



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

By ECF

September 26, 2018

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 v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF)

Dear Judge Furman:

Defendants oppose Plaintiffs' September 24, 2018, letter motion to compel (No. 18-cv-2921, ECF No. 349), seeking release of material in 17 documents over which Defendants have claimed the attorney-client and deliberative process privileges. As an initial matter, Defendants are releasing the following contested documents in full or with redactions for personal information only: Bates Nos. 11301, 11302, 11303, 11305, 11306, 11333, 11335, and 11353. Defendants have also lifted some, but not all of the original redactions in Bates Nos. 9190 and 11312. Bates No. 12464 had already been released in full. With respect to the documents remaining at issue, Defendants have properly withheld the challenged portions on the basis of the attorney-client and deliberative-process privileges.

1. Defendants Have Properly Withheld Material From the Challenged Documents Pursuant to the Attorney-Client Privilege

"The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011). "Its purpose is to encourage attorneys and their clients to communicate fully and frankly." *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007). The attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).

The documents at issue include five versions of a legal analysis memorandum prepared in August 2017 by James Uthmeier, then working as an attorney in the Department of Commerce's ("DOC's") Office of General Counsel, containing legal advice that he submitted to Secretary of Commerce Ross (Bates Nos. 11342, 11346, 11349, 11352, and 11363). *See* Second Comstock Decl. ¶ 4 (Ex. 1). This memorandum contains attorney Uthmeier's legal analysis, recommendations, and advice concerning the legal authority for reinstating a citizenship question on the decennial census questionnaire. The memorandum was presented to Secretary Ross, his client, to provide legal advice to Secretary Ross in his ongoing deliberations on this issue. Attorney Uthmeier's memo discusses the legal authority and pertinent case law for various courses of action and the legal strengths and weaknesses of these alternatives and makes recommendations from a legal standpoint. Also at issue is material redacted from two email chains (Bates Nos. 11312 and 11355) relating to the work he performed to create the memo discussed above. *Id.* ¶ 9. The redacted information in these chains consists of discussions of interim stages in the process by which attorney Uthmeier and other attorneys

at DOC were formulating their advice and communicating it to the client (11312) and information from attorney Uthmeier to another attorney about the nature of the advice sought by his client (11355). Finally, Bates No. 9190 is an email chain including an email from Sahra Park-Su in the Office of Policy and Strategic Planning, forwarding a draft response to a question. *Id.* ¶11. The draft response is redacted, as it includes language suggested by Deputy General Counsel Mike Walsh reflecting his legal analysis and advice to his clients, such as Ms. Park-Su and other parties copied or included on the email chain.

These materials are all protected by the attorney-client privilege because they consist of or contain communications between a DOC attorney or attorneys and their clients that were made for the purpose of obtaining legal advice and that were intended to be and were kept confidential. Plaintiffs' argument that the factual material in the memo, such as the historical use of citizenship questions on the census, is not covered by the privilege is mistaken. As it is used in the memorandum, this material is inextricably intertwined with attorney Uthmeier's legal analysis and advice and reflects the attorney's selection of what he viewed to be relevant to the client's request and to his provision of advice to that client. Second Comstock Decl. ¶ 4. Hence, it cannot be reasonably segregated and released without releasing confidential attorney-client communications. It is accordingly also protected by the attorney-client privilege. *See FTC v. Boehringer Ingelheim Pharms., Inc.*, 180 F. Supp. 3d 1, 32 (D.D.C. 2016) (factual work product may be subject to attorney-client privilege).

2. Defendants Have Properly Withheld Material From the Challenged Documents Pursuant to the Deliberative-Process Privilege

The withheld material is also covered by the deliberative process privilege. As discussed in other recent filings in this case, this privilege 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 of 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). For a document to be protected by the deliberative process privilege, it must be: "(1) an inter-agency or intra-agency document; (2) 'predecisional'; and (3) deliberative." *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002). The deliberative process privilege may be overcome in certain circumstances where "the litigation 'involves a question concerning the intent of the governmental decisionmakers or the decisionmaking process itself.'" *In re Delphi Corp.*, 276 F.R.D. 81, 85 (S.D.N.Y. 2011). Whether this exception applies is assessed under a five-factor balancing test that weighs "(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."

