



Shaw et al v. Schulte

2021 | Cited 0 times | D. Kansas | September 21, 2021

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

BLAINE FRANKLIN SHAW, et al.,)

Plaintiffs,)

v.) Case No. 19-1343-KHV-GEB (LEAD CASE) DOUG SCHULTE, et al.,)

Defendants.) _____)

MARK ERICH, et al.,) Plaintiffs,) v.) Case No. 20-1067-KHV-GEB HERMAN JONES, KHP
Superintendent,) Defendant.)

MEMORANDUM AND ORDER MEMORIALIZING RULINGS FROM JULY 14, 2021 HEARING

On July 14, 2021, the Court conducted a motion and scheduling hearing. The Shaw and Bosire Plaintiffs (Case No. 19-1343) appeared through counsel, Sharon Brett, Leslie Greathouse, Madison Perry, and Joshua Pierson. The Erich and Maloney Plaintiffs (Case No. 20-2076) did not appear. Defendants appeared through counsel, Arthur Chalmers. The Court orally DENIED IN PART and GRANTED IN PART Plaintiff's motion to compel

discovery (ECF No. 167) and modified the schedule governing this matter. (See Order, ECF No. 202.)

I. Background 1 On December 19, 2019, Blaine Shaw, Samuel Shaw and Joshua Bosire, on behalf of themselves and others similarly situated, initiated their case pro se against Kansas

and Brandon McMillan, claiming based on their travel origins and destinations, Defendants subjected them to prolonged detentions and vehicle searches. (No. 19-1343-KHV-GEB; Compl., ECF No. 1.) Plaintiffs later engaged counsel and filed a First Amended Complaint. (ECF No. 7.) Under 42 U.S.C. § 1983, the Shaw and Bosire Plaintiffs sue Defendants for violating their rights under Article IV and the Fourth and Fourteenth Amendments to the United States Constitution, seeking compensatory, punitive, declaratory and injunctive relief. (See No. 19-1343, Mem. and Order, ECF No. 36.) On March 6, 2020, Mark Erich and Shawna Maloney filed a similar case individually and on behalf of the minor child, D.M., against Herman Jones in his official capacity as the Superintendent of the Kansas Highway Patrol as well as an individual Trooper, Justin Rohr. The Erich and Maloney



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plaintiffs made claims also under 42 U.S.C. §§ 1983 and 1988 against Trooper Rohr for compensatory and punitive damages arising

1 Unless otherwise indicated, the information recited is gleaned from No. 19-1343-KHV-GEB, Compl., ECF No. 1; Am. Compl., ECF No. 7; Answers, ECF Nos. 25, 28, 39; No. 20-1067-KHV-GEB, Compl., ECF No. 1; Answer, ECF Nos. 8, 13) and the briefing regarding the instant motion (ECF Nos. 167, 170). This background information should not be construed as judicial findings or factual determinations.

from an alleged prolonged detention and vehicle search. (No. 20-1067-KHV-GEB; Compl., ECF No. 1.) Plaintiffs bring claims against Defendant Jones, in his official capacity, seeking injunctive and declaratory relief to address alleged unconstitutional policies and customs of prolonged detentions and vehicle searches based on travel origins and destinations, which violate their Fourth Amendment rights. (Id.) Defendant Rohr was later dismissed from the action. (No. 20-2067-KHV-GEB; Order, ECF No. 26.) After separate scheduling in each case and an unsuccessful mediation, the Erich/Maloney plaintiffs filed a motion to consolidate the two cases, noting their second Shaw matter, Case No. 19-1343-KHV-GEB. (No. 20-2067-KHV-GEB, ECF No. 28.) On November 10, 2020, the cases were consolidated for all purposes, with the Shaw matter designated the lead case where all future filings should occur. (No. 19-1343-KHV-GEB, Order, ECF No. 84.) A Phase II Scheduling Order governing both cases set deadlines for class and merits discovery together. (ECF No. 83.) However, following the establishment of the joint schedule, discovery conferences and modifications to the schedule have occurred to account for difficulties in discovery. 2 During one of such discovery conferences, the parties presented the question of ppropriately withheld as protected by The undersigned ordered

2 See, e.g., ECF No. 104 (discovery conference held Jan. 12, 2021); ECF No. 135 (status and discovery conference held April 12, 2021); ECF No. 162 (discovery conference held May 17, 2021).

in camera review. (Id.) Following the 2021 status conference the Court ordered the parties to file formal briefs on the topic.

