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' MOTION TO COMPEL DOCUMENTS WITHHELD UNDER THE LAW ENFORCEMENT AND DELIBERATIVE PROCESS PRIVILEGES

NOTE ON MOTION CALENDAR: January 24, 2020

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. INTRODUCTION

Plaintiffs challenge CARRP, an extra-statutory vetting policy for immigration applications, on both statutory and constitutional grounds. A crucial part of the CARRP process is a determination that an applicant poses a "national security concern." Plaintiffs are entitled to know *how* and *why* Defendants make this determination. However, Defendants have invoked the law enforcement privilege—a narrow and qualified privilege—in redacting hundreds of documents containing exactly this information. From those, Plaintiffs have identified a narrow subset of 64 documents, plus certain redactions in the Certified Administrative Record (CAR), that appear to be especially relevant. These documents should be disclosed because Plaintiffs' need for them outweighs Defendants' purported security concerns, and any risks associated with disclosure are small given the Protective Order entered in this case. Defendants also assert the deliberative process privilege over 34 of these 64 documents. These documents should be disclosed because Plaintiffs' need for accurate fact-finding outweighs Defendants' interest in non-disclosure. Plaintiffs respectfully request that the Court compel production of these documents without redactions. In the alternative, Plaintiffs request that the Court review the 64 documents *in camera* to determine whether Defendants should produce them to Plaintiffs.

II. PROCEDURAL BACKGROUND

This is Plaintiffs' second motion to compel selected documents where Defendants improperly assert the law enforcement and deliberative process privileges. *See also* Dkt. 260. On December 18, 2019, Plaintiffs sent Defendants a list of 83 documents, plus redactions in the CAR, that Plaintiffs sought to challenge from the hundreds of documents that assert the law enforcement and deliberative process privileges in an effort to avoid the Court's involvement. One document was added later. Defendants reproduced lesser redacted versions of a subset of these documents between January 6–9, 2020, but Defendants' reproduction still contained numerous improper and overly broad redactions. Including the documents that Defendants removed certain redactions, Plaintiffs then culled the list on which they are moving down to

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

these 64 documents. Hyatt Decl. ¶ 9. Plaintiffs will file the 64 documents and redacted portions of the CAR with the Court for review when Plaintiffs receive the re-productions of certain documents with Bates numbers from the Defendants.

Moreover, when Plaintiffs asked Defendants to remove redactions, Defendants *added* redactions in some documents and asked to claw back others in their entirety. Defendants' post hoc claw backs force Plaintiffs to litigate its case on quicksand. Plaintiffs are assessing the claw back requests and will respond at the appropriate time. Hyatt Decl. ¶ 7.

With respect to the CAR, during a meet and confer with the government on December 31, 2019, Plaintiffs told Defendants that they had again failed to assert the law enforcement privilege over documents in the CAR. Defendants responded by directing Plaintiffs to identical or near identical versions of the documents over which Defendants contend they properly asserted the privilege. Hyatt Decl. ¶ 6.

III. MEET AND CONFER CERTIFICATION

On December 31, 2019, the parties held a final telephonic meet and confer, in good faith, to avoid the Court's involvement in this dispute. Hyatt Decl. ¶ 4. Despite good faith efforts, the parties could not reach an agreement with respect to the remaining documents that are the subject of this motion.

IV. ARGUMENT

A. Defendants' Privilege Logs are Insufficient

The scope of discovery is broad. "The party who resists discovery has the burden to show that discovery should not be allowed and of clarifying, explaining, and supporting its objections." *See* Dkt. 98 at 2 (quoting *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997)). And, when parties seek to withhold information on the basis of privilege, they must describe the withheld material "in a manner that . . . will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A)(ii).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Defendants' privilege logs asserting the law enforcement and deliberative process privileges fall short of this standard. The privilege descriptions in the logs are short, generic, and lack page numbers, even when the same privilege description is applied to large block redactions spanning tens or even hundreds of pages. *See, e.g.*, DEF-00021130 (applying same privilege description to all redactions in 209-page document).

