UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	EDCV 17-2048 PSG (SHKx)	Date	April 8, 2019
Title	Inland Empire—Immigrant Youth Collective, et al. v. Kirstjen Nielsen, et al.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING Plaintiff's motion to complete the administrative record

Before the Court is Plaintiffs'[1] motion to complete the administrative record or compel production of a privilege log. *See* Dkt. # 101 ("*Mot.*"). Defendants[2] (the "Government") have opposed this motion, *see* Dkt. # 102 ("*Opp.*"), and Plaintiffs replied, *see* Dkt. # 103 ("*Reply*"). The Court held a hearing on the motion on April 8, 2019. Having considered the moving papers and the arguments made at the hearing, the Court **GRANTS** the motion.

I. Background

This action is brought by a class of undocumented immigrants who allege that the Government unlawfully revoked their status under the Deferred Action for Childhood Arrivals program, otherwise known as DACA, without first giving them notice and an opportunity to challenge the revocation.

A. Factual Background

The Court extensively described the history of the DACA program and the factual background of the named Plaintiffs' individual cases in its previous orders, and it does not repeat that discussion here. *See* Dkts. # 31 ("*Prelim. Inj. Order*"); # 62 ("*Class Inj. Order*"); # 79 ("*MTD Order*"). For purposes of this motion, it is enough to say that the DACA program grants

[1] The named plaintiffs in this class action are Jesus Alonso Arreola Robles, Ronan Carlos de Souza Moreira, Jose Eduardo Gil Robles, and the Inland Empire—Immigrant Youth Collective.
[2] The Defendants in this case are various Department of Homeland Security officials who are being sued in their official capacities.

certain immigrants without legal immigration status a temporary reprieve from the possibility of being removed from the country. *See Class Inj. Order* at 2. Three of the named plaintiffs in this case are individuals who had their DACA status revoked without notice after they were issued a Notice to Appear ("NTA") in immigration court. *See id.* at 2–3. They contend that the practice of revoking DACA without providing "notice, a reasoned explanation, an opportunity to be heard prior to revocation, or a process for reinstatement when the revocation is in error" violates the DACA Standard Operating Procedures ("SOPs"), which "do[] not allow for termination without notice in the vast majority of cases," as well as the Due Process Clause of the Fifth Amendment. *Id.* at 3. They also argue that the policy is fundamentally illogical because an NTA can be issued (leading to an automatic termination of DACA) simply because a person lacks lawful immigration status—a condition that necessarily applies to every DACA recipient. *See id.*

B. Procedural History

Plaintiffs Inland Empire–Immigrant Youth Collective and Arreola originally filed their class action complaint on October 5, 2017, alleging that Defendants' DACA termination policy violated the Administrative Procedure Act ("APA") and the Fifth Amendment. *See* Dkt. # 1. The following month, on November 20, 2017, the Court granted Arreola's motion for a preliminary injunction, enjoining USCIS's decision to terminate his DACA. *See Prelim. Inj. Order* at 15–16.

Plaintiffs then moved to certify a class and for entry of a classwide preliminary injunction. *See Class Inj. Order*. On February 26, 2018, the Court granted the motion. After a stipulated modification, the Court certified a class of "[a]ll recipients of [DACA] who, after January 19, 2017, have had or will have their DACA grant and employment authorization terminated without notice or an opportunity to respond," with the exception of certain categories of DACA recipients detailed in the order. *See Modified Class Definition*, Dkt. # 74. The Court preliminarily enjoined Defendants from, among other things, terminating the DACA status of class members absent a fair procedure that complies with the DHS SOPs and terminating DACA status "based solely on the issuance of an [NTA] that charges the DACA recipient as removable due to his or her presence in the United States without admission or having overstayed a visa." *See Class Inj. Order* at 35.

