

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

**JOINT STATUS REPORT FOR
SEPTEMBER 29, 2020 STATUS
CONFERENCE**

1 In advance of the September 29, 2020 status hearing, the parties respectfully submit the
2 following Joint Status Report.

3 **PLAINTIFF’S AND PLAINTIFF-INTERVENOR’S STATEMENT**

4 In this Joint Status Report, Plaintiffs provide the Court an update regarding the following
5 issues:

6 1. The Government’s production of documents withheld pursuant to the deliberative
7 process privilege in response to the Court’s July 15, 2020 (Dkt. 545) and August 17, 2020 (Dkt.
8 566) Orders.

9 2. The Government’s Motion to Stay Discovery Pending Disposition of Mandamus
10 Petitions (Dkt. 601).

11 **A. Government’s Production of Documents Withheld Pursuant to Deliberative Process**
12 **Privilege.**

13 On July 15, this Court ordered the Government to produce all documents withheld solely
14 on the basis of the deliberative process privilege unless they fell within the presumptive
15 predecisional timeframes of the Carter Policy (July 13, 2015 to June 30, 2016) and Mattis Policy
16 (September 14, 2017 to January 11, 2018). The Government subsequently moved to stay that
17 Order (Dkt. 547). In its Order denying the Government’s stay request, this Court amended its
18 July 15 Order to permit the Government to submit *in camera* any purportedly privileged
19 documents outside these two timeframes without motion practice, and ordered that all documents
20 be produced to Plaintiffs or submitted *in camera* by August 28, 2020. (*See* Dkt. 566 at 13.) At
21 the last status conference on August 24, the Court ordered the Government to prioritize two
22 timeframes: (1) documents from the two weeks following President Trump’s tweets were to be
23 produced by August 28, 2020, and (2) documents between January 11, 2018 and February 22,
24 2018 were to be produced by September 4, 2020. (*See* Dkt. 569 at 1-2.)

25 On August 28, the Government produced 193 documents to Plaintiffs and submitted 53
26 documents *in camera*. On September 4, the Government produced 1725 documents to Plaintiffs
27 and submitted 409 documents *in camera*. According to the Government’s “Notice of
28 Compliance” filed concurrently with these productions, the Government decided to only

1 “formally assert” the deliberative process privilege over a subset of the documents that had been
2 withheld for the past three years in an “attempt to narrow the dispute before the Court” and to
3 comply with this Court’s instruction “that Defendants’ submissions should be more limited and
4 more circumspect.” (Dkt. 573 at 2.) Thus, between these two productions, the Government
5 elected to produce 80% of the documents it had been withholding.

6 These two productions, however, only address the two prioritized timeframes identified
7 during the last status conference, and the Government has not made any further productions of
8 documents from the remaining portions of the timeframes identified in the Court’s July 15 Order.
9 Plaintiffs met and conferred with the Government regarding a production schedule for these
10 remaining documents. The parties agreed to prioritize two timeframes of documents: July 26,
11 2017 to September 14, 2017, and January 20, 2017 to July 25, 2017, with the remaining
12 documents to follow in a third production. However, the parties could not reach agreement on a
13 production schedule. Plaintiffs propose the following schedule for the Government to either
14 produce to Plaintiffs documents over which it does not “formally assert” the deliberative process
15 privilege or submit for *in camera* review the documents over which it does “formally assert” the
16 deliberative process privilege:

- 17 • By **October 7**: documents dated July 26, 2017 to September 14, 2017
- 18 • By **October 16**: documents dated January 20, 2017 to July 25, 2017
- 19 • By **October 26**: all remaining documents that do not fall within the presumptive
20 predecisional timeframes set forth in the Court’s July 15 Order (July 13, 2015 to June 30,
21 2016, and September 14, 2017 to January 11, 2018)

22 Plaintiffs’ schedule is reasonable given that the Court ordered the Government to produce these
23 documents **by August 28** after denying the Government’s request for a stay. (*See* Dkt. 566.) After
24 the Government made two relatively small productions on August 28 and September 4 that were
25 discussed during the last status conference, the Government appears to have helped itself to a
26 stay and has not made any productions since that time. Plaintiffs’ proposed schedule above
27 represents a reasonable compromise to get the Government back on track to comply with this
28 Court’s Order issued in mid-July.