The Shaw 3

timely filed their Motion to Compel Documents Withheld Based on the Deliberative Process Privilege (ECF No. 167) and Defendants filed a timely Response (ECF No. 170). As noted, a motion hearing was held on July 14, 2021, in conjunction with the status conference previously scheduled on the same date. As described above, the motion was decided at the July 14 hearing and the ruling is memorialized here. II. Plaintiffs Motion to Compel Discovery (ECF No. 167) The question presented is whether Defendants should be compelled to produce documents and portions of otherwise privileged documents Defendants withheld solely based on the deliberative process privilege. Plaintiff Bosire was stopped by KHP troopers, Defendants Schulte and McMillan, on February 10, 2019. (ECF No. 167 at 2.) Following his stop, Plaintiff Bosire made a complaint to the KHP that his



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search constituted a (Id.) That complaint resulted in his stop being (Id.) investigation. (Id.) Superintendent Jones provided his determination regarding the

3 The Erich and Mahoney Plaintiffs are not parties to this motion.

investigation to Plaintiff Bosire by letter dated August 9, 2019. Id. Ultimately, Id.

Case #2019- No. 170 at 3.) Defendants withheld certain documents from discovery regarding the resulting internal

(See Third Suppl. Priv. Log, ECF No. 167, Ex. 2.) Four privilege log entries cite this privilege; however, only one document is being withheld solely based on this privilege. The two-page document being withheld is an email chain dated May 24, 2019 and May 29, 2019. The initial email, dated May 24, 2019, is from Lt. Bullock to KHP Captain Brent Hogelin, with a copy to KHP officer Eric Pippin, regarding the PSU case review. 4 The second email is the responsive email from Cpt. Hogelin back to Lt. Bullock, dated May 29, 2019 (also copying Eric Pippin). A. Plaintiffs contend the privilege does not apply to the Kansas Highway Patrol as a state agency, and even if it did, factors weigh in favor of disclosure. (ECF No. 167 at 4.) Plaintiffs argue in *Fish v. Kobach*, 5

one court in the District of Kansas and is therefore not applicable to state agencies. 6

4 The document provided to the court in camera is securely maintained in the undersigned magistrate case file. 5 *Fish v. Kobach*, No. 16-2105-JAR, 2017 WL 1373882, at *5 (D. Kan. Apr. 17, 2017) 6 Id.

Plaintiffs allege the cases cited by Defendants to apply the privilege to the KHP are either distinguishable (the Tenth Circuit case of *Denver Policemen v. Liechenstein* 7

or nonbinding because they are not decided in this District (i.e., *Glossip v. Chandler*, 8

from the Western District of Oklahoma; and *Fogarty v. Gallegos*, 9

in the District of New Mexico). Plaintiffs outline the ten factors considered by the court in *Fogarty* and argue their application weighs in favor of production. (ECF No. 167 at 5-6.) Defendants present three primary arguments. First, they contend the deliberative process privilege applies to all governments, not just federal agencies. Second, they maintain the deliberative process privilege applies to the Bullock/Hogedin email chain; and finally, because the privilege applies, the email chain should not be produced, especially for policy reasons. (ECF No. 170.) Defendants cite to treatises discussing the privilege 10

and to the recent U.S. Supreme Court decision in *United States Fish & Wildlife Serv. v. Sierra Club*,



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Inc., 11

which defined , to argue the privilege applies to all governments, not just federal agencies. They maintain this privilege also applies to civil discovery, citing the 2016 District of Kansas opinion in *United States v. Malik*. 12

Defendants contend Plaintiffs improperly rely on the *Fish* decision because the ruling was clearly limited, and the Court

7 *Denver Policemen's v. Lichtenstein*, 660 F.2d 432 (10th Cir. 1981). 8 *Glossip v. Chandler*, No. CIV-14-0665-F, 2020 WL 7220789, at *1 (W.D. Okla. Dec. 7, 2020). 9 *Fogarty v. Gallegos*, No. 05-26 WJ/LFG, 2005 WL 8163463, at *4 (D.N.M. Dec. 22, 2005). 10 ECF No. 170, citing *K. Graham, Jr.* But compare *M. Graham*, 4 Handbook of Fed. Evid.

