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15 UNITED STATES DISTRICT COURT
16 DISTRICT OF ARIZONA

17 Russell B. Toomey,
18 Plaintiff,
19 v.
20 State of Arizona, *et al.*
21 Defendants.

No. 4:19-cv-00035

**DEFENDANTS STATE OF
ARIZONA’S, ANDY TOBIN’S, AND
PAUL SHANNON’S OPPOSITION
TO PLAINTIFF’S MOTION TO
COMPEL**

22 Defendants State of Arizona, Andy Tobin, and Paul Shannon (collectively, the “State
23 Defendants”) hereby oppose Plaintiff Russell B. Toomey’s Motion to Compel (the
24 “Motion”).

25 Plaintiff has obtained substantial evidence in this matter but still cannot prove his
26 claims. In another attempt to find some supporting evidence, Plaintiff now requests that
this Court order the State Defendants to produce documents protected by the deliberative
process privilege. Rule 26 provides that parties may obtain discovery about any
nonprivileged matter. Fed. R. Civ. P. 26(b)(1). Nothing in the Federal Rules of Civil
Procedure authorizes a party to demand the production of privileged documents, which is

1 exactly what Plaintiff seeks here.

2 The documents withheld by the State Defendants are protected by the deliberative
3 process privilege. The State Defendants appropriately asserted the privilege¹ and have
4 complied with all legal requirements to do so. Plaintiff's arguments to the contrary
5 misconstrue legal authority, the State Defendants' privilege log, and the documents at issue.
6 Plaintiff also attempts to overcome the clearly applicable privilege by asserting that the
7 withheld documents are the only source of relevant and important information. Plaintiff's
8 argument is again flawed, and ignores the substantial evidence already produced in this
9 matter. There is no justification for overcoming the clearly established privilege. The Court
10 should deny Plaintiff's Motion.

11 **I. THE COURT SHOULD DENY PLAINTIFF'S MOTION TO COMPEL.**

12 Pursuant to Federal Rule of Civil Procedure 37, a party may move for an order
13 compelling disclosure or discovery.² The moving party bears the burden of showing that
14 the non-moving party's objections are unjustified. *Ocean Garden Prod. Inc. v. Blessings*
15 *Inc.*, No. CV-18-00322-TUC-RM, 2020 WL 4284383, at *2 (D. Ariz. July 27, 2020).

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17
18 ¹ The Arizona Governor's Office also asserted that many of the same documents are
19 privileged. Declaration of Ryan Curtis ("Curtis Decl.") at ¶ 5, Ex. 13, filed concurrently,
20 incorporated by reference. Because the Governor's Office is not a party to this litigation, it
21 was not permitted the opportunity to respond to Plaintiff's motion to compel the privileged
documents. If the Court is inclined to order production of these documents, we understand
that the Governor's Office requests the opportunity to address its independent assertion of
the privilege with the Court, if the Court so desires.

22 ² Rule 37 requires that a party confer with the non-moving party in an attempt to resolve
23 the discovery dispute prior to filing a motion to compel. Fed. R. Civ. P. 37(a)(1). Plaintiff's
24 counsel met and conferred with counsel for the State Defendants to superficially meet this
25 requirement. Curtis Decl., ¶ 4. However, Plaintiff's counsel did not engage in any
26 meaningful discussion regarding the State Defendants' privilege assertions. Instead
Plaintiff counsel stated during a meet and confer on March 3, 2021, that unless the State
Defendants produced all documents withheld pursuant to the deliberative process privilege,
they would file a motion to compel. *Id.* Short of complying in full with Plaintiff's demands,
there was nothing State Defendants could have done to cure any alleged defect in asserting
the privilege that would have stopped Plaintiff from filing the pending Motion to Compel.

1 **A. The Deliberative Process Privilege.**

2 The deliberative process privilege shields from mandatory disclosure inter and intra-
3 governmental communications relating to decision-making matters of law or policy. 5
4 U.S.C. § 552(b)(5) (1996); *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S.
5 Ct. 777, 785 (2021); *F.T.C. v. Warner Commc 'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).
6 The Supreme Court has expressly recognized the privilege with respect to the decision-
7 making processes of government agencies. *See Sierra Club*, 141 S. Ct. at 785; *NLRB v.*
8 *Sears, Roebuck & Co.*, 421 U.S. 132, 148–53 (1975). The privilege is designed to protect
9 “frank and open discussions within governmental agencies” and to prevent the “chilling” of
10 “personal opinions and ideas of government personnel involved in the decision-making
11 process.” *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 87 (1973); *Sierra Club*, 141 S. Ct. at
12 785; *Warner Commc 'ns*, 742 F.2d at 1161; *Greenpeace v. Nat'l Marine Fisheries Serv.*,
13 198 F.R.D. 540, 543 (W.D. Wash. 2000).