These block redactions paired with short, generic privilege descriptions make it difficult, if not impossible, to match descriptions to specific redactions and assess their validity. With regards to the law enforcement privilege, the redactions also contravene this Court's Order that Defendants "use the privilege deliberately" and "be exacting with which documents fall within this privilege, stating its reasons for withholding clearly in the privilege logs." Dkt 148 at 5. To the extent these redactions contain truly irrelevant information—such as password formatting instructions—Plaintiffs do not object to withholding such information. *See* Dkt. 269 at 3.

Plaintiffs' concerns are amplified by the inconsistency of Defendants' redactions. In instances where the same content is redacted in some documents but not others, it is apparent that Defendants have used privilege redactions to redact non-privileged information. *Compare* Ex. 2 (excerpt of original production of DEF-00065590), *with* Ex. 3 (recent reproduction of same document) (showing the lesser-redacted reproduction of CARRP training document reveals that earlier, heavier redacted version withheld non-privileged CARRP procedure under the law enforcement privilege).

Finally, Defendants fail to explain why the Protective Order in this case is insufficient to address their purported security concerns. Revealing information to Plaintiffs' counsel under the Protective Order will not enable criminals to circumvent the law.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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B. Defendants Cannot Withhold These Documents Under the Law Enforcement Privilege.

Many of the identified documents do not fall within the scope of this narrow privilege. In addition, the privilege is qualified rather than absolute, and the applicable balancing test weighs in favor of disclosure for each of these highly relevant documents.

1. Legal Standard Governing the Law Enforcement Privilege

The law enforcement privilege has received only limited recognition in courts. Neither the Supreme Court nor the Ninth Circuit have acknowledged the privilege. *See Shah v. Dep't of Justice*, 714 F. App'x 657, 659 n.1 (9th Cir. 2017). District courts within the Ninth Circuit have looked to other circuits for guidance on what the privilege covers.

Where it is recognized, courts have held the law enforcement privilege is a "very narrow one." *See, e.g.*, *U.S. Commodity Futures Trading Comm'n v. U.S. Bank, N.A.*, No. C13-2041, 2014 WL 5465808, at *8 (N.D. Iowa Oct. 28, 2014) (quoting *Stephens Produce Co., Inc. v. N.L.R.B.*, 515 F.2d 1373, 1376 (8th Cir. 1975)). Further, the privilege is qualified: "[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." *See* Dkt. 148 at 3. Defendants may not withhold a document under the law enforcement privilege unless they can show that the public's interest in nondisclosure outweighs Plaintiffs' need. Courts often consider the following balancing factors:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the information sought to the plaintiff's case.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2013 WL 1703367, at *4 (N.D. Cal. Apr. 19, 2013); *see also In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). Additionally, the existence of a protective order that safeguards confidential information weighs in favor of disclosure. *In re Anthem, Inc. Data Breach Litig*., 236 F. Supp. 3d 150, 167 (D.D.C. 2017).

2. Many of These Documents Do Not Fall Within the Scope of the Law Enforcement Privilege.

Defendants' expansive withholdings relate to general CARRP policies and procedures. But withholding such documents "does not present a typical [law enforcement] privilege fact pattern," as "[t]he government is not seeking to protect information relating to an ongoing investigation or that would tend to reveal the identity of a confidential informant." *See Ibrahim*, 2013 WL 1703367, at *5. This mismatch undercuts their broad invocation of the privilege. *See In re Anthem,* 236 F. Supp. 3d at 166-67 ("[T]hese [documents] do not pertain to an ongoing or closed criminal or civil investigation of a particular law violation and, therefore, fall outside the heartland of the types of records the privilege is designed to protect."). In addition, the Court "must view USCIS's withholding of documents with more skepticism than it might with a different agency" to "ensure that the Government's blanket affidavit is not being used in an unbridled sense." *See* Dkt. 148 at 3.