11 *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). 12 *United States v. Malik*, No. 15-9092-CM-TJJ, 2016 WL 3167307, at *3, n. 5 (June 7, 2016).

acknowledged it never apply 13

Defendants further argue other courts, including the Tenth Circuit, have held the privilege applicable to state agencies. 14 Second, Defendants argue the deliberative process privilege properly applies to the withheld email chain. (ECF No. 170 at 12-19.) Defendants apply three steps of analysis: they outline 1) the emails are predecisional, 2) deliberative, and 3) when properly weighed,

maintaining the privilege. (Id.) final argument notes because the privilege applies, the email chain should not be produced. (ECF No. 170 at 19- deliberative opinions provided to the head of a - Id. at 19.)

Defendants cite a recent decision in the Southern District of New York, 15

which cites 2021 Supreme Court decisions, noting rooted in the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, is intended to promote open and frank discussions amongst government officials 20.) 16

13 *Fish*, 2017 WL 1373882 at *5, n. 39. 14 Defs at 11-12 (citing *Glossip*, 2020 WL 7220789 at *1-2; and *Lichtenstein*, 660 F.2d at 437). 15 *Am. Soc'y for Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv.*, No. 19 CIV. 3112, 2021 WL 1163627, at *9 (S.D.N.Y. Mar. 25, 2021), 16 Citing *Am. Soc'y for Prevention of Cruelty to Animals*, 2021 WL 1163627 at *9.

B. Duty to Confer As outlined above, the topics of the pending motion were discussed at the January



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12 and April 9, 2021 discovery conferences. Through pre-conference statements and their briefing, the parties outlined their attempts to confer regarding the disputes, and have demonstrated conferral as required by D. Kan. Rule 37.2 and Fed. R. Civ. P. 37(a)(1). C. Discussion are given broad discretion to control and place appropriate limits on

17 non- 18

Upon review of the various cases cited by the parties, and particular review of the District of Kansas opinions in *United States v. Malik* 19

and *Mason v. Stock*, 20

this Court first determines whether the deliberative process privilege is applicable to a state agency. Finding it is applicable, the Court then applies the three-step analysis outlined in *Malik*. 21 1. Application of the Privilege to a State Agency After thorough consideration, this Court finds *Fish* case is simply too narrow. Although the court in *Fish*

17 *Semsroth v. City of Wichita*, No. 06-2376-KHV-DJW, 2007 WL 2287814, at *1 (D. Kan. Aug. 7, 2007) (citing *Kutilek v. Gannon*, 132 F.R.D. 296, 297 (D. Kan. 1990) (discussing whether to stay discovery). 18 In re *Urethane Antitrust Litig.*, No. 04-1616-JWL, 2014 WL 61799, at *1 (D. Kan. Jan. 8, 2014) (citing *A/R Roofing, L.L. C. v. Certainteed Corp.*, 2006 WL 3479015, at *3 (D. Kan. Nov. 30, 2006) (other internal citations omitted). 19 *Malik*, 2016 WL 3167307. 20 *Mason v. Stock*, 869 F. Supp. 828 (D. Kan. 1994). 21 The factors analyzed by the court in *Malik*, 2016 WL 3167307 at *3-4, mirror the factors later analyzed by the W. D. Oklahoma court in *Glossip*, 2020 WL 7220789, at *2-3. Both cases collect a number of authorities on the topic.

the decision specifically noted, court is not ruling that some manner of deliberative-process privilege can never apply to

accorded federal agencies. Defendant never directly asserted a state agency privileg

22 Because this is an action brought under federal law, the determination of privilege depends on federal common law. 23

And, federal common law clearly recognizes the existence of the deliberative process privilege, even if not specifically identified as such. 24 In , the Tenth Circuit did not explicitly recognize the

governmental departments when determining whether police investigative records were discoverable. 25

And in *Mason*, although the Court -polici - it -



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air willingness to be candid 26

This analysis is strikingly Malik:

The rationale for the privilege i

22 Fish, 2017 WL 1373882 at *8 n. 39. 23 See Mason, 869 F. Supp. at 832. 24 Id.; see also Glossip, 2020 WL 7220789 at *1-2 e.g., Dept. of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association, 532 U.S. 1, 8-9 (2001)). 25 Lichtenstein, 660 F.2d at 437. And recently, the Supreme Court clearly characterized the United States Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777, 785 (2021). 26 Mason, 869 F. Supp. at 834.

