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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Arizona Dream Act Coalition; Jesus Castro-  
10 Martinez; Christian Jacobo; Alejandro  
Lopez; Ariel Martinez; and Natalia Perez-  
11 Gallagos,

12 Plaintiffs,

13 v.

14 Janice K Brewer, et al.,

15 Defendants.  
16

No. CV-12-02546-PHX-DGC

**ORDER**

17 Following a discovery conference call with the Court on December 6, 2013, and at  
18 the Court's direction, the parties filed briefs regarding application of the deliberative  
19 process and attorney-client privileges. Plaintiffs seek to compel the production of  
20 documents and testimony concerning the policy of the Governor's Office and the Arizona  
21 Department of Transportation ("ADOT") to deny driver's licenses to individuals granted  
22 deferred action status under the 2012 Deferred Action for Childhood Arrivals ("DACA")  
23 program. Doc. 210. Plaintiffs have submitted Defendants' privilege log and portions of  
24 deposition transcripts in which Defendants assert that certain material is privileged.  
25 Defendants argue that both the documents in the log and testimony about those  
26 documents are protected by the attorney-client privilege, work product doctrine, and the  
27 deliberative process privilege. Doc. 209.

28 For ease of analysis, the contested documents are divided into two categories:

1 (1) documents for which Defendants assert only the deliberative process privilege, and  
2 (2) documents for which Defendants assert the attorney-client privilege. Plaintiffs do not  
3 challenge the assertion of the work product doctrine.

4 **I. Deliberative process privilege.**

5 Defendants' privilege log (Doc. 210-2) identifies 174 documents as protected only  
6 by the deliberative process privilege. For the reasons stated below, Plaintiffs' motion to  
7 compel production of these documents will be granted.

8 **A. Legal Standard.**

9 Federal common law recognizes a deliberative process privilege. *Dep't of Interior*  
10 *v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The privilege rests on  
11 the fact that officials will not communicate candidly among themselves if each remark  
12 could be subject to discovery. The privilege seeks to enhance the quality of government  
13 by promoting open and frank exchanges among government decision-makers. For the  
14 privilege to apply, a document must meet two threshold requirements. "First, the  
15 document must be predecisional – it must have been generated before the adoption of an  
16 agency's policy or decision . . . . Second, the document must be deliberative in nature,  
17 containing opinions, recommendations, or advice about agency policies. Purely factual  
18 material that does not reflect deliberative processes is not protected." *F.T.C. v. Warner*  
19 *Comm'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

20 Even if a party satisfies these requirements, the deliberative process privilege is  
21 qualified. "A litigant may obtain deliberative materials if his or her need for the materials  
22 and the need for accurate fact-finding override the governments' interest in non-  
23 disclosure." *Id.* Among the factors that the Court must consider are: (1) the relevance of  
24 the evidence, (2) the availability of other evidence, (3) the government's role in the  
25 litigation, and (4) the extent to which disclosure would hinder frank and independent  
26 discussion regarding contemplated policies and decisions. *Id.* Thus, if the Court  
27 determines that the privilege applies, the Court must consider whether portions of the  
28 document are still subject to disclosure. *See Elec. Frontier Found. v. Office of the Dir. of*

1 *Nat'l. Intelligence*, 639 F.3d 876 (9th Cir. 2010) (citing *Vaughn v. Rosen*, 484 F.2d 820,  
2 826-27 (D.C. Cir. 1973)). “The party asserting an evidentiary privilege has the burden to  
3 demonstrate that the privilege applies to the information in question.” *Tornay v. United*  
4 *States*, 840 F.2d 1424, 1426 (9th Cir. 1988) (citing *United States v. Hirsch*, 803 F.2d  
5 1493, 1496 (9th Cir. 1986)).

6 **B. Analysis.**

7 The driver’s license policy at issue in this case was originally adopted in 2012.  
8 The Court issued an order denying a preliminary injunction of the 2012 policy in May of  
9 2013. The policy was subsequently changed, and that change was implemented on  
10 September 17, 2013.

