



**U.S. Department of Justice**  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW  
Washington, DC 20530

August 7, 2018

**By ECF**

The Honorable Jesse M. Furman  
United States District Judge  
Southern District of New York  
Thurgood Marshall Courthouse  
40 Foley Square  
New York, New York 10007

Re: *State of New York, et al., v. U.S. Department of Commerce, et al.*, 18-cv-2921 (JMF)  
*N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 18-cv-5025 (JMF)

Dear Judge Furman:

Pursuant to Local Rule 37.2 and Individual Practice 2.C, Defendants write to oppose Plaintiffs' letter requesting a conference with the Court to address a number of discovery disputes.

I. Deliberative Process Privilege May Apply When Plaintiffs Challenge a Government Agency's Motivation or Intent.

Plaintiffs first seek a categorical ruling that *all* documents withheld by Defendants pursuant to the deliberative process privilege are improper because Plaintiffs challenge the intent of the decisionmaker. ECF No. 73 at 1. However, there is no such unconditional rule and Plaintiffs have failed to specify why, under the applicable legal standard, they are entitled to obtain any specific documents or categories of documents withheld under the deliberative process privilege.

The deliberative process privilege is a subset of executive privilege and protects from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). This privilege arises out of a recognition "that it would be impossible to have any frank discussion legal or policy matters in writing if all such writings were to be subjected to public scrutiny." *EPA v. Mink*, 410 U.S. 73, 87 (1973). Tellingly, the sole published opinion Plaintiffs cite, *In re Delphi Corp.*, explicitly rejected plaintiffs' claimed categorical bar and held that any deliberative process privilege claim is evaluated under a five-factor balancing test: "(1) the relevance of the evidence the agency seeks to protect; (2) the availability of other evidence; (3) the seriousness of the litigation; (4) the role of the agency in the litigation; and (5) the possibility that disclosure will inhibit future candid debate among agency decision-makers." 276 F.R.D. 81, 85 (S.D.N.Y. 2011) (citation omitted).

Just as application of "the deliberative process privilege is . . . dependent upon the individual document and the role it plays in the administrative process," *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), so too is the analysis undertaken in determining whether the privilege should be overcome. The five-factor balancing test reflects the

need for granular consideration of documents, as the precise balancing of those factors varies from document to document. Here, Plaintiffs have not identified specific documents being wrongfully withheld in full or in part on the basis of deliberative process privilege,<sup>1</sup> nor have they even attempted to explain why the information withheld pursuant to the privilege is necessary. Indeed, although Defendants have produced voluminous privilege logs cataloging each individual document over which Defendants assert deliberative process privilege, Plaintiffs have not offered any explanation as to relevance, availability, or need as to any specific document or category of documents. Plaintiffs' blanket, generic assertion is insufficient to enable the Court to assess whether the need for a deliberative document "outweigh[s] the possibility that disclosure will inhibit future candid debate among agency decision-makers." *In re Delphi*, 276 F.R.D. at 85.

## II. The Documents Over Which Defendants Assert Deliberative Process Are Predecisional.

Plaintiffs next assert that the deliberative process privilege may not apply to any documents generated after May 1, 2017, because on that date Secretary Ross wrote that he was "mystified why "nothing ha[s] been done in response to my months old request that we include the citizenship question." ECF No. 73 at 2 (quoting AR 3699). According to Plaintiffs, this constituted a final decision on behalf of the Commerce Secretary to reinstate a citizenship question to the 2020 Census, and therefore any document generated after this email was not predecisional. *Id.*

Plaintiffs' argument rests upon the erroneous assumption that the email communication between Secretary Ross and a member of his staff reflected a final agency decision. Secretary Ross explicitly notes that months ago he made a "request," not an "order," "decision," or some other term denoting finality. He further notes confusion as to why "nothing ha[s] been done" on this request, signaling an understanding that there is a process that must be followed prior to any decision being made. The record demonstrates that there were extensive deliberations, generating thousands of pages of documentation reflecting the agency's consideration of whether to reinstate a citizenship question before Secretary Ross's March 26, 2018 final decision. Because the documents and communications withheld by Defendants pursuant to the deliberative process privilege were "prepared in order to assist an agency decisionmaker in arriving at his decision," *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 80 (2d Cir. 2002), they are therefore predecisional.

