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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, *et al*.,

Plaintiffs,

v.

WILBUR L. ROSS, JR., *et al.*,

Defendants.

Case No. 5:20-cv-05799-LHK

DEFENDANTS' RESPONSE TO PLAINTIFFS' PRIVILEGE OBJECTIONS

Since December 1, 2020, Defendants have produced over 90,000 documents in response to Plaintiffs' requests for production. During that time, Defendants have produced two privilege logs identifying a modest number of documents that were withheld or redacted under a claim of privilege. On December 8, 2020, Defendants produced their first log identifying 42 documents over which they asserted privilege. Ultimately, the parties were able to reach agreement regarding any privilege disputes over these documents without court intervention. On December 21, 2020, Defendants produced a second log of 135 documents. *See* Ex. 1 (privilege log). Thus, Defendants initially claimed privilege over less than 0.2% of the 90,000 documents produced. Plaintiffs originally challenged *125* out of the 135 documents on Defendants' privilege log. After meeting and conferring, and in the interest of compromise and to avoid burdening the Court with unnecessary privilege disputes, Defendants agreed to produce 50 of the 125 documents challenged by Plaintiffs. Plaintiffs then withdrew their challenges to 12 of the entries, but continue to maintain their challenges to 63 of the documents on Defendants' privilege log, or less than 0.1% of the documents Defendants produced. *See id.* (the 63 documents currently in dispute are highlighted).

As explained further below and in the accompanying declaration of Megan Heller, the majority of these documents reflect the internal deliberations of senior Census Bureau and Department of Commerce officials and thus are protected from disclosure under the deliberative process privilege. *See* Ex. 2 (Heller Decl.).[1] Some additional documents reflect deliberations between Commerce and Census officials and those in the Executive Office of the President in the White House. The remainder involve communications between government counsel and the respective agencies that are protected under the attorney client and work product privileges. All of Defendants' remaining privilege claims should be upheld.

I. DOCUMENTS SUBJECT TO THE DELIBERATIVE PROCESS PRIVILEGE SHOULD NOT BE DISCLOSED

To fall within the deliberative process privilege, a document must be both "(1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative,' meaning 'it

[1] Due to the parties' ability to resolve several of their disputes immediately before filing, Ms. Heller's declaration may not reflect the final status of negotiations in some instances by, for example, addressing documents that are no longer in dispute.

must actually be related to the process by which policies are formulated.'" *Nat'l Wildlife Fed'n*, 861 F.2d at 1117 (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)) (FOIA case); *see also, e.g.*, *Modesto Irrigation Dist. v. Gutierrez*, No. 1:06-CV-00453, 2007 WL 763370, at *5 (E.D. Cal. Mar. 9, 2007) (applying same standard in civil discovery to determine whether information is privileged, and then considering whether privilege can be overcome). A document is "predecisional if it was 'prepared in order to assist an agency decisionmaker in arriving at his decision.'" *Assembly of the State of Cal.*, 968 F.2d at 921 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). A document is "deliberative" if "disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* (quoting *Dudman Comm'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). Further, to qualify as deliberative, a document need not "contain recommendations on law or policy." *Nat'l Wildlife Fed'n*, 861 F.2d at 1118. Documents covered by the deliberative process privilege include "'recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency,' as well as documents which would 'inaccurately reflect or prematurely disclose the views of the agency.'" *Id.* at 1118-19 (quoting *Coastal States Gas Corp.*, 617 F.2d at 866); *see also Klamath*, 532 U.S. at 8.

As the attached declaration of Megan Heller explains, the documents identified on Defendants' privilege log easily satisfy these standards. *See* Ex. 2. The declaration describes the internal processes within the Bureau and the Department, the deliberative documents generated during those processes, and the harms that would ensue were those candid and open internal communications publicly disclosed. *See id.*

A. Plaintiffs' challenges to the deliberative documents are unavailing.

In challenging Defendants' asserted privileges, Plaintiffs seek to overcome the deliberative process privilege on three grounds, none of which has merit.

First, Plaintiffs argue that Defendants' assertions of deliberative process privilege should categorically be rejected because Defendants did not provide a declaration contemporaneously

with their privilege log. *See* Ex. 3 (12/22/20 Email from A. Robinson). But the Court specifically directed Defendants to provide their declaration with their brief in support of their privilege claims. See ECF No. 383 at 2 ("[T]he parties must file simultaneous briefs and any supporting declarations on the privilege issues by December 23 at noon."). And, in any event, a declaration is not required until after Plaintiffs challenge particular documents on Defendants' privilege log. *See, e.g.*, *RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc.*, 2017 WL 2292818, at *6 (D. Nev. May 25, 2017) ("The obligation to produce affidavits to support the assertion of privilege should be limited to the elements of the privilege that are challenged by the withholding party's opponent and not adequately addressed in the log."). Defendants have now submitted a detailed declaration supporting their privilege assertions, so there is no basis to reject Defendants' privilege assertions on the ground that they did not provide a declaration contemporaneous with their privilege log.