Defendants then filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, which the Court denied. *See MTD Order*. After the Court denied the motion, the parties began preparing for the summary judgment stage. *See First Scheduling*

Order, Dkt. # 97. Because Plaintiffs bring a claim under the APA, this required the Defendants to produce a complete administrative record with regard to Defendants' policy of terminating DACA status without notice. *See id.*

The Government produced four separate administrative records to Plaintiffs. The first three administrative records contain documents relating to the decision to terminate each of the named Plaintiff's DACA status as a result of them having been issued an NTA. *See Opp.* 2:3–5. Those administrative records are not at issue here. The fourth administrative record—the record that is the subject of the current motion—contains documents relating to the agency's policy of terminating DACA status without prior notice (the "termination AR"). *See id.* 2:15–24. After Plaintiffs raised concerns about the scope of the termination AR, the parties met and conferred and were able to resolve most of their disputes. *See Mot.* 3:1–3. This motion addresses the single issue that remains.

While finalizing the termination AR, the Government informed counsel for Plaintiffs that USCIS was unable to determine a "moment in time" when a decision was made to enact a policy of terminating DACA status without first sending a Notice of Intent to Terminate, which the parties refer to as a "NOIT." *See January 17, 2019 Email from James Walker*, *Exhibit B to Declaration of Katrina L. Eiland*, Dkt. # 101-4, at 2. Accordingly, it included documents in the termination AR that the Government contends "reflect the agency's understanding that an individual's deferred action was always subject to termination without advance notice at the agency's discretion." *See id.* These include "DACA policy memoranda and internal guidance and training documents, including the DACA SOP and appendices, and emails reflecting decisions to enforce the termination without advance notice policy as far back as early 2013." *Id.*

While this case challenges Defendants' policy of terminating DACA *without* first providing the DACA recipient with a Notice of Intent to Terminate, Plaintiffs asked the Government to also include documents in the termination AR that relate to the agency's policy of terminating DACA *after* issuing a Notice of Intent to Terminate, i.e. termination *with* notice. Plaintiffs explained their rationale for this request in an email to the Government:

> Our case alleges that the agency's practice of terminating without process violates its written rules requiring process before termination for the plaintiffs and class members. It is difficult to imagine that the agency did not consider the written policies outlining the circumstances under which termination with process is required in deciding to undertake a practice of terminating without process for

> certain groups. We therefore think it's clear that the agency must include records concerning written rules that describe when process is required.

January 3, 2019 Email from Katrina Eiland, *Exhibit C to Declaration of Katrina L. Eiland*, Dkt. # 101-5, at 13. The Government informed Plaintiffs that the agency's policies regarding termination with a Notice of Intent to Terminate were laid out in the DACA SOPs and that it had included all versions of the SOPs in the termination AR. *See id.* But Plaintiffs still insisted that the administrative record should include "any other documents . . . beyond the SOPs explaining when, whether, and how process is provided." *See id.*

While the Government disagreed with this reasoning, it reexamined the documents that had been identified as potentially relevant to the termination *without* notice policy to determine whether any had been excluded because they described only the process for terminating *with* an NOIT. *See Opp.* 2:25–3:3. After this reexamination, it concluded that no such documents had been excluded from the administrative record. *See id.* 3:3–5. The Government now asserts that "the termination *with* NOIT policy is fully represented in the documents contained in the termination [administrative record], and there are no features or modifications to that policy that are not reflected in the termination [administrative record]." *See id.* It has, however, represented that it has excluded two categories of documents from the administrative record because they are protected by deliberative process privilege: (1) documents that "reflect agency deliberations over individual termination cases" and (2) "non-final policy discussions that are irrelevant to the lawfulness of the termination without a NOIT policy as it existed at the time each Plaintiff's DACA was terminated." *See id.* 3:8–12.

Plaintiffs agree that the documents in the first category, which concern other individual DACA termination cases, are not relevant to this case. *See Reply* 2 n.2. But they contend that the Government should be compelled to include in the record the "non-final policy" discussions about the termination *with* a Notice of Intent to Terminate policy, or, to the extent that the Government asserts privilege over those documents, that it should be required to produce a privilege log. *See generally Mot.*

II. Legal Standard

The APA provides that in reviewing an agency action, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. "'The whole record' includes everything that was before the agency pertaining to the merits of its decision." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). It "consists

of all documents and materials directly or *indirectly* considered by agency decision-makers." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis original).