1 In addition, Plaintiffs request that by **November 6** the Government produce or “formally
2 assert” the deliberative process privilege regarding all documents within the two presumptive
3 predecisional timeframes, as there is no basis to continue withholding documents where the
4 privilege has not been asserted. For the first time in the three years of vigorously litigating the
5 deliberative process privilege, the Government introduced a new concept of “formal assertion”
6 of the deliberative process privilege in its recent “Notices of Compliance” filed concurrently
7 with its August 28 and September 4 document productions. (Dkt. 573, 597.) The Government
8 explained that it was only submitting *in camera* those documents for which it was “formally
9 asserting” the privilege, and producing to Plaintiffs the remaining documents. In those notices,
10 the Government cited *Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000), which held
11 that “assertion” of the deliberative process privilege “requires: (1) a formal claim of privilege by
12 the ‘head of the department’ having control over the requested information; (2) assertion of the
13 privilege based on actual personal consideration by that official; and (3) a detailed specification
14 of the information for which the privilege is claimed, with an explanation why it properly falls
15 within the scope of the privilege.” *Landry*, 204 F.3d at 1136. Plaintiffs merely request that the
16 Government properly assert the deliberative process privilege under *Landry* and provide
17 Plaintiffs with the required “detailed specification” so that Plaintiffs can make an informed
18 decision which documents to seek further review *in camera* pursuant to this Court’s July 15
19 Order. (See Dkt. 545 at 11 (“[T]he Court will entertain future briefing from the Parties as to
20 specific documents the Government continues to withhold after complying with this Order.”).)
21 To be clear, Plaintiffs are not asking the Government to submit these documents for *in camera*
22 review, but instead are only asking the Government to properly assert the privilege under
23 *Landry*.

24 The Government tries to dance around this requirement by arguing below that a declaration
25 submitted in September 2019 from Robert Easton at the Department of Defense satisfies the
26 requirements to assert the privilege, explaining that “[g]iven that Plaintiffs did not move to
27 compel specific documents, but rather thousands of documents at once in broad categories,
28 Defendants’ declaration satisfied their obligation to formally invoke the deliberative process

1 privilege.” But this position has no basis in the law, nor does the Government cite any authority
2 in support of this novel argument. *Landry* requires the Government to submit a “detailed
3 specification of the information for which the privilege is claimed” and that the specification be
4 submitted by the “head of the department” based on that person’s “actual personal consideration”
5 of the document at issue. The cited Easton Declaration (Dkt. 381-1) satisfies none of these
6 requirements. Plaintiffs merely request that the Government properly assert the privilege under
7 the standard they rely upon in *Landry*. Otherwise, there is no basis to withhold production of
8 these documents.

9
10 **B. The Government’s Motion to Stay Discovery Pending Disposition of Mandamus
Petitions and Third Mandamus Petition.**

11 On September 10, the Government filed a motion to stay all discovery pending disposition
12 of the Mandamus Petitions, or in the alternative to stay this Court’s September 2 Order denying
13 the Government’s motions to quash the depositions of General Paul J. Selva, Secretary Robert
14 Wilkie Jr. (Dkt. 601). By order of this Court, Plaintiffs filed their response on September 24 and
15 the Government’s reply is due October 1 (Dkt. 609).

16 The Government also filed its third Mandamus Petition with the Ninth Circuit on
17 September 18, which seeks review of this Court’s September 2 Order regarding the four
18 depositions and requests the same stay currently pending before this Court. Plaintiffs’ and this
19 Court’s answers to the Petition are due October 7 and the Government’s reply is due October 12.
20 Plaintiffs moved for an extension to respond to the stay motion until after this Court ruled on the
21 pending stay motion, and the Ninth Circuit granted the relief in part by extending Plaintiffs’
22 response date to October 12. Oral argument on the second Mandamus Petition is scheduled for
23 October 14.

24 **DEFENDANTS’ STATEMENT**

25
26 **A. Production or Submission In Camera of Documents Subject to the July 15, 2020
Order, as Amended By Subsequent Orders.**

27 As Plaintiffs describe, Defendants are currently engaged in a process of producing to
28 Plaintiffs or submitting for *in camera* review those documents from the Court’s presumptively

1 non-predecisional timeframes (before July 13, 2015; between June 30, 2016 and September 14,
2 2017; and after January 11, 2018) that are withheld solely on the basis of the deliberative process
3 privilege. To begin, Defendants note their continued objection to this process. Plaintiffs still
4 have not established the relevance of the documents at issue—let alone that those documents
5 would further their claims—which should be a basic requirement before Defendants are required
6 to provide specific formal assertions of the deliberative process privilege or otherwise disclose
7 documents, particularly where the Ninth Circuit has specifically questioned the relevance of
8 documents pre-dating the Panel of Experts. *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir.
9 2019) (“For example, is information concerning the basis for the 2017 Memorandum still
10 relevant now that the 2018 Policy has been adopted?”).