11 To meet their threshold burden in asserting the privilege, Defendants must show  
12 that the contested communications are pre-decisional. *Warner*, 742 F.2d at 1161; *Tornay*,  
13 840 F.2d at 1426. Defendants do not attempt to make this showing. They do not attach a  
14 copy of their privilege log to their brief, and do not discuss the timing of claimed  
15 deliberative documents or the relationship of those documents to the 2012 policy or the  
16 2013 policy change. Plaintiffs provide a copy of Defendants’ privilege log with their  
17 brief, and it does include dates of documents, but the log says nothing about whether  
18 documents claimed to be deliberative relate to the 2012 policy or the 2013 policy change.  
19 Although the Court could make assumptions on the basis of the document dates and the  
20 dates of the 2012 policy and the 2013 policy change, the Court should not have to  
21 proceed on the basis of assumptions. Moreover, the record suggests that the 2013 policy  
22 change was considered by Defendants for many months before it was adopted, and the  
23 Court cannot safely attempt to guess which allegedly deliberative documents relate solely  
24 to that policy change.<sup>1</sup>

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26 <sup>1</sup> All of the documents in Defendants’ privilege log that assert only the  
27 deliberative process privilege pre-date the 2013 policy change. Doc. 210-2. But  
28 Defendants have not argued that all of the documents on the privilege log are pre-  
decisional to the 2013 policy change, and some of the documents from the summer and  
fall of 2012 appear to be pre-decisional as to the Governor’s executive order, such as a  
series of emails described as “re: DHS Announcement” from August, 2012. Doc. 210-2  
at 39.

1 Defendants must also make the threshold showing that the documents are  
2 deliberative in nature. *Warner*, 742 F.2d at 1161; *Tornay*, 840 F.2d at 1426. Defendants  
3 do not make this showing. In order to be deliberative, the documents must contain  
4 opinions, recommendations, or advice about agency policies. *Warner*, 742 F.2d at 1161.  
5 In analyzing this threshold requirement in *Warner*, the Ninth Circuit examined the  
6 contents of the documents to determine whether such opinions or recommendations  
7 existed. Defendants in this case provide no information about the content of the  
8 documents other than the privilege log's very short description of a few words and the  
9 names of the senders and recipients. The description in many cases is uninformative,  
10 such as the series of emails described as "re: DHS Announcement." Doc. 210-2 at 39. A  
11 few documents have notes in the "comments" column, but none of those notes discuss the  
12 contents of the documents.

13 In sum, Defendants have not carried their burden of showing that the deliberative  
14 process privilege applies to the documents listed in the privilege log. Defendants have  
15 not addressed whether the documents are pre-decisional, and have made no showing that  
16 the documents are deliberative under *Warner*. But this is not the only reason for granting  
17 Plaintiff's motion. Even if Defendants had made this threshold showing, the Court would  
18 conclude, under the four factors articulated in *Warner*, that the qualified privilege should  
19 not be applied in this case. 742 F.2d at 1161.

20 First, the communications at issue in this case are highly relevant. Under the  
21 Ninth Circuit's active level of rational basis review for Equal Protection claims, which  
22 the Court found applicable in its previous decision, the Court must consider the actual  
23 intent behind Arizona's driver's license policy when it considers the merits of this case.  
24 Doc. 114 at 24-27, discussing *Dep't. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *City*  
25 *of Cleburn v. Cleburn Living Center, Inc.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517  
26 U.S. 620 (1996); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011). Under such an analysis,  
27 documents concerning the government's intent and purpose in crafting this policy are  
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1 relevant. This factor weighs in favor of disclosure.<sup>2</sup>

2 Second, there may be other evidence available that would negate the need for  
3 disclosure of these documents. Plaintiffs argue that the documents Defendants seek to  
4 withhold are “the best evidence of improper motive.” Doc. 210 at 10. The inquiry,  
5 however, is not whether this is the “best” evidence that can be found, and Defendants  
6 assert that other evidence as to the motive for the policy is available to Plaintiffs in the  
7 form of “the Executive Order, the Policy, publicly made statements, declarations, written  
8 discovery responses, and express testimony of several deponents.” Doc. 209 at 7. This  
9 factor weighs against disclosure.

