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' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE

INTRODUCTION

On June 15, 2018, Plaintiffs filed a supplemental brief in support of their motion to compel regarding deliberative process. *See* Dkt. # 194. Plaintiffs' motion should be denied. The Court has already determined that the documents at issue are "predecisional and deliberative and therefore subject to the deliberative process privilege." Furthermore, Plaintiffs have failed to show that the deliberative process privilege should be overcome under the balancing test articulated by the Ninth Circuit.

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BACKGROUND

A. Procedural History

On April 19, 2018, Plaintiffs filed a motion to compel regarding deliberative process. Dkt. # 152. On April 30, 2018, Defendants filed a response supported by an affidavit from Matthew D. Emrich, Associate Director of the Fraud Detection and National Security ("FDNS") Directorate, U.S. Citizenship and Immigration Services ("USCIS"). Dkt. # 174 (response); Dkt. # 174-3 (affidavit). On May 4, 2018, Plaintiffs filed a reply. Dkt. # 180.

On May 21, 2018, the Court issued an Order reserving ruling on 40 categories of documents listed in the Emrich affidavit. Dkt. # 189. The Court determined that the documents were "predecisional and deliberative, and therefore subject to the deliberative process privilege." *Id.* at 7. The Court further expressed skepticism that the documents were "truly relevant for Plaintiff's purposes." *Id.* at 8. However, the Court gave Plaintiffs an opportunity to file a supplemental brief regarding the documents. *Id.* at 7-9.

Following the Court's Order, the parties resolved their differences with respect to 38 of the 40 categories of documents. On June 15, 2018, the Plaintiffs filed a supplemental brief in which they challenged the documents withheld under paragraphs 17 and 45 of the Emrich affidavit. Dkt. # 194. The parties have since resolved their differences on the documents withheld under paragraph 45, leaving only the documents withheld under paragraph 17 ("Paragraph 17 documents").

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B. The Paragraph 17 Documents

There are 122 Paragraph 17 documents. *See* Dkt. # 174-3 ¶ 17. In his April 30 affidavit, Mr. Emrich stated that the documents "reflect the process of USCIS's efforts to generate, review, and/or revise policy and procedure in the form of draft policy memoranda and/or draft policy manual content relating to [the Controlled Application Review and Resolution Program ("CARRP")] and to the handling of cases for which there may be national security concerns." *Id*.

According to a supplemental affidavit submitted with this brief, Mr. Emrich further explains that in late 2015, USCIS commenced a process that was intended to rescind, update and consolidate the existing CARRP policy documents. *See* Exhibit A ¶ 6. That process continued into 2017. *Id.* The effort never resulted in the implementation of a new or revised CARRP policy. *Id.* The Paragraph 17 documents reflect the internal process of review and development related to this never-completed effort at policy revision. *Id.* ¶ 7.

According to Mr. Emrich, "[p]ublic disclosure of the withheld portions of these documents would jeopardize USCIS's ability to engage in decision making by discouraging future candid discussion and debate within USCIS." *See* Dkt. # 174-3 ¶ 6. "USCIS personnel would be reluctant to share their opinions for or against a particular decision if those predecisional comments were subject to disclosure." *Id.* "It is reasonable to expect that, if the court elects to make these deliberations and discussion public, it will influence the future actions of USCIS personnel, to the detriment of the decision making process, and the ability to make well informed decisions at USCIS." *Id.*

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ARGUMENT

A. The Deliberative Process Privilege

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).

The purpose of the privilege is "to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1088-89 (9th Cir. 2002) (citations omitted). As the Supreme Court explained: "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 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) (citations omitted); *see also Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) (observing that the privilege "maintain[s] the confidentiality of the give-and-take that occurs among agency members"). Moreover, the privilege "protect[s] against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Kortlander*

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v. Bureau of Land Mgmt., 816 F. Supp. 2d 1001, 1011 (D. Mont. 2011) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

The deliberative process privilege is qualified, and the privilege may be overcome by a plaintiff's showing of need. *See FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). In determining whether a party has overcome an agency's assertion of the privilege, this Court must balance four factors: "(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.* A party seeking to pierce the privilege bears the burden of establishing its need for the documents. *See Ctr. for Biological Diversity v. Norton*, No. CV 01-409, 2002 WL 32136200, at *4 (D. Ariz, 2002).