14 To qualify, a document must be both: (1) “predecisional;” and (2) “deliberative.”
15 *Warner Commc 'ns*, 742 F.2d at 1161; *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d
16 1114, 1117 (9th Cir. 1988). A document is pre-decisional if it is “generated before the
17 adoption of an agency’s policy or decision.” *Warner Commc 'ns*, 742 F.2d at 1161; *see also*
18 *Sierra Club*, 141 S. Ct. at 786 (“[d]ocuments are ‘predecisional’ if they were generated
19 before the agency’s final decision on the matter”). A document is “deliberative” if it
20 contains “recommendations, draft documents, proposals, suggestions, and other subjective
21 documents which reflect the personal opinions of the writer rather than the policy of the
22 agency” or that “inaccurately reflect or prematurely disclose the views of the agency.”
23 *Warner Commc 'ns*, 742 F.2d at 1161; *Nat'l Wildlife Fed'n*, 861 F.2d at 1118–19; *Sierra*
24 *Club*, 141 S. Ct. at 786 (documents are “‘deliberative’ if they were prepared to help the
25 agency formulate its position”). Factual material may also be considered “deliberative” if
26 its disclosure would reveal the mental processes of the decisionmakers. *Nat'l Wildlife*, 861

1 F.2d at 1119. To determine whether a document is “deliberative,” “courts must consider
 2 whether the agency treats the document as its final view on the matter.” *Sierra Club*, 141
 3 S. Ct. at 786. “[A] document that leaves agency decisionmakers free to change their minds
 4 does not reflect the agency’s final decision.” *Id.*

5 In *Sierra Club*, the deliberative process privilege applied to draft biological opinion
 6 memorandum exchanged between the EPA, the U.S. Fish and Wildlife Service, and the
 7 National Marine Fisheries Service. 141 S. Ct. at 787–88. The Supreme Court noted that
 8 compelling disclosure of “any email or memorandum that has the effect of changing an
 9 agency’s course” of decision “would gut the deliberative process privilege.” *Id.* In *Nat’l*
 10 *Wildlife Fed’n*, the deliberative process privilege applied to “tentative opinions and
 11 recommendations of Forest Service employees on matters instrumental to the formulation
 12 of policies governing the allocation of the Forest’s resources to competing uses.” 861 F.2d
 13 at 1120. The *Nat’l Wildlife Fed’n* court further stated that “[r]ecommendations on how best
 14 to deal with a particular issue are themselves the *essence* of the deliberative process.” *Id.*
 15 (emphasis in original). In *Warner Commc’ns Inc.*, the deliberative process privilege applied
 16 to “memoranda contain[ing] analyses of the record industry and the merger’s potential
 17 effects on competition, and recommendations on whether the Commission should challenge
 18 the venture,” where the memoranda “play[ed] a critical role” and “go to the heart” of the
 19 agency’s decision-making process. 742 F.2d at 1161.

20 **B. The Withheld Documents Are Protected By The Deliberative Process**
 21 **Privilege.**

22 Each document withheld by the State Defendants is pre-decisional and deliberative.
 23 A detailed summary of the content of and the basis for asserting the privilege as to each
 24 document is included in the concurrently filed Declaration of Paul Shannon.

25 **1. The Withheld Documents Are Pre-Decisional.**

26 Plaintiff concedes that documents dated before December 8, 2016 are pre-decisional.

1 (See Doc. 168 at 11:1–11 (asserting that documents after 12/8/2016 are not pre-decisional)).
 2 Privilege Log Entry Nos. 20–21, 75, 153, 173–175, 204–209, and 226–227 are each dated
 3 prior to December 8, 2016 and are, per Plaintiff’s argument, pre-decisional. (See also
 4 Declaration of Paul Shannon (“Shannon Decl.”) at ¶¶ 5, 9, 10, 11, filed concurrently,
 5 incorporated by reference (explaining that the documents are pre-decisional).)

