I'IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Adam Steele, Brittany Montrois, and Joseph Henchman, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

United States of America,
Defendant.

Civil Action No.: 1:14-cv-01523-RCL

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

Defendant, the United States of America, hereby submits this brief in opposition to the Plaintiffs' Motion to Compel dated February 4, 2022, seeking production of all information the United States withheld based on the deliberative process privilege.

This case was remanded to determine whether the amount of the PTIN fee charged by the Internal Revenue Service ("the Service" or "the IRS") is reasonable and consistent with the Independent Offices Appropriations Act. *Montrois v. United States*, 916 F.3d 1056, 1068 (D.C. Cir. 2019). The D.C. Circuit already determined, as the law of this case, the Service can charge "tax-return preparers a fee to obtain and renew PTINs," and the "decision to charge the fee was not arbitrary and capricious." *Id.* at 1058, 1068. The costs to provide a PTIN include more than the cost of generating the number itself.

Plaintiffs ask the Court to undertake a document-by-document review of the 1,362 documents for which the Service asserted deliberative process privilege without explaining how the requested information relates to the remaining issues in the suit. *See,*

generally, Doc. No. 163. The D.C. Circuit remanded this case for the Court to determine whether the amount of the PTIN fees is reasonably related to the costs of administering the program to the Service, not the considerations of the Service in implementing the PTIN program. *Montrois*, 916 F.3d at 1066–68. The D.C. Circuit already answered that latter question. The Service's deliberations on that topic are not only privileged, they are also not relevant.

With respect to the issues the Court will decide on remand, a court's review is narrow. *Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985). The fee schedule is "entitled to more than mere deference or weight." *Id.* (quoting *Am. Trucking Ass'n, Inc. v. United States*, 627 F.2d 1313, 1320 (D.C. Cir. 1980). The fees should be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Am. Trucking Ass'n, Inc.*, 627 F.2d at 1320–21. In sum, Plaintiffs cannot ask this Court to substitute the Plaintiffs' or the Court's judgment for that of the Service. *Cent. & S. Motor Freight Tariff Ass'n, Inc.*, 777 F.2d at 729.

Not to be deterred by this established case law, Plaintiffs served the United States with 85 Requests for Production, seeking everything in the United States' possession related to the PTIN program, Return Preparer Office, and the Service in general. For example, Request for Production No. 23 requested "[a]ll documents relating to the decision to utilize a one-year PTIN renewal period and the decision not to use a three-year period," while Request for Production No. 30 requested "[a]ll documents relating to action taken, or proposed or possible action to be taken" with respect to return preparers without a PTIN, and Request for Production No. 40 requested "[a]ll documents showing

any analysis or discussion of charging a fee to tax return preparers for the issuance of PTINs prior to 2010,"[1] which was before the PTIN program was implemented.

The Service has produced over 41,000 pages of documents, along with over 176,000 pages of documents produced by Accenture, over 4,300 pages of documents produced by Booz Allen Hamilton, and over 6,800 pages of documents produced by MITRE, all of which demonstrate the cost to the government of the PTIN program.[2] Both Plaintiffs' discovery requests and their Motion to Compel seek information beyond the cost of the PTIN. The Plaintiffs requests seek information about the Service's internal discussions and deliberations in planning and establishing the Return Preparer Office. Given the issue before this Court, Plaintiffs' attempts to examine all deliberations and discussions of the PTIN implementation by the Service cannot result in the advancement of a legally relevant claim. For these reasons, the requested discovery should be denied.

Plaintiffs may not demand that the Court conduct an *in camera* examination of the withheld materials solely "for purposes of verifying that the content of the documents

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[1] These examples are not an exhaustive list of Plaintiffs' requests in response to which the Service asserted the deliberative process privilege.

[2] The Service also complied with Plaintiffs' numerous informal discovery requests, many of which had no relevance to this case; spent over 30 hours to find and reformat metadata to provide Plaintiffs with a list of custodians after Plaintiffs agreed to self-collection of the materials which they should have known would alter the metadata; voluntarily drafted several declarations of the directors of the Return Preparer Office, including exhibits, to help guide Plaintiffs' discovery requests; produced at least 16 different Service employees and former employees to testify at depositions; worked with Plaintiffs to ensure that they could take Rule 30(b)(6) depositions of Booz Allen Hamilton and Accenture; and sat through hours of depositions containing questions completely irrelevant to the topics at hand (i.e., travel vouchers).

withheld is what the Government says it is." *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 332 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967) (*per curiam*). Exercising his lawfully delegated authority, Richard Goldman has submitted a declaration to support the Service's deliberative process privilege claims.[3] Goldman's declaration describes the nature of the information withheld and the bases of the privilege claims in exacting detail. Exhibit D, *Goldman Decl.*, ¶¶ 8–12. To overcome the government's well-substantiated deliberative process privilege claims, the "necessity the moving party must show is considerably more than a demand that someone other than his adversary look at the materials in question to make certain that statements as to their character are accurate." *Carl Zeiss Stiftung*, 40 F.R.D. at 332.

