

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 2, *et al.*,

Plaintiffs

v.

DONALD J. TRUMP, *et al.*,

Defendants

Civil Action No. 17-1597 (CKK)

ORDER

(April 23, 2018)

Plaintiffs contacted chambers on April 20, 2018, to notify the Court of a discovery dispute.¹ Specifically, Plaintiffs e-mailed the Court to request a teleconference to discuss Defendants' clawback of two documents on the basis of the deliberative process privilege.

The first document is an October 2, 2017 presentation to the Transgender Personnel Policy Working Group. According to Plaintiffs, this document has been produced by various Defendants with different degrees of redaction (ranging from fully redacted to partially redacted to fully unredacted). Plaintiffs apparently used a partially redacted version of this document last week at the deposition of Col. Mary Krueger, during which they questioned Col. Krueger about the document's content. Defense counsel apparently did not object to the use of the partially redacted version of the document (although counsel did apparently clawback a fully unredacted copy of the document on the record).

After the deposition, Defendants sought to clawback even the partially redacted version of the document. Defendants now contend that the entire document is protected by the deliberative process privilege. Plaintiffs argue that the document is not protected by privilege in the first instance, but the Court has already explained that it will not consider the parties' numerous disputes about the applicability of privileges until after certain of Defendants' pending motions have been resolved. The Court will, however, consider Plaintiffs' alternative contention that Defendants have waived any privilege with respect to the partially redacted version of the document by allowing its use without objection at Col. Krueger's deposition. This represents a narrow exception to the Court's decision to otherwise hold privilege issues in abeyance. The Court is only considering this issue because it relates to Defendants' potential waiver of privilege at Col. Krueger's deposition, and because Plaintiffs seek to use this document in an upcoming filing.

The Court is preliminarily inclined to agree with Plaintiffs that Defendants have waived privilege. *See Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp.*, 218 F. Supp. 3d 197, 202 (E.D.N.Y. 2016) (holding that party "waived privilege and work-product protection for [certain exhibits] by failing to seek to preclude their introduction and use at the

¹ Plaintiffs' e-mail is attached to this Order as Exhibit A.