6 Plaintiff asserts that documents dated after December 8, 2016 are not pre-decisional
 7 because the Arizona Department of Administration (“ADOA”) had communicated its
 8 decision to cover hormones and therapy to its insurance vendors by that time.³ The State
 9 Defendants agree that ADOA had decided the scope of its coverage by December 8, 2016,
 10 but that does not end the inquiry or the State Defendants’ deliberations. ADOA did not
 11 come to a final decision regarding the *Plan language* until December 16, 2016. (See
 12 Shannon Decl., ¶ 5.) Indeed, in Privilege Log Entry Nos. 76, 170, 171, and 172, which
 13 were exchanged on December 14 and 15, ADOA and the Governor’s Office discussed a
 14 draft redlined version of the Plan language.⁴ (*Id.*) As noted in *Sierra Club*, “[a] draft is, by
 15 definition, a preliminary version of a piece of writing subject to feedback and change.” 141
 16 S. Ct. at 786. As such, documents dated between December 8 and December 16 relating to
 17 the draft Plan language are pre-decisional. The State’s decision making did not end when

18 _____
 19 ³ Plaintiff’s Motion characterizes ADOA’s communications as “that there had been no
 20 change to the Plan’s exclusion.” (Doc. 168 at 11:6–8.) Plaintiff is wrong. Prior to 2016,
 21 the Plan excluded “transsexual surgery, including medical or psychological counseling and
 hormonal therapy.” Curtis Decl., Ex. 7. From 2017 to present, the Plan excludes “gender
 reassignment surgery” but provides coverage for hormones and therapy. (See Doc. 168-2,
 Ex. 11.)

22 ⁴ The State Defendants also withheld further transmissions of this email chain where the
 23 forwarding message was non-substantive, namely, Privilege Log Entry Nos. 6, 7, 50, 67,
 24 70, 71, and 125. See Shannon Decl., ¶¶ 6–8. For example, in Privilege Log Entry Nos. 70
 25 and 71, Ms. Yvette Medina forwarded the email chain to Mr. Scott Bender, without
 26 including any other discussion or information. *Id.* at ¶ 8. The State Defendants withheld
 these later communications because 95% of the content of each of the documents would
 need to be redacted pursuant to the privilege, and the remaining 5% would have no context
 or use without the privileged information. The State Defendants are willing to produce
 redacted versions of these communications.

1 it informed the vendors that the forthcoming Plan language would revise the exclusion to
2 expand coverage and to exclude only gender transition surgery. Other decisions were still
3 being deliberated including the language to be included in the Plan. ADOA concluded the
4 deliberative process regarding the expanded coverage for the 2017 Plan when it agreed upon
5 the final Plan language and published the Plan documents on its website.

6 Plaintiff's remaining argument mischaracterizes both the State Defendants' privilege
7 log and the withheld documents. First, Plaintiff asserts that Privilege Log Entry No. 153 is
8 not pre-decisional because it is a "February 3, 2020 email" and was, according to Plaintiff,
9 transmitted after ADOA made a final decision regarding the Exclusion. (Doc. 168 at 11:1–
10 11, n.5.) This clearly mischaracterizes the document. Privilege Log Entry No. 153 is a set
11 of handwritten notes from Ms. Marie Isaacson, former Assistant Director of the Benefit
12 Services Division of ADOA, which were made contemporaneously with ADOA's decision-
13 making process in 2015 and 2016. Curtis Decl., Ex. 16. Indeed, the notes reference
14 conversations occurring on October 15, 2015 (AZSTATE.151751), November 17, 2015
15 (AZSTATE.151752), November 7, 2016 (AZSTATE.151753), and May 25, 2016
16 (AZSTATE.151760). *Id.* Indeed, the redacted portion of the document reflects notes from
17 a July 11, 2016 telephone discussion. Shannon Decl., ¶ 10. Entry No. 153 is pre-decisional.