10 Third, the government has a central role in the events at issue in this case, and the  
11 basis for its action is a central issue in the litigation. In *Warner*, the Court examined  
12 whether there was evidence of bad faith or misconduct on the part of the government in  
13 concluding that the reports at issue were protected under the privilege. 742 F.2d at 1162.  
14 While no allegations of bad faith have been made here, this is not a situation in which the  
15 content of government deliberations regarding the policy is secondary to the issues at  
16 play, as was the case in *Warner*. The government is a party to this case and its intent in  
17 crafting the policy is a primary issue. Moreover, the bad faith inquiry in *Warner* arose  
18 from an alleged inconsistency in how the government disclosed or withheld information,  
19 and no similar inconsistency has been alleged here. This factor weighs in favor of  
20 disclosure.

21 Fourth, the Court cannot conclude that disclosure would be likely to hinder frank  
22 and independent discussion. Arizona has a policy in favor of full and open disclosure, as  
23 evidenced by Arizona’s open meetings law. *Rigel Corp. v. State*, 225 Ariz. 65, 72-73,  
24 234 P.3d 633, 640-41 (Ariz. Ct. App. 2010) (“Arizona recognizes a legal presumption in  
25 favor of disclosing public records.”); *see also Cox Ariz. Publ’ns, Inc. v. Collins*, 175 Ariz.  
26 11, 14, 852 P.2d 1194, 1198 (1993). Arizona courts have not recognized a deliberative

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28 <sup>2</sup> The Court does not intend to foreclose Defendants from arguing that a different level of scrutiny should be applied in this case, but the Court’s analysis so far has found that active rational basis review is warranted. *See* Doc. 114 at 24-27.

1 process privilege under state law. *See Arizona Indep. Redistricting Comm'n v. Fields*,  
2 206 Ariz. 130, 141, 75 P.3d 1088, 1099 (Ariz. Ct. App. 2003); *Star Pub'g Co. v. Pima*  
3 *County Attorney's Office*, 181 Ariz. 432, 434, 891 P.2d 899, 901 (App.1994). Arizona  
4 state government officials, therefore, should reasonably expect that their deliberations in  
5 crafting policy are open to public scrutiny. This factor weighs in favor of disclosure.

6 Thus, even if the contested documents were privileged – which Defendants have  
7 not shown – the *Warner* factors would result in disclosure.

## 8 **II. Attorney-client privilege.**

9 For the remaining contested documents on the privilege log, Defendants have  
10 asserted the attorney-client privilege. This privilege is sometimes combined in the log  
11 with the deliberative process privilege or the work product doctrine, but the Court has  
12 already found that the deliberative process privilege does not permit withholding of the  
13 documents, and, as noted, Plaintiffs have not challenged assertions of the work product  
14 doctrine. Plaintiffs argue that Defendants have impliedly waived the attorney-client  
15 privilege by putting the 2013 Policy at issue in this litigation, impermissibly using the  
16 privilege as both a sword and a shield. Doc. 210, 12-16.

### 17 **A. Legal Standard.**

18 The attorney-client privilege is absolute. It is not qualified like the deliberative  
19 process privilege or the work product doctrine. Thus, if a communication is privileged, it  
20 normally cannot be obtained in discovery no matter how relevant it might be to the  
21 claims or defenses at issue in the action.

22 The Ninth Circuit has held, however, that the privilege may be waived through a  
23 party's litigation actions. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (1992) (citing  
24 *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)). The test for such waiver  
25 is three-pronged. First, a party must assert the privilege as an affirmative act in the  
26 litigation. Second, through the affirmative act, the party must put privileged information  
27 at issue. Third, the Court must find that allowing the privilege to stand would deny the  
28 opposing party access to information vital to its case. *United States v. Amlani*, 169 F.3d

1 1189, 1195 (1999).

2 **B. Analysis.**

3 Plaintiffs argue that Defendants have placed their attorney-client communications  
4 about the 2013 policy change at issue by asserting that the 2013 policy change cures the  
5 constitutional violations of the 2012 policy. Doc. 210 at 14. Plaintiffs cite Defendants'  
6 Motion to Supplement the Record on Appeal before the Ninth Circuit, where Defendants  
7 argue that the 2013 policy change passes constitutional muster and moots Plaintiffs'  
8 Equal Protection claim because the new policy denies drivers' licenses to *all* deferred  
9 action recipients, not just DACA recipients. *See* Reply in Support of Mot. To Supp. the  
10 Record on Appeal, No. 13-16248 (9th Cir.). Defendants respond that they do not contend  
11 that their decision to change the policy was at the direction of legal counsel, nor that the  
12 decision is constitutional because they sought or received legal advice. Doc. 209 at 11.