I. The United States Properly Claims the Deliberative Process Privilege Over the Withheld Information.

Invoking the deliberative process privilege, the United States has withheld certain information sought by the Plaintiffs. Because of the voluminous nature of Plaintiffs' requests, the Service's assertion of over 1,300 instances of deliberative process privilege shows restraint and a careful and limited use of the privilege. The United States produced thousands of pages while only withholding a small portion of them under deliberative process privilege. Those claims of privilege are necessary to protect tax administration or drafts of the final actions, and those final actions were produced to

[3] As noted below, Plaintiffs do not identify which specific entries in the privilege logs they challenge, identifying instead "examples." Doc. No. 163. Despite repeated requests from the United States for Plaintiffs to identify specific challenges, Plaintiffs have merely responded by challenging all deliberative process privilege claims.

Plaintiffs. Plaintiffs deposed numerous witnesses in over 100 hours of depositions with only minimal objections based on deliberative process.

A. Plaintiffs have not adequately identified which privilege log entries they challenge.

Plaintiffs repeatedly argue that *all* of the government's log entries were insufficient and demand the government produce *all* information withheld under deliberative process privilege. Exhibit A, *Letter from Plaintiffs dated July 2, 2021*; Exhibit B, *Letter from Plaintiffs dated December 6, 2021*; Exhibit C, *Letter from Plaintiffs dated January 25, 2022*; Doc. No. 163. The United States, in turn, has repeatedly requested that the Plaintiffs identify specific log entries, to no avail. Doc. No. 163-5; Doc. No. 163-6; Doc. No. 163-7.

Plaintiffs' assertion that *all* privilege log entries are insufficient is, at best, disingenuous. Although Plaintiffs are seeking all 1,362 items, they identified exemplar entries in their previous correspondence to the United States. Exhibit A, *Letter from Plaintiffs dated July 2, 2021*; Exhibit B, *Letter from Plaintiffs dated December 6, 2021*; Exhibit C, *Letter from Plaintiffs dated January 25, 2022*. In their letter dated July 2, 2021, Plaintiffs identified the following eight documents[4] in their challenges to the United States' deliberative process claims: USA-0007868, USA-0008213, USA-0013035, USA-0013102, STE-00026721, USA-CTRL-00052027, BAH_0000643, and BAH_0003163. *Compare* Exhibit

[4] In their letter, Plaintiffs also challenged "Redacted Entry No. 19," however, that does not appear on the exhibits Plaintiffs filed with the Court. *Compare* Exhibit A at 3, "Redacted Entry No. 19" *with* Doc. No. 163-2 at 5. The United States redacted this document and withheld portions under law enforcement privilege, which Plaintiffs do not challenge here. Doc. No. 163.

A at 3 ("Redacted Entry No. 153," "Redacted Entry No. 170," "Redacted Entry No. 272," "Redacted Entry No. 275," "Withheld Entry No. 3," "Withheld Entry No. 283") *with* Doc. No. 163-2 at 5, 6, 9, and 14; *Compare* Exhibit A at 3 ("BAH Withheld Entry No. 40," "BAH Withheld Entry No. 523") *with* Doc. No. 163-3 at 4 and 34. In their letter dated December 6, 2021, Plaintiffs further identified the following seven documents in their challenges to the United States' deliberative process claims: BAH_000007, BAH_0000655, BAH_0001041, BAH_0001360, BAH_0001426, BAH_0002529, and BAH_0002713. Exhibit B at 2–3. Finally, in their letter dated January 25, 2022, Plaintiffs also identified the following eleven documents in their challenges to the United States' deliberative process claims: MITRE-006682, MITRE-000550, MITRE-000566, MITRE-001014, MITRE-001035, MITRE-001332, MITRE-002071, MITRE-002074, MITRE-003082, MITRE-003090, and MITRE-003224. Exhibit C at 2. The United States is providing the Court with support for these examples through the declaration of Richard Goldman to support the Service's claim of deliberative process privilege over these documents. Exhibit D, *Goldman Decl.*

1. *The United States can use repeated words and phrases in its claims for deliberative process privilege.*

Plaintiffs appear to challenge the Government's privilege descriptions, calling them "boilerplate." Doc. No. 163 at 5. But simply because a description is repeated does not mean that it is "boilerplate,"[5] and Plaintiffs cite no law suggesting that repeated

[5] Similarly, though Plaintiffs object to the United States using repeated language in its responsive letters, the letters sent by the Plaintiffs all include the same repeated arguments, swapping out only new examples.

privilege descriptions are insufficient. Plaintiffs' discovery requests all information related to the Service's *decisions* on implementing and administering the PTIN program. Consequently, responsive documents on the privilege log are *necessarily* part of the process in which government decisions and policies were formulated. *See Dep't of the Interior v. Klamath Waters User Prot. Ass'n*, 532 U.S. 1, 8–9 (2001). To explain to Plaintiffs, in each of its 1,362 privilege claims, that the withheld information is responsive to their discovery requests is unnecessary.[6]