18 Next, Plaintiff asserts that Privilege Log Entry Nos. 216–223 are not pre-decisional
19 because they were transmitted after ADOA made a final decision regarding the Exclusion.
20 (Doc. 168 at 11:1–11, n.5.) Plaintiff ignores, however, that these communications do not
21 relate to ADOA's consideration of transgender benefits. Instead, as outlined in the State
22 Defendants' privilege log, these communications discuss "proposed transgender benefits in
23 advance of finalization of *[the] City of Gilbert[s]* healthplan documents." (See Doc. 168-
24 2, Ex. 9 at Entry Nos. 216–223 (emphasis added).) That these communications occurred
25 after ADOA, a different government entity, made its independent decision regarding
26 transgender benefits is irrelevant. The material fact is that the Town of Gilbert was still

1 considering recommendations, proposals, and suggestions relating to its own health plan,
 2 prior to making its final decision.⁵ These documents are pre-decisional and open and frank
 3 discussions between government agencies is the very reason the deliberative process exists.

4 **2. The Documents Are Deliberative.**

5 Plaintiff also takes issue with documents purportedly “reflecting State Defendants’
 6 interpretation of Section 1557 of the Affordable Care Act.” (Doc. 168 at 11:12–12:14.)
 7 Again, Plaintiff’s argument mischaracterizes the State Defendants’ privilege log. Nowhere
 8 in the privilege log do the State Defendants assert that these documents contained
 9 interpretations or explanations of Section 1557. (See Doc. 168-2, Ex. 9 at Privilege Log
 10 Entry Nos. 20–21, 50, 67, 70–71, 75–76, 170–175, 204–209, 225–227.) To the contrary,
 11 the privilege log indicates that these documents contain “recommended proposed revisions
 12 to [ADOA’s] transgender benefits.” *Id.* Such communications clearly fall within the
 13 protections of the deliberative process privilege.

14 Moreover, even if the documents did contain legal interpretations of Section 1557,
 15 such information would still be protected. In *Nat’l Wildlife Fed’n*, the Ninth Circuit
 16 recognized that the application of the privilege “should not turn on whether we label the
 17 contents of a document ‘factual’ as opposed to ‘deliberative.’” 861 F.2d at 1119. Rather,
 18 “this distinction (fact or opinion) has been refined to look at the deliberative process as a
 19 whole.” *California Native Plant Soc’y v. U.S. E.P.A.*, 251 F.R.D. 408, 413 (N.D. Cal.
 20 2008). “In some circumstances, even material that could be characterized as ‘factual’ would
 21 so expose the deliberative process that it must be covered by the deliberative process
 22

23 ⁵ Plaintiff also asserts that ADOA waived the privilege as to these documents by sharing
 24 them with the other Arizona municipalities, counties, and agencies. (Doc. 168 at 12:5–14.)
 25 As explained, Privilege Log Entry Nos. 216–223 relate to the Town of Gilbert’s assessment
 26 of transgender benefits, not the analysis done by ADOA. Shannon Decl., ¶ 12. Part of the
 Town’s decision-making process, apparently, was consulting other Arizona agencies,
 municipalities, and counties. *Id.* ADOA did not waive the privilege by assisting in the
 Town’s process.

1 privilege.” *Nat’l Wildlife Fed’n*, 861 F.2d at 1119 (citation omitted); *see also California*
2 *Native Plant Soc’y*, 251 F.R.D. at 413 (“even factual material can be protected, where its
3 disclosure would reveal a decision-maker’s mental process”). In such situations,
4 “documents containing nonbinding recommendations on law or policy” and factual
5 materials that “reveal the mental processes of the decisionmakers” fall within the privilege.
6 *Nat’l Wildlife Fed’n*, 861 F.2d at 1119. For example, in *Greenpeace*, the court noted that
7 “expressions of expert opinion and professional judgment” are protected by the privilege
8 where they “relate to the exercise of policy-oriented judgment.” 198 F.R.D. at 544.
9 Similarly, in *Nat’l Wildlife Fed’n*, the Ninth Circuit found that reports assessing
10 “[p]rojected levels of various activities expected from implementation of the Forest Plans,
11 the estimated costs and benefits associated with each activity, and estimates as to the
12 Forest’s maximum capacity for sustaining each activity” were protected by the deliberative
13 process privilege, even where the reports “might be characterized as opinions on facts or
14 the consequences of facts.” 861 F.2d at 1121.

