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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

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11 Russell B Toomey,
12 Plaintiff,
13
14 v.
15 State of Arizona, et al.,
16 Defendants.

No. CV-19-00035-TUC-RM (LAB)
ORDER

17 Pending before the Court is the Office of Governor Douglas A. Ducey’s (the
18 “Governor’s Office”) Appeal (Doc. 239) of Magistrate Judge Leslie A. Bowman’s Order
19 (Doc. 238) granting Plaintiff’s Motion to Compel Production of Documents from the
20 Governor’s Office (Doc. 202). Plaintiff responded to the Appeal. (Doc. 240.) For the
21 following reasons, the Appeal will be denied, and Magistrate Judge Bowman’s Order
22 affirmed.¹

23 **I. Background**

24 Plaintiff Dr. Russell B. Toomey is a transgender male who is employed as an
25 Associate Professor at the University of Arizona. (Doc. 241 at 1-2.) His health
26 insurance—a self-funded plan (“the Plan”) controlled by the Arizona Department of
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28 ¹ The Court finds that the Appeal is suitable for decision without oral argument and therefore denies the Governor’s Office’s request for oral argument.

1 Administration (“ADOA”)—categorically excludes “gender reassignment surgery” from
2 coverage (the “Exclusion”). (*Id.*) Plaintiff brings this class action lawsuit alleging that the
3 exclusion of gender reassignment surgery is sex discrimination under Title VII of the
4 Civil Rights Act and a violation of the Fourteenth Amendment Equal Protection Clause.
5 (*Id.*) One of the disputed factual questions in this case is “[w]hether the decision to
6 exclude gender reassignment surgery in [the Plan] was actually motivated by a legitimate
7 governmental interest.” (*Id.*)

8 On February 17, 2021, Toomey served on the Governor’s Office a subpoena
9 “seeking documents and information regarding surgery to treat gender dysphoria . . .
10 including insurance coverage for such surgeries in health insurance plans administered by
11 the Arizona Department of Administration, Medicaid, Medicare and any other
12 government health care program.” (Doc. 238 at 1; Doc. 202 at 4-5.) The Governor’s
13 Office produced some documents but withheld others. (Doc. 238 at 1; Doc. 202 at 5-7.)
14 Plaintiff’s Motion to Compel seeks production of 17 of those withheld documents. (Doc.
15 202 at 7.)

16 On September 21, 2021, this Court issued an Order directing Defendants State of
17 Arizona, Andy Tobin, and Paul Shannon (the “State Defendants”) to produce “all
18 documents related to Defendants’ decision-making regarding the exclusion of coverage
19 for gender reassignment surgery as requested in Plaintiff’s Requests for Production One,
20 Three, and Nine, including legal advice that may have informed that decision-making.”
21 (*See* Doc. 241.) State Defendants petitioned the Ninth Circuit Court of Appeals for a writ
22 of mandamus regarding that Order; the petition for writ of mandamus is currently
23 pending before that Court. (*See* Doc. 245.) This Court temporarily stayed its September
24 21, 2021 Order pending resolution of the petition for writ of mandamus. (*See* Doc. 251.)

25 **II. Plaintiff’s Motion to Compel**

26 Plaintiff’s Motion to Compel seeks production of 17 documents which the
27 Governor’s Office has withheld based on assertions of irrelevance, the executive
28 communications privilege, and the deliberative process privilege. (*See* Doc. 238 at 3-7.)

1 Plaintiff argues that the 17 withheld documents, all of which discuss gender reassignment
2 surgery, are relevant to determining the key issue of whether the Governor’s Office and
3 its staff members acted with discriminatory intent in deciding to maintain the Exclusion.
4 (Doc. 202 at 7-8.) Three categories of documents are at issue: (1) communications in
5 2017 and 2020 between Senior Health Policy Advisor Christina Corieri, the Arizona
6 Health Care Cost Containment System (“AHCCCS”), and the Arizona Department of
7 Corrections (“ADOC”); (2) emails sent in January 2017 among Governor’s Office staff
8 members discussing proposed legislation; and (3) a 2015 communication between Ms.
9 Corieri and Gerrie Marks at the Arizona Department of Insurance with the subject line
10 “Healthcare Plans.” (*Id.* at 7.) Plaintiff argues that the documents are “highly relevant to
11 show whether Ms. Corieri and other members of the Governor’s Office were
12 ideologically opposed to all instances” of state-provided insurance coverage, including
13 Medicare, Medicaid, and prison health care, for gender reassignment surgery. (*Id.* at 8.)