The Court should accord substantial weight to the Government's assertions of the privilege, *see Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012), because Government agencies are best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions.'" *See Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)). The Government's justification for asserting the privilege is "sufficient if it appears 'logical' or 'plausible.'" *See Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

B. Applying the Ninth Circuit's Balancing Test, Plaintiffs Are Not Entitled to Production of the Paragraph 17 Documents.

The Court has already determined that the Paragraph 17 documents are "predecisional and deliberative, and therefore subject to the deliberative process privilege." *See* Dkt. # 189 at 7. Therefore, the only issue before the Court is whether Plaintiffs have established their need for the

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documents under the balancing test articulated in *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156 (9th Cir. 1984). As discussed below, the balancing test weighs against disclosure because (1) the Paragraph 17 documents are not relevant to Plaintiffs' claims; (2) Plaintiffs have access to other information obviating the need for disclosure; (3) Plaintiffs have not shown that the Government is using the privilege to hide evidence of bad faith or misconduct; and (4) disclosure would hinder frank and independent discussions about proposed policy changes at USCIS.

1. The Paragraph 17 Documents Are Not Relevant Because They Were Never Adopted as USCIS Policy.

Under the Ninth Circuit's balancing test, the first factor to consider is the relevance of the documents sought. *See Warner Commc'ns Inc.*, 742 F.2d at 1161. Here, Plaintiffs have alleged that CARRP is unlawful because it does not provide applicants with notice and opportunity to respond to evidence against them, it delays processing, it imposes extra-statutory criteria for benefit eligibility, and it was promulgated without notice and comment. *See* Dkt. # 47 at 45-50. Given this context, the Paragraph 17 documents are irrelevant because they were never finalized, adopted, or implemented as USCIS policy. *See* Exhibit A ¶ 6. Thus, the documents had no effect on CARRP, and they will shed no light on how Plaintiffs were affected by CARRP.

Plaintiffs do not explain how the Paragraph 17 documents are relevant to their claims. *Cf. United States v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981) (conclusory statements are insufficient to establish relevance). First, Plaintiffs conclusorily state that the Paragraph 17 documents are relevant to their claim that CARRP "imposes unlawful, extra-statutory hurdles on individuals applying for residency or citizenship." *See* Dkt. # 194 at 6. However, the documents were never finalized, adopted, or implemented. *See* Exhibit A ¶ 6. Thus, the documents do not "impose" anything at all. Second, Plaintiffs conclusorily state that the documents are relevant to

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their claim that "CARRP labels applicants national security concerns based on vague and overbroad criteria." *See* Dkt. # 194 at 6. Again, the documents were never finalized, adopted, or implemented. *See* Exhibit A ¶ 6. Thus, they do not "label" anyone at all. Third, Plaintiffs argue that the documents "will likely shed light on the motivations behind CARRP." *See* Dkt. # 194 at 6. However, Plaintiffs have not made any claims of discriminatory motive with respect to CARRP. *See* Dkt. # 47 at 45-50. To the contrary, Plaintiffs' allegations of discriminatory motive are limited to their claims challenging the Executive Orders, which post-date the establishment of CARRP by nearly a decade. *See* Dkt. # 47 ¶ 106 ("First EO was intended to target Muslims.); ¶ 119 (". . . Defendant Trump issued a Second EO, which espouses the same discriminatory policy and effect as the First EO."). Consequently, the "motivations behind CARRP" have no relevance to the litigation. Finally, Plaintiffs argue that the Paragraph 17 documents "may also reveal the details of existing policy." Dkt. # 194 at 6. Even assuming that the Paragraph 17 documents discuss existing CARRP policy, Plaintiffs have access to a wealth of other documents explaining existing CARRP policy, as discussed below.

2. Plaintiffs Have Access to a Wealth of Other Evidence Explaining CARRP-Related Policies and Procedures.

Under the Ninth Circuit's balancing test, the second factor to consider is the availability of other evidence. *See Warner Commc'ns Inc.*,742 F.2d at 1161. One court in this Circuit has concluded that "the availability of other evidence is perhaps the most important factor in determining whether the deliberative process privilege should be overcome." *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, No. CV 14-1667, 2015 WL 3606419, at *7 (C.D. Cal. Feb. 4, 2015) (citation omitted). Courts weighing this factor consider documents that have been produced in discovery, the availability of other discovery vehicles (such as interrogatories and

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depositions), and access to materials in the public domain. *See Sterr v. Baptista*, No. 2:08CV2307, 2010 WL 1236546, at *2 (E.D. Cal. Mar. 25, 2010); *Young v. City and County of Honolulu*, No. CV 07-68, 2008 WL 2676365, at *6 (D. Hawaii 2008); *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099, 2008 WL 2523550, at *6 (E.D. Cal. June 19, 2008); *Gen. Elec. Co. v. Johnson*, No. CV 00-2855, 2007 WL 433095, at *16 (D.D.C. 2007).

