The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL RE DELIBERATIVE PROCESS PRIVILEGE

NOTE ON MOTION CALENDAR:
MAY 4, 2018

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I. INTRODUCTION

Plaintiffs challenge Defendants' invocation of the deliberative process privilege on the grounds that the privilege is inapplicable in this case because the government's intent is at issue, that the privilege must yield because Plaintiffs' need outweighs Defendants' non-disclosure interests, and that Defendants did not properly invoke the privilege. The deliberative process privilege is a critical protection to enable effective governmental decision-making, and it would be highly unusual to pierce it based upon the generalized showing made by Plaintiffs. Indeed, Plaintiffs must make a strong showing of malfeasance to probe the mental processes of agency decisionmakers. This they have not done. Moreover, a fundamental problem with Plaintiffs' argument for piercing the privilege is that their allegations of discriminatory conduct are made exclusively in counts 2, 3, and 6, which challenge two Executive Orders no longer in force—not CARRP, which has been in existence since 2008. Further, Plaintiffs are mistaken that their need for privileged material outweighs the government's interest in non-disclosure, and that Defendants have not properly invoked the privilege.

II. PROCEDURAL HISTORY

At the time that Plaintiffs initially challenged Defendants' assertion of the deliberative process privilege, eight production volumes by Defendants were at issue. *See* Decl. of Joseph F. Carilli ("Carilli Decl.") at ¶ 3 (attached hereto as Ex. 1). Defendants have produced privilege logs for each document production.[1] *Id.* at ¶ 4. Defendants' document production in this matter continues bi-weekly. On March 7, 2018, via telephone conference, Plaintiffs categorically challenged Defendants' claim of the deliberative process privilege. *Id.* at ¶ 5. Defendants asked Plaintiffs to identify the specific documents for which Plaintiffs were challenging the claim of privilege, but Plaintiffs declined to do so. *Id.* Plaintiffs then moved to compel. *Id.*

III. LEGAL STANDARD

[1] Plaintiffs understate the number of privilege logs produced. *See* Dkt. 152 at 2. At present, Defendants have produced privilege logs for Defendant USCIS 001 through USCIS 008. Ex. 1 at ¶ 4. Privilege logs for Defendant USCIS 009 and 010 are forthcoming.

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The deliberative process privilege protects the government's decision-making process by shielding from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 150 (1975). "[P]redecisional" and "deliberative" materials are shielded from disclosure. *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp*., 421 U.S. 168, 184 (1975); *Klamath Water Users Protective Ass'n v. Dep't of the Interior*, 189 F.3d 1034, 1043 (9th Cir. 1999), *aff'd*, 532 U.S. 1 (2001); *In re Sealed Case*, 121 F.3d 729, 735-36 (D.C. Cir. 1997) (citing cases). A document is "predecisional" if it precedes a final agency decision or policy, and is "deliberative" if reflects the process by which a decision or policy was formulated. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001); *National Wildlife Fed'n v. United States Forest Service*, 861 F.2d 1114, 1117 (9th Cir. 1988).

The deliberative process privilege is qualified, and may not apply where, upon balancing, the court determines a party's need for privileged material outweighs the government's interest in non-disclosure. *See FTC v. Warner Commc'ns Inc*., 742 F.2d 1156, 1161 (9th Cir. 1984). A court must balance several factors, including: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. *Id*.

IV. ARGUMENT

A. Plaintiffs Apply the Wrong Standard to Pierce the Privilege Based on Alleged Government Misconduct and Do Not Satisfy the Proper Standard.

Plaintiffs seek to pierce the deliberative process privilege with regard to every document produced thus far, without any individualized showing of need with respect to those materials. Their argument relies wholly on *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422 (D.C. Cir. 1998), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998). *See* Dkt. 152 at 3-7. The court in *In re Subpoena* ordered disclosure of deliberative process-protected documents, declining to apply the privilege to certain materials of the FDIC, the

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Federal Reserve Board, and the Comptroller of the Currency, in light of the movant's allegation of bad faith cooperation between the agencies. *Id*. at 1425 ("If the plaintiff's cause of action is directed at the government's intent, [] it makes no sense to permit the government to use the privilege as a shield.").