decisions within the Government, which is based upon the belief that ternal]

27 Other district courts within the Tenth Circuit have persuasively found the deliberative process privilege potentially available to state and municipal agencies. 28

For the reasons set forth above, the deliberative process privilege is appropriately applied to

2. Three-Step Analysis After finding the privilege applicable to the KHP, the Court must then undergo a three-prong analysis of the documents to determine whether the privilege applies. 29

The Court evaluates: 1) whether the documents are predecisional; 2) whether the documents are deliberative; and then 3) whether the need of the party seeking disclosure outweighs the potential harm to the agency from disclosure. 30

deliberative process privilege bears the burden of proving that the documents at issue are

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27 Malik, 2016 WL 3167307 at *3 (citing Casad v. U.S. Dep't of Health & Human Servs., 301 F.3d 1247, 1251 (10th Cir. 2002) (quoting Klamath, 532 U.S. at 8 9)). 28 See, e.g., Glossip, 2020 WL 7220789 at *2 (citing Leadholm v. City of Commerce City, Colorado, 2017 WL 3839454 (D. Colo. September 1, 2017)). 29 Plaintiffs suggest analyzing a different set of 10 factors, those analyzed by the District of New Mexico court in Fogarty, 2005 WL 8163463 at *2-3 (6). Regardless, the overarching considerations are the same. Plaintiffs acknowledge a number of the Fogarty factors do not apply here, and this Court prefers to analyze the issue in line with the recent District of Kansas opinion in Malik. Additionally, many of the applicable factors in Fogarty and Malik document through in its in camera inspection. 30 See Malik, 2016 WL 3167307 at *3, 8-9. 31 Id. at *3 (citing Trentadue v. Integrity Comm., 501 F.3d 1215, 1226-27 (10th Cir. 2007)).



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a. Pre-decisional Both the D. Kan. opinion in Malik and th Casad v. U.S. Dep't of Health & Human Servs. 32

are instructive to determining whether the information sought is predecisional. As found in Malik,

A document is pre-decisional if it is prepared in order to assist an agency decisionmaker in arriving at his decision. In Casad, the Tenth Circuit cited - decisional: (1) officer or person issuing the disputed document; and (2) the relative positions in the author and recipient. 33

in is more simplified: if the agency seeking to withhold the document can 1) identify its specific decision which correlates with the document; and 2) demonstrate the purpose of the confirm the document being withheld was created prior to the agency decision being

rendered, the document is predecisional. 34 b. Deliberative To be deliberative, the document must be

the deliberative process if it relates to government decision-making and its -making process in such a way as to discourage candid discussion within the agency and

32 Casad v. U.S. Dep't of Health & Human Servs., 301 F.3d 1247, 1251 (10th Cir. 2002) (quoting Klamath, 532 U.S. at 8 9). 33 Malik, 2016 WL 3167307 at *3 (quoting Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975), and Casad, 301 F.3d at 1252). 34 , 981 F.2d 552, 557 (1st Cir. 1992) (internal quotations and citations omitted).

A document -and-take of the deliberative process 35 A 36

Although non-factual materials which state opinions or recommendations are clearly protected under the deliberative process privilege, compiled factual material or purely factual material contained in deliberative memoranda

policy-making processe process.

37 When making such determinations, the court should apply a flexible, 38 c. Balancing Process Even if a document is found to be both pre-decisional and deliberative, and therefore covered by the deliberative process privilege, the Court must still undergo a balancing hed by the harm likely to result from its disclosure. This balancing test is consistent with the approach

35 Malik, 2016 WL 3167307 at *3 (citing Dudman Commc'ns Corp. v. Dep't of Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987); quoting Abtew v. U.S. Dep't of Homeland Sec., 808 F.3d 895, 898- 99 (D.C. Cir. 2015)). 36 Stalcup v. C.I.A., 768 F.3d 65, 70 (1st Cir. 2014). 37 Malik, 2016 WL 3167307 at *4 (quoting Trentadue, 501 F.3d at 1227 (citing N.L.R.B., 421 U.S. at 150)). 38 Id. See also Pitman v. United States Citizenship & Immigr. Servs., No. 2:17-CV-00166-CW- EJF, 2018 WL 6725535, at *3 (D.



