

The Honorable Marsha J. Pechman

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

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J. TRUMP, et al.,  
  
Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' SECOND NOTICE  
OF COMPLIANCE RE ECF NO. 617**

1 Defendants respectfully give notice to the Court of their compliance with the Court's  
2 September 29, 2020 Order regarding documents from the Department of Defense, Department  
3 of Homeland Security, Department of the Army, Department of the Navy, Department of the Air  
4 Force, and Coast Guard from the time period between January 20, 2017 and July 25, 2017  
5 withheld solely pursuant to the deliberative process privilege. *See* Order of Sep. 29, 2020, Dkt.  
6 617 at 2. As with the documents submitted for *in camera* review on August 28, 2020, *see* Dkt.  
7 573, September 4, 2020, *see* Dkt. 597, and October 9, 2020, *see* Dkt. 617, in an attempt to narrow  
8 the dispute before the Court, and in light of this Court's instruction that Defendants' submissions  
9 should be more limited and "more circumspect," 8/24/2020 Hr'g Tr. 10:22, and the short period  
10 of time the Court has afforded Defendants to formally assert the deliberative process privilege  
11 over documents during this time period, Defendants have focused their assertion of the  
12 deliberative process privilege over only the most sensitive documents at the highest levels of the  
13 relevant agencies. Accordingly, Defendants have chosen to formally assert the deliberative  
14 process privilege over 103 documents from the time period between January 20, 2017 and July  
15 25, 2017. These documents are being provided to the Court for *in camera* review accompanied  
16 by a declaration from the Department of Defense formally asserting the deliberative process  
17 privilege. The remaining documents from the period between January 20, 2017 and July 25,  
18 2017 that were previously withheld exclusively pursuant to the deliberative process privilege are  
19 being separately produced to Plaintiffs.

20 The Court's recent order required that the *in camera* submission "be accompanied by a  
21 certification" by one of Defendants' counsel that attorneys of record have "personally reviewed  
22 the documents" submitted. Order of Aug. 24, 2020, Dkt. 569; *see also* Order of Sep. 29, 2020,  
23 Dkt. 617. Insofar as this Order intended to require a formal assertion of the deliberative process  
24 privilege, Defendants are submitting a declaration from the Department of Defense formally  
25 asserting the privilege, consistent with the principle that litigation counsel do not make formal  
26 assertions of the privilege on behalf of an agency. *See* Declaration of Robert Easton, on behalf  
27 of the Department of Defense, Ex. A of Carmichael Decl.; *see Landry v. FDIC*, 204 F.3d 1125,  
28 1135–36 (D.C. Cir. 2000) (requiring that a formal assertion of the privilege be made by a

1 sufficiently high official at the agency). The Department of Defense declaration specifically  
2 addresses each document submitted to the Court and provides information necessary for the  
3 Court's review. The formal assertion of privilege in this declaration supersedes any prior  
4 privilege log. However, Defendants have still provided a privilege log to accompany this  
5 declaration as required by the Court. *See* Ex. B of Carmichael Decl.; Order of Sep. 29, 2020 at  
6 2-3. Documents are described in the declaration in the order they have been submitted for review.  
7 As required by the Court's order, Defendants are also submitting a separate declaration certifying  
8 that attorneys of record in this case for the Department of Justice reviewed the documents  
9 submitted. *See* Declaration of Andrew E. Carmichael; Order of Aug. 24, 2020; Order of Sep. 29,  
10 2020.<sup>1</sup>

11 In light of Defendants' efforts to narrow the dispute at issue discussed above, and the  
12 short period of time the Court afforded Defendants to formally assert the deliberative process  
13 privilege over documents in the relevant time period, Defendants will not formally assert the  
14 deliberative process privilege over the remaining documents between January 20, 2017 and July  
15 25, 2017. Accordingly, these remaining documents have been separately produced to Plaintiffs  
16 on October 23, 2020 (with a small remainder that will be produced today). This disclosure of  
17 documents is consistent with the approach Defendants have routinely applied in this case and  
18 others, insofar as Defendants have attempted to focus their assertions of the deliberative process  
19 privilege when limited categories of documents are at issue. *See, e.g.,* 7/21/2020 Hr'g Tr. 16:5-  
20 6 (explaining that in the related *Doe* case, the plaintiffs sought narrow categories of documents,  
21 and the Government "waive[d] the privilege" over certain deliberative documents "in order to  
22 narrow the scope of the dispute"). Rather than consider sweeping categories of deliberative  
23 documents wholesale, Defendants have repeatedly urged that the parties should negotiate and  
24 litigate over individual documents (or narrow categories) for which Plaintiffs have identified a

---

25 <sup>1</sup> A portion of the documents produced *in camera* to the Court as well as a portion of  
26 documents produced to the Plaintiffs contain redactions to preserve the attorney client and  
27 attorney work product privileges and Defendants' ability to formally assert the presidential  
28 communications privilege. *See* Easton Decl. ¶ 5. Additionally, documents wholly subject to  
any of these other privileges have been withheld in full.

1 particular need related to their claims. Those documents should be the focus of any privilege  
2 disputes.

3 Although Defendants have made further disclosures this week as discussed above, they  
4 nonetheless maintain their continued objection that Plaintiffs have not established the relevance  
5 of the documents at issue—let alone that those documents would further their claims—which  
6 should be a basic requirement before Defendants are required to formally invoke the deliberative  
7 process privilege or otherwise disclose privileged documents, particularly where the Ninth  
8 Circuit has specifically questioned the relevance of documents pre-dating the Panel of Experts.  
9 *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (“For example, is information  
10 concerning the basis for the 2017 Memorandum still relevant now that the 2018 Policy has been  
11 adopted?”).

12 Dated: October 30, 2020

Respectfully submitted,

14 JOHN COGHLAN  
Deputy Assistant Attorney General

16 ALEXANDER K. HAAS  
Branch Director

18 ANTHONY J. COPPOLINO  
Deputy Director

19 /s/ James Powers  
20 ANDREW E. CARMICHAEL  
Senior Trial Counsel  
21 JAMES R. POWERS  
MATTHEW SKURNIK  
22 Trial Attorneys  
United States Department of Justice  
23 Civil Division, Federal Programs Branch  
24 Telephone: (202) 353-0543  
25 Email: [james.r.powers@usdoj.gov](mailto:james.r.powers@usdoj.gov)  
*Counsel for Defendants*