## III. Defendants Properly Withheld Certain Documents Pursuant to Title XIII

Plaintiffs also challenge the withholding of census data pursuant to Section 9 of Title 13 ("Title XIII"). ECF No. 73 at 3. This provision governs the protection of statistical data used in the development of the census and prohibits "any publication whereby the data furnished . . . can be identified." In *Baldridge v. Shapiro*, the Supreme Court recognized that Title XIII places confidentiality protections on census data and that Sections 8(b) and 9 express an explicit Congressional intent to preclude all raw census data from the reach of civil discovery. *Id.* at 361.

As explained more fully in the attached declaration of Dr. John M. Abowd, Associate Director for Research and Methodology and Chief Scientist of the Census Bureau, Title XIII applies not only to individually-identifiable information, but also to any type of disclosure from

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<sup>1</sup> Plaintiffs do list 12 pages within the supplemental materials as "examples" of documents that were wrongfully designated as deliberative because they are primarily factual in nature, ECF No. 73 at 2, but this point appears to be separate from their categorical argument as to the deliberative process privilege.

which anyone could possibly derive individually-identifiable information, which includes many types of summaries, microdata, and summaries prepared based on confidential data. Abowd Decl. ¶¶ 4-22. Defendants are therefore precluded from releasing documents containing information from which individuals may be identified and matched with sensitive personal information, and such documents are properly withheld from being produced in civil discovery.

#### IV. Defendants Have Not Waived Privilege as to Certain Documents on Their Privilege Logs.

Plaintiffs next claim that Defendants have waived work product protection and/or attorney-client privilege for “over 300 entries” in violation of Local Rule 26.2 and Federal Rule 26(b)(5)(A). The authorities cited by Plaintiffs involve factual circumstances very different from the present. *See, e.g., S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 162-65 (S.D.N.Y. 2014) (holding that privilege was waived because privilege logs contained no entries for individual documents, no entries for either authors or recipients, and contained only four entries, each of which purported to represent a broad category of documents). Here, Defendants produced privilege logs totaling approximately 1600 individual documents. Further, after Plaintiffs raised claims that the logs were insufficient, Defendants have worked diligently and in good faith to resolve those differences, within ten days of the court’s deadline, by producing revised logs. This approach is consistent with the committee note to Local Rule 26.2, which encourages parties to cooperate to resolve differences. Plaintiffs did not identify the more than 300 “deficient” privilege log entries until after 10:00 p.m. on July 31, and filed their letter two days later on August 2, before Defendants had an adequate opportunity to review and respond. The district court has broad discretion on matters of local rules, *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001), and Defendants have not only produced detailed privilege logs, but have worked (and continue to work) in good faith to supplement those logs with additional information sought by Plaintiffs.

#### V. Work Product

Finally, Plaintiffs argue that any document generated prior to Secretary Ross’s final decision to reinstate a citizenship question would not have been in anticipation of litigation and therefore not subject to work product protection. ECF No. 73 at 3. The law is clear that reasonable anticipation may predate the action giving rise to litigation, or even a certainty that the action will occur, *see U.S. v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995), and given the extensive media scrutiny devoted to the census, agency officials would have had little doubt that there would be some sort of legal challenge if and when a decision was made to reinstate the citizenship question. The Court has ordered Defendants to produce the eight challenged documents for *in camera* review so that it may evaluate the basis for work product protection on a document-by-document basis. After further review, Defendants are withdrawing the assertion of work product protection (but not any other privilege assertion that applies to the documents, which Plaintiffs have not specifically challenged) from five of these eight documents: 1594, 1595, 2051, 2057, and 2507. Defendants are concurrently producing the other three documents: 2034, 3888, and 3984, to chambers for *in camera* review as ordered by the Court.

#### Conclusion

For the foregoing reasons, Defendants request that this Court deny Plaintiffs’ letter motion requesting a status conference to address several discovery disputes.