15 Documents reflecting ADOA’s interpretation of Section 1557 would be similarly
16 protected. ADOA’s consideration and analysis of Section 1557 was an intimate part of
17 ADOA’s decision-making process relating to transgender healthcare benefits and the
18 Exclusion. Disclosure of such documents would reveal the mental processes,
19 recommendations, and opinions of ADOA’s representatives and attorneys, as well as those
20 of other government entities, including the Arizona Attorney General’s Office (which are
21 also protected by the attorney-client privilege) and the Arizona Governor’s Office. As such,
22 these documents are protected by the deliberative process privilege.

23 **C. The State Defendants Met Their Prima Facie Burden For Asserting The**
24 **Privilege.**

25 Plaintiff asserts that the State Defendants were required to affirmatively provide a
26 declaration or affidavit from ADOA’s Director prior to asserting the deliberative process

1 privilege. (See Doc. 168 at 9:1–19.) However, the cases that Plaintiff relies upon do not
2 support this proposition.

3 Each of the cases cited by Plaintiff discuss requiring a declaration in the context of
4 a motion to compel or a motion for a protective order. See *E.E.O.C. v. Swissport Fueling,*
5 *Inc*, No. CV-10-2101-PHX-GMS, 2012 WL 1648416, at *15 (D. Ariz. May 10, 2012)
6 (motion to compel); *L.H. v. Schwarzenegger*, No. CIVS-06-2042 LKK GGH, 2008 WL
7 2073958, at *6 (E.D. Cal. May 14, 2008) (same); *Unknown Parties v. Johnson*, No. CV-15-
8 00250-TUC-DCB, 2016 WL 8199308, at *1 (D. Ariz. July 21, 2016) (motion for protective
9 order); *California Native Plant Soc’y v. U.S. E.P.A.*, 251 F.R.D. 408, 410 (N.D. Cal. 2008)
10 (letter brief regarding discovery dispute); see also *Mayfield v. Cty. of Los Angeles*, No.
11 219CV1298FMOSKX, 2020 WL 2510649, at *1 (C.D. Cal. Mar. 20, 2020) (interpreting
12 prior discovery order compelling production). Plaintiff has cited no case that requires the
13 party asserting a deliberative process privilege to provide a declaration *prior* to briefing
14 before the court.

15 Indeed, Plaintiff’s cases reflect that a detailed declaration is required so that the *court*
16 can properly assess the application of the privilege—not the party opposing invocation of
17 the privilege. As the *Swissport Fueling* court explained, a declaration from the agency is
18 necessary “so that *the court*, in looking at the list of document, can understand the basis on
19 which the privilege is asserted.” 2012 WL 1648416, at *15 (emphasis added). In *Unknown*
20 *Parties*, the defendants objected to three Rule 30(b)(6) deposition topics based on the
21 deliberative process privilege and moved for a protective order. 2016 WL 8199308, at *1.
22 The *Unknown Parties* court denied the protective order because it was premature, and
23 directed the parties to proceed with the deposition. *Id.* at *5. However, the court clarified
24 that the defendants could still object during the deposition based on the privilege and that,
25 “subsequent to the depositions,” the defendants should file the required declaration for the
26 court’s review. *Id.* Likewise, in *Mir v. Med. Bd. of California*, No. 12CV2340-GPC

1 (DHB), 2016 WL 3406118, at *2 (S.D. Cal. June 21, 2016), the plaintiff brought a motion
 2 to compel the defendant to produce documents withheld pursuant to the deliberative process
 3 privilege. *Aff'd sub nom. Mir v. Kirchmeyer*, No. 312CV02340GPCDHB, 2017 WL
 4 164086 (S.D. Cal. Jan. 17, 2017). The defendant had not provided any declaration (or even
 5 a privilege log) supporting his assertion of the privilege. *Id.* at *3. The *Mir* court explained
 6 that, without a declaration, ***the court*** did not have sufficient information to assess the
 7 privilege claim; however, the court permitted the defendant to “continue to assert the
 8 privilege” if he submitted a privilege log and supporting declaration. *Id.* Plaintiff’s
 9 arguments misconstrue the relevant case law and further demonstrate Plaintiff’s wishful
 10 thinking as they have no evidence of any discriminatory intent. Moreover, based on
 11 Plaintiff’s Motion and statements during the March 3 meet and confer, Plaintiff would have
 12 filed the pending Motion even if State Defendants had provided such an affidavit. Curtis
 13 Decl., ¶ 4.