Applying *In re Subpoena*, Plaintiffs contend that "Defendants' decision-making process is central to this case" given Plaintiffs' allegation that "Defendants created an extra-statutory internal vetting program that discriminates on the basis of religion and/or national origin[.]" Dkt. 152 at 10. But the special rule of *In re Subpoena* applied where Congress had specifically enacted a statute that "requires a showing of the government's intent" and "the cause of action is directed at the agency's subjective motivation." 145 F.3d at 1425 n.2. That special rule does not apply in challenges to administrative action under the APA, as the D.C. Circuit acknowledged on rehearing. *In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 156 F.3d 1279, 1279 (D.C.Cir.1998) (on petition for reh'g) (*In re Subpoena* standard does not apply in APA case); *see Georgia Aquarium, Inc. v. Pritzker*, 134 F. Supp. 3d 1374, 1380 (N.D. Ga. 2014) (same); *Arizona Rehab. Hosp., Inc. v. Shalala*, 185 F.R.D. 263, 267 (D. Ariz. 1998) (to apply *In re Subpoena* and "find the privilege does not exist in this APA challenge would undermine the very basis for its existence"); *Pub. Employees for Envtl. Responsibility v. Beaudreu*, No. CV 10-1073, 2013 WL 12193038, at *4 (D.D.C. May 16, 2013). A much higher bar is set in this context to inquire into the subjective motivation that underlies agency actions. In the context of a case like this one, the Supreme Court has explained that "there must be a *strong showing* of bad faith or improper behavior before [inquiry into the mental processes of the administrative decisionmaker] may be made." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis added); *see In re Subpoena*, 156 F.3d at 1279 (must be "showing of bad faith or improper behavior" under *Citizens to Preserve Overton Park* to inquire into decisionmaking process).[2] Plaintiffs have not made such a showing here.

[2] Relatedly, the Supreme Court also has held that, "in the absence of clear evidence to the contrary, courts presume that [Executive Branch officials] have properly discharged their official duties," and must apply "rigorous standard[s] for discovery in aid of" discriminatory enforcement claims. *United States v. Armstrong*, 517 U.S. 456, 464, 468.

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Plaintiffs showing also fails even under the erroneous *In re Subpoena* test. First, Plaintiffs have not alleged discriminatory intent or misconduct specific to the CARRP, independent of the Executive Orders. Relatedly, they do not identify a discrete factual basis to pierce the privilege.

1. Plaintiffs do not challenge the government's intent in connection with the bulk of documents produced

The Second Amended Complaint does not allege discriminatory intent with respect to CARRP or the CARRP decision-making process. The allegations of discriminatory intent in the complaint (in counts Two, Three, and Six)[3] all relate to the 2017 Executive Orders issued nine years after U.S. Citizenship and Immigration Services ("USCIS") began using CAARP.[4] Moreover, Plaintiffs' motion to compel highlights their misplaced reliance on the Executive Orders for their intent-based arguments. From among the paragraphs Plaintiffs cite in their motion to try to show that discriminatory intent is at issue here, four of five relate to the Executive Orders. *See* Dkt. 152 at 6 (citing Dkt. 47 at ¶¶ 268, 269, 271, 272). Although the fifth paragraph refers to CARRP, that paragraph merely alleges that CARRP "labels applicants national security concerns" using criteria that "turn on national origin." That allegation makes an objective claim about the criteria used to designate a person a "national security concern," does not allege discriminatory intent in the creation or execution of CARRP, and does not substantiate the conclusory and erroneous claim that CARRP subjects are selected based upon national origin. *See* Dkt. 152 at 6 (citing Dkt. 47 at ¶ 76). In short, Plaintiffs attempt to use allegations about the intent motivating the Executive Orders to bootstrap their argument that the Court should pierce the privilege over documents relating to CARRP, as to which they have not alleged discriminatory intent.[5]

