THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

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

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL RE DELIBERATIVE PROCESS PRIVILEGE

NOTE ON MOTION CALENDAR: MAY 4, 2018

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I. INTRODUCTION

The deliberative process privilege "has no place . . . in a constitutional claim for discrimination." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) ("*Subpoena I*"), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998) ("*Subpoena II*"). The privilege is thus inapplicable where, as here, Plaintiffs have alleged invidious discrimination based on religion and national origin. And even if the privilege applied, Plaintiffs' need for information outweighs any interest in keeping their deliberations secret, particularly in light of the parties' protective order. Finally, Defendants' declaration invoking the privilege is insufficient. Plaintiffs' motion to compel should be granted.

II. ARGUMENT

A. The Deliberative Process Privilege Does Not Apply Where, As Here, Plaintiffs Allege That The Government Has Engaged In Unconstitutional Discrimination.

1. Defendants' efforts to distinguish *Subpoena I* are unavailing, and this Court should follow its persuasive reasoning.

As the D.C. Circuit has explained, the deliberative process privilege "was fashioned in cases where the governmental decisionmaking process is *collateral* to the plaintiff's suit." *Subpoena I*, 145 F.3d at 1424 (emphasis added). "If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield." *Id*. The privilege thus "has no place . . . in a constitutional claim for discrimination." *Id.* "[I]f . . . the Constitution . . . makes the nature of governmental officials' deliberations *the* issue, the privilege is a non sequitur." *Id*.

To be sure, as Defendants point out (Opp'n at 3), the deliberative process privilege applies in challenges to administrative action under the APA. But the very reasons why the privilege applies in APA actions highlight why it does *not* apply to claims alleging unconstitutional discrimination. "When a party challenges agency action as arbitrary and capricious the reasonableness of the agency's action is judged in accordance with its stated reasons." *Subpoena*

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II, 156 F.3d at 1279 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). "Agency deliberations not part of the record are deemed immaterial." *Id.* "That is because the actual subjective motivation of agency decisionmakers is *immaterial as a matter of law*—unless there is a showing of bad faith or improper behavior." *Id.* at 1279-80 (emphasis added). Accordingly, "the ordinary APA cause of action does not directly call into question the agency's subjective intent." *Id.* at 1280. By contrast, "the deliberative process privilege is unavailable" where "the cause of action is directed at the agency's subjective motivation." *Id*. *See also Thomas v. Cate*, 715 F. Supp. 2d 1012, 1023 (E.D. Cal. 2010).

Defendants' reliance on *Overton Park*, 401 U.S. 402, is thus misplaced. *See* Opp'n at 3, 6-7, 9. In that case, which does not involve the deliberative process privilege, the Court found that "there must be a strong showing of bad faith or improper behavior" before a plaintiff may inquire into the mental processes of administrative decisionmakers where "*administrative findings . . . were made at the same time as the decision*." 401 U.S. at 420 (emphasis added). By contrast, a party may inquire into an agency's decisionmaking process where there is no administrative record to review. *See id.* (without "formal findings," "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves"). Here, Defendants issued *no administrative findings* with respect to CARRP; indeed, CARRP's very existence was kept secret. But more importantly, Plaintiffs do not seek disclosure of the withheld materials on the ground that Defendants' decisions were arbitrary and capricious. Rather, Plaintiffs contend that the privilege is inapplicable because they allege that Defendants engaged in unconstitutional discrimination in enacting CARRP and its successor extreme vetting programs.

Defendants argue that "the special rule of [*Subpoena I*] applied where Congress had specifically enacted a statute that require[d] a showing of the government's intent." Opp'n at 3 (alterations omitted). But the reasoning of *Subpoena I* is not limited to the specific facts of that case. To the contrary, the D.C. Circuit observed that "the privilege has no place in a Title VII action or in a constitutional claim for discrimination." 145 F.3d at 1424 (footnote omitted).