Plaintiffs are entitled to information regarding USCIS's adjudication of immigration benefits for applicants who supposedly present a national security concern, as this information is important to Plaintiffs' claims. For example, Plaintiffs seek to learn which indicators and databases USCIS relies on to process immigration benefit applications, and *how* USCIS uses databases from third-party agencies to inform its *internal* processing of applications. Such information is indicative of the accuracy and reliability of USCIS's adjudication processes and is plainly relevant to Plaintiffs' claims. Plaintiffs do *not* seek to learn the specific investigative methods third-party agencies use to populate databases or determine that a given indicator or database code applies to an applicant. Revealing which indicators and codes USCIS relies on—

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 without revealing any of the investigative methods used to determine that a given indicator or
2 code applies to a specific applicant—will not enable criminals to circumvent the law. This
3 information falls outside the narrow bounds of the law enforcement privilege.

4 This Court has instructed Defendants to "deliberately" draw an "important distinction"
5 between (1) documents outlining procedures for adjudicating an immigration benefit, which do
6 not fall within the privilege, and (2) documents describing how a national security risk is
7 discovered and investigated. *See* Dkt 148 at 4-5. Defendants have failed to do so, as they redact
8 content falling within the former category from many of their documents. *See, e.g.*,
9 DEF-00052177 (redacting examples of indicators used to identify cases that may include a
10 national security concern); DEF-00023299 (redacting databases and checks USCIS uses to
11 process immigration applications).

12 Producing this general information—all of which pertains to how USCIS adjudicates
13 immigration benefit applications for applicants that purportedly present a national security
14 concern—would not enable criminals to circumvent the law. In fact, the government already
15 publicly reveals its standards for reporting suspicious activity and other national security
16 information in other contexts. *See, e.g.*, Nationwide Suspicious Activity Reporting (SAR)
17 Initiative, Functional Standard, Suspicious Activity Reporting (Feb. 23, 2015),
18 http://nsi.ncirc.gov/documents/SAR_FS_1.5.5_PMISE.pdf. USCIS and other government
19 agencies have also disclosed these kinds of indicators and database codes in other public
20 contexts. Moreover, producing the information under the Protective Order would address any
21 potential concerns about the disclosure of such information. The information Plaintiffs seek
22 regarding how USCIS adjudicates applications subject to CARRP does not fall within the law
23 enforcement privilege.

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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3. Even Where the Law Enforcement Privilege Applies, the Balancing Test Weighs in Favor of Disclosure.

Plaintiffs' need for these 64 documents and the unredacted Certified Administrative Record outweighs Defendants' purported interests in nondisclosure for two main reasons. First, the risks related to disclosure are insignificant. The Protective Order in this case would mitigate the risks, if any, that may arise from disclosure. Second, these documents are important to Plaintiffs' case. Plaintiffs challenge CARRP on the basis that Defendants rely on unconstitutional and non-statutory processes to determine if an applicant for immigration benefits is a "national security concern." Documents revealing what these processes are—including the records systems, indicators, and factors they rely on—are highly relevant to Plaintiffs' claims. Yet Defendants are withholding information regarding these same processes on the grounds of the law enforcement privilege. Defendants cannot use a limited, narrow privilege to hide the very processes at the heart of this case and thereby preclude judicial scrutiny of a program that affects thousands of aspiring U.S. citizens and lawful permanent residents.

a. All Relevant Balancing Factors Weigh in Favor of Disclosure.

Because Plaintiffs are not seeking information relating to the kind of ongoing investigation traditionally subject to the law enforcement privilege, many of the factors that might otherwise weigh in favor of nondisclosure are irrelevant. In *Ibrahim*, for example, the court declined to consider factors 1-3 and 5-7 because the plaintiff sought documents related to her placement on the No Fly List and the government's No Fly List policies, not an ongoing investigation more traditionally subject to the privilege. 2013 WL 1703367, at *4. The remaining four factors—the fourth, eighth, ninth, and tenth factors—all weigh in favor of disclosure.

