

The Honorable Marsha J. Pechman

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**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. 629**

1 Defendants respectfully give notice to the Court of their compliance with the Court's
2 October 28, 2020 Order regarding documents from the Department of Defense, Department of
3 Homeland Security, Department of the Army, Department of the Navy, Department of the Air
4 Force, and Coast Guard from the time period between September 14, 2017 and November 17,
5 2017 withheld solely pursuant to the deliberative process privilege. *See* Order of Oct. 28, 2020,
6 Dkt. 629 at 2. As with the documents submitted for *in camera* review on August 28, 2020, *see*
7 Dkt. 573, September 4, 2020, *see* Dkt. 597, October 9, 2020, *see* Dkt. 622, October 30, 2020, *see*
8 Dkt. 631, November 13, 2020, *see* Dkt. 637, and December 1, 2020, *see* Dkt. 643, in an attempt
9 to narrow the dispute before the Court, and in light of this Court's instruction that Defendants'
10 submissions should be more limited and "more circumspect," 8/24/2020 Hr'g Tr. 10:22, and the
11 short period of time the Court has afforded Defendants to formally assert the deliberative process
12 privilege over documents during this time period, Defendants have focused their assertion of the
13 deliberative process privilege over only the most sensitive documents at the highest levels of the
14 relevant agencies. Accordingly, Defendants have chosen to formally assert the deliberative
15 process privilege over 13 documents from the time period between September 14, 2017 and
16 November 17, 2017. These documents are being provided to the Court for *in camera* review
17 accompanied by a declaration from the Department of Defense formally asserting the deliberative
18 process privilege. The remaining documents from the period between September 14, 2017 and
19 November 17, 2017 that were previously withheld exclusively pursuant to the deliberative
20 process privilege are being separately produced to Plaintiffs.

21 The Court's recent orders have required that the *in camera* submission "be accompanied
22 by a certification" by one of Defendants' counsel that attorneys of record have "personally
23 reviewed the documents" submitted. Order of Aug. 24, 2020, Dkt. 569; Order of Sep. 29, 2020,
24 Dkt. 617; Order of Oct. 28, 2020, Dkt. 629. Insofar as this Order intended to require a formal
25 assertion of the deliberative process privilege, Defendants are submitting a declaration from the
26 Department of Defense formally asserting the privilege, consistent with the principle that
27 litigation counsel do not make formal assertions of the privilege on behalf of an agency. *See*
28 Declaration of Robert Easton, on behalf of the Department of Defense, Ex. A of Carmichael

1 Decl.; *see Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000) (requiring that a formal
2 assertion of the privilege be made by a sufficiently high official at the agency). The Department
3 of Defense declaration specifically addresses each document submitted to the Court and provides
4 information necessary for the Court’s review. The formal assertion of privilege in this
5 declaration supersedes any prior privilege log. However, Defendants have still provided a
6 privilege log to accompany this declaration as required by the Court. *See* Ex. B of Carmichael
7 Decl.; Order of Oct. 28, 2020 at 2. Documents are described in the declaration in the order they
8 have been submitted for review. As required by the Court’s order, Defendants are also submitting
9 a separate declaration certifying that attorneys of record in this case for the Department of Justice
10 reviewed the documents submitted. *See* Declaration of Andrew E. Carmichael; Order of Aug.
11 24, 2020; Order of Sep. 29, 2020; Order of Oct. 28, 2020.¹

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

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26 ¹ A portion of the documents produced to the Plaintiffs contain redactions to preserve the attorney
27 client and attorney work product privileges and Defendants’ ability to formally assert the
28 presidential communications privilege. Additionally, documents wholly subject to any of these
other privileges have been withheld in full.

1 parties should negotiate and litigate over individual documents (or narrow categories) for which
2 Plaintiffs have identified a particular need related to their claims. Those documents should be
3 the focus of any privilege disputes.

4 Although Defendants have made further disclosures this week as discussed above, they
5 nonetheless maintain their continued objection that Plaintiffs have not established the relevance
6 of the documents at issue—let alone that those documents would further their claims—which
7 should be a basic requirement before Defendants are required to formally invoke the deliberative
8 process privilege or otherwise disclose privileged documents.

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10 Dated: December 11, 2020

Respectfully submitted,

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