"An agency's designation and certification of the administrative record is treated like other established administrative procedures, and thus entitled to a presumption of administrative regularity." *Ctr. for Biological Diversity v. U.S. Army Corp. of Eng'rs*, No. CV 14-1667 PSG (CWx), 2015 WL 3606419, at *2 (C.D. Cal. Feb. 4, 2015) (quoting *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007)). Accordingly, "the court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." *Id.* (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)).

III. Discussion

The Government makes two arguments for why the documents it has withheld do not need to be included in the termination AR. First, it contends that these documents—which are non-final discussions about the policy of terminating DACA *with* a notice—are not "relevant" to Plaintiff's challenge to the policy of terminating DACA *without* a notice. *See Opp.* 3:6–12 ("Defendants . . . confirmed that no relevant documents related to DACA termination policy . . . were excluded from the termination AR, except those that reflect agency deliberations over individual termination cases and non-final policy discussions that are irrelevant to the lawfulness of the termination without a NOIT policy as it existed at the time each Plaintiff's DACA was terminated"); *id.* 7:17–22 ("Contrary to Plaintiffs' claims, Defendants have made clear, and the termination AR reflects, that all known documents relevant to the DACA policy of termination with a NOIT are included in the termination AR . . . [except] deliberative policy discussions that bear no relevance to Plaintiffs' legal challenge to the termination without a NOIT policy as it was applied to them."). The Government further argues that even assuming the documents at issue should otherwise be included in the termination AR, they were properly withheld because they are protected by deliberative process privilege. *See Opp.* 12:9–15:4. The Court addresses each argument in turn.

A. Exclusion Based on Lack of Relevance

To rebut the Government's position that the predecisional documents regarding the termination with a NOIT policy were properly excluded from the termination AR, Plaintiffs must articulate "reasonable, non-speculative grounds to support their belief that Defendants considered these items in reaching the challenged decisions." *California v. U.S. Dep't of Labor*, No. 2:13-cv-2069-KJM-DAD, 2014 WL 1665290, at *2 (E.D. Cal. Apr. 24, 2014) (cleaned up).

"The application of an incorrect standard constitutes 'reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record.'" *Winnemem Wintu Tribe v. U.S. Forest Serv.*, No. 2:09-CV-1072-KJM-KJN, 2014 WL 3689699, at *11 (E.D. Cal. July 24, 2014).

Throughout its opposition, the Government asserts that the documents at issue were properly excluded because they are not "relevant" to Plaintiffs' challenge to the policy of terminating DACA without notice. *See, e.g.*, *Opp.* 1:19, 3:9, 7:22, 8:17, 11:2, 14:28, 16:14. However, Plaintiffs point out that courts have held that it is improper for an agency to exclude documents from the record solely because they are deemed "irrelevant" because "'[r]elevance to a claim does not necessarily correlate with whether a document was 'directly or indirectly considered.'" *See Reply* 5:3–25 (quoting *Winnemem Wintu Tribe*, 2014 WL 3689699, at *11); *Trout Unlimited v. Lohn*, No. C05-1128C, 2006 WL 1207901, at *2–3 (W.D. Wash. May 4, 2006) (ordering an agency to reassess its preparation of the administrative record when it had selected documents for the record based on whether they were relevant or significant instead of whether they had been considered by decisionmakers).

At the hearing, the Government explained that its position is that the documents it has withheld do not add any material information that is not already contained in other documents within the record. But this is not the proper standard. Defendants have never explicitly certified—whether in their opposition or in their communications with Plaintiffs—that the documents they have withheld were not "directly or indirectly considered by agency decision-makers." *See Thompson*, 885 F.3d at 555.

Instead, Defendants have rested on their position that Plaintiffs have not rebutted the presumption that the administrative record is complete. *See Opp.* 7:3–14. But as several courts have held, the application of an improper standard in compiling the administrative record is sufficient to rebut the presumption that it was prepared properly. *See Winnemem Wintu Tribe*, 2014 WL 3689699, at *11; *Trout Unlimited*, 2006 WL 1207901, at *2–3. Because the Government has (1) never certified that it has included within the termination AR all of the documents that were considered "directly or indirectly" by the decisionmakers—the relevant standard in this Circuit—and (2) has not provided any authority supporting its position that it is entitled to withhold documents purely because it determines that they are not "relevant," the Court finds that Plaintiffs have demonstrated that the agency applied an improper standard in compiling the termination AR such that the presumption of regularity has been rebutted. Accordingly, it concludes that the Government's assertions of lack of relevance are insufficient to justify withholding the documents at issue.