The fourth factor is whether the information sought is factual data or an "evaluative summary." Plaintiffs seek factual data regarding how CARRP works. The documents at issue discuss general CARRP policies and procedures, and how USCIS processes applications subject to CARRP. They do not appear to include evaluative data. And even if the withheld material includes an evaluative summary, that does not necessarily weigh against disclosure. *See Kelly v.*

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

City of San Jose, 114 F.R.D. 653, 664, 666 (N.D. Cal. 1987) (finding "no empirical support for the contention" that disclosure would reduce the candor of officers performing internal investigations, and "solid reasons to believe" the opposite). In addition, courts typically "require reports containing both factual and evaluative materials to be disclosed in civil rights actions." *See also Anderson v. Marion Cty. Sheriff's Dep't*, 220 F.R.D. 555, 566 (S.D. Ind. 2004). Because Plaintiffs are entitled to the factual material in these documents and the evaluative data is limited, this factor weights in favor of disclosure.

The eighth factor asks "whether the plaintiff's suit is non-frivolous and brought in good faith." It is. Plaintiffs' claims have survived a motion to dismiss, and weighty constitutional issues of vital public importance are at stake. This factor clearly weighs in favor of disclosure.

The ninth factor is "whether the information sought is available through other discovery or from other sources." The government bears the burden of "show[ing] that information of comparable quality is as efficiently available from alternative sources." *Kelly*, 114 F.R.D. at 667; *see also id.* ("It is difficult to imagine how plaintiffs, who generally will not know what is in confidential police files, could satisfy a court who demanded that they prove the negative, i.e., that there were no practicable alternative routes to the same information."). Although Defendants may argue they have already provided some policy documents, they have not shown that the highly relevant information Plaintiffs seek is available elsewhere. In fact, Plaintiffs have moved to compel on these limited documents precisely *because* this information is not available elsewhere. This factor weighs in favor of disclosure.

Finally, the tenth factor concerns "the importance of the information sought to the plaintiff's case." These documents, most of which are training and guidance documents on CARRP, are highly relevant to Plaintiffs' claims that CARRP imposes unlawful, extra-statutory hurdles on certain individuals applying for residency or citizenship. At issue in Plaintiffs' procedural due process and APA claims, for example, are the reliability of CARRP processes and the likelihood that they result in erroneous denials of immigration benefits—matters to

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

which the sought-after documents plainly pertain. The documents are also relevant to Plaintiffs' claim 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." Second Am. Compl., Dkt. 47 ¶ 76. For example, some of the redacted information includes indicators of suspicious activities. *See, e.g.*, DEF-00359641 at DEF-00359805–DEF-0035982 (redacting training slides labeled "National Security Red Flags"); DEF-00052177 (redacting "examples of indicators used to identify cases that may include a national security concern").

Defendants will likely argue the third, fifth, and sixth factors weigh against disclosure. Defendants are incorrect, as the factors are irrelevant or can be mitigated by the Protective Order. *See Ibrahim*, 2013 WL 1703367, at *4 (declining to consider these factors). The third factor asks "the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure." This factor cannot weigh heavily here, as the mere potential that the government could at some point improve relevant processes cannot be used to thwart review of the program's legality. In any event, this factor is irrelevant as to much of the information sought. To the extent the documents would reveal USCIS's periodic efforts to revise CARRP procedures, any chilling effect caused by disclosure is mitigated by the Protective Order.

The fifth factor asks if the requestor is an actual or potential defendant in a criminal action, and the sixth factor asks if the police investigation is complete. As none of the Plaintiffs is an actual or potential defendant in a criminal action, investigations into Plaintiffs' immigration applications are complete, and information Plaintiffs request relates to general policies that are not specific to any particular investigation, the fifth and sixth factors are irrelevant or—as the confidentiality concerns implicated by these factors do not apply—weigh in favor of disclosure.

