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Hon. Dale E. Ho, United States District Judge
United States District Court for the Southern District of New York
40 Foley Square
New York NY 10007

Re. Letter motion to compel removal of redactions to administrative record, and discovery, *Abdo Doe et al. v. Noem, et al.*, No. 1:26-cv-2280 (S.D.N.Y.)

Your Honor:

Plaintiffs respectfully submit this letter motion to compel production of (1) unredacted versions of materials within the Certified Administrative Record (“CAR”) as filed on the docket, ECF 37,¹ and (2) extra-record discovery appropriate in this case due to the evidence of the Secretary’s pretextual decision to terminate TPS for Yemen and other countries.

There are unexplained redactions in three areas of the CAR: First, the entire substance of the Decision Memo from the USCIS Director to Secretary Noem, Bates 1-19, is redacted (except for the headings at the start, including the title “Decision,” and the Secretary’s signature approving the document at the end, Bates-19). Second, at Bates-245, a small block of text is redacted from a document showing the results of a search of the USCIS database that keeps records of criminal and terrorist violations, FDNS-DS NexGen. Third, a few bits of text and some email addresses of recipients (which redactions leave no information identifying the agencies for which these individuals work) are redacted from Bates-266-67, which is the terse email thread with a State Department official that purports to pass for “consultation” in this case.

Numerous Decision Memos have been made public in unredacted form in other TPS termination cases. On the public Supreme Court docket for *Mullin v. [Dahlia] Doe*, No. 25-1083, Joint Appendix, volume 2, pages 751-762 (Ex. A), there is a complete, fully unredacted version of the Decision Memo for Haiti in the public record. *See Miot v. Trump*, 1:25-cv-02471 (D.D.C.), Dec. 16, 2025 Min. Order (“The Court sees no basis for the redaction of [] the [Haiti] Decision Memorandum”). In fact, unredacted production of these memos has been ordered in TPS litigation for at least six countries just under the second Trump Administration. *See, e.g., NTPSA v. Noem*, 25-cv-05687 (N.D. Cal.), Dkt. No. 105 (holding DPP did not apply to Decision Memos for termination of TPS for Nicaragua, Nepal and Honduras); Ex. B (Honduras Memo); Ex. C

¹ We noted our objections at oral argument this morning: It is ordinarily incumbent on a party seeking to file materials under seal that that party offer a justification for any redactions from the public record—a requirement rooted in the First Amendment right of public access to judicial proceedings and litigation records.

(Nicaragua Memo); Ex. D (Nepal Memo); *CASA v. Noem*, 25-cv 1484 (D. Md.), Dkt. No. 143 (ordering production of mostly unredacted Decision Memos for Afghanistan and Cameroon); Ex. E (Afghanistan Memo); Ex. F (Cameroon Memo); *NTPSA v. Noem*, 25-cv-1766 (N.D Cal.), Dkt. No. 184 (ordering production of documents withheld under DPP, including Decision Memo); *see also Miot*, 25-cv-2471, Dkt. Nos. 84-2; 84-3; 84-5 (collecting unredacted Decision Memos produced in litigation during first Trump administration). The public disclosure of these memos has demonstrated that they reflect the final recommendation of the agency (USCIS) with respect to the termination of TPS for these countries.

Based on the markings visible on the top of the redacted USCIS Decision Memo in this case, and the government's comments at the argument today, it seems as if the government's rationale for the redaction of this entire document is an assertion of "deliberative process privilege" ("DPP"). But it is blackletter law that DPP does not apply to documents that embody a final agency decision once that final agency decision has been made. *United States Fish and Wildlife Service v. Sierra Club*, 592 U.S. 261, 268 (2021). Indeed, all six of the previously disclosed Decision Memos in other TPS cases are titled "Decision"; each ends with a page that can be simply signed by the Secretary to approve of its recommendation to terminate; and their contents are consistent with the idea that they reflect the final agency recommendation of USCIS with respect to the terminations. All this strongly indicates that the memos reflect the "final view" and decision of the agency on the status of each country's TPS, not the agency's "preliminary view" or "merely tentative position." *Sierra Club*, 592 U.S. at 268. Documents that "reflect a final agency decision and the reasons supporting it" are not covered under the deliberative process privilege. *Id.*

The fact that a Decision Memo includes USCIS's recommendation to the Secretary does not render it deliberative, as Department of Homeland Security (DHS) has by all appearances "adopted" the Decision Memo as DHS's final agency policy on the termination of TPS for Yemen—as it did in the other six country cases described above. Even where a document may have DPP status, it "can lose" its DPP "status if it is adopted, formally or informally, as the agency position on an issue." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The purpose of the privilege—encouraging candid discussion among government officials—is not served where a document is adopted as final agency policy. *NLRB v. Sears*, 421 U.S. 132, 161 (1975). "First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure]." *Id.* Here, the Secretary signed and adopted the aptly-titled "Decision" Memo as the "agency[']s position on [the] issue" of terminating TPS for Yemen. *Coastal State Gas*, 617 F.2d at 866.

