

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’ RESPONSE TO
DEFENDANTS’ SUBMISSION ON THE
FOURTH *WARNER* FACTOR**

INTRODUCTION

1 The deliberative process privilege is a qualified privilege. Even where it applies, it is not
 2 absolute, and can be overcome where the Court determines, in the reasonable exercise of its
 3 discretion, that Plaintiffs' need for the information overrides the Government's interest in non-
 4 disclosure. *FTC v. Warner Commc'ns Inc.*, 742 F. 2d 1156, 1161 (9th Cir. 1984); *Lane v. Dep't*
 5 *of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) ("A district court has wide latitude in controlling
 6 discovery, and its rulings will not be overturned in absence of a clear abuse of discretion."
 7 (citations omitted)). To assist it in making this determination, the Court has asked the
 8 Government to provide additional information as to how disclosure of 145 documents identified
 9 during the Court's *in camera* document review "would hinder frank and independent discussion
 10 regarding contemplated policies and decisions" (Dkt. No. 641 at 5), as required by *Warner's*
 11 fourth factor. 742 F. 2d at 1161. Rather than identify the particular risk of disclosure, however,
 12 the Government has largely pointed only to generalized, non-specific concerns. This is
 13 insufficient to overcome Plaintiffs' need for these documents under *Warner*. Moreover, as
 14 detailed below, the balancing test as a whole, including all of the factors set forth in *Warner*,
 15 weigh in favor of Plaintiffs. These documents are relevant to the core issues in this case, namely,
 16 the Government's process, motive, and intent behind the Ban, and should be ordered produced.

ARGUMENT

A. **The Government's generalized and non-specific fears of chilling future decision-making fail to show why these 145 documents should not be disclosed.**

1. **The fourth *Warner* factor requires more than just references to generalized harm.**

23 *Warner's* fourth factor requires consideration of "the extent to which disclosure would
 24 hinder frank and independent discussion regarding contemplated policies and decisions."
 25 *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (citation omitted). The resulting
 26 analysis of this factor "need not give rise to a uniform answer," and thus should be undertaken on
 27 a particularized basis because "[t]he disclosure of some types of documents will be less likely to
 28 cause embarrassment or chilling than others." *See Ctr. for Env't Health v. Perdue*, No. 18-cv-

1 01763-RS (TSH), 2019 WL 6114513, at *3 (N.D. Cal. Nov. 18, 2019) (citation omitted). The
2 Government’s response, however, puts forward explanations assuming harm on categorical
3 bases, rather than explaining how and why such harm may occur from the disclosure of each
4 specific document. And even where the Government does describe harm resulting from
5 disclosure of a particular document, the same generic arguments are advanced, with no
6 discussion of harm unique to that specific document.

7 This Court has already taken the Government to task about their boilerplate claims of
8 harm. For example, with regard to certain documents and communications between RAND and
9 DoD officials, the Government provided the following explanation of harm:

10 The release of DoD’s communications with RAND and Kennell would have a
11 harmful chilling effect on the DoD’s future deliberations. The DoD decision-
12 making process apparatus relies on open and candid conversations between DoD
13 officials and nongovernmental consultants to address many of the difficult and
14 complicated decisions that DoD faces. If such deliberations were disclosed, even
15 pursuant to a protective order, DoD officials who interact with retained
16 consultants would be less willing to engage in full and frank discussions about
17 policy. Indeed, if DoD personnel knew that their thoughts, impressions, and
18 opinions conveyed to contractors like RAND and Kennell would be open to
19 scrutiny, they may hesitate to provide their true positions on potential sources of
20 action out of concern that these discussions could be revealed to wider
21 audiences. The absence of such essential input from DoD personnel would
22 degrade DoD’s decision-making process and could expose the nations [*sic*] to
23 greater overall risk.

