 29, 2020

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