

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' THIRD 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 July 13, 2015 and June 30, 2016 withheld  
5 solely pursuant to the deliberative process privilege. *See* Order of Oct. 28, 2020, Dkt. 629 at 2.  
6 As with the documents submitted for *in camera* review on August 28, 2020, *see* Dkt. 573,  
7 September 4, 2020, *see* Dkt. 597, October 9, 2020, *see* Dkt. 622, October 30, 2020, *see* Dkt. 631,  
8 November 13, 2020, *see* Dkt. 637, December 1, 2020, *see* Dkt. 643, and December 11, 2020, *see*  
9 Dkt. 652 in an attempt to narrow the dispute before the Court, and in light of this Court's  
10 instruction that Defendants' submissions should be more limited and "more circumspect,"  
11 8/24/2020 Hr'g Tr. 10:22, and the short period of time the Court has afforded Defendants to  
12 formally assert the deliberative process privilege over documents during this time period,  
13 Defendants have focused their assertion of the deliberative process privilege over only the most  
14 sensitive documents at the highest levels of the relevant agencies. Accordingly, Defendants have  
15 chosen to formally assert the deliberative process privilege over 31 documents from the time  
16 period between July 13, 2015 and June 30, 2016. These documents are being provided to the  
17 Court for *in camera* review accompanied by a declaration from the Department of Defense  
18 formally asserting the deliberative process privilege. The remaining documents from the period  
19 between July 13, 2015 and June 30, 2016 that were previously withheld exclusively pursuant to  
20 the deliberative 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.<sup>1</sup>

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 July 13, 2015 and June 30,  
16 2016. Accordingly, these remaining documents have been separately produced to Plaintiffs on  
17 December 18, 2020 (with a small remainder that will be produced today). This disclosure of  
18 documents is consistent with the approach Defendants have routinely applied in this case and  
19 others, insofar as Defendants have attempted to focus their assertions of the deliberative process  
20 privilege when limited categories of documents are at issue. *See, e.g.*, 7/21/2020 Hr’g Tr. 16:5–  
21 6 (explaining that in the related *Doe* case, the plaintiffs sought narrow categories of documents,  
22 and the Government “waive[d] the privilege” over certain deliberative documents “in order to  
23 narrow the scope of the dispute”). Rather than consider sweeping categories of deliberative  
24 documents wholesale, Defendants have repeatedly urged that the parties should negotiate and

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25 <sup>1</sup> A portion of the documents produced *in camera* to the Court as well as a portion of documents  
26 produced to the Plaintiffs contain redactions to preserve the attorney client and attorney work  
27 product privileges and Defendants’ ability to formally assert the presidential communications  
28 privilege. *See, e.g.*, Easton Decl. ¶ 8. Additionally, documents wholly subject to any of these  
other privileges have been withheld in full.

1 litigate over individual documents (or narrow categories) for which Plaintiffs have identified a  
2 particular need related to their claims. Those documents should be the focus of any privilege  
3 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, particularly where the Ninth  
9 Circuit has specifically questioned the relevance of documents pre-dating the Panel of Experts.  
10 *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (“For example, is information  
11 concerning the basis for the 2017 Memorandum still relevant now that the 2018 Policy has been  
12 adopted?”).

13 Dated: December 23, 2020

Respectfully submitted,

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