11 That objection notwithstanding, Defendants propose the following schedule for production
12 to Plaintiffs or submission to the Court of the remaining documents from the Court’s
13 presumptively non-predecisional timeframes that are withheld solely on the basis of the
14 deliberative process privilege. Consistent with Plaintiffs’ request, Defendants propose
15 prioritizing documents from the time periods July 26, 2017 to September 14, 2017 (category 1)
16 and January 20, 2017 to July 25, 2017 (category 2).

- 17 • By **October 7**, produce to Plaintiffs category 1 documents that Defendants do not
18 anticipate submitting for *in camera* review.
- 19 • By **October 16**, submit withheld category 1 documents for *in camera* review and produce
20 to Plaintiffs any remaining category 1 documents.
- 21 • By **October 23**, produce to Plaintiffs category 2 documents that Defendants do not
22 anticipate submitting for *in camera* review.
- 23 • By **October 30**, submit withheld category 2 documents for *in camera* review and produce
24 to Plaintiffs any remaining category 2 documents.
- 25 • By **November 6**, produce to Plaintiffs all remaining documents from the Court’s
26 presumptively non-predecisional timeframes solely withheld for deliberative process
27 privilege that Defendants do not anticipate submitting for *in camera* review.
- 28 • By **November 13**, submit withheld documents from these timeframes for *in camera*
review and produce to Plaintiffs any remaining documents from the Court’s
presumptively non-predecisional timeframes solely withheld for deliberative process
privilege.

1 This proposal is reasonable and will facilitate Defendants' continuing efforts to narrow the
2 scope of this deliberative process privilege dispute and to submit substantial declarations and
3 tailored privilege logs regarding withheld documents to aid the Court's review of documents
4 submitted. Defendants estimate that there are approximately 15,541 documents that will be
5 produced to Plaintiffs or submitted for *in camera* review through this process. The modest
6 timeframes set forth in Defendants' proposal will provide necessary time for Defendants to
7 further rigorously consider which among the large volume of documents to submit for *in camera*
8 review and which to produce to plaintiffs, as they did for the August 28 and September 4
9 submissions. Additionally, Defendants' proposal separates the deadlines for production to
10 Plaintiffs and submission to the Court in recognition of the fact that preparation of the detailed
11 declarations accompanying Defendants' most recent *in camera* submissions—which addressed
12 with specificity each document submitted for *in camera* review—was extremely burdensome for
13 Defendants. Accordingly, additional time for preparation of these declarations and submission to
14 the Court is warranted, particularly where that time will ultimately aid the Court's review by
15 ensuring Defendants are able to provide substantial declarations describing the submitted
16 documents and fully explaining the basis for withholding.

17 Defendants' proposal is also consistent with Plaintiffs' recently stated preference regarding
18 a pace for production. During the Parties' meet-and-confer session on September 15, 2020,
19 Plaintiffs' counsel indicated that the Parties should agree to a pace of production of 1,500 to
20 2,000 documents per week and agreed that the Parties would seek agreement on a schedule by
21 the end of that week. Although the parties did not reach agreement on a schedule, consistent
22 with their discussion, Defendants' proposal would result in an average disclosure or submission
23 of just under 2,000 documents per week over the period September 21 to November 13, 2020.
24 Defendants' proposal would also result in no prejudice to Plaintiffs given that it is a mere three
25 weeks longer than Plaintiffs' proposal and, in any event, that there is no discovery cutoff
26 currently in place.

27 Finally, Plaintiffs' suggestion that Defendants have not diligently complied with the
28 Court's prior orders regarding production and submission of documents from the presumptive

1 non-predecisional timeframes is baseless. Although Plaintiffs indicate that all documents should
2 have been produced by August 28, they ignore this Court’s subsequent order of August 24, Dkt.
3 569, establishing that *in camera* review would proceed as to two specific time periods from the
4 Court’s presumptive non-predecisional timeframes. Indeed, only on the afternoon of this filing
5 did Defendants learn that Plaintiffs believed Defendants should have been making productions
6 and submissions absent further order of the Court or conference of the parties, even though the
7 parties had met and conferred over a week prior regarding a schedule for further productions and
8 submissions. Instead, Defendants had understood that the parties were meeting and conferring
9 regarding a schedule for completion of the remaining *in camera* review process. Defendants
10 have not “helped themselves to a stay.”