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	
v.	)	No. 1:18-CV-2921 (JMF)
	)	
UNITED STATES DEPARTMENT OF COMMERCE, et al,	)	
	)	
<i>Defendants.</i>	)	

**DECLARATION**

JOHN MARON ABOWD, Ph.D., makes the following Declaration under the penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct to the best of his knowledge and belief:

1. I am the Associate Director for Research and Methodology and Chief Scientist of the United States Census Bureau.

2. Section 9 of Title 13 (“Title XIII”) governs the protection of statistical data used in the development of the census and all Census Bureau data collection activities. Title XIII precludes the Secretary of Commerce, his employees, or any person who has sworn to protect this sensitive information from making “any publication whereby the *data* furnished . . . can be identified.” (emphasis added). In *Baldrige v. Shapiro*, the Supreme Court interpreted the language of Section 9 literally, emphasizing that the language places confidentiality protections on the data itself. 455 U.S. 345, 356 (1982) (observing that “the language of each section refers to protection of the ‘information’ or ‘data’ compiled . . . By protecting data revealed ‘on behalf of’ a respondent, Congress further emphasized that the data itself was to be protected from disclosure. The legislative history also makes clear that Congress was concerned not solely with protecting the identity of individuals”).

3. The language of Sections 8(b) and 9 express an explicit congressional intent to preclude all raw census data from the reach of civil discovery. *Id.* at 361.

4. Disclosure avoidance is the Census Bureau's process for protecting the confidentiality of data, as required under Title XIII.

5. Before any product/document involving census data may be released, the product/document/data to be produced or released must be reviewed by the Census Bureau to ensure that no identifiable Title XIII confidential data are or may be disclosed. Should the Census Bureau’s Disclosure Review Board (DRB) determine that the product/document/data

does or reasonably could result in such disclosure, then the data product will be modified prior to approval for release.

6. When the DRB is asked to conduct a review and allow the release of summary statistics or properly anonymized micro-data records, its responsibility is to ensure that the data in the release cannot be used, alone or in combination with other data publicly available, to re-identify any individual or business included in the confidential files and any data item supplied by that entity under the authority of Title XIII. This is the serious charge that the DRB was given in 1995, as the successor to the Microdata Review Panel, which was chartered in 1981. The DRB is organized by the Data Stewardship Executive Policy Committee at the Census Bureau. Its charter is published on [www.census.gov](http://www.census.gov) at [http://www2.census.gov/foia/ds\\_policies/ds025.pdf](http://www2.census.gov/foia/ds_policies/ds025.pdf). The DRB meets twice weekly and continuously revises the requirements for data release in conformance with best practices for confidentiality protection.

7. When creating the DRB, the Census Bureau explicitly recognized that improperly prepared tabular summaries and microdata could result in harmful and illegal re-identifications of individual or business data items.

8. Over the last 23 years the DRB has continuously updated the procedures required to secure permission to release summary tabulations and microdata in order to keep up with advances in mathematics, statistics and computer science.

9. A disclosure of data occurs when someone can use published statistical information to identify an individual who has provided confidential information or associate a specific data item collected under the authority of Title XIII with a particular individual respondent.

10. For data tabulations, the Census Bureau uses disclosure avoidance procedures to modify or remove the characteristics that put confidential information at risk for disclosure. Although a published table may appear to show information about a specific individual, the Census Bureau has taken steps to disguise or suppress the original data, while making sure the results are still useful. The techniques used by the Census Bureau to protect confidentiality in tabulations vary, depending on the type of data.

11. The prohibited disclosure of data subject to Title XIII protection can occur even in the absence of identifying information. Just because someone's specific name or address does not appear, it does not mean that certain data (or analysis about the difference between two data points) does not implicate an individual's confidentiality. One must understand that the cited statistics are, themselves, composed from samples, and the analysis of those samples changes frequently, especially during the process of confirming that the various data files have been properly extracted, loaded and linked.

12. Differences in results that arise from this process can easily expose single micro-data records and, thus, information subject to non-disclosure under Title XIII. Therefore, the primary reason such releases are barred from disclosure is to avoid any type of disclosure that could be brought about by deriving information from the known (or discovered) differences.

