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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J TRUMP, et al.,  
  
Defendants.

CASE NO. C17-1297 MJP  
  
ORDER RE *IN CAMERA* REVIEW  
OF DOCUMENTS SUBMITTED  
PURSUANT TO THE COURT'S  
ORDER ON DOCUMENTS  
WITHHELD BY THE  
GOVERNMENT AS  
NON-RESPONSIVE (DKT. NOS.  
455, 464)

This matter comes before the Court on Defendants' submission of documents for *in camera* review pursuant to the Court's Order on Plaintiffs' Motion to Compel Documents Withheld by the Government as Non-Responsive. (Dkt. Nos. 449, 455, 465.) Having conferred with the Special Master concerning the approximately 1,700 pages of documents the

1 Government filed for *in camera* review, the Court has made the following privilege  
2 determinations on a document-by-document basis, as listed in the attachment to this Order<sup>1</sup>:

- 3 (1) The Government must produce all documents listed in the attached exhibit in which “N”  
4 has been marked in the column labelled “Privileged” not later than **June 5, 2020**;
- 5 (2) Where the negative privilege decision is followed by an indication in the “Reasons”  
6 column that only a portion of the document needs to be produced, the balance of the  
7 document may be redacted;
- 8 (3) Documents that are privileged have been labelled by “Y” in the “Privileged” column;  
9 where the column is blank, the Court has determined that the document is not relevant  
10 and need not be produced.

### 11 **Background**

12 On March 4, 2020, the Court granted Plaintiffs’ motion to compel documents which are  
13 part of an otherwise responsive “family group” of produced material but were withheld on the  
14 grounds of “non-responsiveness”; as an example, the Government withheld attachments to  
15 emails as “non-responsive” where the email itself was produced. (Dkt. No. 455.) While the  
16 Government had not asserted any privilege over these documents or listed them on a privilege  
17 log, shortly after the Court issued its Order, the Government submitted an agreed motion for  
18 clarification or reconsideration, informing the Court that “during the course of preparing these  
19 non-responsive family documents for production, Defendants [] discovered that a small subset of  
20 the documents are subject to privilege.” (Dkt. No. 463 at 2.) Defendants believed these

21  
22 \_\_\_\_\_  
23 <sup>1</sup> The Special Master has adjusted the privilege log provided to the Court as an Excel spreadsheet so that the  
24 documents would be listed in PrivWithhold order, while still identifying the Defendants’ document numbering  
scheme.

1 documents were protected from disclosure by the attorney-client privilege, the attorney work  
2 product privilege, the deliberative process privilege, and the executive privilege. (*Id.*) The Court  
3 granted Defendants' Motion for Clarification, ordering Defendants to submit the subset of  
4 documents that Defendants believed to be privileged to the Court for *in camera* review along  
5 with a privilege log. (Dkt. No. 464.)

### 6 Discussion

7 Each of the documents submitted for *in camera* review, covering PrivWithholding page  
8 numbers 1415 through 3180, have now been reviewed. For a sizeable number of these  
9 documents, Defendants' privilege assertions were not justified. This blanket assertion of  
10 privilege without close analysis or articulated rationale must stop.

11 Defendants are reminded of the Ninth Circuit's guidance concerning the deliberative  
12 process privilege:

13 The deliberative process privilege ... still commands judicial consideration. We  
14 have held that "[a] litigant may obtain deliberative materials if his or her need for  
15 the materials and the need for accurate fact-finding override the government's  
16 interest in non-disclosure." As the district court here correctly recognized, we  
17 balance four factors in determining whether this exception to the deliberative  
18 process privilege is met "1) the relevance of the evidence; 2) the availability of  
19 other evidence; 3) the government's role in the litigation; and 4) the extent to  
20 which disclosure would hinder frank and independent discussion regarding  
21 contemplated policies and decisions. In balancing these factors, we note that the  
22 second and third favor plaintiffs.

23 Karnoski v. Trump, 926 F.3d 1180, 1206 (9<sup>th</sup> Cir 2019) (internal citation omitted). Here,  
24 because the Court has determined that the documents at issue are relevant (see Dkt. No.  
455), the Government was required to establish that the "chilling effect" of disclosure  
outweighs the three other factors. This means, as a non-exhaustive list, that the following

1 types of documents meant for public disclosure or describing public reports are not  
 2 protected by the deliberative process privilege<sup>2</sup>:

- 3 1. Press Accounts. Many of the documents claimed privileged are summaries of  
 4 press inquiries about transgender service policies and the responses to those  
 5 inquiries. Obviously, these constitute reporting on who was asking questions,  
 6 the answers provided to the press, and similar public issues. Similarly, “Close  
 of Business” memos reporting on news reports summaries as a historical  
 accounting of the week’s news events should not have been withheld pursuant  
 to the deliberative process privilege.
- 7 2. Cards for prepared responses. These documents reported the use of certain  
 8 “cards” by categories, including “Transgender.” Prepared responses to  
 common or expected public questions are not deliberative.
- 9 3. Confirmation preparation. Questions and prepared responses to actual or  
 10 potential confirmation, budget, or Congressional questions are not  
 11 deliberative. Instead, they are designed for public consumption, the very  
 antithesis of deliberate privilege.

12 As to claims involving the attorney-client privilege, not all documents that include  
 13 the name of an attorney are subject to withholding pursuant to the privilege. Instead, the  
 14 communication must seek or elicit legal advice or send information relevant to that end.

15 See In re Grand Jury Investigation, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992) (internal  
 16 citation omitted) (“The attorney-client privilege may be divided into eight essential  
 17 elements: (1) Where legal advice of any kind is sought (2) from a professional legal  
 18 adviser in his capacity as such, (3) the communications relating to that purpose, (4) made  
 19 in confidence (5) by the client, (6) are at his instance permanently protected (7) from  
 20 disclosure by himself or by the legal adviser, (8) unless the protection be waived”).

21 Transmittal emails that do not otherwise contain privileged information are not

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 23 <sup>2</sup> In the attachment to this Order, the Court lists these documents as “not deliberative,” a shorthand for rejection of  
 24 Defendants’ deliberative process privilege claims.



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The clerk is ordered to provide copies of this order to all counsel.

Dated May 29, 2020.



Marsha J. Pechman  
United States District Judge