

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Adam Steele, Brittany Montrois, and Joseph  
Henchman, on behalf of themselves and all others  
similarly situated,

*Plaintiffs,*

v.

United States of America,

*Defendant.*

Case No. 14-cv-01523-RCL

**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF INFORMATION  
WITHHELD ON THE BASIS OF THE DELIBERATIVE PROCESS PRIVILEGE**

Despite repeated challenges by Plaintiffs, the United States continues to withhold in full or in part over 1,000 documents produced by the government and its third-party contractors based solely on the deliberative process privilege. It has produced logs that contain boilerplate descriptions such as “draft document related to agency decisionmaking,” and no affidavit in support of its claims. Ex. B; *see also* Exs. A, C. Because it has not established that any of the information withheld is predecisional and deliberative, and thus has failed to sustain its burden in asserting the privilege, the United States should be compelled to produce the withheld information.

The government produced initial logs for three productions on three separate occasions—one for its own production, one for the Booz Allen Hamilton (BAH) production, and one for the MITRE production.<sup>1</sup> Before producing the MITRE log and in response to correspondence from Plaintiffs, the government produced revised logs for its own production and the BAH production, but only provided additional information in support of its claims of attorney-client privilege. The

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<sup>1</sup> The government also produced a privilege log for the Accenture production, but withheld very little information. Plaintiffs do not challenge those claims of privilege.

government refused to provide additional information in support of its claims of deliberative process privilege, claiming the information in the logs sufficed and it would be impossible to provide additional information without waiving the privilege. Ex. D at 4 (Letter from J. Sergi to W. Narwold re: privilege logs (July 16, 2021) (“For example, ‘proposed initiatives’ is self-explanatory: these are documents describing proposed initiatives. And there is ‘little doubt’ that meeting minutes are predecisional in nature . . . To further describe these documents would require the United States to specify what the proposals and meetings entailed, and those proposals and deliberations are protected by privilege because they reflect a preliminary view not a final decision.”)).<sup>2</sup> The parties met and conferred after the production of the revised logs. During that meet-and-confer, Plaintiffs challenged the revised logs as providing insufficient, conclusory, circular descriptions of information that gave no clue as to whether the information was either predecisional or deliberative. In response, the government indicated that it understood Plaintiffs’ concerns, and committed to reviewing and likely revising the logs. After its re-review, the government declined to produce any revised logs, arguing again (using the identical language) that the logs were sufficient and it would be impossible to provide further detail without waiving the privilege. Ex. E at 3 (Letter from E. Miller to W. Narwold re: revised BAH privilege log (January 25, 2022) (“For example, ‘proposed initiatives’ is self-explanatory: these are documents describing proposed initiatives. And there is ‘little doubt’ that meeting minutes are predecisional in nature . . . To further describe these documents would require the United States to specify what the proposals and meetings entailed, and those proposals and deliberations are protected by privilege because

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<sup>2</sup> Five documents in the logs are described as meeting minutes. All were also withheld on the basis of attorney-client privilege. None were at issue during any of the meet-and-confers, and none are at issue here. If there are other meeting minutes that have been withheld, they have not been identified as such.

they reflect a preliminary view not a final decision.”)). The government also refused to provide declarations in support of its privilege claims, arguing that “declarations are not mandatory.” *Id.* at 2. The government subsequently produced a log for the MITRE productions that suffered the same deficiencies as the IRS and BAH logs. In response to a letter identifying those inadequacies, the government declined to provide additional information, as it had done with the earlier IRS and BAH logs. Ex. F at 3 (Letter from E. Miller to W. Narwold re: MITRE privilege log (January 28, 2022) (“To further describe these documents would require the United States to specify what the proposals and meetings entailed, and those proposals and deliberations are protected by privilege because they reflect a preliminary view, not a final decision.”)). In a final meet-and-confer on January 28, 2022, Plaintiffs informed the government that they intended to file a motion to compel challenging the logs. The government indicated that it would oppose the motion.

### ARGUMENT

To invoke the deliberative process privilege, a party must establish “(1) a formal claim of privilege by the head of the department possessing control over the requested information, (2) an assertion of the privilege based on actual personal considerations by that official, and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation why it properly falls within the scope of the privilege.” *Cobell v. Norton*, 213 F.R.D. 1, 7 (D.D.C. 2003)<sup>3</sup> (Lamberth, J.); *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). “To qualify for the privilege, documents must be reviewed by the agency head, who must file a formal declaration of the privilege describing the withheld materials and the likely consequence if they were to be disclosed.” *Wainwright v. Wash. Metro. Area Transit Auth.*, 163 F.R.D. 391, 396 (D.D.C. 1995) (Lamberth, J.); *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 267 F.R.D. 1, 4, n.3 (D.D.C.

