

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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 REPLY
BRIEF IN SUPPORT OF MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS PROTECTED BY THE
DELIBERATIVE PROCESS PRIVILEGE**

PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF

1
2 Plaintiffs reiterate their request for the documents listed in Paragraph 17 of the Emrich
3 affidavit (Dkt. # 174-3) because their need for the documents outweighs Defendants' interest in
4 non-disclosure. *See FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

5 Plaintiffs also repeat their request, joined by Defendants, that the Court review a sample of the
6 Paragraph 17 documents *in camera*.

7 Plaintiffs have explained in prior briefs that policy memoranda and manuals relating to
8 CARRP are highly relevant to Plaintiffs' claims that CARRP imposes unlawful, extra-statutory
9 hurdles on individuals applying for permanent residency or citizenship who are alleged to have an
10 "articulable link" to activities, entities, or individuals purportedly raising national security
11 concerns. *See* Dkt. # 152 at 8-10; *id.* # 180 at 3-5; *id.* # 194 at 3-4. In particular, even draft policy
12 memoranda and manuals may reveal the details of policies that have been enacted by USCIS. An
13 agency may not "avail itself of [the deliberative process privilege] to shield existing policy from
14 disclosure simply by describing the policy in a document that as a whole is predecisional, such as
15 a memo written in contemplation of a change in that very policy." *See Pub. Citizen, Inc. v. Office*
16 *of Mgmt. & Budget*, 598 F.3d 865, 875-76 (D.C. Cir. 2010). Draft documents may also shed light
17 on the motivations behind CARRP. As Plaintiffs have elsewhere explained (*e.g.*, Dkt. #180 at 3-
18 5), their allegations of discriminatory motive are not limited to their claims challenging the
19 Executive Orders ("EOs"). Rather, the gravamen of Plaintiffs' complaint is that "CARRP labels
20 applicants national security concerns based on vague and overbroad criteria that often turn on
21 national origin or innocuous and lawful activities or associations." Dkt. # 47 ¶ 76. Plaintiffs allege
22 that those activities and associations include involvement in Muslim communities, such as
23 donating to Muslim charities and traveling to Muslim-majority countries. *See, e.g., id.* ¶ 170.
24 Plaintiffs' claim that CARRP erects extra-statutory obstacles for Muslim immigrants puts the
25 motivations behind CARRP at issue, as do Plaintiffs' allegations that Defendants delay or deny
26

1 applications subject to CARRP for pretextual reasons. *See id.* ¶¶ 84, 94. Moreover, Defendants err
2 in attempting to divorce CARRP from the EOs, as Plaintiffs allege that CARRP and the EOs are
3 part of the same unlawful extreme vetting policy. *See id.* ¶¶ 18, 26-28, 132-141. If evidence of
4 discriminatory motive exists, it may be reflected in documents discussing CARRP and how
5 USCIS has proposed that it change.

6 Plaintiffs have also explained why the remaining balancing factors weigh in favor of
7 disclosure. *See* Dkt. # 152 at 8-10; *id.* # 180 at 3-5; *id.* # 194 at 3-4. With respect to the
8 availability of other evidence, Defendants maintain that they “have already produced a significant
9 number of CARRP-related policy and guidance documents to Plaintiffs,” noting that they have
10 produced about 7,000 documents in this litigation and 3,600 pages of documents relating to
11 CARRP under the Freedom of Information Act (“FOIA”). Dkt. # 198 at 8. But Plaintiffs
12 understand that many (if not all) of the documents released under FOIA have been reproduced in
13 this litigation. And Defendants acknowledge that they have asserted deliberative process privilege
14 claims for about 1,000 documents. *See* Dkt. # 198-2. More importantly, the absolute number of
15 documents produced is not particularly meaningful; given that CARRP is a vast government
16 program spanning about a decade, an extensive paper trail is to be expected. What matters is
17 whether the Paragraph 17 documents include important, relevant details about CARRP not
18 included in other documents. If so, Plaintiffs maintain that the documents should be produced.