Second, Plaintiffs have taken the position that *any* document dated after July 29, 2020 is "post-decisional" and thus cannot meet the requirements of the deliberative process privilege. But, at most, this argument would apply to documents reflecting agency deliberations over what the Court previously found to be the Secretary's July 29 decision to complete the census count by December 31. *See* ECF No. 179 at 6 (holding that certain documents dated after July 29 were post-decisional as to Secretary's decision to complete the census count by December 31). But the documents over which Defendants have asserted privilege reflect deliberations over issues wholly separate from the July 29 decision that the Court previously identified. For example, DOC_0160166 reflects deliberations concerning incentive pay for decennial workers, an issue that was not decided on July 29. DOC_0164764 reflects predecisional deliberations concerning enumeration of off-campus college and university students. And DOC_0180514 reflects deliberations concerning various actions that would help support the 2020 census. None of these documents (or any of the post-July 29 documents) reflect deliberations concerning the Secretary's plan to complete the census count by December 31. And nowhere has this Court adopted the bright-line rule that Plaintiffs advocate, *i.e.*, that the deliberative process privilege suddenly became unavailable to the Government after July 29. Thus, the challenged documents are not "post-decisional."

Third, Plaintiffs contend that the policy decisions to which the documents relate are insufficiently "significant" to satisfy the deliberative process privilege and instead reflect only factual material. *See* Ex. 3. Again, Plaintiffs are mistaken. The documents over which Defendants have claimed privilege reflect deliberations over a broad range of significant issues, from providing incentive pay for decennial census workers, *see, e.g.*, DOC_0160166, to adjusting the timeline for the census, *see* DOC_0158825. While these agency decisions and policies may not have been adopted through formal means such as notice-and-comment rulemaking, they are nonetheless significant agency policies over which officials have a right to deliberate candidly. *See Assembly of the State of Cal.*, 968 F.2d at 921 (document is deliberative if disclosure "would expose an agency's decision-making process in such a way as to discourage candid discussion"); *Nat'l Wildlife Fed'n*, 861 F.2d at 1118-19 (documents covered by deliberative process privilege include "recommendations, . . . proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"). So Plaintiffs' attack on the "significance" of the decisions at issue is irrelevant and insufficient to overcome Defendants' claims of privilege.

B. The *Warner Communications* Factors Support Defendants' Claims of Privilege

Consideration of the four factors identified by the Ninth Circuit in *FTC v. Warner Communications*, 742 F.2d 1156 (9th Cir. 1984), further support Defendants' claims of deliberative process privilege. In *Warner*, the court held that courts should balance four factors in assessing such claims: "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.* at 1161. All four factors favor Defendants.

First, the privileged documents are not relevant to Plaintiffs' claims in this litigation. Plaintiffs' requests for production focused on data and other documents sufficient to show the accuracy of Defendants' assertions regarding census completion rates. *See* Ex. 4 (Plaintiffs' First Requests for Production). The privileged documents do not contain the requested data or bear on the accuracy of census completion rates. While the documents arguably fall within the scope of

Plaintiffs' broad requests for production, *see, e.g.*, RFP 21 (requesting "All Documents and Communications to or from Secretary Ross regarding the 2020 Census"), and thus may technically be *responsive* to Plaintiffs' requests, they are not plainly *relevant* to any claim or defense in this case. Accordingly, this factor weighs in favor of non-disclosure.

Second, ample other evidence is available. "[T]he 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 produced and to be produced to a plaintiff in discovery; a plaintiff's use of other discovery vehicles, such as interrogatories and depositions; and a plaintiff's 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*, 2008 WL 2676365, at *6; *Fabbrini v. City of Dunsmuir*, No. CIVS07-1099, 2008 WL 2523550, at *6 (E.D. Cal. June 19, 2008); *Gen. Elec. Co.*, 2007 WL 433095, at *16. Here, a voluminous amount of evidence has been provided to Plaintiffs—Defendants have produced over 90,000 documents since December 1 alone. As the Court is aware, Defendants have also submitted a number of declarations from senior census officials explaining, among other things, the history underlying the 2020 Census, the adoption of the COVID-19 Plan, and the later adoption of the Replan. *See* Declaration of Albert Fontenot ¶¶ 77-88, ECF No. 81-1. Defendants also produced over ten thousand pages of materials related to the Replan under prior court orders. *See* ECF Nos. 105, 154-57. Plaintiffs have also served interrogatories on Defendants and will be taking multiple depositions of Defendant witnesses in the coming weeks, all of which provide more than ample opportunity for Plaintiffs to obtain nonprivileged information that is relevant to their claims.