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[3] Count Two alleges Defendants interpret the First and Second EOs "to authorize the suspension of immigration benefit applications [of the named Plaintiffs] and reiterates Defendants' "statutory and constitutional duty to adjudicate . . . in a nondiscriminatory manner." *See* Dkt. 47 at ¶¶ 254-59. Count Three alleges that the intent behind the EOs is to "target a specific religious faith" in violation of the First Amendment's Establishment Clause. *Id.* at ¶¶ 260-61. Count Six alleges Defendants suspended adjudication of benefit applications based on country of origin with a "discriminatory animus and discriminatory intent." *Id.* at ¶¶ 267-72.

[4] USCIS began using CARRP in 2008; the Executive Orders in question issued in 2017. *See* Dkt. 47 at ¶ 10.

[5] Prior to issuance of either Executive Order, Plaintiffs never questioned the government's "intent" as a basis for Plaintiffs' challenge to CARRP. *Compare* Dkt. 1 (lacking discrimination allegations) with Dkts. 17, 47 (alleging,

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Defendants' document production to date primarily relates to CARRP documents.[6] Because these documents do not concern to the Executive Orders, they do not relate to Plaintiffs' allegations concerning Defendants' intent. As such, even applying the erroneous logic of *In re Subpoena*, Plaintiffs' allegations of discriminatory intent do not suffice to permit piercing the deliberative process privilege with respect to the documents at issue here.

Defendants also submit that to the extent this Court wants to consider the need to pierce the deliberative privilege based upon the two executive orders, that would also not be warranted, and the Court should await the ruling of the Supreme Court in *Trump v. Hawaii*. That case is addressing related claims that the travel proclamation – issued after the two executive orders – was motivated by an improper animus and will therefore provide significant guidance in this area. *See Trump v. Hawaii*, No. 17-965 (S. Ct.) (argued Apr. 25, 2018).

2. <u>Plaintiffs do not meet the standard for piercing the deliberative process privilege</u>

Even in non-APA cases where a party seeks to disclose of deliberative process-privileged material based on alleged misconduct, Plaintiffs must identify "a discrete factual basis for the belief that 'the deliberative information sought may shed light on government misconduct.'" *See Alexander v. F.B.I.*, 186 F.R.D. 154, 164–65 (D.D.C. 1999) (quoting *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997)); *see also Landry v. F.D.I.C.*, 204 F.3d 1125, 1136 (D.C. Cir. 2000) (upholding application of the deliberative process privilege and declining to find waiver where plaintiff "ma[de] no credible claims that improper factors motivated [the] enforcement action"). Plaintiffs do not do so and therefore do not meet the standard to pierce the privilege.

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among other things, "intent" to "target a specific religious faith" while preferring others; violation of the Establishment Clause "by not pursuing a course of neutrality with regard to different religious faiths;" and "discriminatory animus" and "discriminatory intent" to suspend benefits adjudications based on "country of origin").

[6] Of the 2,456 documents produced in volumes USCIS 001 through USCIS 008, 459 documents were responsive to Plaintiffs' requests for production for documents related to E.O. 13769 and E.O. 13780. *See* Ex. 1, ¶ 6b. Of those 459 documents, Defendants claimed the deliberative process privilege over 75 documents, and only 70 documents relate to USCIS actions under E.O. 13769 and E.O. 13780. *See id.,* ¶ 6e. These 70 EO-related documents represent merely 9.7% of Defendants' deliberative process claims in production volumes USCIS 001 through USCIS 008. *See id.,* 6b,e.

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As explained above, the documents Defendants have produced are predominantly CARRP-related. Accordingly, the complaint must meet the piercing standard as to the *CARRP-specific* allegations. The complaint, however, identifies no "discrete factual basis" specific to CARRP and independent of the Executive Orders to support the claim that the privileged materials will "shed light" on discriminatory animus as a motivating factor for USCIS's adoption of CARRP. *See* generally Dkt. 47.