Here, Defendants have already produced a significant number of CARRP-related policy and guidance documents to Plaintiffs. As of July 2, 2018, Defendants have produced approximately 7,000 documents (not pages, documents) to Plaintiffs. Exhibit B ¶ 3. For example, Defendants have produced the April 11, 2008 memorandum establishing CARRP and subsequent policy memoranda issued by USCIS explaining the evolution of CARRP over time. *Id.*. ¶ 4. Defendants have also produced a litany of CARRP-related handbooks, FAQ documents, training manuals, and guidance documents, all of which explain how CARRP operates. *Id.* Defendants even identified many of these documents for Plaintiffs via email in an effort to resolve this dispute. *Id.* ¶ 5. For the Court's convenience, Defendants have attached a sample of the CARRP-related documents that have been produced to Plaintiffs. *Id.* ¶ 4.

In addition, the American Civil Liberties Union of Southern California ("ACLU"), one of the organizations representing Plaintiffs in this case, has previously filed one or more Freedom of Information Act ("FOIA") requests seeking documents related to CARRP. Exhibit B ¶ 6. In response, the Government released over 3,600 pages of documents relating to CARRP, including policy memoranda, operational guidance, and training materials. *Id.* Based on these records, the ACLU published two lengthy articles about CARRP on its website. *Id.* Indeed, the author of the ACLU articles is counsel of record in this case. *Id.* The articles cite and discuss several

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fundamental CARRP policy documents. *Id.* The articles also include images of various CARRP flow charts and operational diagrams. *Id.* Plaintiffs argue that they need the Paragraph 17 documents to determine "what CARRP is," *see* Dkt. # 194 at 7; however, one of the ACLU articles includes a 6-page section entitled "What is CARRP?", which details the various stages of CARRP. *Id.*

Plaintiffs argue that the Paragraph 17 documents "may provide Plaintiffs with the best (and only) evidence of what CARRP is and how it is applied." Dkt. # 194 at 7. However, as discussed above, the Paragraph 17 documents do not reliably explain "what CARRP is or how it is applied" because the documents were never finalized, adopted, or implemented. *See* Exhibit A. Furthermore, as discussed above, Defendants have produced documents showing "what CARRP is and how it is applied," which obviates the need for discovery into un-adopted draft documents. Exhibit B ¶ 4. In sum, Plaintiffs can scarcely identify a significant need for draft, un-adopted revisions to CARRP when they have access to numerous documents that fully describe and explain the CARRP process.

3. Plaintiffs Have Not Identified Any Evidence of Government Misconduct

Under the Ninth Circuit's balancing test, the third factor to consider is the Government's role in the litigation. *See Warner Commc'ns Inc.*,742 F.2d at 1161. The third factor does not weigh in favor of disclosure simply because a plaintiff has brought suit against the Government; rather, this Court must analyze whether Plaintiffs have "presented [] evidence of bad faith or misconduct on the part of" the Government. *See Warner Commc'ns Inc.*, 742 F.2d at 1162; *see also Modesto Irrigation Dist v. Gutierrez*, No. CV 06-453, 2007 WL 763370, at *12 (E.D. Cal. 2007) (In *Warner*, "the Ninth Circuit appeared to be looking for evidence of bad faith."). Here,

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Plaintiffs do not allege that Defendants acted in bad faith or engaged in misconduct in connection with CARRP. *See* Dkt. # 47 at 45-50. Furthermore, notwithstanding the extensive documents produced to Plaintiffs thus far in discovery, supplemented by other documents in the public domain, Plaintiffs have not identified any evidence that Defendants acted in bad faith or engaged in misconduct in connection with CARRP. There is no reason to believe that Defendants are hiding evidence of bad faith or misconduct by asserting the deliberative process privilege. Hence, this factor weighs against disclosure.

4. Disclosure of the Paragraph 17 Documents Would Chill Frank Discussion and Deliberation and Injure the Quality of Agency Decisions.