Third, the presence of government Defendants favors nondisclosure. The Ninth Circuit's decision in *Warner Communications* confirms that 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" Defendants in asserting privilege over the documents. *See Warner Commc'ns Inc.*, 742 F.2d

at 1162; *see also Modesto Irrigation Dist.*, 2007 WL 763370, at *12. Plaintiffs here have offered *no* evidence that Defendants acted in bad faith or engaged in misconduct. Indeed, Defendants have claimed privilege over a miniscule amount of documents—less than 0.1% of the documents produced. This third factor weighs in favor of nondisclosure.

Fourth, disclosure would hinder frank and independent discussion. "[I]f disclosure of the privileged documents would hinder [] frank and independent discussion, it would weigh heavily against disclosure. This factor is largely subsumed in the inquiry of whether or not the documents are 'deliberative' at all." *U.S. Army Corps of Eng'rs*, 2015 WL 3606419, at *7 (internal citation omitted). As explained above, disclosure of the documents submitted for *in camera* review would hinder frank and independent discussion. 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 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 Norton*, 2002 WL 32136200, at *4. This factor therefore weighs heavily in favor of non-disclosure.

Because all four factors weigh strongly in favor of non-disclosure, Plaintiffs cannot overcome the deliberative process privilege. Accordingly, this Court should not require disclosure of any of Defendants' documents withheld under the deliberative process privilege.

II. DOCUMENTS SUBJECT TO THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES SHOULD NOT BE DISCLOSED.

"The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice . . . as well as an attorney's advice in response to such disclosures." *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992). The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and

administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "Clients must be able to consult their lawyers candidly, and the lawyers in turn must be able to provide candid legal advice." *United States v. Christensen*, 828 F.3d 763, 802 (9th Cir. 2015). This rationale applies with "special force in the government context" to encourage employees "to seek out and receive fully informed legal advice." *In re City of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

Similarly, the attorney work product doctrine protects documents and other memoranda prepared by an attorney in anticipation of litigation. *See* Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). To qualify for work product protection, "documents must have two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *In re. Cal. Pub. Utils. Comm'n*, 892 F.2d 778, 780-81 (9th Cir. 1989) (internal quotation marks omitted).

Each of the documents identified on the privilege log as withheld or redacted under the attorney-client privilege reflects officials from the Bureau or the Department seeking confidential legal advice from Government counsel. For example, DOC_0164908 is an email from Michael Walsh, who has been delegated the duties of the General Counsel of the Department of Commerce, to Secretary Ross concerning legal strategy. DOC_0166906 likewise is an email from Mr. Fontenot to Mr. Walsh describing the consequences to the Census Bureau of its compliance with the legal requirements of the Court's temporary restraining order. DOC_0167374 contains a chart prepared by agency counsel containing legal advice and analysis of Presidential directives and assessments whether inter-agency memoranda further the underlying goals of those directives. Disclosing these documents would not only reveal protected attorney-client communications, but would further inhibit such communications, important to the proper functioning of a government agency, in the course of its business in the future. *Id.*

During the parties' meet and confer, Plaintiffs took the position that certain documents on the privilege log are not protected by the attorney-client privilege because the only attorneys appearing on the log are members of the White House Counsel's Office. In Plaintiffs' view, such attorneys are not in an "attorney-client" relationship with the Department or the Bureau, and thus Defendants cannot assert attorney-client privilege over *any* communications with the White House

Counsel's Office, even if those communications unequivocally seek legal advice. But Plaintiffs have pointed to no authority that supports their rigid position. There's a good reason for that: it would eviscerate attorney-client privilege—along with full and frank legal communications—between an Executive Branch attorney in the White House Counsel's Office and an Executive Branch agency. Thus, unsurprisingly, courts have rejected such formalistic distinctions when considering claims of privilege within the Executive Branch. *See N.Y. Times Co. v. U.S. Dep't of Justice*, 282 F. Supp. 3d 234, 238-39 (D.D.C. 2017) (upholding government claim of attorney-client privilege asserted by National Security Agency over Office of Legal Counsel ("OLC") document and rejecting plaintiff's argument that NSA was not a "client" of OLC). Here, the Department and Bureau are both Executive agencies that ultimately answer to the President. Plaintiffs have offered no basis in the law or the purposes underlying the attorney-client privilege why communications concerning legal advice between an Executive Branch agency and the White House Counsel's Office should categorically be excluded from the attorney-client privilege. Accordingly, these documents should not be disclosed.

CONCLUSION

The Court should uphold Defendants' claims of privilege.

DATED: December 23, 2020

Respectfully submitted,

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