

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

**CAIR-FOUNDATION, INC.
and CAIR-FLORIDA, INC.,**

Plaintiffs,

v.

**RONALD DESANTIS, in his
official capacity as Governor,
State of Florida,**

Defendant.

**Case No. 4:25-cv-00516-MW-
MJF**

**OPPOSITION BRIEF TO PLAINTIFF'S MOTION TO COMPEL
DEPOSITION TESTIMONY WITHHELD UNDER THE
DELIBERATIVE PROCESS PRIVILEGE**

Pursuant to Federal Rule of Civil Procedure 37 and N.D. Loc. R. 7.1(E), Defendant hereby files this Opposition Brief to Plaintiffs' Motion to Compel Deposition Testimony Withheld Under the Deliberative Process Privilege, and requests this Court DENY the Plaintiffs' request to compel Defendant's Rule 30(b)(6) designee, Jay K. Arnold, Jr., to answer the deposition questions identified in their motion. As grounds for this Opposition Brief, Defendant submits the following:

STATEMENT OF FACTS

The facts of this case are largely a matter of public and court record, not for dispute here. However, the facts relevant to Plaintiffs' Motion to Compel and this Opposition Brief are as follows:

Defendant agrees with Plaintiffs' statement that Plaintiffs took the deposition of the Executive Office of the Governor under Federal Rule of Civil Procedure 30(b)(6). And that Jay K. Arnold, Jr., Deputy Chief of Staff to Governor DeSantis, testified as Defendant's Rule 30(b)(6) designee on eighteen topics related to the drafting, research, and promulgation of the Executive Order.

Defendant agrees that during the deposition of Mr. Arnold, some questions were asked that, had Mr. Arnold been required to answer, would have revealed information that is protected by the deliberative process privilege, and therefore defense counsel objected and instructed the witness not to answer.

The questions that were allowed to be answered, as alleged in Plaintiffs STATEMENT OF FACTS, were those that specifically would not require the witness to divulge any information that was predecisional or deliberative as it relates to Executive Order 2025-244. Plaintiffs now

seek to compel disclosure of this clearly privileged information without demonstrating any overriding need or providing an appropriate justification. The Court should deny Plaintiffs' motion.

ARGUMENT

I. Plaintiffs' Seek to Compel Testimony that is Squarely Protected by the Deliberative Process Privilege.

“[D]eliberative process covers ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,’ *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance ‘the quality of agency decisions,’ *Id.*, at 151, by protecting open and frank discussion among those who make them within the Government,” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001). *See also EPA v. Mink*, 410 U.S. 73, 86–87 (1973); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984).

The deliberative and legislative process privilege share striking similarities and legal significance. The legislative process privilege “protects the legislative process itself, and therefore covers both governors’ and legislators’ actions in the proposal, formulation, and passage of legislation.” *In re Hubbard*, 803 F.3d 1298, 1307-1308 (11th Cir. 2015); *see also Baraka v. McGreevey*, 481 F.3d 518, 196–97 (3d Cir. 2007) (same). Meanwhile, the deliberative process privilege “provides a useful analogy for a confidentiality-based privilege for state legislators because executive agencies, like state legislators, engage in a wide variety of activities, including factual investigations for quasi-legislative rulemaking.” *In re Grand Jury*, 821 F.2d 946, 958–59 (3d Cir. 1987). Both privileges are grounded in the need to protect the confidentiality of communication with the officeholder involving the discharge of his or her office. *Fla. Ass’n of Rehab. Facilities, Inc. v. State of Fla. Dep’t of Health & Rehab. Servs.*, 164 F.R.D. 257 (N.D. Fla. 1995). “[A]ny legislative privilege regarding the production of documents available to state legislators is a qualified ‘deliberative process privilege.’” *Doe v. Nebraska*, 788 F. Supp. 2d 975, 986 (D. Neb. 2011) (quoting *Kay v. City of Rancho*

Palos Verdes, No. CV 02-03922 MMM RZ, 2003 WL 25294710, at *15-17 (C.D. Cal. Oct. 10, 2003)).

“The privilege ‘applies whether or not the legislators [or Governor] themselves have been sued.’” *In re Hubbard*, 803 F.3d at 1308 (citation omitted) And “[t]he reason . . . is clear”: “[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.” *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951) (collecting citations) (quotations omitted).

“For the deliberative process privilege to apply to a document, the court must find that two requirements have been satisfied. The first, or procedural, requirement demands that: (1) the privilege be asserted by the highest ranking member of the government agency or his or her designated subordinate, *see Mobil Oil Corp. v. Dep’t of Energy*, 520 F.Supp. 414, 416 (N.D.N.Y.1981); and (2) such individual submit an affidavit sufficiently describing the documents. *See Asahi Chem. Indus.*

Co. v. United States, 1 CIT 21, 23, 1980 WL 2231 (1980).” *Elkem Metals Co. v. United States*, 24 C.I.T. 1395, 1397–98 (2000).