In an effort to remedy this lack of a discrete showing, Plaintiffs' motion attempts to read allegations into the complaint that are not present. For example, to "shed light on whether discriminatory animus motivated [Defendants'] enactment of CARRP," Plaintiffs argue the privileged documents they seek "are clearly relevant to Plaintiffs' claims that Defendants violated the First Amendment and the Equal Protection Clause." *See* Dkt. 152 at 8. Plaintiffs' First Amendment and Equal Protection Clause claims (Counts Three and Six), however, *lack any reference to CARRP*. *See* Dkt. 47 at ¶¶ 260-61, 267-72. These claims instead cite the "First EO" and "Second EO" as examples of intentional targeting of a specific religious faith, with *no explanation* of whether CARRP is a part of this alleged targeting and, if so, how CARRP is a part of it.[7] And with respect to the two Executive Orders – which have limited relevance to this suit – plaintiffs have not identified the sort of discrete factual basis for misconduct that justifies piercing the privilege. The Court should also await the *Hawaii* ruling before addressing that claim. In sum, Plaintiffs have not identified a discrete factual basis showing that the deliberative material they seek would shed light on government misconduct.

B. The Balancing Approach is the More Reasoned Approach to Application of the Deliberative Process Privilege

We have shown there no "strong showing of bad faith" here (*Citizens to Preserve Overton Park*, 401 U.S. at 420, and no "discrete factual basis" to conclude that deliberative material would reveal misconduct (*Sealed Case*, 121 F.3d at 746). Further, the balancing

[7] The other counts lack allegations of intent or motive, alleging arbitrary and capricious action, unauthorized suspension of adjudication in violation of due process, unreasonable delay, failure to provide a notice and comment period, and creation of *ultra vires* naturalization requirements.

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approach articulated by the Ninth Circuit also weighs against piercing the privilege. *See Warner*, 742 F.2d at 1161.

1. <u>This Court should apply *FTC v. Warner Commc'ns Inc*., 742 F.2d 1156 (9th Cir. 1984), rather than the D.C. Circuit's approach in *In re Subpoena*</u>

The Ninth Circuit has not adopted *In re Subpoena*,[8] and Defendants are unaware of any other circuit decision requiring the privilege to yield simply upon a party's challenge to government intent in the decision-making process.[9] Instead, the great weigh of authority, including *Citizens to Preserve Overton Park* and *Sealed Case*, weigh strongly in the other direction, first requiring some affirmative showing of misconduct when that is the basis for the claim that the privilege should be pierced. Significantly, the Court of Federal Claims directly eschews the D.C. Circuit's approach of automatically piercing the deliberative process privilege where government intent is relevant to the claim. *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 322 (2000) (applying a balancing approach weighing evidentiary need against potential harm from disclosure and "declin[ing] to follow the reasoning of *In re Subpoenas* [sic] to the extent that it supports an automatic bar on assertions of deliberative process privilege in any case where the Government's intent is potentially relevant."). In *First Heights*, the plaintiffs challenged government actions pursuant to federal financial assistance agreements, alleging that certain losses incurred by the plaintiffs resulted from an intentional government effort to minimize government losses. *Id*. Despite allegations implicating government intent, the Federal Circuit balanced plaintiffs' need for the documents against potential harm to the government from disclosure, piercing the deliberative process privilege only upon finding the government failed to "articulate[] any specific or significant harm that would result from disclosure[.]" *Id*. at 322.

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[8] Plaintiffs effectively acknowledge no other circuit has adopted the *In re Subpoena* approach. *See* Dkt. 152 at 4.