The information withheld is important to Plaintiffs' claims under the Due Process Clause, APA, Immigration and Nationality Act, and Uniform Rule of Naturalization Clause. To the extent this information reflects that CARRP determinations turn on national origin or religion, it is also relevant to Plaintiffs' Equal Protection claim. Plaintiffs plainly need this information, and

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

any potential risks associated with disclosure can mitigated through the Protective Order. Defendants' assertion of the law enforcement privilege lacks merit.

b. The Balancing Test Weights Even More Heavily in Favor of Disclosure for the Certified Administrative Record.

First, Defendants have *again* failed to properly assert the law enforcement privilege with respect to the CAR. Despite this Court's clear holdings requiring a formal privilege claim, supporting affidavits, and explanations to substantiate assertions of the law enforcement privilege, Defendants have not fulfilled these requirements with regards to their law enforcement privilege redactions in the CAR. *See* Dkt. 148 at 3.

Second, because the CAR is full of unsupported redactions, Defendants have failed to provide a complete administrative record. Federal agencies have an obligation under the APA to provide a complete administrative record to the court. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). This obligation ensures that agency action does not become effectively unreviewable, for "[i]f the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

Further, documents in the CAR are, by definition, highly relevant to Plaintiffs' case. The CAR "consists of all documents and materials directly or indirectly considered by agency decision-maker." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Documents considered by Defendants in their development of CARRP and adjudication of CARRP-subjected applications are important to Plaintiffs' claims that CARRP imposes unlawful, extra-statutory hurdles on certain applicants. Defendants should not be permitted to withhold such highly relevant information from the CAR based on the "limited" and "qualified" law enforcement privilege, especially when Defendants have failed to formally claim the privilege, provide affidavits, or explain the redactions. Eliminating such information from the

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 CAR renders Defendants' actions related to CARRP essentially unreviewable. Thus, the law
2 enforcement privilege balancing test weighs heavily in favor of disclosure of the CAR.

3
4 **C. Defendants Have Improperly Withheld Documents Under the Deliberative Process Privilege.**

5 Defendants assert the deliberative process privilege over 34 of the 64 redacted
6 documents. As Defendants' assertion of this privilege over these documents is without merit,
7 Plaintiffs request that the Court order Defendants to produce the documents without redactions.

8 The deliberative process privilege is qualified, not absolute, and the party seeking to
9 invoke the privilege carries the burden to establish its applicability. *Greenpeace v. Nat'l Marine*
10 *Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000); *see also FTC v. Warner Commc'ns*,
11 742 F.2d 1156, 1161 (9th Cir. 1984). An opposing party can overcome the privilege by showing
12 that "his or her need for the materials and the need for accurate fact-finding override the
13 government's interest in non-disclosure." *Warner*, 742 F.2d at 1161. In deciding whether the
14 qualified privilege has been overcome, a court may consider "1) the relevance of the evidence; 2)
15 the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to
16 which disclosure would hinder frank and independent discussion regarding contemplated policies
17 and decisions." *Id*; Dkt. 189 at 7-8. In addition, "[p]urely factual material that does not reflect
18 deliberative processes is not protected." *Id.*

19 Defendants' assertion of the deliberative process privilege regarding these documents
20 lacks merit. First, the privilege does not apply because the government's decision-making
21 process is itself at issue here. *See In re Subpoena Duces Tecum Served on Office of Comptroller*
22 *of Currency*, 145 F.3d 1422, 1424-25 (D.C. Cir.) ("Subpoena I"), *on reh'g in part*, 156 F.3d
23 1279 (D.C. Cir. 1998); *see also* Dkt. 189 at 2. Draft policy documents may provide important
24 insights into the motivations behind CARRP as a whole. For example, to the extent these
25 documents reveal that CARRP determinations were designed to turn on religion, national origin,
26 or their proxies, they are highly relevant to Plaintiffs' Equal Protection claim. *See, e.g.*,

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

DEF-00174739 (document redacting highly relevant information because it *may* include predecisional deliberations). As the Court has already noted, "the Government plays a central role in this case," and "'the basis for its action is a central issue in the litigation.'" Dkt. 189 at 7 (citation omitted). The deliberative process privilege cannot become a means of concealing documents and information reflecting the very processes that Plaintiffs challenge.