14 The State Defendants filed concurrently with this Opposition a declaration from Paul
 15 Shannon, Assistant Director of the Benefit Services Division of ADOA.⁶ *See generally*
 16 Shannon Decl. Mr. Shannon’s declaration meets the particularity requirement necessary
 17 for this Court to analyze the State Defendants’ privilege claim. *See generally id.* As such,
 18 the State Defendants have satisfied the procedural requirements for asserting the privilege.

19 **II. NO EXCEPTION TO THE PRIVILEGE APPLIES.**

20 The deliberative process privilege is not absolute. A party may obtain privileged
 21 information if its “need for the materials and the need for accurate fact-finding override the
 22 government’s interest in non-disclosure.” *Warner Commc’ns Inc.*, 742 F.2d at 1161. The
 23 Ninth Circuit has recognized a four factor test to determine if the privilege is overcome. *Id.*
 24

25 ⁶ Plaintiff’s Motion repeatedly refers to Mr. Shannon as “ADOA Director.” (See Doc. 168
 26 at 5:18, 7:14–15.) Andy Tobin, not Paul Shannon, is the Director of ADOA.

1 The factors considered are: “(1) the relevance of the evidence; (2) the availability of other
2 evidence; (3) the government’s role in the litigation⁷; and (4) the extent to which disclosure
3 would hinder frank and independent discussion regarding contemplated policies and
4 decisions.” *Id.* Even if Plaintiff were to concede that discriminatory intent is necessary,
5 Plaintiff has not shown any despite having thousands of documents and emails. There is
6 no reason to suspect the communications related to the deliberative process contain
7 statements showing some discriminatory intent. Plaintiff is desperately fishing in the
8 deliberative process pond hoping to find something they have failed to find in an ocean of
9 other evidence.

10 Relevance of the Evidence: Plaintiff has repeatedly asserted that the Exclusion is
11 facially discriminatory and that no evidence of discriminatory intent is necessary. (Doc. 86
12 at 12–15; *see also* Doc. 168 at 4:14.) Under Plaintiff’s own argument, then, the decision-
13 making process and the reasons underlying ADOA’s decision to uphold the Exclusion are
14 not relevant. This factor weighs against disclosure.

15 Availability of Other Evidence: There is **substantial** other evidence available to
16 Plaintiff that addresses this issue. Plaintiff asserts that the “only source” of the evidence he
17 seeks is the withheld documents (Doc. 168 at 14:13–16), but that is demonstrably incorrect.
18 First, the State Defendants have produced more than 8,000 documents in this matter.⁸ Curtis
19 Decl., ¶ 9. Much of that information could have been withheld under the deliberative

20
21 ⁷ The State Defendants recognize that the fact that the State of Arizona is a party to this
22 matter may weigh against upholding the privilege, but government involvement is always
23 at issue in deliberative process privilege cases. The privilege exists under the common law
24 to allow the government to engage in full and frank discussions on policy matters. *Karnoski*
25 *v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019). The State’s involvement alone does not
26 suggest the privilege is overcome because government involvement is always present in
such matters. Instead of talking about the role ADOA had in analyzing the applicability of
ACA § 1557, Plaintiff relies exclusively on the status of the State of Arizona as well as
Messrs. Tobin and Shannon being Defendants. This adds nothing to the analysis.

⁸ The State Defendants have also acceded to Plaintiff’s request for additional searches of
their electronically stored information.

1 process privilege. In particular, ADOA produced all of its internal communications and
2 analyses regarding transgender benefits and the Exclusion, and its communications with
3 each of its four insurance vendors regarding transgender benefits and with several
4 healthcare consulting firms. *Id.* at ¶ 10. ADOA produced meeting minutes from its
5 meetings with insurance vendors and from internal meetings. *Id.* In addition, Plaintiff
6 subpoenaed each of ADOA’s four insurance vendors and the Arizona Governor’s Office.
7 (*See* Docs. 140–143; Doc. 161.)