The material at issue includes the five versions of the memo drafted by attorney Uthmeier, reflecting advice and recommendations provided by a subordinate (attorney Uthmeier) to the decisionmaker (Secretary Ross), before the decision being made, reviewing various alternatives and analyzing their strengths and weaknesses. Second Comstock Decl. ¶ 5. Some or all of these versions may have been early drafts of the memorandum, but even the version that eventually was forwarded to Secretary Ross was considered a "draft" by attorney Uthmeier as he intended to revise it upon receiving further feedback. The material redacted from Bates No. 9190 is also a draft, specifically, draft language proposed by Deputy General Counsel Walsh before finalization of the document on which he was commenting. *Id.* ¶ 12. Also included is material redacted from two email chains,

consisting of attorneys' and advisers' interim back-and-forth discussions of how to proceed with formulating their advice and communicating it to the client, before the decision was made. *Id.* ¶ 10.

All of the foregoing material is deliberative and predecisional, and hence covered by the deliberative-process privilege. The privilege should not be overcome here. Plaintiffs have not established how the advice provided by DOC's attorneys or communications between attorneys and the decisionmaker are relevant to their claims in this litigation. And disclosure of the withheld material would discourage open and candid discussion between DOJ decisionmakers and subordinates. Second Comstock Decl. ¶¶ 6-7, 10, 12-13. If DOC employees are aware that their opinions, deliberations, and recommendations may be subject to public disclosure and scrutiny, the quality and volume of input offered and received with regard to these matters could be adversely affected. Agency officials would thus be hindered in their ability to solicit and receive honest opinions and recommendations, which would inhibit the desired goal of sound decision making. *See ACLU v. U.S. Dep't of Justice*, 844 F.3d 126, 133 (2d Cir. 2016) (upholding assertion of privilege as to "informal and preliminary" documents); *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) ("The [deliberative process] privilege protects recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency."). The chilling effect on disclosure greatly outweighs the relevance, if any, of the challenged documents, and the assertion of the deliberative-process privilege should be upheld.

3. The Attorney Work-Product Doctrine Also Applies

Defendants respectfully request that, if the Court finds the privileges discussed in the text do not apply, it also consider whether the memo drafted by attorney Uthmeier is properly protected from disclosure by the attorney work-product doctrine. Upon review of the memo by DOC's declarant, Deputy Chief of Staff and Director Policy Comstock, and based on his discussions with their author, DOC now believes that this doctrine applies to the multiple versions of this memo. Second Comstock Decl. ¶ 8. As Mr. Comstock states, he was informed that attorney Uthmeier was asked to prepare his memorandum in anticipation that litigation would follow if the Secretary decided to reinstate a citizenship question and because of the recognition of this probability. Mr. Comstock states that attorney Uthmeier would not have been tasked with preparing such a comprehensive review if not for the threat of litigation. This memo embodies attorney Uthmeier's "mental impressions, conclusions, opinions, or legal theories," which is classic attorney work-product discoverable only upon a showing of "substantial need for the materials" and inability, "without undue hardship, [to] obtain their substantial equivalent elsewhere." Fed. R. Civ. P. 26(b)(3); *see United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)). The Court should decline to find waiver of this privilege, as Plaintiffs have not been prejudiced by any delay in Defendants' assertion thereof. *See Wilder v. World of Boxing LLC*, 324 F.R.D. 57, 62 n.7 (S.D.N.Y. 2018) (declining to find waiver of work-product protection even though party initially identified emails only as attorney-client privilege protected and not as work-product protected in their privilege log); *see also United States v. Stewart*, 287 F. Supp. 2d 461, 470 (S.D.N.Y. 2003) (finding no waiver despite defects in privilege log and noting that current version of Local Rule 26.2 makes no reference to waiver). The Court should therefore conclude that this doctrine applies here. *See Am. Civil Liberties Union v. U.S. Dep't of Justice*, 210 F. Supp. 3d 467, 482 (S.D.N.Y. 2016).

Conclusion

For the foregoing reasons, Defendants request that this Court deny Plaintiffs' letter seeking the release of the material over which Defendants claim the attorney-client and deliberative-process privileges.

Respectfully submitted,

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CC: All Counsel of Record (by ECF)

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, *et al.*,

Defendants.

No. 1:18-cv-2921 (JMF)

NEW YORK IMMIGRATION
COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, *et al.*,

Defendants.

No. 1:18-cv-5025 (JMF)

SECOND DECLARATION OF EARL W. COMSTOCK

I, Earl W. Comstock, make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am the Deputy Chief of Staff and Director of Policy at the U.S Department of Commerce (“DOC”). I am responsible for reviewing submissions to the Secretary from the various bureaus for alignment with departmental policy and for overseeing general policy implementation. The following statements are based upon my personal knowledge or on information supplied to me

in the course of my professional responsibilities. These statements are provided in support of the DOC's assertion of the attorney-client and deliberative process privileges for certain documents at issue in the above-captioned case.