19 (Dkt. No. 509 at 6 (citing Easton Decl. ¶ 24).) This Court found such an explanation to be “so
20 generic and non-specific as to be worthless,” continuing on to inquire: “If this generic language
21 and nothing more suffices, then under what circumstances could any claim of deliberative
22 process privilege in any case be overcome?” (*Id.*) Moreover, this Court noted that where drafts
23 “consist[ed] principally of editorial revisions,” release was “not likely to prevent RAND from
24 giving the government its full frank and candid advice in the future.” (*Id.* at 7.)

25 Despite the Court’s admonitions, the Government attempts to establish its supposed harm
26 here with the same boilerplate reasoning and general and non-specific claims of harm. Such
27 statements are insufficient. *See, e.g., Greenpeace v. Nat’l Marine Fisheries Serv.*, 198 F.R.D.
28 540, 545 (W.D. Wash. 2000) (“[T]he bare assertion that internal agency discussions will be

1 ‘chilled’ is nothing but a legal platitude asserted in the abstract.”). The Easton, McPherson,
 2 Emanuel, and Stingl Declarations are authored by officials, three of whom are lawyers, who
 3 were not involved in the matters in question and can only speak to generalized harm; no
 4 declarant is an author or recipient of any document at issue who can speak to the particular harm
 5 they may experience if the document was disclosed. Instead, the declarations recycle the same
 6 generic justifications through the list of documents at issue, including assertions that:

- 7 • Drafts with track changes and emails soliciting such revisions reflect pre-decisional
 8 deliberations (a fact not at issue, as the pre-decisional nature of drafts necessarily was
 9 already determined if the documents are protected by the deliberative process privilege
 10 in the first place), release of which would cause “foreseeable harm,” *see, e.g.*, Stingl
 11 Decl. ¶¶ 5–6; Emanuel Decl. ¶¶ 3–7; Easton Decl. ¶¶ 6, 11–15, 19, 21, 23–24, 32–33,
 12 36–37;
- 13 • Lower-level personnel may be concerned of negative consequences to their personal
 14 and professional reputations, *see, e.g.*, Stingl Decl. ¶ 8; Easton Decl. ¶¶ 7, 29, 42;
 15 McPherson Decl. ¶ 6;
- 16 • Release of documents reflecting concerns of senior military officials would inhibit their
 17 ability to speak candidly, *see, e.g.*, Emanuel Decl. ¶¶ 9–10; Easton Decl. ¶¶ 4, 18, 22,
 18 25, 35, 45–46; McPherson Decl. ¶¶ 4–5, 7; and
- 19 • Release of non-final drafts and officials’ recommendations for changes to those drafts
 20 could cause public and internal confusion, *see, e.g.*, Stingl Decl. ¶ 9; Easton Decl. ¶¶ 5,
 21 17, 19, 26–27, 31.

22 Despite the Government’s assertions that disclosure of the documents at issue would risk
 23 “acute harms to the government and the public interests” (Dkt. No. 647 at 2), each reason given
 24 in their brief and supporting declarations assumes the fact of harm without explaining how and
 25 why such harm would occur as a result of disclosure of that *specific* document. Nearly every
 26 cited document discussed in the Government’s four declarations is tied back to one of only a few
 27 generic potential harms. This failure is a fatal flaw in their argument, as courts do not lightly
 28 assume that disclosing deliberations will hamper future discussions. *E.g., Univ. of Penn. v.*