Second, some documents appear to contain "purely factual information" that is not subject to the privilege. *See, e.g.*, DEF-00266453 (redacting what appear to be statistics).

Third, Defendants justify the privilege in several documents by merely stating that the documents *may* include predecisional deliberations—not that the documents *do* contain such deliberations—or that the policies discussed *may* not have been adopted. *See, e.g.*, DEF-00174739 (containing a policy that *may* have been adopted or *may* have been changed before adoption, and that the document *may* also include predecisional, deliberative information); DEF-00280914 (document that includes deliberations between agency officials about policies that *may* have been implemented). These vague, noncommittal statements are not sufficient to support an invocation of the deliberative process privilege.

Finally, Plaintiffs' need for the information outweighs Defendants' interest in non-disclosure because this information is directly relevant to Plaintiffs' claims and not available elsewhere. In addition, any risks associated with disclosure are substantially mitigated by the parties' stipulated Protective Order. *See Rodriguez v. City of Fontana*, No. EDCV 16-1903-JGB (KKx), 2017 WL 4676261, at *4 (C.D. Cal. Oct. 17, 2017).

V. CONCLUSION

Plaintiffs respectfully request an order compelling Defendants to produce the 64 documents identified in this motion and the CAR unredacted. These documents are important to Plaintiffs' claims, and the existing Protective Order would mitigate any risk possibly associated with disclosure. Alternatively, Plaintiffs ask that the Court review the 64 documents *in camera* to determine whether disclosure is warranted.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Respectfully submitted,

s/ Jennifer Pasquarella
Jennifer Pasquarella (admitted pro hac vice)
ACLU Foundation of Southern California
1313 W. 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-5236
jpasquarella@aclusocal.org

s/ Matt Adams
Matt Adams #28287
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98122
Telephone: (206) 957-8611
matt@nwirp.org

s/ Stacy Tolchin
Stacy Tolchin (admitted pro hac vice)
Law Offices of Stacy Tolchin
634 S. Spring St. Suite 500A
Los Angeles, CA 90014
Telephone: (213) 622-7450
Stacy@tolchinimmigration.com

s/ Hugh Handeyside
s/ Lee Gelernt
s/ Hina Shamsi
Hugh Handeyside #39792
Lee Gelernt (admitted pro hac vice)
Hina Shamsi (admitted pro hac vice)
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2616
lgelernt@aclu.org
hhandeyside@aclu.org
hshamsi@aclu.org

DATED: January 9, 2020

s/ Harry H. Schneider, Jr.
s/ Nicholas P. Gellert
s/ David A. Perez
s/ Cristina Sepe
s/ Heath L. Hyatt
Harry H. Schneider, Jr. #9404
Nicholas P. Gellert #18041
David A. Perez #43959
Cristina Sepe #53609
Heath L. Hyatt #54141
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
HSchneider@perkinscoie.com
NGellert@perkinscoie.com
DPerez@perkinscoie.com
CSepe@perkinscoie.com
HHyatt@perkinscoie.com

s/ Trina Realmuto
s/ Kristin Macleod-Ball
Trina Realmuto (admitted pro hac vice)
Kristin Macleod-Ball (admitted pro hac vice)
American Immigration Council
1318 Beacon Street, Suite 18
Brookline, MA 02446
Telephone: (857) 305-3600
trealmuto@immcouncil.org
kmacleod-ball@immcouncil.org

s/ John Midgley
John Midgley #6511
ACLU of Washington
P.O. Box 2728
Seattle, WA 98111
Telephone: (206) 624-2184
jmidgley@aclu-wa.org

Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date indicated below, I caused service of the foregoing document via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 9th day of January, 2020, at Washington, DC.

By: s/ *Cristina Sepe*
Cristina Sepe
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
CSepe@perkinscoie.com