Under the Ninth Circuit's balancing test, the final factor to consider is the extent to which disclosure would hinder frank and independent discussion regarding agency policies and decisions. *See Warner Commc'ns Inc.*, 742 F.2d at 1161-62. "[I]f disclosure of the privileged documents would hinder [] frank and independent discussion, it would weigh *heavily* against disclosure." *U.S. Army Corps of Eng'rs*, 2015 WL 3606419, at *7 (emphasis added).

According to Mr. Emrich's April 30 affidavit, disclosure of the Paragraph 17 documents would hinder frank and independent discussion within the Executive Branch. *See* Dkt. # 174-3 ¶¶ 6-7. "Public disclosure of the withheld portions of these documents would jeopardize USCIS's ability to engage in decision making by discouraging future candid discussion and debate within USCIS." *Id.* ¶ 6. Indeed, courts considering this fourth factor have repeatedly held that such information tips the scales in favor of non-disclosure. *E.g.*, *U.S. Army Corps of Eng'rs*, 2015 WL 3606419, at *7 ("As the 21 emails contain information revealing the mental process of agency as it worked toward its final decision on the Section 404 Permit, compelled disclosure of these documents would chill frank discussion and deliberation in the future among

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those responsible for making governmental decisions in this context."); *Modesto Irrigation Dist.*, 2007 WL 763370, at *12 (concluding that "[t]here is no doubt" that disclosure of documents similar to those at issue here "would stifle frank and independent discussions regarding policy matters"); *see also Ctr. for Biological Diversity v. Norton*, No. CV 01-409, 2002 WL 32136200, at *4 (D. Ariz. 2002). This factor therefore weighs heavily against disclosure.

Plaintiffs have contended that because the Paragraph 17 documents would be produced subject to the existing Protective Order, "there is minimal risk that the limited disclosure . . . would hinder frank discussion within the [G]overnment." Dkt. # 180 at 5. But this test – that the privilege is defeated whenever there is a protective order – would swallow the deliberative process privilege whole, and would serve to chill internal deliberations about important policies, just as an order limiting access to a Court's bench memos to the parties litigating the case would warp the process of free deliberations within chambers. Moreover, according to Mr. Emrich's April 30 affidavit, the "existence of the protective order does not change [his] assessment of the importance of shielding these internal predecisional agency deliberations from disclosure." Dkt. # 174-3 ¶ 7. "Even disclosure under a protective order would not mitigate the chilling effect and detrimental consequences that would result from these documents being disclosed for purposes of this litigation." *Id.* If the documents are disclosed under the Protective Order, there is an inevitable risk of inadvertent disclosure, and there is no assurance that the Protective Order will remain unchanged. For example, Plaintiffs may seek a modification of the Protective Order, or a third party (such as a journalist or media organization) may move the Court for a modification. And if this case goes to trial and any of the documents are found to be relevant, the Court could modify the Protective Order to permit the use of the documents in open court. *See e.g. Davis v.*

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City of New York, 2012 WL 612794, at * 12, n. 12 ("[C]onsidering the overall balance of interests in this case, ordering disclosure of these documents subject to a protective order would not adequately protect the interests that underlie the deliberative process privilege."). Thus, disclosure of the Paragraph 17 documents is a risk not worth taking, even under the Protective Order, because the documents are irrelevant, Plaintiffs have access to other CARRP-related evidence, and disclosure would have a chilling effect on future USCIS deliberations.

Because all four factors weigh against disclosure of the Paragraph 17 documents, this Court should not require the disclosure of the Paragraph 17 material.

C. Defendants Do Not Object to Presenting the Paragraph 17 Documents to the Court for *In Camera* Review.

Defendants have no objection to providing some or all of the Paragraph 17 documents to the Court for *in camera* review, notwithstanding Plaintiffs' failure to show that the balancing test warrants piercing the deliberative process privilege. The Paragraph 17 documents consist of approximately 98 drafts of a policy memorandum proposing revisions to CARRP, and 24 other associated documents, such as emails, consolidated comments to the memorandum, and draft operational guidance. *See* Exhibit A ¶¶ 7-8. To minimize the burden on the Court, Defendants suggest it would be most efficient to present the Court with a randomly-selected sample of 10 draft policy memoranda for review, which would include approximately 200 pages.

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CONCLUSION

For these reasons, the Court should deny Plaintiffs' Motion to Compel production of the Paragraph 17 documents.

Dated: July 6, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 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 all counsel of record.

/s/Daniel Bensing
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