“The second, or substantive, requirement demands that the documents at issue be both ‘predecisional’ and ‘deliberative.’” *Id.* at 1398. *See also Torres v. City Univ. of New York*, 1992 WL 380561 (S.D.N.Y. Dec. 3, 1992). Predecisional means something that is “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Renegotiation Bd. V. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975).

A document or communication is deliberative if it “reflects the give-and-take of the consultative process’ by revealing the manner in which the agency evaluates possible alternative policies or outcomes.” *City of Virginia Beach v. United States Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir.1993) (quoting *Coastal States Gas v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). To determine whether this “give-and-take” is present, courts examine the “process by which governmental decisions and policies are formulated,” *Sears*, 421 U.S. at 150), or whether disclosure would impair the “uninhibited and frank internal discussion in the formulation of governmental policy and decisionmaking.” *SCM Corp. v. United States*, 473 F. Supp. 791, 797 (Cust. Ct. 1979).

Deliberative process privilege extends beyond protecting documents, also protecting any communications or testimony that would reveal predecisional and deliberative information. *Fla. v. United States*, 342 F.R.D. 153, 159 (N.D. Fla. 2022). “If Plaintiff’s counsel asks questions that implicate the deliberative process privilege counsel ‘may protect against the disclosure of ... privileged information ... by interposing appropriate objections and giving instructions on a question-by-question basis.’” *Id.* (quoting *SEC v. Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012)).

Mr. Jay Arnold, Deputy Chief of Staff for the Executive Office of the Governor and designated subordinate of the Governor, invokes the deliberative process privilege in the name of the Governor to prevent being required to answer questions on the eight (8) topics prompted by Plaintiffs. An accompanying affidavit is attached to this reply brief.

All of Plaintiffs’ topics related to their Motion to Compel are predecisional and deliberative in nature and therefore subject to the deliberative process privilege.¹

¹ Plaintiffs’ complaint that Executive Privilege was raised at the deposition holds no water. Objections lodged at any deposition are properly raised as they are implicated. Indeed, if they are not, they are deemed waived. *E.g.*, *Gober v. City of Leesburg*, 197 F.R.D 519, 520 (M.D. Fla. 2007) (“The Court agrees that it is appropriate to instruct a witness

A. Topic 1: Whether other organizations were considered for designation, and the criteria used.

The nature of Plaintiffs’ question concerns topics that are predecisional and deliberative. Plaintiffs’ own motion concedes this and the language used in the motion makes that plain: “how the Governor’s office decided which organizations to research,” ECF No. 101 at 3, “considered for inclusion,” and “whether the Governor had decided not to designate,” *id.* at 4 all indicate decisions made by the Governor and his direct subordinates prior to publishing the final draft of the EO. The question of whether another organization was chosen for designation – aside from the lack of relevance as to whether the rationale to include CAIR-Foundation, Inc, in the EO was valid – aims to penetrate directly into the decision-making process and conversations that the Governor and his direct subordinates employed in writing this Executive Order.

As this topic is both predecisional and deliberative in nature, it is protected by the deliberative process privilege.

not to answer a question at deposition in order to preserve a privilege). If a question presents objectionable substance, the relevant objection must be raised.

B. Topics 2: Why draft “whereas” clauses were removed before the Order issued and 3: Who added the “material support” provision in Section 2 of the EO, and why.

These topics both concern questions asked regarding the removal and addition of certain clauses between early drafts of the EO and the final, published draft and similar to Topic 1, address a predecisional and deliberative issue, as evidenced by Plaintiffs’ own language: “An early draft of the EO included a whereas clause . . . Mr. Arnold [was asked] why it was removed [and] whether there were any conversations among staff about removing it,” *id.*, and “[b]etween two drafts.” *Id.* at 5. Any question concerning the addition or removal of provisions between two drafts of a finished product must be, by its very nature, predecisional – as it occurred before the final draft – and deliberative – as it requires contemplation of the give-and-take of the consultive process between members of the organization.

C. Topic 4: Whether anyone in the Governor’s office reviewed a source cited in Mr. Arnold’s declaration.

Again, Plaintiffs’ language makes it apparent that this question is both predecisional and deliberative: “whether anyone in the Governor’s office consulted that source during the drafting of the Order” *id.* Although this topic does not apply to the whereas clauses in the same way as topics

2 and 3, it clearly aims at a decision made before the final, published draft of the EO and seeks to ask why a particular source was cited as evidence. While Plaintiffs can certainly attempt to attack the veracity of the source itself, the Governor’s decision to consult the source is protected under the deliberative process privilege. This topic is clearly predecisional and deliberative in nature.