11 **B. Additional Disclosures of Documents Currently Before the Ninth Circuit Should Not**
12 **Be Ordered at This Time.**

13 Finally, contrary to Plaintiffs’ request, there is no basis to require the Government to
14 produce documents from the Court’s Carter and Mattis Policy timeframes unless they produce
15 declarations specifically asserting privilege as to each such document. The premise of Plaintiffs’
16 request is incorrect—Defendants *have* put forth a procedurally proper assertion of privilege for
17 those documents. In initially withholding the documents, Defendants provided Plaintiffs with
18 privilege logs specifically listing which documents were withheld and explaining the basis for
19 withholding. Thereafter, when Plaintiffs moved to compel broad categories of privileged
20 documents, Defendants provided a declaration from the Department of Defense explaining why
21 the categories of documents Plaintiffs sought were privileged and the chilling effect that would
22 result from their disclosure. *See* Decl. of Robert E. Easton, ECF No. 381-1. Given that Plaintiffs
23 did not move to compel specific documents, but rather thousands of documents at once in broad
24 categories, Defendants’ declaration satisfied their obligation to formally invoke the deliberative
25 process privilege.

26 Plaintiffs’ contention that this assertion of privilege was inadequate is meritless. The
27 weight of authority holds that formal assertions of deliberative process privilege in the form of
28 agency declarations need not occur until a formal motion practice occurs. *See, e.g., Tri-State*

1 *Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 n.13 (D.D.C. 2005) (finding “no
2 obligation to formally invoke the [deliberative process] privilege in advance of the motion to
3 compel”). Accordingly, in response to Plaintiffs’ motion to compel broad categories
4 encompassing huge volumes of privileged documents, Defendants appropriately responded with
5 an agency declaration that asserted the privilege as to those broad categories. That is,
6 Defendants’ prior privilege assertion was directed at and responsive to the scope of the demand,
7 which sought to set aside the deliberative process privilege *en masse*. A party cannot obligate
8 an agency to formally invoke the privilege as to each and every document withheld simply by
9 moving to set aside the deliberative process privilege as to *all* deliberative documents in a
10 litigation, as Plaintiffs did here. In that scenario, a party could potentially obtain *de facto* relief
11 on a meritless motion simply by imposing an impossible burden of formal invocation on the
12 agency for every document. That outcome cannot be squared with the Ninth Circuit’s holding in
13 this litigation that the deliberative process privilege “commands judicial consideration” and, in
14 the context of litigation involving the military, implicates “national defense interests.” *Karnoski*
15 *v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019).

16 Defendants have since provided additional, more specific declarations with their most
17 recent *in camera* submissions. But those declarations were provided in recognition of the fact
18 that the ongoing *in camera* review involves consideration of particular documents—not broad
19 categories of documents—and pursuant to the Court’s order that submissions be accompanied by
20 declarations specific to each document submitted.¹ No such *in camera* review is occurring as to
21 the documents within the Court’s Carter and Mattis Policy timeframes, nor should such review
22 occur.

23 Plaintiffs’ request should also be rejected because these same documents are at issue in
24 the Government’s second mandamus petition and, as noted above, oral argument on that petition
25 is scheduled in less than three weeks. Thus, this Court should wait for the Ninth Circuit’s

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27 ¹ Although the Court’s Order concerned declarations by counsel of record, ECF No. 569 at 2, Defendants also
28 submitted declarations from the relevant agencies and military services because litigation counsel is unable to assert
the deliberative process privilege on behalf of government agencies. See *Landry v. FDIC*, 204 F.3d 1125, 1135–36
(D.C. Cir. 2000) (requiring that a formal assertion of the privilege be made by a sufficiently high official at the
agency).