B. Deliberative Process Privilege

The Court now turns to what appears to be the Government's primary argument: that the predecisional documents regarding the policy of terminating DACA with notice were properly withheld from the termination AR because they are protected by deliberative process privilege.[3]

i. Legal Standard

Deliberative process privilege "permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated." *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). "It was developed to promote frank and independent discussion among those responsible for making government decisions" and is primarily intended to "protect the quality of agency decisions." *Id.*

Plaintiffs do not dispute that deliberative process privilege may be a legitimate ground for shielding the documents at issue from disclosure; instead, they contend that if Defendants choose to assert privilege, they must provide a privilege log. *See Reply* 8:22–9:2. Defendants counter that no privilege log is necessary because documents subject to deliberative process privilege should be treated as if they were never part of the record in the first place. *See Opp.* 15:7–15.

Whether an agency withholding documents from an administrative record based on deliberative process privilege must provide a privilege log is an unsettled issue in this Circuit. *See In re United States*, 875 F.3d 1200, 1210 (9th Cir. 2017), *vacated on other grounds* 138 S. Ct. 443 (2017) ("[W]e have not previously addressed whether assertedly deliberative documents must be logged and examined or whether the government may exclude them from the administrative record altogether."). District courts have reached different conclusions.

Several decisions, including many from the Northern District of California, have held that when an agency withholds documents that were considered by the agency decisionmaker on the

[3] The Government has noted in its communications with counsel for Plaintiffs and briefly in its opposition that at least some of the documents may also be protected by attorney-client privilege. *See Opp.* 3 n.2. However, because it has primarily discussed only deliberative process privilege in its opposition, the Court also discusses only that issue. In any event, whether the Government must provide a privilege log to claim privilege does not turn on the nature of the privilege asserted.

basis of deliberative process privilege, it must provide a privilege log. *See, e.g.*, *S.F. Bay Conservation & Dev. Comm'n v. U.S. Army Corp of Eng'rs*, No. 16-cv-5420-RS (JCS), 2018 WL 3846002, at *7 (N.D. Cal. Aug. 13, 2018); *Sierra Club v. Zinke*, No. 17-cv-7187-WHO, 2018 WL 3126401, at *2 (N.D. Cal. June 26, 2018); *Inst. For Fisheries Res. v. Burwell*, No. 16-cv-1574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017); *City of Laguna Niguel v. FEMA*, No. SACV 09-198 DOC (MLGx), 2010 WL 11519590, at *3–4 (C.D. Cal. Mar. 26, 2010); *see also Mot.* 7:1–22 (collecting cases). Responding to the argument Defendants make here that documents subject to deliberative process privilege should not be considered part of the administrative record in the first place, these courts have found that "the proper strategy isn't pretending that the protected material wasn't considered" directly or indirectly by the decisionmaker, *see Thompson*, 885 F.3d 551, but instead "withholding or redacting the protected material and then logging the privilege." *Inst. for Fisheries*, 2017 WL 89003, at *1.

Courts reaching this conclusion have also observed that a privilege log is needed to allow the plaintiff to challenge or attempt to defeat the privilege. Deliberative process privilege is only a qualified privilege, and it can be defeated if the litigant's "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Warner*, 742 F.3d at 1161. Courts have recognized that without a privilege log, it would be nearly impossible for a plaintiff to challenge or overcome a privilege assertion. *See Sierra Club*, 2018 WL 3126401, at *5 ("The only way to know if privilege applies is to review the deliberative documents in a privilege log.").

