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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' SUPPLEMENTAL BRIEF  
IN SUPPORT OF MOTION TO COMPEL  
RE DELIBERATIVE PROCESS  
PRIVILEGE**

**NOTE ON MOTION CALENDAR:  
June 29, 2018**

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## I. INTRODUCTION

1  
2 In its May 21, 2018 order (Dkt. # 189), the Court requested supplemental briefing on 40  
3 categories of documents that Defendants withheld under the deliberative process privilege. The  
4 parties have since conferred and resolved their differences with respect to 95 percent of those  
5 documents—38 of the 40 categories. With respect to the two remaining categories, however,  
6 Plaintiffs’ need for the documents outweighs any interest in nondisclosure, as the documents are  
7 highly relevant to Plaintiffs’ claims regarding CARRP or its successor extreme vetting programs.  
8 Plaintiffs therefore renew their challenge to Defendants’ assertion of the privilege over the two  
9 remaining categories of documents.

## II. PROCEDURAL HISTORY

10  
11 On May 21, 2018, the Court granted in part Plaintiffs’ motion to compel certain  
12 documents withheld under the deliberative process privilege. *See* Dkt. # 189. With respect to  
13 other documents, however, the Court requested that Plaintiffs file a supplemental brief “more  
14 precisely challeng[ing] [Defendants’] remaining privilege assertions” in light of the affidavit filed  
15 by Matthew D. Emrich. *Id.* at 9; *see also* Dkt. # 174-3. Specifically, the Court requested briefing  
16 with respect to the documents “described in paragraphs 15-21, 23, 28-30, 32, 40, 42, 45-46, 48,  
17 51-52, 54, 56, 58-59, 62-63, 68, 70-74, 76, 78, 83-85, 88, 90-92 of Mr. Emrich’s affidavit.” Dkt.  
18 # 189 at 7 n.3.

19 The Court later granted the parties’ stipulated motion to postpone supplemental briefing to  
20 allow the parties to meet and confer regarding these remaining categories of documents. *See* Dkt.  
21 # 190. On June 7, 2018, the parties conferred via conference call, and Plaintiffs indicated they  
22 were willing to focus on just eight of the remaining 40 categories. On June 12, 2018, Defendants  
23 provided Plaintiffs with additional information regarding the eight categories. *See* Declaration of  
24 Laura K. Hennessey (“Hennessey Decl.”) Ex. 1. With respect to certain categories, Defendants  
25 pointed Plaintiffs to final versions of the documents or agreed to produce final versions of the  
26

1 documents. *See id.* Defendants also produced several of the documents at issue on June 14, 2018.  
2 In light of Defendants' June 12 email and June 14 production, Plaintiffs decided to forego  
3 challenging six of the eight categories and focus only on the documents listed in Paragraphs 17  
4 and 45.

5 On June 15, 2018 (the same day Plaintiffs' supplemental brief was due), Defendants  
6 offered to produce an "exemplar" document from Paragraph 17 (DEF-00000667) redacted only  
7 for law-enforcement and attorney-client privilege. Plaintiffs intend to continue conferring with  
8 Defendants regarding their offer over the next few days, and the parties will alert the Court if they  
9 resolve their differences. In the meantime, however, Plaintiffs maintain that the balancing test  
10 weighs in favor of disclosure with respect to the documents listed in Paragraphs 17 and 45, and  
11 request a ruling from the Court to that effect.

12 Plaintiffs now renew their motion to compel disclosure of two of the original 40  
13 categories: the documents listed in Paragraphs 17 and 45 of the Emrich affidavit.

