

1 HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ABDIQAFAR WAGAFE, et al.,

11 Plaintiffs,

12 v.

13 DONALD TRUMP, et al.,

14 Defendants.
15

CASE NO. C17-94 RAJ

ORDER

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17 This matter comes before the Court again on Plaintiffs' Motion to Compel re
18 Deliberative Process Privilege and Defendants' Unopposed Motion for Reconsideration
19 Waiver of Privilege. Dkt. ## 152, 230. For the reasons stated below, the Court **DENIES**
20 Plaintiffs' Motion to Compel as to the Paragraph 17 documents and **GRANTS**
21 Defendants' Motion for Reconsideration.

22 On May 21, 2018, the Court granted in part Plaintiffs' Motion to Compel, but
23 reserved ruling on portions of the Motion pending supplemental briefing from the parties.
24 Dkt. # 189. The parties then submitted supplemental briefing, and the Court held a
25 telephonic conference with the parties to discuss the status of this Motion. Dkt. ## 194,
26 198, 199, 211. In the Court's May 21 Order, the Court granted Plaintiffs' Motion to
27 Compel as to a number of documents the Court determined were not shielded by the

1 deliberate process privilege. Dkt. # 189 at 9. The Court determined that the Plaintiffs did
2 not previously have access to the Emrich Affidavit (Dkt. # 174-3), and ordered the parties
3 to submit supplemental briefing whereby Plaintiff could more precisely challenge the
4 remaining privilege assertions. *Id.*

5 In their supplemental briefing, the parties identified only two additional sets of
6 documents to be subject to Plaintiffs' Motion: (1) documents identified in Paragraph 17
7 of the Emrich Affidavit; and (2) documents identified in Paragraph 45 of the Emrich
8 Affidavit. Dkt. ## 194, 198. The parties clarified, first in Defendants' supplemental
9 brief, and again in Plaintiff's supplemental reply, that Plaintiffs no longer sought
10 documents identified in Paragraph 45. In the telephonic conference on December 18,
11 2018, the parties again confirmed that they had narrowed this dispute to one category of
12 documents, certain pre-CARRP draft policy memoranda listed in Paragraph 17 of the
13 Emrich affidavit (Dkt. # 174-3). Accordingly, on February 27, 2019, the Court denied
14 Plaintiffs' Motion to Compel as to the Paragraph 45 documents. Dkt. # 224 at 2.

15 As for the Paragraph 17 documents, the parties agreed to submit a portion of the
16 remain documents for *in camera* review, following a randomization procedure which the
17 Court approved of. *See* Dkt. # 224 at 2-3. Instead of following this randomization
18 procedure, Defendants provided "four documents previously shared with Plaintiffs during
19 the parties' deliberative process privilege negotiations for the Court's *in camera* review in
20 relation to Dkt. #152." Dkt. # 212 at 2. Due to the lapse in appropriations, Defendants'
21 submission of the four documents occurred instead on February 5, 2019. Dkt. # 218.

22 As this four-document sample did not comport with the randomization procedure
23 the parties agreed upon, the Court ruled that it could not determine whether all the
24 Paragraph 17 documents were subject to the deliberative process privilege. Dkt. # 224 at
25 3. The Court ordered Defendants to produce a randomly-selected sample of 10
26 documents from Paragraph 17 of the Emrich Affidavit for *in camera* review for this
27 Court, and to provide a supporting affidavit of the randomization procedure used. *Id.*

1 The Court also ruled that for the four documents already shared with Plaintiffs, the
2 claimed privilege was waived. *Id.*

3 On March 12, 2019, Defendants made the requested submission. Dkt. # 229. The
4 day after, Defendants filed an Unopposed Motion for Reconsideration of the Court's
5 ruling that privilege was waived for the four documents already shared with Plaintiffs.
6 Dkt. # 230. Defendants argue that Plaintiffs agreed, as part of the parties' discovery
7 deliberations, that privilege would not be waived by virtue of Defendants' disclosure of
8 the four documents. *Id.*

9 The Court has reviewed the documents produced by Defendants. The Court
10 confirms that the deliberative process privilege applies to these documents because they
11 are (1) predecisional and (2) deliberative in nature, in that they concern "opinions,
12 recommendations, [and] advice about agency policies." *F.T.C. v. Warner Connc'ns Inc.*,
13 742 F.2d 1156, 1161 (9th Cir. 1984). The Court thus turns next to the four *F.T.C.* factors
14 to determine whether to pierce the privilege, which are "(1) the relevance of the evidence;
15 (2) the availability of other evidence; (3) the government's role in the litigation; and (4)
16 the extent to which disclosure would hinder frank and independent discussion regarding
17 contemplated policies and decisions." *F.T.C.*, 742 F.2d at 1161. The Court will address
18 each in turn.

19 The Court believes that the balance of factors weighs against compelling
20 production of the Paragraph 17 documents. As Defendants note, the Paragraph 17
21 documents were never finalized, adopted, or implemented, and have little bearing on how
22 CARRP operates today. After reviewing the documents provided by Defendants, the
23 Court does not believe these predecisional documents would be particularly helpful in
24 ascertaining whether Defendants are currently administering CARRP in a discriminatory
25 fashion. Moreover, Defendants have provided Plaintiffs with a number of other
26 documents that explain existing CARRP policy. *See, e.g.*, Dkt. # 198-2. The Court
27 accordingly does not believe the Paragraph 17 documents are necessary to ascertain the

1 motives or operations behind the current CARRP policies and procedures. Lastly, the
2 Court believes the fourth factor, which generally “weighs in factor of the privilege and
3 nondisclosure,” weighs in favor of Defendants, who articulate in sworn affidavits the
4 serious danger of public disclosure, whether intentional or inadvertent. *All. for the Wild*
5 *Rockies v. Pena*, No. 2:16-CV-294-RMP, 2017 WL 8778579, at *8 (E.D. Wash. Dec. 12,
6 2017).

7 As for Defendants’ Unopposed Motion for Reconsideration, “motions for
8 reconsideration are disfavored.” LCR 7(h)(1). “The court will ordinarily deny such
9 motions in the absence of a showing of manifest error in the prior ruling or a showing of
10 new facts or legal authority which could not have been brought to its attention earlier
11 with reasonable diligence.” *Id.* Based on Defendants’ submission, there seems to be
12 little dispute that Plaintiffs agreed that the disclosure of the four documents in question
13 would not waive privilege as to those documents. The Court will thus revise its ruling,
14 and holds that privilege for these documents was not waived.

15 Accordingly, the Court hereby **DENIES** Plaintiff’s Motion to Compel as to the
16 Paragraph 17 documents. Dkt. # 152. The Court **GRANTS** Defendants’ Unopposed
17 Motion for Reconsideration. Dkt. # 230.

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19 Dated this 23rd day of April, 2019.

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23 The Honorable Richard A. Jones
24 United States District Judge
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