2. After Plaintiffs filed their Letter Motion to Compel (ECF No. 349), DOC released the following documents in full or with only redactions for personal information: Bates Nos. 11301, 11302, 11303, 11305, 11306, 11333, 11335, and 11353. DOC also lifted some but not all of the original redactions in Bates Nos. 9190 and 11312. Bates No. 12464 had already been released in full. The remaining documents at issue in this motion therefore are: (a) five versions of the same memorandum, 11342, 11346, 11349, 11352, and 11363, being withheld in full; (b) two email chains relating to the work being performed to create that memo, 11312 and 11355; and (c) 9190. The currently redacted versions of 11312, 11355, and 9190 are attached to this declaration.

3. I have reviewed each of the documents listed in paragraphs 2(a)-(c) and affirm that the material withheld from these documents is properly covered by the claimed privileges, for the reasons stated below. DOC has also made redactions to these documents for privacy-related reasons. Plaintiffs do not contest these redactions and this declaration does not address them.

11342, 11346, 11349, 11352, and 11363

4. These documents consist of five versions of a legal analysis memorandum prepared in August 2017 by James Uthmeier, then working as an attorney in the Office of General Counsel, containing advice that was submitted to Secretary Ross (Bates Nos. 11342, 11346, 11349, 11352, and 11363). This memorandum contains a communication between a DOC attorney and his client that was made for the purpose of obtaining legal advice. The memo contains attorney Uthmeier's legal analysis, recommendations, and advice concerning the legal authority for reinstating a citizenship question on the decennial census questionnaire. This memorandum was presented to Secretary Ross, his client, to provide advice to Secretary Ross in his ongoing deliberations on this issue.

Attorney Uthmeier discusses the legal authority and pertinent case law for various courses of action and the legal strengths and weaknesses of these alternatives and makes recommendations from a legal standpoint. As Plaintiffs note in their letter (ECF No. 349), the memorandum contains some factual material, such as the historical use of citizenship questions on the census, but this material is inextricably intertwined with attorney Uthmeier's legal analysis and advice and reflects the attorney's selection of what he viewed to be relevant to his client's request for advice and for his provision of his advice to that client. Hence, it cannot be reasonably segregated and released without releasing confidential attorney-client communications. This material was intended to be and was kept confidential.

5. These memoranda are also covered by the deliberative process privilege, and that privilege should not be overcome here. These memoranda reflect advice and recommendations provided by a subordinate (attorney Uthmeier) to the decisionmaker (Secretary Ross), prior to the decision being made, reviewing various possible alternatives and analyzing their strengths and weaknesses. Some or all of these versions may have been early drafts of the memorandum, but even the version that eventually was forwarded to Secretary Ross was considered a "draft" by attorney Uthmeier as he intended to revise it upon receiving further feedback. This material is thus both predecisional and deliberative.

6. Disclosure of these drafts of attorney Uthmeier's memo would discourage open and candid discussion between agency employees responsible for providing this type of advice to higher-level officials within the agency. This is especially true where, as here, the opinions and recommendations are utilized to make complicated and sensitive decisions related to the decennial census. If agency employees are aware that their opinions, deliberations, and recommendations as reflected in draft materials may be subject to public disclosure, as well as the scrutiny, second guessing, and criticism that would foreseeably follow, the quality and volume of input offered and

received with regard to these matters could be adversely affected. Foreseeably, individual employees could be discouraged from sharing a full range of ideas or opinions -- for example, thoughts or opinions that are part of a brainstorming process, that are not necessarily fully formed, or that may later prove to be erroneous, unpopular, or controversial may no longer be freely offered. In addition, employees could become reluctant to engage in internal debates and disagreements that are critical to healthy decision making if they believe their drafts could later publicly exposed. Decision-making officials would thus be hindered in their ability to solicit and receive honest, unfiltered opinions and recommendations -- often from offices with divergent perspectives and priorities, which, in turn could jeopardize fulsome discussions of the issues, and ultimately, the desired goal of sound decision making.

7. For the foregoing reasons, release of these memoranda would harm DOC's deliberative process by revealing preliminary opinions, advice, and recommendations shared with decision makers and between agency employees, discouraging open, candid communications. These memoranda should therefore be protected from disclosure under the deliberative process privilege.