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Defendants' attempt to cast *Subpoena I* as a one-off, therefore, does not withstand scrutiny. Indeed, as Plaintiffs noted in their motion to compel, courts across the country have found the deliberative process privilege inapplicable in a wide variety of factual circumstances. In *Children First Found., Inc. v. Martinez*, No. CIV. 1:04-CV-0927, 2007 WL 4344915, at *5 (N.D.N.Y. Dec. 10, 2007), for example, the court found that the "deliberative process privilege [could] not stand" where plaintiff alleged that the Department of Motor Vehicles violated its First and Fourteenth Amendment rights by denying its application for a custom license plate. Defendants do not distinguish that case or the others cited in Plaintiffs' motion. *See* Dkt. # 152 at pp. 5-6.

As the Ninth Circuit has neither embraced nor rejected *Subpoena I*, this Court is free to follow its persuasive logic. Indeed, the D.C. Circuit's opinion on the scope of the deliberative process privilege should carry particular weight, as the D.C. Circuit frequently adjudicates such claims in the FOIA context. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (FOIA Exemption 5 incorporates the deliberative process privilege); *Welby v. United States Dep't of Health*, No. 15-CV-195 (NSR), 2016 WL 1718263, at *4 n.5 (S.D.N.Y. Apr. 27, 2016) ("Courts in the Second Circuit frequently cite FOIA decisions from the D.C. Circuit as it is a jurisdiction with considerable experience on FOIA matters.") (alterations omitted). The Court should follow *Subpoena I* and hold that the deliberative process privilege is inapplicable where the government's intent is at issue.

2. Plaintiffs allege discriminatory intent with respect to CARRP.

Defendants argue that the Second Amended Complaint does not allege discriminatory intent with respect to CARRP. Opp'n at 4. In so arguing, Defendants overlook the gravamen of the Complaint. As Defendants acknowledge, Plaintiffs allege that "CARRP labels applicants national security concerns based on vague and overbroad criteria that often turn on national origin or innocuous and lawful activities or associations." Dkt. # 47 ¶ 76. Plaintiffs allege that those activities and associations include involvement in Muslim communities, such as donating to Muslim charities and traveling to Muslim-majority countries. *See, e.g., id.* ¶ 170 ("USCIS may

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have subjected Mr. Ostadhassan's adjustment application to CARRP because he has resided in and traveled through . . . Iran . . . and because of his donations to Islamic charities and involvement in the Muslim community."); *see also id.* ¶¶ 62-76, 158-60, 190-96. Plaintiffs' claim that CARRP erects extra-statutory obstacles for Muslim immigrants puts the motivations behind CARRP at issue. So do Plaintiffs' allegations that Defendants delay or deny applications subject to CARRP for pretextual reasons. *See id.* ¶¶ 84, 94. Moreover, Defendants err in attempting to divorce CARRP from the EOs. Plaintiffs allege that CARRP and the EOs are part of the same unlawful program, and that the EOs built upon and expanded CARRP's unlawful vetting procedures. *See id.* ¶¶ 18, 26-28, 132-141; *see also id.* ¶ 19 n.1. ("Plaintiffs' reference to 'CARRP' incorporates any similar non-statutory and sub-regulatory successor vetting policy, including pursuant to . . . the Second EO."). Indeed, this Court has understood that "Plaintiffs' case centers on their allegation that an extra-statutory policy based on *discriminatory* and illegal criteria is blocking the fair adjudication of immigration benefits of which they are statutorily eligible." Dkt. # 69 at p. 17 (emphasis added).

Even if Plaintiffs' allegations of discriminatory intent with respect to CARRP were insufficiently clear, however, there can be no doubt that Plaintiffs have alleged discriminatory animus with respect to the EOs. Defendants have claimed the deliberate process privilege over 75 documents related to the EOs. *See* Opp'n at 5 n.6. At a minimum, the Court should order disclosure of those documents.[1]

B. Plaintiffs' Need For Information Outweighs Any Interest In Keeping the Information Secret.

Even if the privilege applied, Plaintiffs explained in their motion to compel why their need for information outweighs any interest in maintaining total secrecy over the records at issue. *See* Dkt. # 152 at pp. 7-10. While Defendants disagree, it is notable that they say little about the Stipulated Protective Order. They state that the protective order "does not offer sufficient

[1] Defendants' suggestion that the Court should await the ruling of the Supreme Court in *Trump v. Hawaii*, No. 17-965 (S. Ct.), is misplaced, as that case will not determine the scope of the deliberative process privilege.