19 With respect to the government’s role in the litigation, this Court has already found that
20 that factor weighs in favor of disclosure. *See* Dkt. # 189 at 7. Additionally, Plaintiffs have alleged
21 that Defendants engaged in misconduct by applying CARRP in a discriminatory manner. *See*
22 *supra* at 1-2. And the government may designate the documents as confidential under the
23 protective order entered in this case, thereby preventing their *public* disclosure. The balancing test
24 thus weighs in favor of disclosure to Plaintiffs.

25 In any event, Defendants do not object to “providing some or all of the Paragraph 17
26 documents to the Court for *in camera* review” and suggest that “it would be most efficient to

1 present the Court with a randomly-selected sample of 10 draft policy memoranda for review,
 2 which would include approximately 200 pages.” Dkt. # 198 at 12. Plaintiffs support Defendants’
 3 proposal, particularly as Plaintiffs are “at a distinct disadvantage in attempting to controvert the
 4 agency’s claims” of privilege because Plaintiffs “[do] not have access to the withheld materials.”
 5 *See Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997). Plaintiffs
 6 therefore request that the Court review a sample of the Paragraph 17 documents *in camera*.
 7 Plaintiffs further request that for the *in camera* review by Court, Defendants remove all redactions
 8 and indicate by highlighting what information they would redact on the basis of other claimed
 9 privileges.

10
 11
 12 DATED: July 13, 2018

13 s/Jennifer Pasquarella (admitted pro hac vice)
 14 s/Sameer Ahmed (admitted pro hac vice)
 15 ACLU Foundation of Southern California
 16 1313 W. 8th Street
 17 Los Angeles, CA 90017
 Telephone: (213) 977-5236
 Facsimile: (213) 997-5297
 jpasquarella@aclusocal.org
 sahmed@aclusocal.org

18 s/Matt Adams
 19 s/Glenda M. Aldana Madrid
 20 Matt Adams #28287
 21 Glenda M. Aldana Madrid #46987
 22 **Northwest Immigrant Rights Project**
 23 615 Second Ave., Ste. 400
 Seattle, WA 98122
 Telephone: (206) 957-8611
 Facsimile: (206) 587-4025
 matt@nwirp.org
 glenda@nwirp.org

24 s/Stacy Tolchin (admitted pro hac vice)
 25 Law Offices of Stacy Tolchin
 26 634 S. Spring St. Suite 500A
 Los Angeles, CA 90014
 Telephone: (213) 622-7450
 Facsimile: (213) 622-7233

s/ Harry H. Schneider, Jr.
 Harry H. Schneider, Jr. #9404
s/ Nicholas P. Gellert
 Nicholas P. Gellert #18041
s/ David A. Perez
 David A. Perez #43959
s/ Laura K. Hennessey
 Laura K. Hennessey #47447

Attorneys for Plaintiffs
Perkins Coie LLP
 1201 Third Avenue, Suite 4900
 Seattle, WA 98101-3099
 Telephone: 206.359.8000
 Facsimile: 206.359.9000
 Email: HSchneider@perkinscoie.com
 NGellert@perkinscoie.com
 DPerez@perkinscoie.com
 LHennessey@perkinscoie.com

s/Trina Realmuto (admitted pro hac vice)
s/Kristin Macleod-Ball (admitted pro hac vice)
 Trina Realmuto
 Kristin Macleod-Ball
 American Immigration Council
 100 Summer St., 23rd Fl.

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

1 Stacy@tolchinimmigration.com

Boston, MA 02110
Tel: (857) 305-3600
Email: trealmuto@immcouncil.org
Email: kmacleod-ball@immcouncil.org

2
3 s/Hugh Handeyside
4 Hugh Handeyside #39792
5 s/Lee Gelernt (admitted pro hac vice)
6 s/Hina Shamsi (admitted pro hac vice)
7 American Civil Liberties Union Foundation
8 125 Broad Street
9 New York, NY 10004
10 Telephone: (212) 549-2616
11 Facsimile: (212) 549-2654
12 lgelernt@aclu.org
13 hhandeyside@aclu.org
14 hshamsi@aclu.org

s/Emily Chiang
Emily Chiang #50517
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Telephone: (206) 624-2184
Echiang@aclu-wa.org

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

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

DATED this 13th day of July, 2018, at Seattle, Washington.

By: s/Laura K. Hennessey

Laura K. Hennessey
Attorney for Plaintiffs
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Email 1390862831:
LHennessey@perkinscoie.com