D. Topics 5: Whether anyone in the Governor’s office considered the EO’s First Amendment implications before it issued, 6: Whether the Governor’s office considered alternative measures before designating CAIR, and why they were rejected, 7: Whether the Governor’s office assessed the sufficiency of existing Florida law before issuing the Order, and 8: Whether the Champions for Justice Fund was discussed before the EO issued.

The language of the subheadings of these topics provide ample evidence that Plaintiffs seek both predecisional and deliberative information. For topic 5: “whether anyone in the Governor’s office considered ... implications before it was issued.” For topic 6: “whether the Governor’s office considered alternative measures before . . .” Topic 7: “assessed the sufficiency of existing Florida law before issuing the Order.” Topic 8: “was discussed before the EC issued.” *Id.* at 6 (emphasis added). To consider, assess, or discuss something makes it deliberative

and the preposition “before” means the decision must have been made before the EO was completed.

These questions also directly implicate the protected process noted in *City of Virginia Beach*, because they want to “reveal the manner in which the agency evaluates possible alternative policies or outcomes.” 995 F.2d at 1253.

All of these topics seek predecisional and deliberative information.

II. Plaintiffs Cannot Overcome Deliberative Process Privilege by Simply Filing a Lawsuit.

Plaintiffs’ argument presupposes that government misconduct occurred because they allege it. This is an attempt to make the exception to the deliberative process privilege swallow the rule. Plaintiffs’ assertion that misconduct animated the Executive Order is their own *ipse dixit*, which is not enough to overcome the deliberative process privilege.

Instead, Plaintiffs must show government misconduct before they can argue that the deliberative process privilege doesn’t apply. But they have made no such showing. As their motion points out: “[A] plaintiff must present evidence of a retaliatory animus on the part of the defendant, i.e., ‘the defendant was subjectively motivated to [take action] against the plaintiff for exercising his First Amendment rights.’”

Andrews v. Miner, 301 F. Supp. 3d 1128, 1135 (N.D. Ala. 2017) (quoting *O'Bryant v. Finch*, 637 F.3d 1207, 1219 (11th Cir. 2011)). Not so here.

Plaintiffs' suit does not directly attack the deliberative process privilege nor the Governor's decision-making process before enacting the Executive Order but rather seeks to overcome the deliberative process privilege as a collateral issue to their causes of action. "The [deliberative process] privilege was fashioned in cases where the governmental decisionmaking (sic) process is collateral to the plaintiff's suit." *In re Subpoena Duces Tecum Served on Off. of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir.), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998). *See also Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200 (4th Cir. 1964) (petitioner wanted deliberative materials to establish a defense to an unfair labor practice charge).

In other words, Plaintiffs must have shown that the Executive Order is facially discriminatory. But they have not. The rationale and supporting arguments for the Executive Order were all published in the final draft of EO 2025-244 in the form of the various whereas clauses. Plaintiffs' causes of action do not allege that the Executive Order did or should have considered alternatives, but rather that it is facially

discriminatory. ECF No. 21 at 42 (Plaintiffs’ own prayer for relief asks this Court to find “that Executive Order 25-244, on its face and as applied to Plaintiffs, is unlawful, unconstitutional, void, and of no force or effect.”). A facially discriminatory policy “does not depend on why the [defendant] discriminates but rather on the explicit terms of the discrimination.” *Lange v. Houston Cnty., Georgia*, 152 F.4th 1245, 1251 (11th Cir. 2025) (quoting *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)). Plaintiffs already possess all the Governor’s rationale for promulgating the Executive Order. *See Overton Park*, 401 U.S. 402, 420 (1971). (explaining that when there is no administrative record to review, the party challenging the agency action may inquire into the decisionmaking process in order to create such a record, but it does not necessarily follow that the party can also probe subjective motivations.)

The purpose of the “whereas” clauses in the Executive Order are specifically to announce the rationale and reasons why an Order is being promulgated. The “prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause.” *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2786, 171 L. Ed. 2d 637 (2008).

“[T]he interpretation of an Executive Order begins with its text.” *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005). “The text must be construed consistently with the Order's ‘object and policy.’” *Id.* (quoting *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 830 (9th Cir.1996) (internal quotation marks omitted)). The text of Executive Order 25-244 is clear as to the motivations for the Order: CAIR was founded by the Palestine Committee in 1994 “as ‘an official U.S. cover representing the Islamic community’ to conceal ties to Islamic extremist groups.” And “CAIR was designated as an unindicted co-conspirator by the United States Government in the largest terrorism-financing case in American history.” Fla. Exec. Order 25-244, at 2-3 (Dec. 8, 2025).

A. Arguing that Deliberative Process Privilege is a Qualified Privilege Necessarily Concedes that it Applies in this Case.