1 *EEOC*, 493 U.S. 182, 200–01 (1990) (rejecting “chilling effect” argument; while “it is possible”
 2 decisionmakers “may become less candid as the possibility of disclosure increases, others may
 3 simply ground their evaluations in specific examples and illustrations in order to deflect potential
 4 claims of bias or unfairness”); *Carter v. U.S. Dep’t of Com.*, 307 F.3d 1084, 1092 (9th Cir. 2002)
 5 (rejecting “chilling effect argument”); *Marilley v. McCamman*, No. C 11-02418 DMR, 2012 WL
 6 4120633, at *6 (N.D. Cal. Sept. 19, 2012) (“[T]he court is not convinced that communications in
 7 the future are likely to be chilled” where defendants submitted declaration stating that disclosure
 8 “would inhibit the free flow of ideas.”). That is because candor among decisionmakers is not an
 9 end in itself; courts protect deliberations only so much as necessary to promote “the agency’s
 10 ability to perform its functions.” *Carter*, 307 F.3d at 1090 (citation omitted); *In re Sealed Case*,
 11 121 F.3d 729, 751 (D.C. Cir. 1997) (privilege does not protect candor at all costs given “the goal
 12 of open government”).

13 The bulk of the Government’s generic assertions rely on documents’ draft status as causing
 14 a chilling effect upon disclosure. But nearly every case cited by the Government—namely, *Lahr*,
 15 *National Wildlife Federation*, *Dudman Communications Corporation*, *Leopold*, *Leopold*, *Reliant*
 16 *Energy Power Generation*, *Westland/Hallmark Meat Co.*, and *California Air Resources Board*
 17 (Dkt. No. 647 at 6–7)¹—is inapposite, as each evaluates not the *Warner* balancing test or whether
 18 the qualified privilege has been overcome, but rather the threshold question of whether the
 19 deliberative process privilege applies at all. This Court has already determined that the privilege
 20 applies to the documents at issue; the fact that they are deliberative does not prove that their
 21 disclosure would “hinder frank and independent discussion regarding contemplated policies and
 22 decisions.” *See Karnoski*, 926 F.3d at 1206. To the contrary, where, as here, the purpose of a
 23 lawsuit is to “deliberatively expose[] government decisionmaking to the light,” any chilling
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 26 ¹ *See Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 983 (9th Cir. 2009); *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*,
 27 861 F.2d 1114, 1120–22 (9th Cir. 1988); *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1568–69
 28 (D.C. Cir. 1987); *Leopold v. DOJ*, 411 F. Supp. 3d 1094, 1107 (C.D. Cal. 2019); *Leopold v. Office of Dir. of Nat’l*
Intel., 442 F. Supp. 3d 266, 278 (D.D.C. 2020); *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d
 194, 204 (D.D.C. 2007); *United States v. Westland/Hallmark Meat Co.*, No. EDCV 08-221-VAP (OPx), 2012 WL
 12886501, at *6 (C.D. Cal. Sept. 26, 2012); *Cal. Air Res. Bd. v. EPA*, No. Civ. A. 19-965(CKK), 2020 WL 2934914,
 at *12 (D.D.C. June 3, 2020).

1 concern “evaporates.” *In re Subpoena Duces Tecum Served on the Office of the Comptroller of*
2 *Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). And here the only views disclosure would chill
3 are discriminatory ones, which cuts in favor of disclosure: “[I]f because of this case, members of
4 government agencies acting on behalf of the public at large are reminded that they are subject to
5 scrutiny, a useful purpose will have been served.” *Marilley*, 2012 WL 4120633, at *6; *accord*
6 *Newport Pac. Inc. v. Cnty. of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001).

7 Indeed, many courts hold that the privilege “is not appropriately asserted” at all when a
8 plaintiff’s claim “turns on the government’s intent.” *In re Subpoena*, 145 F.3d at 1424 (it is
9 “obvious” the privilege “has no place” in a “constitutional claim for discrimination”);
10 *Greenpeace*, 198 F.R.D. at 543 (“[T]he privilege may be inapplicable where the agency’s
11 decision-making process is itself at issue.”); *Mr. & Mrs. B v. Bd. of Educ. of Syosset Cent. Sch.*
12 *Dist.*, 35 F. Supp. 2d 224, 230 (E.D.N.Y. 1998) (“[T]he privilege may be inapplicable where the
13 agency’s deliberations are among the central issues in the case.”) (citation omitted). At a
14 minimum, these cases demonstrate that in cases such as this, the need for information concerning
15 the Government’s decision-making is critical and can only be overcome, if at all, by a strong and
16 specific showing of harm to the Government from disclosure—a standard the Government has
17 not met.