8. Finally, although I understand that the attorney work-product doctrine was not originally asserted as a basis for withholding these materials, on review of the memoranda and discussions with their author, I believe that that doctrine applies here as well. As I have been informed, attorney Uthmeier was asked to prepare his memorandum in anticipation that litigation would follow if the Secretary decided to reinstate a citizenship question and because of the recognition of this probability. Attorney Uthmeier would not have been tasked with preparing such a comprehensive review if not for the threat of litigation.

11312 and 11355

9. Also included are two email chains relating to the work being performed to create the memoranda discussed above. This material relates to communications between a DOC attorney

and his client that was made for the purpose of obtaining legal advice. The redacted information in these chains consists of discussions of interim stages in the process by which attorney Uthmeier and other attorneys at DOC were formulating their advice and communicating it to the client (11312) and information from attorney Uthmeier to another attorney about the nature of the advice sought by his client (11355). This material was intended to be and was kept confidential.

10. The material redacted from these email chains is also covered by the deliberative process privilege, and that privilege should not be overcome here. The material reflects the attorneys' and advisers' interim back-and-forth discussions of how to proceed with formulating their advice and communicating it to the client, prior to the decision being made. This material is thus both predecisional and deliberative. Disclosure of the redacted information in these chains would discourage open and candid discussion between agency employees responsible for providing this type of advice to higher-level officials within the agency, which, in turn could jeopardize thorough discussions of the issues, and ultimately, the desired goal of sound decision making. For these reasons, release of this material would harm DOC's deliberative process and the material should therefore be protected from disclosure.

9190

11. Bates No. 9190 is an email chain including an email from Sahra Park-Su forwarding on a draft response to a question that reflected comments from Deputy General Counsel Mike Walsh. That draft response, which is what is redacted, is protected by the attorney-client privilege as it includes language suggested by Deputy General Counsel Walsh which reflected his legal analysis and advice to his clients, such as Ms. Park-Su and other parties copied or included on this email chain. The redacted language is accordingly a communication between a DOC attorney and his client that was made for the purpose of imparting legal advice. This information was intended to be and was kept confidential.

12. The redacted language is also covered by the deliberative process privilege, and that privilege should not be overcome here. This language reflected comments by Deputy General Counsel Walsh. This material is thus both predecisional and deliberative. Disclosure of draft language such as this would discourage open and candid discussion between agency employees responsible for providing this type of advice to higher-level officials within the agency. This is especially true where, as here, the opinions and recommendations are utilized to make complicated and sensitive decisions related to the decennial census. If agency employees are aware that their opinions, deliberations, and recommendations as reflected in draft materials may be subject to public disclosure, as well as the scrutiny, second guessing, and criticism that would foreseeably follow, the quality and volume of input offered and received with regard to these matters could be adversely affected. Foreseeably, individual employees could be discouraged from sharing a full range of ideas or opinions -- for example, thoughts or opinions that are part of a brainstorming process, that are not necessarily fully formed, or that may later prove to be erroneous, unpopular, or controversial may no longer be freely offered. In addition, employees could become reluctant to engage in internal debates and disagreements that are critical to healthy decision making if they believe their drafts could later be publicly exposed. Decision-making officials would thus be hindered in their ability to solicit and receive honest, unfiltered opinions and recommendations -- often from offices with divergent perspectives and priorities, which, in turn could jeopardize fulsome discussions of the issues, and ultimately, the desired goal of sound decision making.

13. For the foregoing reasons, release of this language would harm DOC's deliberative process by revealing preliminary opinions, advice, and recommendations shared with decision makers and between agency employees, discouraging open, candid communications. These memoranda should therefore be protected from disclosure.



Earl W. Comstock
Deputy Chief of Staff and Director of Policy
Office of the Secretary
United States Department of Commerce

September 26th, 2018

ATTACHMENT

To: Uthmeier, James (Federal) [REDACTED]
From: Shambon, Leonard (Federal)
Sent: Fri 8/11/2017 6:56:17 PM
Importance: Normal
Subject: RE: Census paper
Received: Fri 8/11/2017 6:56:19 PM

Got it and will shoot you the timeline. Updating it now.

Leonard M. Shambon

Special Legal Advisor

Office of the Chief Counsel for Economic Affairs

U.S. Department of Commerce

[REDACTED]

From: Uthmeier, James (Federal)
Sent: Friday, August 11, 2017 1:59 PM
To: Shambon, Leonard (Federal) [REDACTED]
Subject: Fwd: Census paper

Hey Lenny,

I just wanted to shoot you a current copy of the census paper. Earl is currently reviewing, [REDACTED]
[REDACTED]
[REDACTED] Really appreciate all of your help--you've been so great to us.