Other courts, however, have held differently. The Government relies most heavily on a recent decision from this District that adopted the argument that materials covered by the deliberative process privilege "are not part of the administrative record in the first place," so no privilege log is required. *ASSE Int'l, Inc. v. Kerry*, No. SACV 14-534 CJC (JPRx), 2018 WL 3326687, at *3 (C.D. Cal. Jan. 3, 2018). This view of deliberative process privilege has its origin in several decisions from the federal district court in Washington, D.C. *See id.*, at *2–3 (citing *Stand Up for California! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 123 (D.D.C. 2014); *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32 (D.D.C. 2013); *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013); *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007)); *see also id.*, at *2 ("Many courts look to D.C. Circuit case law in APA review cases, as the majority of such disputes occur in that circuit."). The D.C. rule that predecisional deliberative material is categorically excluded from the administrative record flows from the proposition that because the propriety of an agency's action is generally "judged in accordance with [the agency's] stated reasons," documents probative of the actual subjective motivations of the decisionmakers are immaterial

as a matter of law. *See Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009) (quoting *In re Subpoena Duces Tecum Served on Officer of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998)).

Because, under this view, the privileged documents are treated as if they had never been part of the record in the first place, courts have found that requests for a log of the deliberative process privilege claims are analyzed under the standard applicable to disclosure of extra-record material, which requires the plaintiff to produce "clear evidence" showing "bad faith or other exceptional circumstances." *See Stand Up for California!*, 71 F. Supp. 3d at 123. Courts adopting this position have generally viewed this exacting standard as a feature, not a bug, because "requiring the United States to identify and describe on a privilege log all of the deliberative documents would invite speculation into an agency's predecisional process and potentially undermine the limited nature of review available under the APA." *See id.*; *ASSE*, 2018 WL 3326687, at *3 (quoting this passage from *Stand Up for California!*).

ii. Discussion

Having considered the authority on both sides, the Court concludes that Plaintiffs' argument that predecisional materials considered by the decisionmakers should be included in the administrative record—subject to claim of privilege—is more in line with the Ninth Circuit's instruction that the administrative record should consist all documents "directly or *indirectly* considered by agency decision-makers." *Thompson*, 885 F.3d at 555. As other courts have explained, it makes little sense to create a legal fiction that predecisional material was not actually considered by agency decisionmakers simply to avoid requiring the agency to produce a privilege log. *See Inst. for Fisheries*, 2017 WL 89003, at *1. Instead, these documents are properly categorized as part of the administrative record under the definition in *Thompson* but nonetheless subject to withholding based on privilege, as long as the agency is willing to provide a privilege log.

Though some courts have cited the possibility that producing a privilege log will chill frank discussion among agency decisionmakers, *see ASSE*, 2018 WL 336687, at *3, the Court believes that this concern is overstated. Privilege logs are the norm when various privileges, including attorney-client privilege, are asserted in civil litigation, and they are generally not seen as unduly chilling the underlying privileged discussions. Additionally, the Court agrees with others that have noted that it would be very difficult, if not impossible, for an APA plaintiff to challenge a claim of deliberative process privilege or to make the required showing of need

necessary to overcome the privilege without at least some description of the document over which privilege is asserted. *See Sierra Club*, 2018 WL 3126401, at *5.

While the Court recognizes that a recent decision from this District addressing this issue held that a privilege log is not required, *see ASSE*, 2018 WL 336687, previous Central District cases have held differently, as have most other decisions from district courts in the Ninth Circuit. *See Laguna Niguel*, 2010 WL 11519590, at *3–4; *In re United States*, 857 F.3d at 1210 (collecting cases). Accordingly, the Court joins the majority of courts in this Circuit that have held that the Government must provide a privilege log if it intends to assert deliberative process privilege—or any other privilege—over documents that were directly or indirectly considered by agency decisionmakers.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiffs' motion to complete the termination AR or compel the production of a privilege log.

The Government is **ORDERED** to either add the predecisional documents at issue to the termination AR or, if it chooses to assert privilege, to provide Plaintiffs with a privilege log, no later than **May 10, 2019**.

Following this date, the parties are instructed to meet and confer regarding a briefing schedule for any challenges to privilege and for dispositive motions and submit a stipulation to the Court no later than **May 24, 2019**.

IT IS SO ORDERED.