18 Moreover, the only cases cited by the Government that evaluate draft documents in the
19 context of the *Warner* balancing test are distinguishable. In *Conservation Law Foundation v.*
20 *Department of Air Force*, the plaintiffs had not cited specific reasons why their need for the
21 documents outweighed the privilege, and thus the court found that the “relevancy of the material
22 to the plaintiffs’ claims [was] questionable,” the information sought was “obtainable from other
23 sources,” and the “government’s role in the litigation fail[ed] to offer support for the plaintiffs’
24 assertion of need.” No. C-92-156-L, 1994 WL 279747, at *2–3 (D.N.H. June 20, 1994). As a
25 result, the balance of *Warner* factors was heavily weighted in the government’s favor even
26 before the court analyzed possible harm. *Id.* And in *General Motors v. United States*, the
27 government’s intent in interpreting one of its rules was not in dispute. No. 07-14464, 2009 WL
28 5171806, at *1 (E.D. Mich. Dec. 23, 2009) (evaluating the interpretation of an IRS rule).

1 **2. The Government’s “national defense interests” rationale is a red herring.**

2 The Government’s allegation that its “national defense interests” should be given great
3 weight (Dkt. No. 647 at 4) is a red herring. The Government has not identified any national
4 security affairs at issue here. And, even if there were, the Ninth Circuit has stated that such
5 interests are “not insurmountable,” *Karnoski*, 926 F.3d at 1206, and the showing of need
6 Plaintiffs have made, *see infra* at 7–8, outweighs such considerations. Moreover, if there is
7 particularly sensitive information that actually relates to national security (*e.g.*, foreign wars,
8 specific threats to country), this Court has expressly permitted that such information can be
9 redacted since it is irrelevant to Plaintiffs’ claims. (Dkt. No. 614 at 9 n.1 (finding “appropriate”
10 the redacting of “non-transgender related materials and then producing the balance”).)

11 **3. The fact that transgender issues are “high profile” does not support the**
12 **privilege.**

13 The Government does not cite any support for its suggestion that a special rule applies
14 where, as here, the issues in dispute are “sensitive and high-profile,” nor are Plaintiffs aware of
15 any. (Dkt. No. 647 at 2–3.) In fact, this consideration *supports* disclosure. Disclosure and
16 transparency in the Government’s decision-making process are *more* important in cases such as
17 this one, which involves a facially discriminatory policy of significant interest to the public, not
18 less so. The Government’s purported rule to the contrary would allow the Government to hide
19 behind the deliberative process privilege in cases that involve important public interests and
20 constitutional concerns.

21 **4. The protective order entered by this court protects against the public disclosure**
22 **of confidential information.**

23 Moreover, the protective order in this litigation prohibits public disclosure of designated
24 material, thus largely preventing the potential “chilling effect” alleged by the Government. *See*
25 *Schreiber v. Soc’y for Sav. Bancorp., Inc.*, 11 F.3d 217, 222 (D.C. Cir. 1993) (concerns of a
26 “chilling effect” would “largely be alleviated if the court could fashion a practical protective
27 order”); *Marilley*, 2012 WL 4120633, at *6 (concluding “that a protective order will help
28 mitigate [defendant’s] concerns” regarding chilling); *Price v. Cnty. of San Diego*, 165 F.R.D.

1 614, 620 (S.D. Cal. 1996) (concluding that documents at issue should be produced and noting
 2 that “the infringement upon the frank and independent discussions regarding contemplated
 3 policies and decisions of the County... can be alleviated through the use of a strict protective
 4 order”).