13 It is well-established that a holder of the privilege cannot claim that legal advice  
14 from his or her attorney justifies his or her action while simultaneously shielding that  
15 advice from disclosure. *Chevron*, 974 F.2d at 1156; *Amlani*, 169 F.3d at 1195; *In re*  
16 *Cnty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008); *Sedco Int'l S.A. v. Cory*, 683 F.2d 1201,  
17 1206 (8th Cir.1982). But if the privilege holder makes no claim that he or she relied on  
18 counsel's advice, the question of how privileged information is placed at issue – the  
19 second prong of the waiver test – is more difficult.

20 The most analogous case in this circuit appears to be *Amlani*, in which the  
21 defendant argued on appeal that the prosecutor's disparaging comments about his lawyer  
22 caused him to fire his lawyer and settle for less effective counsel. 169 F.3d 1189. The  
23 government sought discovery of the defendant's conversations with his lawyer to  
24 determine whether the alleged disparagement had in fact caused him to change counsel,  
25 and the defendant asserted the attorney-client privilege in response. The Ninth Circuit  
26 held that the defendant's claim – that his lawyer was fired only because of statements  
27 made by the prosecutor – sufficiently interjected his communications with the lawyer into  
28 the case to constitute waiver of the privilege. *Id.* at 1195.

1 Courts outside the Ninth Circuit have taken a variety approaches to this issue. At  
2 one end of the spectrum, the Eastern District of Washington in *Hearn v. Rhay*, 68 F.R.D.  
3 574 (1975), took a broad view of waiver. In *Hearn*, prison officials in a civil rights case  
4 asserted the defense of qualified immunity. *Id.* at 574. The defendants never claimed  
5 advice of counsel as a defense to their actions, but the district court noted that for  
6 qualified immunity to apply, the defendants must have acted in good faith. *Id.* The  
7 plaintiff sought disclosure of the legal advice rendered to the defendants by the state’s  
8 attorney “insofar as such advice related to plaintiff’s confinement and tends to prove  
9 defendants’ bad faith.” *Id.* at 578. The district court held that the defendants’ assertion  
10 of the immunity defense was an affirmative act and, because “the legal advice they  
11 received is germane to the qualified immunity defense they raised,” that the first two  
12 prongs of the waiver test were met. *Id.* at 581. The district court justified its holding by  
13 noting that “the content of defendants’ communications with their attorney is inextricably  
14 merged with the elements of plaintiff’s case and defendants’ affirmative defense. These  
15 communications are not incidental to the case; they inhere in the controversy itself, and to  
16 deny access to them would preclude the court from a fair and just determination of the  
17 issues.” *Id.* at 582.

18 Other courts disagree with the broad scope of waiver articulated in *Hearn*. *See*,  
19 *e.g.*, *In re Cnty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008). The Third Circuit, for  
20 example, reviewed the holding in *Hearn* and similar cases and characterized them as  
21 extending “waiver of the privilege to cases in which the client’s state of mind may be in  
22 issue in the litigation,” rather than limiting waiver to situations where a party  
23 affirmatively asserts that advice of counsel justified his or her actions. *Rhone-Poulenc*  
24 *Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994). The Third Circuit noted  
25 that cases such as *Hearn* “rest on a conclusion that the information sought is relevant and  
26 should in fairness be disclosed.” *Id.* But “[r]elevance is not the standard for determining  
27 whether or not evidence should be protected from disclosure as privileged.” *Id.*; *see also*  
28 *Erie*, 546 F.3d at 229. The Third Circuit held that even if a privilege holder’s state of

1 mind is at issue, the privilege still applies. Other courts have also held that “a party must  
2 *rely* on privileged advice from his counsel” in order to waive the privilege, rather than  
3 merely make the evidence relevant. *Erie*, 546 F.3d at 229 (emphasis in original).