14 Plaintiff further argues that the executive communications privilege, which the
15 Governor’s Office asserts protects the documents from disclosure, does not apply to
16 communications involving the Governor’s Office because federal law limits that
17 privilege—also called the presidential communications privilege—to the President and
18 White House advisors. (*Id.* at 8-11) Plaintiff contends that there is no federal authority for
19 extending the privilege to a state governor. (*Id.*) Plaintiff additionally argues that the
20 Arizona Supreme Court has articulated a “strong policy favoring open disclosure and
21 access” of state records, and that even if the Governor’s Office could successfully assert
22 the executive communications privilege, Plaintiff would make the requisite showing to
23 overcome the privilege due to the relevance and limited availability of the evidence. (*Id.*)

24 Lastly, Plaintiff argues that the deliberative process privilege does not protect the
25 documents from disclosure because the Governor’s Office failed to follow the proper
26 procedure for asserting the privilege when it failed to provide a sworn declaration from
27 the head of the agency explaining the contents of the withheld documents and/or how the
28 documents were pre-decisional and deliberative. (Doc. 202 at 11-12.) Plaintiff further

1 argues that even if the Governor’s Office had properly asserted the privilege, its assertion
2 would fail upon evaluation of the four factors set forth in *F.T.C. v. Warner*
3 *Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) and that Magistrate Judge
4 Bowman’s analysis set forth in her April 20, 2021 Order granting Plaintiff’s Motion to
5 Compel (Doc. 187)² should apply equally here. (*Id.*)

6 In response, the Governor’s Office argues that (1) the documents are not relevant
7 in discerning its intent in deciding to maintain the Exclusion; (2) the executive
8 communications privilege protects the documents and applying that privilege here is a
9 “natural extension” of federal law governing federal privileges; (3) Plaintiff has not met
10 his burden of showing a need for the documents based on relevance and unavailability
11 elsewhere; (4) the deliberative process privilege also protects the documents because they
12 are pre-decisional and deliberative, the Governor’s Office properly asserted the privilege
13 by providing a declaration from Ms. Corieri, and Plaintiff has not shown that the
14 privilege is overcome. (Doc. 208.)

15 III. Magistrate Judge Bowman’s Order

16 In her Order granting Plaintiff’s Motion to Compel, Magistrate Judge Bowman
17 finds that the withheld documents are relevant to the issue of the intent underlying the
18 Exclusion and that neither the executive communications privilege nor the deliberative
19 process privilege precludes their disclosure. (Doc. 238.) In reaching this conclusion, the
20 Order highlights the evidence uncovered by Plaintiff in the course of discovery that the
21 Arizona Department of Administration considered removing the Exclusion in 2016 and
22 that the Governor’s Office “played a key role in State Defendants’ decision to maintain
23 the exclusion.” (Doc. 202 at 3; Doc. 238 at 2.)

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26 ² In the April 20, 2021 Order, Magistrate Judge Bowman concluded that the four *Warner*
27 factors weighed in favor of granting the Motion to Compel. (Doc. 187 at 8.) This Court
28 affirmed Magistrate Judge Bowman’s Order and directed State Defendants to produce
“all documents related to Defendants’ decision-making regarding the exclusion of
coverage for gender reassignment surgery as requested in Plaintiff’s Requests for
Production One, Three, and Nine, including legal advice that may have informed that
decision-making.” (Doc. 241.)

1 First, the Order finds the documents are relevant pursuant to Fed. R. Civ. P.
2 26(b)(1) because it is reasonable to conclude that the documents might address the issue
3 of whether Defendants intentionally discriminated against transgender individuals in
4 maintaining the Exclusion. (Doc. 238 at 4.) The Order rejects the Governor’s Office
5 argument that the documents are irrelevant because they relate not to the Exclusion
6 specifically but rather to the State of Arizona’s insurance coverage for surgery for gender
7 dysphoria more broadly, finding that they are relevant even if not specifically related to
8 the Exclusion because they may reveal a “pattern of discriminatory animus.” (*Id.*)

9 Next, the Order finds that the presidential or executive communications privilege
10 does not preclude disclosure of the documents. (*Id.* at 5-6.) The Order rejects the
11 Governor’s Office’s argument that the presidential communication privilege should
12 extend to the Governor’s Office. (*Id.*) The Order notes that the Governor’s Office has not
13 directed the court to a Ninth Circuit case extending the executive communications
14 privilege to a state governor and finds that the rationale underlying the privilege—
15 namely, the separation of powers between the federal judicial and executive branches of
16 government—does not apply to the state executive branch. (*Id.* at 6.)

17 The Order next finds that, although the Governor’s Office does hold a deliberative
18 process privilege that protects documents reflecting the process by which the Governor’s
19 Office makes decisions, that privilege does not preclude production of the documents.
20 (*Id.* at 6-10.) In reaching this conclusion, the Magistrate Judge analyzes the four *Warner*
21 factors and finds that (1) the documents are relevant; (2) other evidence may be available
22 that would be more responsive to Plaintiff’s discovery requests; and (3) the documents
23 may bear on Plaintiff’s claim that the decision to maintain the Exclusion was a product of
24 intentional discrimination. (*Id.*) The Order concludes that Plaintiff’s “need for the
25 materials and the need for accurate fact-finding override the government’s interest in
26 non-disclosure.” (*Id.* at 10.)