### 14 III. LEGAL STANDARDS

15 The deliberative process privilege is a qualified, not an absolute, privilege. *FTC v. Warner*  
16 *Comm'ns*, 742 F.2d 1156, 1161 (9th Cir. 1984). A party may obtain disclosure of deliberative  
17 materials if it can establish that the need for the materials to allow for accurate fact-finding  
18 outweighs the government's interest in non-disclosure. *Id.* In deciding whether the qualified  
19 privilege should be overcome, a court may consider "1) the relevance of the evidence; 2) the  
20 availability of other evidence; 3) the government's role in the litigation; and 4) the extent to  
21 which disclosure would hinder frank and independent discussion regarding contemplated policies  
22 and decisions." *Id.*

#### IV. ARGUMENT

##### A. The Court Should Order Disclosure of the Documents Described in Paragraphs 17 and 45 of the Emrich Affidavit

###### 1. Paragraph 17

The documents described in Paragraph 17 are “draft policy memoranda and/or draft policy manual content relating to CARRP and to the handling of cases for which there may be national security concerns.” Dkt. # 174-3 ¶ 17. Plaintiffs’ “need for the[se] documents outweighs the Government’s need to withhold the documents.” Dkt. # 189 at 7.

*First*, policy memoranda and manuals relating to CARRP are highly relevant to Plaintiffs’ claims that CARRP imposes unlawful, extra-statutory hurdles on individuals applying for residency or citizenship who are alleged to have an “articulable link” to activities, entities, or individuals raising national security concerns. *See* Dkt. # 47 ¶¶ 9-11, 21, 55-97, 273-78, 289-93. Such 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.” *Id.* ¶ 76. Moreover, the documents will likely shed light on the motivations behind CARRP and the criteria Defendants employ in evaluating individuals for security risks.

Defendants may argue that the documents are not relevant because, according to Defendants, they were “never finalized or implemented.” Hennessey Decl. Ex. 1; *see also, e.g.*, Dkt. # 153 at p. 31 (entry in privilege log stating that document was “not adopted”). But even draft policy documents may provide insight into the motivations behind CARRP; even if the specific policy memoranda and manuals at issue were not put into effect, they relate to the overarching program that Plaintiffs challenge in this case, and thus may contain information about the motivations behind CARRP as a whole. The documents may also reveal the details of existing policy. Indeed, “whenever an agency seeks to change a policy, it logically starts by discussing the existing policy.” *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875-76 (D.C. Cir.

1 2010). An agency may not “avail itself of [the deliberative process privilege] to shield existing  
2 policy from disclosure simply by describing the policy in a document that as a whole is  
3 predecisional, such as a memo written in contemplation of a change in that very policy.” *Id.* at  
4 876. Thus, to the extent the policy memoranda and manuals discuss *existing* policies, those  
5 portions of the documents are highly relevant and should be disclosed.

6 *Second*, Plaintiffs lack access to other evidence that would negate the need for disclosure,  
7 as Plaintiffs have not located any “final” documents in Defendants’ productions outlining CARRP  
8 policies and procedures. *See* Dkt. # 189 at 7. Without such documents, draft policy memoranda  
9 and manuals relating to CARRP may provide Plaintiffs with the best (and only) evidence of what  
10 CARRP is and how it is applied.

11 *Third*, the Government’s role in the litigation weighs in favor of disclosure because, as  
12 this Court explained, “the Government plays a central role in this case” and “the basis for its  
13 action is a central issue in the litigation.” *Id.* (quoting *Ariz. Dream Act Coal. v. Brewer*, No. CV-  
14 12-02546-PHX-DGC, 2014 WL 171923, at \*3 (D. Ariz. Jan. 15, 2014)).

15 *Fourth*, any risk that disclosure would hinder frank and independent discussion regarding  
16 contemplated policies and decisions is substantially mitigated by the existence of the parties’  
17 stipulated protective order. *See Rodriguez v. City of Fontana*, No. EDCV 16-1903-JGB (KKx),  
18 2017 WL 4676261, at \*4 (C.D. Cal. Oct. 17, 2017) (“[T]he Court finds disclosure of the  
19 information sought subject to an appropriate protective order will not harm the generally asserted  
20 governmental interest in confidentiality of performance evaluations.”).

21 Accordingly, Plaintiffs request that the Court order disclosure of the documents listed in  
22 Paragraph 17 of the Emrich affidavit.