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<sup>3</sup> Internal citations and quotation marks have been omitted except where noted.

2010) (“affidavits are necessary to support an agency’s detailed argument for the claim of privilege, but are in no way sufficient in themselves to establish that privilege”).

To assert the privilege, the government must establish that the withheld information is both “predecisional” and “deliberative.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Cobell*, 213 F.R.D. at 4. For information to be “predecisional,” it must have contributed to a specific “agency decision or policy.” *Cobell*, 213 F.R.D. at 4. It also must have been prepared to assist an agency decisionmaker in making a decision, “rather than to support a decision already made,” and must not have been “adopted formally or informally, as the agency position on any issue” or “used by the agency in its dealings with the public.” *Id.* at 5. In determining whether information is “deliberative,” courts often consider “(1) the nature of the decisionmaking authority vested in the . . . person issuing the disputed document and (2) the relative positions in the agency’s chain of command occupied by the document’s author and recipient.” *Id.*

Sometimes this inquiry is articulated as consisting of five factors: “the Court and plaintiffs must be able to determine, from the privilege log, that the documents withheld are (1) predecisional; (2) deliberative; (3) do not ‘memorialize or evidence’ the agency’s final policy; (4) were not shared with the public; and (5) cannot be produced in a redacted form.” *Ascom Mailing*, 267 F.R.D. at 4; *U.S. Dep’t of the Treasury v. Pension Benefit Guar. Corp.*, 222 F. Supp. 3d 38, 42-43 (D.D.C. 2016). Whether two factors with sub-factors are considered, or five factors are applied, the end result is the same: the United States has waived the privilege by refusing to provide the information necessary to properly invoke the privilege. *Pension Benefit*, 222 F. Supp. 3d at 44-45 (ordering “the forthwith production of all documents withheld or redacted solely under the

deliberative process privilege” and noting “Treasury has had ample opportunities to provide sufficient detail to enable the Court to assess its deliberative process privilege claims.”).

The United States’ logs for its own production and the BAH production include the following fields: (1) beginning bates number; (2) ending bates number; (3) “From;” (4) “To;” (5) Date, (6) “Privilege Description; and (6) “Privilege Claim.”<sup>4</sup> The government’s logs for the MITRE production include the following additional, automatically generated metadata: “Custodian” (listed as “Email” for all entries, including MS Word, PowerPoint and Excel files); File Extension (i.e., .pdf, .xls, .doc, .ppt, etc.); “Email From;” “Email To;” “Email CC;” “Email Subject;” “Author;” “Title;” “Date Sent;” “File Name;” and “Date Created.” None of the logs establish that the documents “do not memorialize or evidence the agency’s final policy,” “were not shared with the public,” and were predecisional. *See id.* at 43.

The logs’ privilege descriptions are boilerplate and insufficient to establish that the information withheld is predecisional or deliberative. For example, the following description with slight variations was used for 199 log entries:

- “Discussion of potential risks in connection with agency decisionmaking” (all 123 redacted BAH documents), Ex. B;
- “Discussion of potential risks related to agency decisionmaking” (fifty-five redacted IRS documents), Ex. A; and
- “Draft document related to agency decisionmaking” (twenty-one withheld BAH documents), Ex. B.

Typically, slightly more information is provided for fully withheld documents, but even that falls well short of what is required. For example, 128 of the fully withheld BAH documents are described as “draft document related to agency decisionmaking regarding AFSP

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<sup>4</sup> The Redaction Logs include separate entries for each redaction with the Bates numbers of pages with redactions.

implementation and risks” and ninety-seven are described as “draft document related to agency decisionmaking regarding AFSP implementation.”<sup>5</sup> Describing something as “deliberative,” a “draft,” or related to “risks” or “agency decisionmaking” is not enough to establish that the document is predecisional and deliberative, and thus properly protected by the deliberative process privilege. *Id.* at 42-43 (holding cursory logs to be inadequate and holding that “[d]rafts are not presumptively privileged, and the designation of documents as ‘drafts’ does not end the inquiry into whether a document is predecisional”); *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 106-07 (D.D.C. 2019) (holding more detailed, but still “boilerplate,” descriptions to be insufficient); *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142, 162 (D.D.C. 2012) (considering a *Vaughn* Index that “merely recite[d] legal boilerplate,” and concluding, “[w]hen all is said and done, the Court is left with DHS’s naked claim that the privilege has been properly invoked, and this obviously does not suffice”).