1 guidance regarding the appropriate standard of review for Defendants’ privilege claims as to
2 precisely these documents. Further, the Ninth Circuit has issued an administrative stay
3 preventing the disclosure of these same documents through this Court’s prior orders and has
4 determined that Defendants’ third mandamus petition, which contains a request to halt all
5 discovery, raises issues that warrant an answer. *See* Dkt. 415; Dkt. 612. In the past, this Court
6 has recognized that the Ninth Circuit’s stay is “broadly worded” and “applies to information
7 about drafts of the Report and Recommendations, documents and communications discussing
8 issues related to the policy but never produced to the Panel, and documents and communications
9 related to the Carter policy[,]” Dkt. 519 at 6, and has not permitted Plaintiffs to attempt to
10 circumvent that stay and obtain this same material through other means. *See also* Dkt 545 at 2
11 (expressly exempting from disclosure under the July 15, 2020 Order “any documents specifically
12 subject to the pending appeal to the Ninth Circuit.”). The Court should not reverse that position,
13 at Plaintiffs’ request, less than three weeks before the argument on Defendants’ petition.

14 Further, it is likely impossible for sufficiently senior agency representatives from the
15 Department of Defense, the Department of Homeland Security, and the Military Services to
16 provide specific sworn assertions of privilege as to each of the thousands of documents within
17 the Court’s Carter and Mattis Policy timeframes in the time Plaintiffs have proposed. As a
18 result, Defendants would likely be forced to either release privileged documents without the
19 opportunity to provide such specific declarations or to seek an extension from the Court with
20 supporting declarations explaining Defendants’ progress, as Defendants did following the
21 Court’s order regarding Request for Production No. 44. *See* Dkt. 488. Either result would be
22 particularly inappropriate given that this Court has already determined that documents from these
23 timeframes are presumptively predecisional and the Ninth Circuit is currently considering
24 whether there is any need for disclosure of these documents at all.

1 Respectfully submitted, September 25, 2020

2 **NEWMAN DU WORS LLP**

**UNITED STATES
DEPARTMENT OF JUSTICE**

3
4 s/ Jason B. Sykes

s/ Andrew E. Carmichael

5 Derek A. Newman, WSBA No. 26967
dn@newmanlaw.com

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

6 Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com

ALEXANDER K. HAAS
Branch Director

7 Rachel Horvitz, WSBA No. 52987
rachel@newmanlaw.com

ANTHONY J. COPPOLINO
Deputy Director

8 2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
9 (206) 274-2800

ANDREW E. CARMICHAEL, VA Bar #
76578
andrew.e.carmichael@usdoj.gov
MATTHEW SKURNIK, NY Bar # 5553896
Matthew.Skurnik@usdoj.gov
JAMES R. POWERS, TX Bar #24092989
james.r.powers@usdoj.gov

10 **LAMDBA LEGAL DEFENSE AND
11 EDUCATION FUND, INC.**

12 Tara Borelli, WSBA No. 36759
tborelli@lambdalegal.org
13 Camilla B. Taylor (admitted pro hac vice)
14 Peter C. Renn (admitted pro hac vice)
15 Sasha Buchert (admitted pro hac vice)
16 Kara Ingelhart (admitted pro hac vice)
17 Carl Charles (admitted pro hac vice)
18 Paul D. Castillo (admitted pro hac vice)

Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW, Suite 12108
Washington, DC 20530
(202) 514-3346

17 **OUTSERVE-SLDN, INC. N/K/A
18 MODERN MILITARY ASSOCIATION
19 OF AMERICA**

Peter Perkowski (admitted pro hac vice)

Counsel for Defendants

**OFFICE OF THE WASHINGTON
STATE ATTORNEY GENERAL**

20 **KIRKLAND & ELLIS LLP**

21 James F. Hurst, P.C. (admitted pro hac vice)
22 Steve Patton (admitted pro hac vice)
23 Jordan M. Heinz (admitted pro hac vice)
24 Daniel I. Siegfried (admitted pro hac vice)
25 Sam Ikard (admitted pro hac vice)

s/ Chalia I. Stallings-Ala'ilima
Colleen M. Melody, WSBA No. 42275
colleenm1@atg.wa.gov
Chalia I. Stallings-Ala'ilima, WSBA No.
40694
chalias@atg.wa.gov

24 **REDGRAVE LLP**

25 Vanessa Barsanti (admitted pro hac vice)

Assistant Attorneys General
Civil Rights Unit
Attorney General's Office
800 5th Ave, Suite 2000
Seattle, WA 98104
(206) 464-7744

26 *Counsel for Plaintiffs*

*Counsel for Plaintiff-Intervenor State of
Washington*

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 September 25, 2020.

s/ Jason B. Sykes
Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

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