4 The Court concludes that the reasoning in *Rhone-Poulenc* and *Erie* is truer to the  
5 intent and nature of the attorney-client privilege than *Hearn*. Defendants do not claim  
6 that the 2013 policy change is constitutional because counsel so advised them. Doc. 209  
7 at 11. Defendants instead argue that “[t]hrough this litigation” they learned that all  
8 deferred action recipients are without the right, under Arizona law, to drivers’ licenses,  
9 and that the policy change reflecting this moots any basis for an Equal Protection claim.  
10 Reply in Support of Mot. To Supp. the Record on Appeal, No. 13-16248 (9th Cir.).

11 Plaintiffs’ brief is telling on this distinction. Plaintiffs argue that “[b]y asserting  
12 that the 2013 Policy cures the constitutional violations of the 2012 Policy, Defendants are  
13 using the 2013 Policy as a sword and have placed the 2013 policy revision ‘at issue.’”  
14 Doc. 210 at 14. Plaintiffs do not assert, however, that Defendants have used *the advice of*  
15 *legal counsel* as a sword. Plaintiffs in essence ask the Court to grant them access to  
16 privileged communications because those communications are highly relevant and will  
17 allow Plaintiffs to test Defendants’ assertions concerning the real reasons for the 2013  
18 policy change. As already noted, however, relevancy – even high relevancy – does not  
19 waive the attorney-client privilege. *Erie*, 546 F.3d at 229. Most attorney-client  
20 communications related to a case would be highly relevant to that case, but the privilege  
21 applies even when attorney-client communications are “vital, highly probative, directly  
22 relevant or even go to the heart of [the] issue.” *Rhone-Poulenc*, 32 F.3d at 864. Waiver  
23 requires more than the mere fact that legal counsel were consulted before a defendant  
24 acted.

25 Nor is the Court persuaded that the privilege has been waived in this case on the  
26 basis of the Ninth Circuit’s decision in *Amlani*. The circumstances in *Amlani* were  
27 unique, with a defendant seeking to overturn his criminal conviction by asserting that the  
28 prosecutor interfered with his attorney-client relationship and persuaded him to terminate

1 his counsel. More was at work than the relevancy of the defendant's communications  
2 with his attorney. The very nature of the attorney-client relationship, and why it was  
3 terminated, were injected into the case by the defendant's claim. No similar claim  
4 regarding their relationship with counsel has been made by Defendants in this case.  
5 Rather, Plaintiffs seek the privileged communications to test the credibility of  
6 Defendants' explanation for why they changed the 2012 policy. The fact that the  
7 communications might help Plaintiffs in making their argument, however, provides no  
8 basis for finding waiver.

9 A corollary point is nonetheless important. During his deposition, ADOT Director  
10 John Halikowski testified that he made the decision to implement the 2013 policy change.  
11 Although neither side has provided a complete copy of his deposition transcript, the  
12 portion provided by Defendants shows that the attorney-client privilege was invoked.  
13 Halikowski testified to the reasons for the 2013 policy change, but invoked the privilege  
14 rather than describing the legal advice he received from counsel in connection with the  
15 change. Doc. 209-1 at 59-64. Having thus invoked the privilege, Defendants will not be  
16 permitted at later stages of this litigation to describe that advice or to explain the reasons  
17 for the 2013 policy change by revealing information that was withheld on the basis of the  
18 attorney-client privilege. Defendants cannot selectively disclose privileged  
19 communications for their own benefit. Nor will Defendants be permitted to argue that  
20 the 2013 policy change satisfies the Constitution because it was made on advice of  
21 counsel.

22 **IT IS ORDERED:**

23 1. Defendants shall disclose the documents withheld in their privilege log  
24 solely on the basis of the deliberative process privilege. These documents shall be  
25 disclosed within 14 days of this order. Defendants need not disclose the remaining  
26 documents in the privilege log.

27 2. The parties promptly shall confer concerning any additional deposition  
28 discovery that is warranted by this ruling, and shall place a conference call to the Court to

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discuss a brief modification of the discovery schedule.

Dated this 15th day of January, 2014.



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David G. Campbell  
United States District Judge