The inadequate information provided by the government also makes it impossible to assess whether withheld information consists solely of a presentation of objective facts. *See e.g.*, Ex. C at 6, Entries 160, 170-172, 182 (describing documents as “draft” comments and “powerpoint[s]” “re Fact Pack”). Documents that consist only of “discussion of objective facts, as opposed to opinions or recommendations” are not privileged. *Cobell*, 213 F.R.D. at 6.

In similar fashion, the information provided makes it impossible to determine whether documents pertaining to “response[s] to GAO and/or TIGTA inquiries” were created to assist in GAO’s or TIGTA’s deliberative process or were independently part of the IRS’s deliberative

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<sup>5</sup> AFSP is the Annual Filing Season Program, which is a voluntary certification program implemented by the IRS after the *Loving* decision. To obtain a certification, preparers must pass an exam and take continuing education, two of the mandatory return preparer requirements enjoined by the *Loving* court.

process. *See* Ex. A (describing ninety documents withheld or redacted as “[d]iscussions of draft responses to GAO and/or TIGTA inquiries” and thirty-four documents as “draft response to GAO and/or TIGTA inquiries”). If they were created specifically to assist in the deliberative process of an entity other than the withholding entity, rather than as part of the withholding entity’s own independent deliberative process, they are not privileged. *See Cause of Action Inst. v. Export-Import Bank of the U.S.*, 521 F. Supp. 3d 64, 90 (D.D.C. 2021) (holding that documents are not protected by the deliberative process privilege if they were created “for the sole purpose of assisting Congress with its deliberations”).

The logs are so vague that Plaintiffs have been unable to identify entries corresponding with withheld documents. For example, Plaintiffs requested a 2012 user-fee cost model that was linked to and incorporated into a 2013 user-fee cost model prepared as part of the formal biennial user fee review required by IRS policy and Circular A-25. The government has produced the final cost models from 2013, 2015, and 2017 biennial user-fee reviews. The individual who prepared the 2013 cost model testified that the model “inherited” data or included data “carried over” from the 2012 cost model. *See, e.g.*, Ex. G at 161:1-163:11; 226:25-227:4 (excerpts of deposition transcript of Christopher Kurtz). Based on this testimony and the fact that it is hyperlinked to the 2013 cost model, the 2012 cost model should be produced because it is not predecisional or deliberative. It is not predecisional because it was adopted by the agency when its data was “carried over” to the final 2013 cost model. *Cobell*, 213 F.R.D. at 5. It is also not deliberative because it only estimates the dollars and cents of current and future costs and does not “make[] recommendations or express[] opinions on legal or policy matters.” *Id.*; *see also NAACP v. Bureau of Census*, 401 F. Supp. 3d 608, 616 (D. Md. 2019) (“The Court cannot fathom how disclosure of the Spreadsheets might ever embarrass someone, cause someone in the future to be less than candid

in their professional cost estimations, or result in an Executive Branch official purposefully calling only for ‘fuzzy’ estimates expressed in wide ranges.”). When Plaintiffs specifically requested it believing that it had not been produced through oversight, they learned that the document was being withheld subject to the deliberative process privilege. Ex. H at 2 (Email from S. Sasarak, October 25, 2021 (“The third document, IRS\_RPO\_2012 User Fee Analysis\_2012-1-17\_v0.08.xlsx, we are withholding under the deliberative process privilege. This document is privileged because it was preliminary analysis conducted during an off year review (2012) and the 2013 cost model is the final agency action.”))).

The dearth of information in the logs produced by the IRS, and the absence of any agency affidavit, make it impossible to determine if any of the other information withheld is predecisional or deliberative. The government has had several months and several opportunities to produce the required information, and has consistently refused. It should be compelled to produce the withheld information.

### **CONCLUSION**

By repeatedly refusing to provide logs with sufficient information to establish that the withheld information is predecisional and deliberative, and by repeatedly refusing to provide the required formal declaration of privilege, the United States has waived its claims of deliberative process privilege. By arguing that it cannot provide additional information without waiving the privilege, (Exs. D, E, F), the government has already demonstrated that any order compelling the production of a more detailed log would be futile and unproductive. Plaintiffs thus respectfully request that the Court order the United States to produce all information withheld on the basis of these improper claims of privilege.



Dated: February 4, 2022

/s/ Meghan S. B. Oliver

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 4, 2022 I electronically filed Plaintiffs' Motion to Compel Production of Information Withheld on the Basis of the Deliberative Process Privilege through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: February 4, 2022

/s/ William H. Narwold  
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