Plaintiffs first seek to claim that the deliberative process privilege does not apply at all, yet then turn to the argument of it being a qualified privilege. In subsection I.B., beginning on page 11 of ECF No. 101, Plaintiffs argue that the need for the testimony outweighs the importance of upholding the privilege. Either the privilege doesn’t apply at all, or it applies but can be overcome as a qualified privilege, yielding

when a public interest in divulging the information outweighs the government interest in maintaining the privilege.

Once the question of whether to employ the balancing test of private need versus government interest comes into play, the decision has already been made that the privilege applies, the issue is collateral, and the court is merely determining the value of overruling said privilege. *See In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). Regardless, Plaintiffs can overcome the deliberative process privilege only upon demonstrating a clearly sufficient need to gain access to the information requested. *In re Sealed Case*, 121 F.3d 729, 737–38 (D.C. Cir. 1997). The court must consider five factors on a case-by-case basis. *Id.* (listing “the relevance of the evidence,” “the availability of other evidence,” “the seriousness of the litigation,” “the role of the government,” and the “possibility of future timidity by government employees”).

Even discounting Plaintiffs’ other arguments, examining the balancing test, only one factor weighs in favor of disclosure.

First, the issue of relevance. Plaintiffs’ assertion in their motion is that “the testimony goes to a central factual dispute in this case – whether Defendant enacted the EO to suppress CAIR’s speech.” ECF 101

at 12. But this is Plaintiffs’ own conclusion, not evidence of discrimination, and the Governor has shown why he acted—for the health, safety, and welfare of Floridians after considering Plaintiffs’ ties to terror. And, as discussed immediately above, this balancing test is only employed in cases when the government’s intent is **not** at issue and the deliberative process privilege has already been found to apply. *Tri-State Hosp. Supply Corp.*, No. 00–1463, 2005 WL 3447890, at *8. Plaintiffs are arguing against their own motion.

As to the second factor, Plaintiffs incorrectly phrase it as “no other source for this information.” ECF 101 at 12. That is not the factor outlined in *In re Sealed Case* and following cases. The factor is “the availability of *other* evidence” (emphasis added). 121 F.3d at 738. And other evidence is ample in this case – namely, the lengthy whereas clauses of Executive Order 25-244 that outline the reasons for the Governor’s action.

Third, Plaintiffs rely on this Court’s grant of a preliminary injunction for the sole reason that disclosure weighs in favor of “seriousness of the litigation,” but that isn’t a factor for addressing whether the court should issue a preliminary injunction, *see Siegel v.*

LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc), so it doesn't logically follow that this Court should consider that factor in favor of disclosure.

The only factor that weighs in favor of disclosure is that of "the role of the government," since it is clear the Executive Office of the Governor was central to the promulgation of this Executive Order.

However, Plaintiffs' attempt to sidestep the most crucial factor in the entire test: the possibility of future timidity by government employees. "The purpose of the deliberative-process privilege is to foster freedom of expression among governmental employees involved in decision making and policy formulation." *Ostoin v. Waterford Twp. Police Dep't*, 189 Mich. App. 334, 338, 471 N.W.2d 666, 668 (1991). This factor most heavily weighs *against* requiring disclosure since that's the entire purpose of the privilege.

Based on this application of the balancing test, this Court should not compel this testimony.

III. Defendant will complete the Procedural Requirements to Invoke the Deliberative Process Privilege with the Affidavit and Privilege Log Accompanying this Opposition Brief.

Mr. Jay Arnold's affidavit and privilege log describing the legal grounds as to why these topics are privileged is forthcoming. The idea that Plaintiffs included broad topics in their Notice of Rule 30(B)(6) Deposition does not abrogate the ability of a witness to claim deliberative process privilege. In fact, courts are routinely reluctant to grant broad protective orders and instead prefer the privilege to be invoked in response to specific questions. *See Libertarian Party of Ohio v. Husted*, 33 F. Supp. 3d 914, 920 (S.D. Ohio 2014), *objections overruled*, No. 2:13-CV-953, 2014 WL 12648252 (S.D. Ohio July 24, 2014) ("Given that the privilege is not absolute and that discovery might reveal reasons why it should not be applied, it is fairly standard practice to permit a person who may be able to claim this privilege to be deposed, and to require that the claim of privilege be made in response to specific questions.")

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court DENY the Plaintiffs' Motion to Compel Testimony.

October 8, 2026

Respectfully submitted,

/s/ Coleman Batson

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CERTIFICATE OF WORD COUNT

Pursuant to N.D. Fla. Loc. R. 7.1(F), the undersigned hereby certifies that this motion and accompanying memorandum contains 3,403 words, inclusive of headings, footnotes, and quotations, according to the word-processing system used to prepare the motion.

DATE: October 8, 2026

/s/ Coleman Batson

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record was delivered a true and correct of this motion via CMECF on October 8, 2026.

/s/ Coleman Batson