Also, if you could shoot me a digital copy of your timeline today (wherever you've gotten to, no worries if still early 1900s) that would be awesome. [REDACTED]

Thank you and happy Friday!

James

Begin forwarded message:

From: "Uthmeier, James (Federal)" [REDACTED]
Date: August 11, 2017 at 10:18:56 AM EDT
To: "Comstock, Earl (Federal)" [REDACTED]
Subject: Re: Census paper

Made a couple small edits for clarity. Also, I have not yet sent this to Peter. [REDACTED]

██████████ I think he is heading out pretty early today, and I'm tied up 11-1, but maybe we can walk through with him early next week.

To: Shambon, Leonard (Federal) [REDACTED]
From: Uthmeier, James (Federal)
Sent: Tue 6/27/2017 12:23:22 PM
Importance: Normal
Subject: Census
Received: Tue 6/27/2017 12:23:23 PM

Hey Lenny,

Hope you're doing well. As we discussed last week, [REDACTED]
[REDACTED] 'm tied up until around 1030, but perhaps
we could chat after that? Let me know!

Thanks,
James

To: Park-Su, Sahra (Federal) [REDACTED]
Cc: Ron S Jarrin (CENSUS/ADEP FED); Ron.S.Jarrin@census.gov; Enrique Lamas (CENSUS/ADEP FED)[Enrique.Lamas@census.gov]; Kelley, Karen (Federal) [REDACTED]; Walsh, Michael (Federal) [REDACTED]; Lenihan, Brian (Federal) [REDACTED]
From: Christa Jones (CENSUS/ADEP FED)
Sent: Sat 2/24/2018 7:01:41 PM
Importance: Normal
Subject: Re: Draft Response to Question
Received: Sat 2/24/2018 7:01:42 PM

Sahra, I'm fine with this. (This is not to say there weren't some improvements and presentation changes for the topics between 1990-2000-2010 and planned for 2020. I just want us all to be clear that the questionnaires was not identical from 1990 to now.)

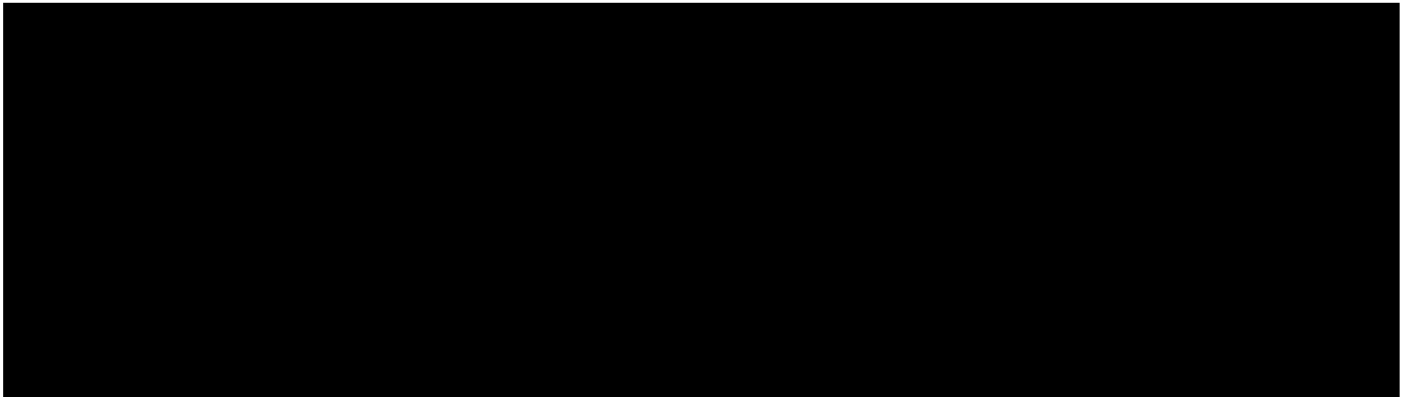
On Feb 23, 2018, at 6:50 PM, Park-Su, Sahra (Federal) <[REDACTED]> wrote:

Ron/Enrique/Christa,

Thank you again for you all your assistance. Below is a draft response worked with Deputy GC Walsh. Please let us know if you have any questions, comments, or concerns. Have a great weekend.

Sahra

What was the process that was used in the past to get questions added to the decennial Census or do we have something similar where a precedent was established?



Senior Policy Advisor

Office of Policy and Strategic Planning

U.S. Department of Commerce