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1 **IV. The Governor’s Office’s Appeal of the Order**

2 On appeal, the Governor’s Office objects to the Order on four grounds. First, the
3 Governor’s Office argues that the Order “misconstrues the scope of the Subpoena at
4 issue” and that this misinterpretation underlies the Order’s incorrect findings regarding
5 relevancy and privilege application, essentially arguing that the contested documents are
6 not relevant because the subpoena in response to which the documents were produced
7 was overly broad. (*Id.* at 1-3.) Second, the Governor’s Office argues that the Order erred
8 in rejecting the executive communications privilege because (1) public policy supports
9 the application of the privilege and (2) district courts have applied the privilege to state
10 executive officers. (*Id.* at 4-5.) Third, the Governor’s Office argues that the Order’s
11 application of the *Warner* factors was erroneous. (*Id.* at 6-9.) Fourth, the Governor’s
12 Office argues that the Magistrate Judge should conduct an *in camera* review of the
13 documents to discern their relevance before potentially ordering their disclosure. (*Id.* at 9-
14 10.)

15 **V. Applicable Law**

16 Federal Rule of Civil Procedure 45 states that “the serving party may move the
17 court for the district where compliance [with his subpoena] is required for an order
18 compelling production or inspections.” Fed. R. Civ. P. 45(d)(2)(B)(i); *see also* Fed. R.
19 Civ. P. 37(a)(3)(B)(iv) (A party seeking discovery may move for an order compelling
20 production if a party fails to produce documents.).

21 In general, “[p]arties may obtain discovery regarding any nonprivileged matter
22 that is relevant to any party’s claim or defense and proportional to the needs of the case,
23 considering the importance of the issues at stake in the action, the amount in controversy,
24 the parties’ relative access to relevant information, the parties’ resources, the importance
25 of the discovery in resolving the issues, and whether the burden or expense of the
26 proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Relevancy
27 under Rule 26 “has been construed broadly to encompass any matter that bears on, or that
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1 reasonably could lead to other matter[s] that could bear on, any issue that is or may be in
2 the case.” *In re Williams-Sonoma, Inc.*, 947 F.3d 535, 539 (9th Cir. 2020).

3 Evidence of discriminatory intent, treatment, or attitude is generally relevant and
4 admissible to prove unconstitutional discrimination. *See Heyne v. Caruso*, 69 F.3d 1475,
5 1479–80 (9th Cir. 1995) (“[E]vidence of the employer’s discriminatory attitude in general
6 is relevant and admissible to prove . . . discrimination.”) (emphasis omitted); *see also RK*
7 *Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1062 (9th Cir. 2002) (“[T]he City’s
8 allegedly discriminatory treatment of other clubs playing rap and hip-hop music and
9 catering to African American patrons may be relevant evidence of an unconstitutional
10 purpose.”).

11 Because the legal claims in this case arise under federal law, federal law governs
12 the Governor’s Office’s assertions of the executive communications privilege. *See Fed.*
13 *R. Evid.* 501; *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2015 WL 12911719, at
14 *1 (D. Ariz. May 14, 2015) (“Issues of privilege in federal question cases are determined
15 by federal law.”). The executive communications privilege protects “communications
16 directly involving, and documents actually viewed by the President, as well as documents
17 solicited and received by the President or his immediate White House advisers.” *Trump v.*
18 *Karnoski*, 926 F.3d 1180, 1203 (9th Cir. 2019) (internal quotations omitted). “The
19 privilege covers documents reflecting presidential decision making and deliberations,
20 regardless of whether the documents are predecisional or not[.]” *Id.* Federal district courts
21 have refused to extend the privilege to state governors. *See Hopley v. Chicago Police*
22 *Commander Burge*, 445 F. Supp. 2d 990, 998 (N.D. Ill. 2006); *Patterson v. Burge*, 451 F.
23 Supp. 2d 947, 955 (N.D. Ill. 2006); *see also* 98 C.J.S. Witnesses § 423 at n.3 (March
24 2021) (“[f]ederal law does not recognize an executive communications privilege for state
25 Governors”).

26 The Supreme Court of Arizona has articulated a “strong policy favoring open
27 disclosure and access.” *Cox Arizona Pubs., Inc. v. Collins*, 852 P.2d 1194, 1198 (1993).
28 “[P]ersons giving advice to Arizona government officials should ordinarily assume that

1 their advice will not be hidden from the public gaze.” *Arizona Dream Act Coal. v.*
2 *Brewer*, No. CV-12-02546-PHX-DGC, 2014 WL 171923, at *3 (D. Ariz. 2014).