Finally, even if the Court finds the privilege is properly invoked, the Court should order disclosure of the unredacted Decision Memo. DPP is a "qualified" privilege which may be overruled if the interests in disclosure outweigh the interests in privacy. *Dorce v. City of New York*, 2023 WL 7545345, at *4 (S.D.N.Y. Nov. 14, 2023). "Courts must balance an agency's interest in nondisclosure against a litigant's need for the information and, to some extent, the public's interest in open government when deciding whether to uphold the privilege. Thus, the privilege may

be inapplicable where the agency’s deliberations are among the central issues in the case.” *Greater New York Taxi Ass’n v. City of New York*, 2017 WL 4012051, at *9 (S.D.N.Y. Sept. 11, 2017) (cleaned up). Courts in this circuit apply a five-part balancing test to evaluate whether the deliberative process privilege should be overruled: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the “seriousness” of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Id.* Each of these factors counsels in favor of disclosure here:

(i) The Decision Memo, the key document which contains the agency’s reasoning in support of termination, is almost certainly extremely relevant to Plaintiff’s claims that the Secretary failed to conduct an objective country-conditions review and failed to comply with the inter-agency consultation requirement required by 8 U.S.C. § 1254a(b)(3)(A). The agency’s explanation of the factors and sources considered in the Secretary’s decision is necessary for Plaintiffs to assess whether the decision was made in compliance with statutory requirements. For instance, the presence (or absence) of references to consultation with the State Department in the Decision Memo would be probative of this central element of Plaintiffs’ claims.

(ii) Little other evidence of the factors considered by the Secretary or her decision-making process is available. The Decision Memo, which explains and memorializes the reasoning behind the Secretary’s decision, is the most complete record of the factors considered by the Secretary in deciding to terminate TPS for Yemen—there is no alternative document that serves a similar function. And there are a limited number of USCIS- or DHS-created documents in the CAR, *see* ECF 37-1 (CAR index), none of which give similar insight into the Secretary’s decision-making process.

(iii) The seriousness of the litigation, which could ultimately result in more than 3000 Yemeni TPS holders being stripped of their status and subject to deportation to an unsafe country, strongly supports disclosure.

(iv) When the government’s decision-making process is at the core of a Plaintiff’s claims, as it is here, courts recognize that the fourth factor favors disclosure. *See e.g., Dorce*, 2023 WL 7545345, at *5.

(v) Finally, given that the USCIS Decision Memo reflects the final decision of the Secretary, *see supra*, “the risk of chilling agency deliberations is limited because the views expressed in [the withheld document] were incorporated in the agency’s justifications of the ... decision.” *New York v. Wolf*, 2020 WL 3073294, at *4 (S.D.N.Y. June 10, 2020). Even if that were not the case, “[t]he small possibility that government employees could be chilled in their internal deliberations is outweighed by the other factors, which balance in favor of disclosure” *Ciaramella v. Zucker*, 2021 WL 4219501, at *5 (S.D.N.Y. Sept. 16, 2021).

Plaintiffs have no way to tell what the redacted material in Bates-245 might consist of; hopefully the Court can resolve the legitimacy of the redactions by reviewing that information in unredacted form *in camera*.²

As to the redactions in Bates 266-67, the government could easily substitute for the email addresses it claims to have redacted the actual identities of the individuals named. (It is commonplace for courts to meet a government demand to redact material with an order to provide an adequate substitute that still protects the interest at stake—here, presumably, the interest in keeping the email recipients from receiving unwanted emails.) Finally, the block of text redacted at Bates-267 has no surrounding context that might reveal what it contains or why it is redacted. As the Court reviews that material *in camera*, it must keep in mind that it is the government’s burden to justify such redaction.

* * *

Time limitations at today’s hearing meant that Plaintiffs could not raise the issue of additional extra-record discovery, which the Court suggested would be a topic for discussion, *see* Order, ECF 41. We reviewed the extra-record discovery emails filed by the *Miot* plaintiffs on the Supreme Court docket that you noted in your order. They are strongly suggestive of pretext—indicating that lower-level staffers were pressured by their supervisors to make claims that Haiti TPS was a “pull factor” drawing in immigrants despite a complete absence of empirical evidence for that assertion. Yet those emails were not included in the CAR in that case.

Generally speaking, APA claims are decided on the CAR alone. But there are narrow exceptions to this general rule, permitting extra-record discovery, including in cases where plaintiffs make a showing of agency “bad faith or improper behavior,” that is to say, pretext. *Dep’t of Commerce v. New York*, 588 U.S. 752, 783-84 (2021). *Cf.* Order, *NTPSA v. Noem*, Case No. 3:25-cv-1766 (N.D. Cal. May 2, 2025), ECF 129 at 3-7. Plaintiffs have already adduced in their Complaint adequate evidence of bad faith and improper behavior on the part of DHS and the Secretary to justify extra-record discovery. As such, Plaintiffs respectfully request that the government be ordered to produce:

- All communications by or with DHS since January 17, 2025 regarding whether to terminate the TPS designation for Yemen, and
- All documents in the custody of DHS and communications by or with DHS since January 17, 2025 about DHS press releases or internal DHS memoranda concerning

² As Plaintiffs noted during the hearing (and the late Professor Charles Alan Wright frequently reminded readers of his treatise), *in camera* need not mean *ex parte*. In this dispute or similar future redaction disputes, Plaintiffs’ counsel can be made subject to a protective order, and can review the relevant documents behind closed doors for use in sealed filings in support of the litigation. If the Court decides, after review, that any of the redacted matter cannot be made public, Plaintiffs intend to seek access to the unredacted materials subject to an appropriate protective order.

terminating TPS designations for Yemen, including any memoranda or guidance about how to respond to questions from media or TPS holders about such decisions.

Plaintiffs believe there is sufficient evidence before the Court to resolve the pending Motion to Postpone Agency Action. However, if the Court seeks to complete a picture of the agency's deliberations as possible before deciding the Motion, we believe it would be reasonable to order the government to produce the above materials as probative of the government's assertion that the decision to terminate TPS for Yemen was neither pretextual nor motivated by discriminatory animus.

Respectfully submitted,



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Counsel for Plaintiffs