8 Moreover, despite the thousands of documents and communications devoid of any
9 discriminatory intent, it does not follow that ADOA would suddenly engage in intentionally
10 discriminatory discussions with the Arizona Governor’s Office and other governmental
11 entities. In addition, Plaintiff has already conducted four depositions, during which he
12 questioned each witness regarding the reason for the Exclusion. Curtis Decl., ¶ 11. Plaintiff
13 has stated his intention to conduct at least four more depositions, during which he can
14 similarly question the witnesses regarding the reasons for the Exclusion. *See id.* at ¶¶ 12–
15 13. Moreover, Plaintiff’s Motion references Ms. Christina Corieri⁹ and Plaintiff’s inability
16 to obtain evidence about Ms. Corieri’s involvement in ADOA’s decision without the
17 withheld documents. (Doc. 168 at 14:4–12.) However, Plaintiff has indicated that he
18 intends to depose Ms. Corieri. Curtis Decl., ¶ 13. Subject to any privileges the Governor’s
19 Office may assert in connection with Ms. Corieri’s deposition (which are not the subject of
20 Plaintiff’s Motion or this Response), Plaintiff can certainly question her regarding the
21 degree of her involvement in the decision-making process regarding the Exclusion. Further,
22 Plaintiff propounded written discovery aimed specifically at this issue: the reasons behind
23 the Exclusion. Curtis Decl., Ex. 16. Plainly, other substantial evidence is available to
24 Plaintiff in the form of the Plan documents, ADOA’s public statements, written discovery

25
26 ⁹ Plaintiff’s Motion inadvertently refers to Ms. Corieri as “Christine Corieri.” (Doc. 168 at 14:5.)

1 responses, the testimony of several deponents, and the thousands of documents produced in
2 this matter. This factor weighs heavily against disclosure.

3 The Extent That Disclosure Would Hinder Frank and Independent Discussion: This
4 factor deserves “careful consideration” because a government’s interest in “full and frank
5 communication about policymaking” is a serious concern. *Karnoski v. Trump*, 926 F.3d
6 1180, 1206 (9th Cir. 2019). For example, in *Warner Commc’ns Inc.*, the court refused to
7 compel production of privileged documents, in part, because compelling disclosure
8 “certainly injures the quality of agency decisions,” “chills frank discussion and deliberation
9 in the future among those responsible for making governmental decisions,” and
10 “encourages the Commission to have deliberative reports and recommendations prepared
11 only by those economists who will draw the conclusions.” 742 F.2d at 1162. Similarly,
12 here, compelling disclosure of the withheld documents would prevent a full and frank
13 discussion of important matters and prevent full and careful consideration, be bad public
14 policy, and not result in the best decision possible for ADOA and its health plans. Shannon
15 Decl., ¶ 14. Placing ADOA employees and other government officials in a “fishbowl”
16 would cause them to skirt around or sterilize their discussions of more difficult or
17 controversial issues, in order to avoid criticism later. It would hamper the full and frank
18 discussions that are the reason for the common law deliberative process privilege. This
19 factor weighs against disclosure.

20 Because three of the four factors considered in the Ninth Circuit weigh against
21 disclosure, the privilege is not overcome.¹⁰ The important public policy reasons for the
22 common law deliberative process privilege and the communications at issue should be

23 _____
24 ¹⁰ Plaintiff’s Motion references four additional factors occasionally considered by courts
25 not in this jurisdiction. (Doc. 168 at 15:24–16:23.) The Ninth Circuit has not adopted these
26 additional factors, and no published case in this District addresses them. While the State
Defendants dispute that these additional factors weigh in favor of disclosure, they will not
address them in detail here.

1 protected.

2 **III. CONCLUSION.**

3 For the foregoing reasons, the deliberative process privilege applies to the withheld
4 documents. The Court should deny Plaintiff’s Motion to Compel.¹¹

5
6 DATED this 1st day of April, 2021.

FENNEMORE CRAIG, P.C.

8 By: s/ Ryan Curtis
9 Timothy J. Berg
10 Amy Abdo
11 Ryan Curtis
12 Shannon Cohan
13 Attorneys for Defendants State of
14 Arizona, Andy Tobin, and Paul
15 Shannon

12 18261102

24 _____
25 ¹¹ If the Court is inclined to grant Plaintiff’s Motion, the State Defendants request that the
26 Court conduct an *in camera* review of the withheld documents prior to ruling upon the
Motion. *See Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (“the district court
should consider classes of documents separately”.)