## 23 **2. Paragraph 45**

24 Defendants explained in their June 12 email that the two documents described in  
25 Paragraph 45 are “draft, four-page documents entitled ‘Executive Summary: CARRP  
26 Enforcement Practice Proposal.’” Hennessey Decl. Ex. 1. “The documents propose identifying

1 CARRP cases that pose the most serious threats to national security by applying a risk-based  
2 prioritization process.” *Id.* The privilege log describes the documents more generically as “an  
3 internal proposal shared between agency officials on how to distinguish an immigration benefit  
4 application subjected to the CARRP.” Dkt. # 153 at p. 111. According to the Emrich affidavit,  
5 “[t]hese 2012 draft documents reflect a proposal to modify USCIS CARRP processes and  
6 procedures,” and “describe goals, and present recommendations and analysis to support the  
7 proposed goals.” Dkt. # 174-3 ¶ 45. Defendants have “attempted to identify whether any finalized  
8 policies or procedures derived from [these documents], but have been unable to do so at this  
9 time.” Hennessey Decl. Ex. 1.

10 For the reasons explained with respect to the documents in Paragraph 17, Plaintiffs’ need  
11 for these documents outweighs Defendants’ interest in nondisclosure. Information on “how to  
12 distinguish an immigration benefit application subjected to the CARRP” is highly relevant to  
13 Plaintiffs’ claims. Dkt. # 153 at p. 111. Similarly, “CARRP processes and procedures,” which  
14 include “goals,” are directly relevant to Defendants’ motivation for enacting CARRP and the  
15 criteria used to delay or deny applications. Dkt. # 174-3 ¶ 45. USCIS’s proposed “risk-based  
16 prioritization process” would also shed light on how CARRP is applied and what factors USCIS  
17 considers in determining whether an individual poses a national security threat. Hennessey Decl.  
18 Ex. 1. The remaining balancing factors also weigh in favor of disclosure for the reasons stated  
19 above with respect to the documents in Paragraph 17. Accordingly, Plaintiffs request that the  
20 Court order disclosure of these documents.

21 **B. In the Alternative, Plaintiffs Request *In Camera* Review of a Sample of Documents**  
22 **from Paragraphs 17 and 45**

23 Plaintiffs are “at a distinct disadvantage in attempting to controvert the agency’s claims”  
24 of privilege because they “[do] not have access to the withheld materials.” *Maricopa Audubon*  
25 *Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997). On June 15, 2018, Defendants  
26 offered to produce an “exemplar” document from Paragraph 17 (DEF-00000667) redacted only



1 for law-enforcement and attorney-client privilege. Plaintiffs intend to continue negotiating with  
2 Defendants regarding the terms of their offer. If the parties are unable to reach an agreement,  
3 however, Plaintiffs request that the Court review a random sample of the documents *in camera* if  
4 it has questions regarding the proper application of the balancing test. *See* Dkt. # 189 at 8 (“When  
5 considering this supplemental briefing, the Court will determine whether *in camera* review of the  
6 targeted documents is necessary.”); *see also, e.g., Skyline Wesleyan Church v. Cal. Dep’t of*  
7 *Managed Health Care*, 322 F.R.D. 571, 590 (S.D. Cal. 2017); *Desert Survivors v. US Dep’t of the*  
8 *Interior*, 231 F. Supp. 3d 368, 382 (N.D. Cal. 2017). Plaintiffs request that for the *in camera*  
9 review by Court, Defendants remove all redactions and indicate by highlighting what information  
10 they would redact on the basis of other claimed privileges.

#### 11 V. CONCLUSION

12 Plaintiffs request that the Court grant their motion to compel the documents listed in  
13 Paragraphs 17 and 45 of the Emrich affidavit.

1 DATED: June 15, 2018

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the date indicated below, I caused service of the foregoing PLAINTIFFS’ SUPPLEMENTAL BRIEF 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 15th day of June, 2018, at Seattle, Washington.

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