[9] *In re Sealed Case* cited *Texaco Puerto Rico, Inc. v. U.S. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) in support of the "routine" denial of the deliberative process privilege. But that case applied a balancing test and cited the "district court's warranted conclusion that [the agency] acted in bad faith over a lengthy period of time." *Id*. The cases cited by *Texaco* applied similar scrutiny rather than rejecting the privilege as a matter of routine. *See In re Franklin Nat'l Bank Secs. Litig.*, 478 F.Supp. 577, 582 (E.D.N.Y. 1979), and *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 402-03 (E.D. Mich. 1965), *aff'd on other grounds*, 377 F.2d 496 (6th Cir. 1967).

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1 Other courts have likewise declined to follow *In re Subpoena*'s approach, even where bad
2 intent or misconduct is alleged. In *Jones v. Hernandez*, as Plaintiffs explain, the court noted that
3 the privilege may be pierced if "there is reason to believe" government misconduct is at issue.
4 *See* Dkt. 152 at 4 (citing *Jones v. Hernandez*, No. 16-CV-1986-W (WVG), 2017 WL 3020930, at
5 *3 (S.D. Cal. July 14, 2017)). But unlike *In re Subpoena*, *Jones* does not automatically bar
6 deliberative process protection upon allegations of bad intent or misconduct in agency
7 deliberations. Rather, *Jones* merely acknowledges there are "certain circumstances" that "may"
8 warrant denial of deliberative process protection. *Id*. Significantly, despite allegations of
9 retaliatory agency decision-making, the *Jones* court ultimately reviewed the subject emails *in*
10 *camera*, weighed the need for the information against the interest in non-disclosure, and found
11 the privilege shielded the material. *Id*. at *3-6.

12 Similarly, in *Thomas v. Cate*, also cited by Plaintiffs, *see* Dkt. 152 at 4, the court opted
13 *against* application of *In re Subpoena's* automatic bar to the deliberative process privilege where
14 misconduct is alleged, and conducted a balancing test despite allegations of misconduct in the
15 government's decision-making process. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1024 (E.D. Cal.
16 2010) ("Once a litigant makes a prima facie showing sufficient to call the decision-making
17 process into issue, the litigant may be entitled to discovery of information that reveals the
18 deliberative and mental processes of the administrative actor, subject to the balance of interests
19 between the parties.").

20 While the Ninth Circuit has not, to Defendants' knowledge, ever ruled on the
21 applicability of *In re Subpoena*, its decision in *Warner*, which requires a four-part balancing test,
22 is directly inconsistent with the approach taken in *In Re Subpoena*. And as we have explained,
23 the D.C. Circuit and the Supreme Court have held that an even higher threshold should apply
24 when the goal is to look behind the stated reasons for an agency decision based on allegations of
25 bad faith. Consequently, considering the national security and investigatory interests at stake
26 here, this Court should reject an automatic bar to deliberative process protection based on the
27 inclusion of certain purportedly talismanic words in a complaint. Instead, this Court should apply
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the *Warner* approach, which calls for a more nuanced balancing of an articulated need for the documents against the government's non-disclosure interests. *Warner*, 742 F.2d at 1161.

2. The *Warner* balancing approach favors application of the deliberative process privilege

As we explained before, under basic administrative law principles, a "strong showing of bad faith or improper behavior" is required before it would be appropriate to probe the intent of decisionmakers. *Citizens to Preserve Overton Park*, 401 U.S. at 420 (1971). But even applying the *Warner* balancing approach, which weighs Plaintiffs' need for the privileged material against the government's interest in non-disclosure, the factors counsel against disclosure. *See Warner*, 742 F.2d at 1161.

The first factor to consider is the relevance of the documents sought. Plaintiffs argue that "records describing Defendants' deliberations would shed light on whether discriminatory animus motivated their enactment of CARRP and any successor 'extreme vetting' programs." Dkt. 152 at 8. But Plaintiffs cannot demonstrate the relevance of the deliberative process-privileged material Defendants have withheld to date because, as noted above, the Plaintiffs do not allege discriminatory intent in the CARRP-related counts of the SAC.[10]

The second and third factors are the availability of other evidence and the government's role in the litigation. Defendants acknowledge they possess the bulk of CARRP documents.[11] And, because USCIS created CARRP, the government's role in this litigation is significant, yet, Plaintiffs do not demonstrate bad intent or misconduct by Defendants as to the CARRP policy.