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Utah Dec. 21, 2018) (quoting Trentadue, 501 F.3d at 1229) because it reflects a choice as to which facts to incl

utilized by other judges in this District; for example, in Malik 39

and Mason, 40

as well as the balancing approach utilized by the Tenth Circuit in Lichtenstein. 41 This privilege is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is to be made flexibly on a case-by-case, ad hoc basis. Each time the deliberative process privilege is asserted the district court must undertake a 42

In Malik, the Court considered five factors

1) the relevance of the evidence sought to be protected; 2) the availability of 4) the role of the government in the litigation; and 5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. 43 misconduct, the privilege is routinely denied, on the grounds that shielding internal

39 Malik can be overcome if the party seeking discovery shows sufficient need for the otherwise privileged the disclosure against the Hinsdale v. City of Liberal, Kan., No. 96-1249-FGT, 1997 WL 557314, at *1 (D. Kan. Aug. 27, 1997)). 40 Mason, 869 F. Supp. at various factors weighing in favor and against disclosure to determine whether police files should be 41 Lichtenstein against the interests of those seeking disclosure). 42 Glossip, 2020 WL 7220789 at *2 (quoting In re Sealed Case, 121 F.3d 729 (D. C. Cir. 1997); see Malik, 2016 WL 3167307 at *8. 43 Malik, 2016 WL 3167307 at *8-9 (citing Sealed Case, 121 F.3d at 737-38; Cobell v. Norton, 213 F.R.D. 1, 5 (D.D.C. 2003); Dairyland Power Coop. v. United States, 77 Fed. Cl. 330, 338 (2007); Gambina v. Fed. Bureau of Prisons, No. 10-CV-02376-MSK-KLM, 2012 WL 4040335, at *3 (D. Colo. Sept. 12, 2012)).

government deliberations in this context do

44 3. Analysis This C in camera review of the emails in question confirm both portions of the email string are predecisional. The timing of the emails is significant both occurred during the PSU investigation in May 2019,

2019. Clearly email is from the PSU investigator, Lt. Bullock, specifically directed at soliciting Cpt.

Therefore, both emails are predecisional. However, only the May 29, 2019 email appears deliberative. Both emails are a part -and-take during the deliberative process decision was made. 45

Lt. Bullock 46



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But, the Court finds the initial May 24, 2019 email from Bullock to Hogelin was not truly deliberative, rather it simply contains factual information.

44 Glossip, 2020 WL 7220789 at *2-3 (quoting *In re Sealed Case*, 121 F.3d 729); see also Mason, 869 F. Supp. 45 See Malik, 2016 WL 3167307 at *3 (quoting *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 898-99 (D.C. Cir. 2015)). 46 *Stalcup v. C.I.A.*, 768 F.3d 65, 70 (1st Cir. 2014).

During the July 14, 2021 hearing, the Court posed this as a question to counsel. Defense counsel agreed the substance of the May 24, 2019 email would not necessarily be protected alone, but rather, Defendants were considering the email chain together as a whole. 47

. . . purely factual material contained in deliberative memoranda and severable from its context is not protected unless - 48

Applying a commonsense approach, the Court finds by redacting the May 29, 2019 email and producing only the May 24, 2019 email, the Plaintiffs would not have access to any greater information than was frankly explained in the briefing or oral argument on this topic. Although the May 29, 2019 email meets the criteria of predecisional and deliberative, and is therefore covered by the deliberative process privilege, this is not the end of the inquiry. The Court still must undergo a balancing process to decide whether the privilege is overcome by a sufficient showing of Plaintiffs need for the document. To do so, it analyzes the five factors listed above. (See *supra* Part II.C.2.c, p. 13.) First, the Court examines the relevance of the information sought to be protected. The information sought relates to the legality of the traffic stop of Plaintiff Bosire, which is one of the ultimate issues in this case. Therefore, the information is clearly relevant, and this factor weighs in favor of disclosure.

47 The July 14, 2021 motion hearing was recorded but a transcript was neither requested nor filed as of 48 Malik, 2016 WL 3167307 at *4 (quoting *Trentadue*, 501 F.3d at 1227) (other internal citation omitted).