3 The deliberative process privilege “permits the government to withhold documents
4 that reflect advisory opinions, recommendations and deliberations comprising part of a
5 process by which government decisions and policies are formulated.” *Warner Commc’ns*
6 *Inc.*, 742 F.2d at 1161. “A litigant may obtain deliberative materials if his or her need for
7 the materials and the need for accurate fact-finding override the government’s interest in
8 non-disclosure.” *Id.* “Among the factors to be considered in making this determination
9 are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the
10 government’s role in the litigation; and 4) the extent to which disclosure would hinder
11 frank and independent discussion regarding contemplated policies and decisions.” *Id.*
12 “[T]he claim of deliberative due process privilege must be raised by a formal claim made
13 by the head of the agency after she has personally considered the material in question
14 prior to the invocation of the privilege.” *EEOC v. Swissport Fueling, Inc.*, No. CV-10-
15 2101-PHX-GMS, 2012 WL 1648416, at *15 (D. Ariz. May 10, 2012). “The party
16 asserting an evidentiary privilege has the burden to demonstrate that the privilege applies
17 to the information in question.” *Tornay v. United States*, 840 F.2d 1424, 1426 (9th
18 Cir.1988).

19 VI. Analysis

20 The Court will affirm Magistrate Judge Bowman’s Order compelling production
21 of the withheld documents. The contested documents are relevant and neither the
22 executive communications privilege nor the deliberative process privilege precludes their
23 disclosure.

24 The Governor’s Office’s focus on the scope of the subpoena is misplaced. At issue
25 is not the scope of the subpoena, but the discoverability of the 17 documents the
26 Governor’s Office is withholding. Regardless of the breadth of the subpoena, Plaintiff
27 seeks in his Motion to Compel production only of 17 particular documents, and the Court
28 is satisfied that those documents are relevant to the key issue of the intent underlying the

1 decision to maintain the Exclusion. Plaintiff has uncovered evidence that the Governor's
2 Office played a role in Defendants' decision to maintain the Exclusion. It is reasonable to
3 conclude that the documents might address the issue of whether Defendants, with input
4 from the Governor's Office, intentionally discriminated against transgender individuals in
5 maintaining the Exclusion. The documents need not relate solely to the Exclusion to be
6 relevant because they may reveal a pattern of discriminatory animus by Defendants.

7 The executive communications privilege does not preclude the discoverability of
8 the documents. The Governor's Office has not presented a compelling reason to extend
9 the privilege to state governors and, in the absence of controlling Ninth Circuit Court of
10 Appeals authority mandating that it do so, the Court declines to so extend it.

11 Nor does the deliberative process privilege preclude discoverability. In weighing
12 the four *Warner* factors, the Court finds as to the first factor that the documents are
13 relevant, as discussed *supra*. As to the second factor, Plaintiff does not have other readily
14 available evidence that addresses the issue of the Governor's Office's role in the State
15 Defendants' decision to maintain the Exclusion. Although Plaintiff may have other
16 evidence relating to the State Defendants' motivation behind the decision to maintain the
17 Exclusion (*see* Doc. 241), that evidence has not yet been disclosed (*see* Doc. 251).
18 Additionally, the documents at issue here are the only evidence Plaintiff has of the
19 Governor's Office's role in the decision. Thus, the second factor weighs in favor of
20 disclosure. As to the third factor, it too favors disclosure because the Governor's Office
21 was involved in the decision to maintain the Exclusion. As to the fourth factor, "the
22 extent to which disclosure would hinder frank and independent discussion regarding
23 contemplated policies and decisions," *Warner*, 742 F.2d at 1161, the Court finds that
24 although disclosure may have such an effect, this possibility is not sufficient to outweigh
25 Plaintiff's need for the documents, the need for accurate fact-finding, and the weight of
26 the first three *Warner* factors. Furthermore, as Magistrate Judge Bowman concluded,
27 Arizona has a policy that favors public disclosure of government records, including those
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1 relating to policy making. (Doc. 238 at 9.) Accordingly, the deliberative process privilege
2 does not preclude disclosure.

3 Lastly, the Court declines to grant the Governor's Office's request for an *in*
4 *camera* review of the documents prior to their disclosure.


5 Accordingly,

6 **IT IS ORDERED** that the Governor's Office Appeal of Magistrate Judge
7 Bowman's Order (Doc. 239) is **denied**.

8 **IT IS FURTHER ORDERED** that Magistrate Judge Bowman's Order (Doc.
9 238) granting Plaintiff's Motion to Compel (Doc. 202) is **affirmed**. Within **fourteen (14)**
10 **days** of the date of this Order, the Governor's Office shall produce the 17 documents that
11 are the subject of the Motion to Compel.

12 Dated this 6th day of May, 2022.

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Honorable Rosemary Márquez
United States District Judge