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[10] As to assertions of privilege specific to documents within "named Plaintiffs' A-files," *see* Dkt. 152 at 2, two additional relevance arguments tip the balance strongly in favor of preserving the privilege. Plaintiffs claim their case is a global challenge to the lawfulness of CARRP and any successor program. Dkt. 58 (Plaintiff's Opposition to Motion to Dismiss) at 24 ("Plaintiffs, however, 'do not seek damages for specific acts of discrimination against themselves,' but rather ask only that the Court review the legality of CARRP against requirements dictated by Congress in the INA."). The Court has adopted this global approach, minimizing the importance in this litigation of discrete facts specific to individual class members' applications. *E.g.*, Dkt. 69 (Order) at 27 ("The common question here is whether CARRP is lawful. The answer is 'yes' or 'no.' The answer to this question will not change based on facts particular to each class member, because each class member's application was (or will be) subjected to CARRP."). In light of the broad, nationwide challenge Plaintiffs mount through their *global* focus on CARRP's lawfulness, documents addressing facts particular to an *individual* class member are of marginal importance under Rule 26 because such documents are not relevant to Plaintiffs' global-oriented approach described above.

[11] It is important to note, however, that Plaintiffs have obtained a significant amount of material through the FOIA process and other litigation. *See* Dkt. 47 at ¶ 59.

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The fourth factor to consider is the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. Of the four *Warner* factors, the Ninth Circuit has held this fourth factor the most significant, and it weighs overwhelmingly against disclosure of the documents at issue here. *See National Wildlife Fed'n*., 861 F.2d at 1117.[12] Plaintiffs facially challenge, on various statutory and constitutional grounds, the legality of USCIS's procedures for handling the adjudication of immigration benefit applications where there exits an articulable link between the applicant and a national security-related inadmissibility ground. The Plaintiffs' allegations about the illegality of CARRP do not depend upon internal deliberations at USCIS or DHS concerning either the development of the policy or its application in individual cases.

On the other hand, piercing the privilege for the documents at issue here, would directly harm national security by revealing predecisional, deliberative advice, opinions, and recommendations concerning important questions of policy affecting national security and the proper application of the nation's immigration laws. *See* Aff. of Matthew D. Emrich ("Emrich Aff.") at ¶ 6 (attached hereto as Ex. 2). The range of material is vast and includes, among other things, reports, revisions to procedures, advisory panel materials, emails, and policy guidance. *Id*. at ¶¶ 8-92. Disclosure of such material risks chilling future internal policy discussions that require free and frank communication within the government. *Id*. at ¶ 6. Such direct harm to the core government responsibility to protect its citizens should carry overwhelming weight.[13]

If, however, after requiring Plaintiffs to show a need for specific documents, rather than allowing them to mount a global challenge regarding the privilege as applied to all documents, the Court has any doubt about the application of the deliberative process privilege here, the Court can, and should, review the documents *in camera* before piercing the privilege. Doing so will allow it to make an accurate finding of whether the material warrants protection, and whether the

[12] Plaintiffs also cite to "other factors" not identified in *Warner* but suggested by a by a district court in *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003). Each of these additional factors either favors the protection of the government's national security information or effectively "double counts" arguments articulated in one or more of *Warner's* four factors. The Court therefore should ignore *Pacifica's* "other factors."

[13] Plaintiffs argue the stipulated protective order provides adequate protection against disclosure. Dkt. 152 at 8. The protective order, however, lacks even an "attorneys' eyes only" provision and does not offer sufficient protection for the national security and investigatory information revealed in the deliberations at issue. *See* Ex. 2 at ¶ 7.