Second, the Court surveys the availability of other evidence, and finds this factor weighs heavily in favor of maintaining the privilege. all of the factual information collected No. 170 at 18.) Even without knowing precisely what other evidence Plaintiffs possess, it is clear they have merited consideration under the confines of investigative reasonable suspicion regarding

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(ECF No. 167-1.) The in camera review of the May 29, 2019 email from Hogelin to Bullock, compared , withheld emails provide no additional information to Plaintiffs not otherwise available. Turning to the next factor, this litigation is serious, as it involves multiple plaintiffs and alleged civil rights violations by law enforcement officers a topic which can hardly be deemed insignificant.



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Additionally, it appears by KHP standards, the complaint, Superintendent and referred to the PSU for investigation. (See KHP Policy ADM-07, ECF

No. 170-3, Ex. 3.) The seriousness of the litigation and the issues involved weigh in favor of disclosure. The fourth factor of analysis is the role of the government in the litigation. Here, the government clearly plays a role. Although the Kansas Highway Patrol, as a state agency,

49 Superintendent Herman T. Joshua Bosire (Aug. 9, 2019) (attached as Ex. 1, ECF No. 167-1).

is not a named Defendant in this litigation; the processes of the agency are at issue. This factor weighs slightly in favor of disclosure. The final factor is both the weightiest and most difficult to discern. The Court is tasked with reviewing the possibility of future timidity by government employees who will be forced to recognize that their secrets are subject to disclosure. Plaintiffs contend both the Tenth Circuit and this District have previously questioned whether disclosure would have a chilling effect on governmental self-evaluation. (ECF No. 167 at 6.) And, Plaintiffs are mostly correct. In *Lichtenstein*, the Tenth Circuit opined police officers will absolutely refuse to cooperate in investigations because of a few

50 But this doubt did not ultimately result in full disclosure. In *Lichtenstein*, disclosure of the staff inspection bureau any opinions or policy decisions

51 And in the District of Kansas opinion of *Mason v. Stock*, the court relied in part on the *Lichtenstein* best, a and can, in some circumstances, serve to 52

However, the *Mason* court did not explain how disclosure would actually increase candor, and did not ultimately rely on this issue for its decision.

50 *Lichtenstein*, 660 F.2d at 437. 51 *Id.* at 438 (emphasis added). 52 *Mason*, 869 F. Supp. at 834 (citing *King v. Conde*, 121 F.R.D. 180, 192 93 (E.D.N.Y. 1988)).

Defendants contend their concern is not the information contained in the email chain itself, because the substance of any opinion contained therein has been disseminated through prior discovery of disclosure of the deliberative-process privileged records would impact future decision-

making. (ECF No. 170 at 19.) Defendants quote a recent 2021 Supreme Court case, *U.S. Fish & Wildlife Serv.*, 53 officials will not communicate candidly among themselves if each remark is a potential No. 170 at 20. 54

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55 After careful consideration and the advantage of in camera review, the Court finds is minimal and,



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in this instance, Although Plaintiffs do not have the benefit of review of the document, as noted above the Court is convinced Plaintiffs have the information they require. Without the need for the information, the Court is loathe to find such need outweighs the government interest. As found in the more recent 2016 District of Kansas opinion in Malik, is significant because of th 56

53 U.S. Fish & Wildlife Serv., 141 S. Ct. at 785. 54 Id. (citation and internal quotation marks omitted). 55 Dep't of the Interior v. Klamath Water Users Proective Ass'n, 532 U.S. 1, 8-9 (2001) (citations omitted). 56 Malik, 2016 WL 3167307 at *10.

III. Conclusion Therefore, for the reasons discussed in the July 14, 2021 hearing and as set forth herein (ECF No. 167) is DENIED in part and GRANTED IN PART, in that the email chain withheld by Defendants on the basis of deliberative process privilege will not be ordered produced in full. Defendants must produce to Plaintiffs the May 24, 2019 portion of the withheld communications because the email is found to not be deliberative. The May 29, 2019 portion of the email chain is found to be deliberative process privileged, because it is

Additionally, the schedule is amended as previously order (ECF No. 202) and will not be amended without a showing of good cause.

IT IS SO ORDERED.

Dated at Wichita, Kansas this 21st day of September 2021.

s/ Gwynne E. Birzer GWYNNE E. BIRZER United States Magistrate Judge