5 Finally, the fact that witnesses can nevertheless be deposed and cross-examined concerning
 6 confidential documents that are subject to the protective order (Dkt. No. 647 at 5) makes no
 7 difference. That is true of any document produced in litigation. Moreover, the likelihood of such
 8 examination is a function of the relevance of such documents and whether they impeach the
 9 witness and/or contradict the Government’s contentions—not their deliberative nature. And, such
 10 highly relevant and/or impeaching documents are those for which Plaintiffs’ need, and the public
 11 interest in disclosure, are greatest.

12 The cases the Government cites in arguing the contrary are inapposite. (Dkt. No. 647 at 5.)
 13 *Perry v. Schwarzenegger* involved the disclosure of political associations implicating the First
 14 Amendment privilege, which is not at issue here. 591 F.3d 1147, 1164 (9th Cir. 2010). Nor is
 15 *Department of Interior v. Klamath Water Users Protective Association* persuasive, as that case
 16 does not discuss the impact of a protective order on the *Warner* analysis. 532 U.S. 1 (2001).

17 **B. The *Warner* test weighs in favor of disclosure.**

18 Each of *Warner*’s factors weighs in favor of disclosure here. *Warner*, 742 F. 2d at 1161.
 19 **First**, as this Court has repeatedly recognized, the Government’s process, motive, and intent
 20 behind the Ban are at the heart of this case. (Dkt. No. 233 at 28 (finding the Ban “necessarily
 21 turns on facts related to Defendants’ deliberative process”); Dkt. No. 299 at 7–8.) Discovery into
 22 these areas is crucial in determining the constitutionality of the Government’s discriminatory
 23 policy. *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1124 (N.D. Cal. 2003)
 24 (privilege was overcome when federal constitutional rights were at issue).² **Second**, only the
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 27 ² The Government asserts that even if the first factor favors Plaintiffs, this is not sufficient to find that the *Warner*
 28 factors favor Plaintiffs. In so arguing, the Government relies on *Noel v. City of New York*, 357 F. Supp. 3d 298, 308
 (S.D.N.Y. 2019). In *Noel*, the court recognized that the relevance factor is “likely to play a significant” role in
 determining whether the privilege was overcome. Indeed, relevance to establishing the city’s discriminatory intent
 weighed in favor of disclosure. *Id.* at 304.

1 Government has access to this evidence. If Plaintiffs must rely solely on those deliberative and
2 other documents the Government elects to disclose, the Court will be unable adequately to assess
3 whether the Ban was indeed a product of “independent military judgment” and significantly
4 furthers an important governmental interest that could not be advanced in a less intrusive way.

5 *Third*, this litigation involves government officials, sued in their official capacity, and acting on
6 behalf of the Government in developing a discriminatory ban. The Government’s role in this
7 case is thus central. *All. for Wild Rockies v. Pena*, No. 2:16-CV-294-RMP, 2017 WL 8778579, at
8 *7 (E.D. Wash. Dec. 12, 2017) (government’s role as a defendant weighs in favor of disclosure).

9 *Fourth*, as detailed above, disclosure is unlikely to have a chilling effect on frank and
10 independent discussion, particularly when a protective order is in place preventing public
11 disclosure.

12 **1. Discovery is not limited to a curated set of documents supporting the**
13 **Government’s position.**

14 The fact that none of these documents were “included in the . . . administrative record
15 supporting DoD’s decision” (Dkt. No. 647 at 11) supports disclosure, rather than cutting against
16 it. That “record” was created by the Government’s attorneys after the Ban was adopted for
17 purposes of supporting it. Documents that contradict that story and “record” are highly relevant
18 and not available from other sources.