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protection for the *national security and investigatory information* revealed in the deliberations at issue," but that concern appears to relate to materials withheld under the *law enforcement privilege*, not the deliberative process privilege. Opp'n at 10 n.13 (emphasis added). The Emrich Declaration (*see infra*) is similarly lacking, as it offers nothing more than the conclusory assertion that "a protective order would not mitigate the chilling effect and detrimental consequences that would result" from disclosure under such an order. Dkt. # 174-3 ¶ 7. To the contrary, the protective order provides that "confidential information" includes "any information not in the public domain," Dkt. # 86 ¶ 2, and that such information "shall not be disseminated outside the confines of this case, nor shall it be included in any pleading, record or document that is not filed under seal with the Court or redacted in accordance with applicable law." *Id.* ¶ 4.1. Given this protection, there is minimal risk that the limited disclosure of information relevant to this lawsuit would hinder frank discussion within the government.

Defendants also claim that the balance weighs in their favor because CARRP-related documents are purportedly not relevant to Plaintiffs' allegations of discriminatory intent. Plaintiffs have addressed that argument above, and also note that CARRP-related documents are relevant to Plaintiffs' claims for additional reasons—*e.g.*, they may reveal the extra-statutory criteria Defendants apply to delay and deny applications under CARRP.

C. The Emrich Declaration Is Insufficient To Satisfy Defendants' Burden Of Establishing Entitlement To The Privilege.

Faced with Plaintiffs' motion to compel, Defendants belatedly submit a declaration from Matthew D. Emrich formally "assert[ing] the deliberative process privilege over documents previously withheld or redacted on that basis." Dkt. # 174-3 ¶ 5. The Emrich Declaration is insufficient for three reasons. *First*, as noted, it does not adequately explain why "disclosure *under a protective order* would create a substantial risk of harm" to government interests. *Rodriguez v. City of Fontana*, No. EDCV 16–1903–JGB (KKx), 2017 WL 4676261, at *3 (C.D. Cal. Oct. 17, 2017). While Mr. Emrich asserts that the protective order "would not mitigate the

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chilling effect" of disclosure, Dkt. # 174-3 ¶ 7, the protective order does not allow for *public disclosure* of confidential information. Rather, the information may be shared only with a select list of people, which includes the named Plaintiffs, Plaintiffs' counsel and support staff, experts and witnesses to whom disclosure is reasonably necessary, and the Court and its personnel. Dkt. # 86 ¶ 4.2. Mr. Emrich makes no attempt to explain why disclosing information only to those individuals listed in the order would purportedly have a chilling effect on government deliberations. *Cf. Kelly v. City of San Jose*, 114 F.R.D. 653, 662 (N.D. Cal. 1987) (explaining with respect to the law enforcement privilege that in many situations it is "is disclosure to the public generally, not simply to an individual litigant and/or her lawyer," that would pose a risk).

Second, the declaration does not "show[] that the material for which the privilege is asserted has been kept confidential." *Bernat v. City of California City*, No. 1:10-CV-00305, 2010 WL 4008361, at *4 (E.D. Cal. Oct. 12, 2010).

Third, Mr. Emrich asserts the deliberative process privilege over a large number of documents that he groups into categories with generalized descriptions. *See, e.g.*, Dkt. # 174-3 ¶¶ 9-13, 15-24, 29, 41, 68, 73, 75, 76. These generalized descriptions do not pass muster. The Court has already ruled with respect to the law enforcement privilege that the Government must use the privilege "deliberately" and be "exacting" with which documents fall within its scope; the same is true here. Dkt. # 148 at p. 5.

In any event, given the belated production of the Emrich Declaration, Plaintiffs request the opportunity to challenge each specific assertion of the privilege if the Court concludes the privilege may be invoked in this case. In light of the new information, for example, Plaintiffs would request the opportunity to show why specific withholdings/redactions are overbroad and why their need for individual documents outweighs Defendants' interest in secrecy.

III. CONCLUSION

Plaintiffs request that the Court grant their motion to compel. In the alternative, they request the opportunity to challenge each privilege assertion in light of the Emrich Declaration.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date indicated below, I caused service of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL RE DELIBERATIVE PROCESS PRIVILEGE via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 4th day of May, 2018, at Seattle, Washington.

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