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material would, in fact, reveal information relevant to Plaintiffs' claims. *See National Wildlife Federation*, 861 F.2d at 1116, 1123 (reviewing material *in camera* and finding it deliberative process privileged); *see also Judicial Watch, Inc. v. United States Department of State*, 235 F. Supp. 3d 310, 314 (D.D.C. 2017) (reviewing material *in camera* and, despite allegations of government misconduct, finding it deliberative process privileged); *Neighborhood Assistance Corp. of America v. U.S. Dep't of Housing and Urban Dev.*, 19 F. Supp. 3d 1, 21 (D.D.C. 2013) (same). If the predecisional, deliberative material involved here does *not* reveal discriminatory intent or bad faith, then the balance would clearly weigh in favor of upholding the privilege.

In sum, the very existence of the balancing approach demonstrates that litigation of matters such as this is not such a zero-sum game. Upon conducting that balancing, the Court should conclude that the government's interest in non-disclosure far outweighs Plaintiffs need for the privileged, deliberative, predecisional material at issue. Finally, if the Court were not able to conclude that the balance weighs in favor of applying the privilege without reviewing the material at issue, then the Court should review of the documents *ex parte* in order to properly weigh the federal interests in non-disclosure against Plaintiffs' purported need for the information. The Court previously has recognized the possibility of undertaking such review. *See* Feb. 14, 2018 Hearing Transcript at 11:18-19.

C. Defendants Have Complied with the Procedure for Asserting the Deliberative Process Privilege

Plaintiffs argue that Defendants waived the deliberative process privilege by not providing declaratory support at the time of production. Defendants acknowledge this Court's April 11 ruling addressing a similar issue with respect to the law enforcement privilege. The productions here predated that ruling. Further, we submit that ruling is in error and will result in a significant reduction in the ability to produce documents in the timeframes expected by the Court and the Plaintiffs – as the agency declarant will now be a bottleneck before any production can be made. This will soon become a very substantial bottleneck, as, to address Plaintiff's significant document discovery requests, Defendants have onboarded 10 full time contract reviewers, and another 10 contract reviewers are slated to begin reviewing documents at a later

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date. In addition, USCIS is adding 50-60 employees to spend part of their time conducting document review for this case. That large number of reviewers will, we hope, help address the concerns by the Court and the Plaintiffs regarding the speed of production – but that will not work under this Court's April 11 order, which will require a single official – the agency head – to review every document that includes a privilege assertion before productions can be made.

In any event, it is well established that the submission of a supporting declaration is appropriate when responding to a motion to compel. *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) ("motion to compel was the first event which could have forced disclosure of the documents," and agency had no "obligation to formally invoke its privileges in advance of the motion to compel."); *see also Huntleigh USA Corp. v. United States*, 71 Fed. Cl. 726, 727 (2006); *Abramson v. United States,* 39 Fed. Cl. 290, 294 n.3 (1997). Defendants are filing with this brief the affidavit of Matthew D. Emrich, *see* Ex. 2, formally invoking the deliberative process privilege. Defendants initially withheld this information on a claim that it was privileged, and identified to Plaintiffs via privilege logs a description of the material withheld and the basis on which it was withheld. Once challenged on those claims by the Plaintiffs' motion to compel, Defendants have now formally asserted the privilege. Plaintiffs' argument to the contrary lacks merit.

As to the specificity of privilege log descriptions accompanying Defendants' document production, Plaintiffs similarly miss the mark by again relying on this Court's previous order on the sufficiency of Defendants' *law enforcement* assertion. *See* Dkt. 152 at 12 (citing Dkt. 148 at 4). Defendants contend their privilege log entries adequately balance specificity against disclosure concerns and this Court has not yet ruled on the sufficiency of Defendants' privilege log descriptions with respect to the deliberative process privilege.

V. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Compel Regarding the Deliberative Process Privilege.

Dated: April 30, 2018 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 30, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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