19 Nor did the Ninth Circuit hold that discovery should be limited to evidence that the Ban
20 “‘significantly furthers’ governmental interests.” (*Id.* (quoting *Karnoski*, 926 F.3d at 1202).)
21 Rather, the Ninth Circuit held that, under heightened scrutiny, the Government bears the burden
22 of establishing that it “*reasonably determined* the policy ‘significantly furthers’ the
23 government’s important interests.” *Karnoski*, 926 F.3d at 1202 (emphasis added). Evidence that
24 the Ban does not further those interests, or undermines them, is directly relevant to whether the
25 Government can satisfy that burden. For example, if documents significantly undermine one of
26 the Government’s stated reasons for the Ban, such as unit cohesion or cost, it is critical for
27 Plaintiffs to receive—and the Court to review—that information and understand to what extent
28 the information was considered and why the Government disregarded it.

1 **2. “Non-final” opinions are relevant and not confusing.**

2 The Government further argues that these documents should not be disclosed because they
3 “largely reflect non-final comments and recommendations . . . generated as part of the
4 policymaking process.” (Dkt. No. 647 at 11.) Over the years, the Government has asserted that
5 the Ban is the result of “considered reason and deliberation,” “exhaustive study,”
6 “comprehensive review,” and “reasonable evaluation.” (Dkt. No. 194 at 15; Dkt. No. 226 at 8;
7 Dkt. No. 647 at 11.) To assess whether these assertions are true and what the true motives for
8 this discriminatory Ban were, knowing which policies the Government *rejected* and why is just
9 as important as knowing what policy the Government ultimately adopted. For example, Thomas
10 Dee raised a dissenting opinion regarding the Ban, and the Government decided not to adopt his
11 approach or revise the Ban in light of his opinions. Understanding why his opinion was rejected,
12 including whether it was rejected because it ran counter to the directives and pressures coming
13 from President Trump, is clearly relevant to determining the motives behind this discriminatory
14 policy. Similarly, non-final documents and drafts can bear directly on whether Defendants can
15 satisfy their burden under heightened scrutiny “of establishing that they reasonably determined
16 the [Ban] ‘significantly furthers’ the government’s important interests” and that the Ban was
17 “necessary to further that interest.” See *Karnoski*, 926 F.3d at 1200, 1202 (citing *Witt v. Dep’t of*
18 *the Air Force*, F.3d 806, 819, 821 (9th Cir. 2008)). For example, the Government has asserted,
19 after-the-fact, that “unit cohesion” is a basis for the Ban. At least one Panel member, however,
20 complained of inaccurate meeting minutes that overstated “unit cohesion” concerns, which were
21 not in fact widely shared by commanders. (Dkt. No. 425 at 1–2.) Non-final opinions and drafts
22 could demonstrate what role these justifications actually played in the development of the Ban,
23 and whether they are merely *post-hoc* rationalizations.

24 Finally, the Government’s assertion that “public confusion as to the final position of the
25 government” would result if these documents were disclosed is nonsensical. The Government’s
26 transgender military Ban is final and has been widely reported to the public. As the final policy
27 has already been announced and these documents pre-date it, there is no risk of deterring
28 officials from seeking comments on drafts “out of fear that early drafts of their non-final work

1 product would be released before the authorized signer had the opportunity to review language.”
2 (Easton Decl. ¶ 5.) Moreover, both of the cases the Government relies on are inapposite.
3 *California Air Resources Board v. United States Environmental Protection Agency* was a FOIA
4 case implicating public disclosure of draft documents when a final rulemaking had issued. 2020
5 WL 2934914. *Leopold v. Office of Director of National Intelligence*, 442 F. Supp. 3d at 279–80,
6 is also a FOIA case, and found the potential for confusion if different intelligence agencies
7 appeared to adopt different public messages. *Id.* at 280. Here, by contrast, Plaintiffs seek the
8 production of documents pursuant to a protective order, not public disclosure under FOIA. *Supra*
9 at 6–7.

10 CONCLUSION

11 For the foregoing reasons, the Court should find that the *Warner* factors weigh in favor of
12 disclosure of the 145 documents identified in the Court’s Order.

13
14 Dated: December 16, 2020

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 December 16, 2020.

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