13. Title XIII requires the Census Bureau to account for such “complementary disclosure,” which is the release of data that does not appear to contain individually identifiable information (e.g., name, address, social security information, birth date, etc.), but could result in identifying individuals when that data is coupled with other information in existing Census Bureau publications and in publicly-available information. For example, while a preliminary percentage, standing alone, may not reveal personally identifiable information, when such a percentage is combined with other information, it can and has been used by sophisticated parties to derive personally identifiable information.

14. For the official publications of censuses and surveys, the DRB does not permit release of preliminary results, except where such preliminary results are a specific scheduled release, but even then certain disclosure avoidance procedures are followed. For example, while the Monthly Advanced Retail Trade Survey (MARTS) permits the release of preliminary results, the final Monthly Retail Trade Survey results constrain the disclosure avoidance procedures on the MARTS. The official tabulations themselves are subjected to a host of disclosure avoidance procedures, including primary item suppression, complementary item suppression, cell suppression, complementary cell suppression, whole table suppression, input noise infusion, record deletion, record swapping, synthetic records, synthetic values, and output noise infusion.

15. These are generally called “confidentiality edits” and they are documented in the technical reports accompanying the tabular summaries or public-use micro-data.

16. When ad hoc research reports are prepared from the confidential data, pursuant to approved projects, they are subjected to the same types of reviews. No preliminary analysis may be released, and the DRB may require any of the disclosure avoidance procedures used in official products before the final version of the results may be released.

17. The DRB recognizes that some research reports will be revised after they have been released in original form. In that case, it requires a thorough review of the differences between the original results and those proposed in the revision and it may again require any of the disclosure avoidance procedures used in official products.

18. The DRB process avoids the release of intermediate work product to the extent that it can be used in combination with the official publications and the final work product of the particular project to re-identify individual respondents and their data items.

19. This is not a hypothetical risk. The Census Bureau, along with other statistical agencies, has acknowledged the issues raised by the Dinur-Nissim (2003) “database reconstruction theorem,” also known as the Fundamental Law of Information Reconstruction, which says that overly accurate estimates of too many statistics can completely destroy privacy. Subsequent work has shown that stripping obvious identifiers such as names, addresses, and identification numbers is inadequate in the face of modern computational and informational resources. The cumulative effect of statistical releases can compromise the privacy of some individuals. The Census Bureau has dedicated significant resources to address this issue, and to balance the interests of data accuracy and the public-good mission to publish data that are suitable for their intended uses with the interests inherent in privacy loss.

20. Intermediate work product is routinely capable of being used, in conjunction with official publications and final work product, to re-identify individual respondents and their data items.

21. First, intermediate work product contains errors that could be used to “reverse engineer” personal information.

22. Second, the dynamic nature of extracting, editing and analyzing data from multiple internal confidential files requires test runs and preliminary reviews, which could again enable someone to re-identify individual respondents and their data items.

23. In the event that the DRB is asked to review results that were not intended for release, it denies the request when final results have already been released unless the input samples are identical, and the preliminary analysis does not by itself expose individual records by, for example, subtly changing definitions of sub-groups. If the final results have not yet been released, it warns the researcher that the final analysis will be constrained to use inputs compatible with the preliminary analysis so as to avoid these same risks.

24. The following Administrative Record documents contain redactions pursuant to Title XIII, in that the redacted figures comprise intermediate work product, as described above: Bates Nos. 10357, 10382, 10465, 10469, 10479, 10489, 10499, 10509, 10520, 10540, 10550, 10564, 10572, 10608, 10649, 10678, 10724, 10742, 10749, 10757, 10770, 10781, 10795, 10810, 10822, 10835, 10874, 10954, 10962, 10964, 10966, 10968, 10970, 10973, 10975, 10978, 10980, 10983, 10984, 10987, 10991, 10993, 10999, 11003, 11004, 10862, 10932, 10936, 10940, 10953, 10996

25. The following documents do not contain information subject to protection under Title XIII, and if they are not subject to any other privileges or protections may be available for release following DRB review, with necessary redactions: 10462, 10957, 10961, 10977, 10995, and 11025.

  
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