But practically speaking, the United States is claiming 1,362 instances of deliberative process privilege. There are not 1,362 synonyms to describe "draft" or "deliberations" or "risks" or any of the other words Plaintiffs challenge. Many of these documents are the same thing in different versions or on different dates.[7] The United

[6] Moreover, the privilege description is not the only information Plaintiffs have available. For example, Plaintiffs seem to challenge the log entry related to BAH_0001360. Exhibit B at 3. But Plaintiffs know that the document was provided in response to their subpoena to Booz Allen Hamilton. Doc. No. 163-3 at 56. They also know that the document originated with Booz Allen Hamilton, who was contracted to assist the Service as a consultant in implementing the PTIN. *Id.* The United States explained to the Plaintiffs that the deliberative process privilege extends to outside consultants. *Bloch v. Dep't of Def.*, 414 F. Supp. 3d 6, 27 (D.D.C. 2019). They also know that the document is dated February 17, 2012. Doc. No. 163-3 at 56. And the privilege log confirms that this document memorialized a discussion of potential risks in connection with agency decision-making. *Id.* Plaintiffs incorrectly suggest that the United States should specify what those risks are, or what decisions were being discussed, all of which would thwart the deliberative process privilege. A discussion of potential risks is both (1) pre-decisional and (2) deliberative. *See U.S. Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 222 F. Supp. 3d 38, 42 (D.D.C. 2016).

[7] For example, on the United States' privilege log of redacted documents, there are entries for USA-0007868, USA-0007871, USA-0007880, USA-0007922, USA-0007946, USA-0007949, and USA-0008027. Doc. No. 163-2 at 5. True, the privilege description for each of these redactions is the same. *Id.* Yet Plaintiffs neglect to mention that these are all

States has used the same description to redact the same type of information, and had Plaintiffs even conducted a cursory review of the redacted documents, the Plaintiffs would recognize this. To argue that the United States cannot use repeated language to describe these privilege claims is absurd and insincere. There are not ten different ways to effectively describe discussions related to budgetary decisions, and the United States need not act as a thesaurus to properly claim a privilege when the simplest words will do.

Plaintiffs also seem to argue that the United States modify its privilege log to state that the withheld information (3) does not memorialize or evidence the agency's final policy; (4) was not shared by the public; and (5) cannot be produced in a redacted form. This request could have been communicated to the United States before filing a motion. To be clear, all the information withheld and identified in the privilege logs for deliberative process privilege does not memorialize or evidence the Service's final policy, was not shared with the public, and cannot be produced in redacted form.

2. *The United States is not required to identify the final decision when claiming deliberative process privilege.*

Plaintiffs appear to argue that the privilege logs are insufficient because the United States did not identify a final agency decision. This is also incorrect. "A document is not

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monthly briefing reports from the Strategy & Finance Office for the months April 2013, May 2013, August 2014, August 2014 (a duplicate), March 2015, April 2015, and March 2017, respectively. Plaintiffs should be aware of this because the documents were all produced with minimal redactions. On each monthly briefing report, there is a heading for "Budget issues," and under each "Budget issues" heading, the United States redacted a single bullet entry. Nothing further is redacted on the documents.

final solely because nothing else follows it. . . . some ideas are discarded or simply languish." *U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021). Documents which leave agency decisionmakers "free to change their minds" do not reflect an agency's final decision, yet they are still protected. *Id.* at 786–88. As Justice Kavanaugh stated, "There may be no final agency document because a draft died on the vine." *Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 463 (D.C. Cir. 2014). "But the draft is still a draft and thus still pre-decisional and deliberative." *Id.* What matters is whether the document "communicates a policy on which the agency has settled." *Sierra Club, Inc.*, 141 S. Ct. at 786. The United States need not identify a final agency decision to claim deliberative process privilege. *Id.*

3. *The United States has produced sufficient information, in the document productions and privilege logs, for Plaintiffs to determine that the withheld information is privileged by deliberative process.*

Plaintiffs do not need more information to determine that the withheld information is protected by deliberative process. Because Plaintiffs' brief cites multiple times to *Cobell*, they are (or should be) aware that "even factual information may be protected if the manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are inextricably intertwined with the policymaking process." *Cobell v. Norton*, 213 F.R.D. 1, 6 (D.D.C. 2003). They also have sufficient information in the hundreds of thousands of pages of discovery and privilege logs provided by the United States to conclude that, yes, these drafts and discussions are deliberative process. Plaintiffs are instead asking the Court to review, document-by-document, the United States' 1,362 claims of deliberative process privilege to verify that

the documents are what the United States says they are. This is both improper, and a waste of judicial resources. *See, e.g.*, *N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 308 (D.D.C. 2009) ("*In camera* review, because of the burden it places on the Court, should be the exception, and not the norm."). To expand upon the voluminous information already provided to the Plaintiffs would foil the claims of deliberative process privilege.

Plaintiffs argue judicial review is needed because they cannot determine whether the withheld information contains a presentation of objective facts. Doc. No. 163 at 6. Also, Plaintiffs argue that they are unable to determine whether the documents related to discussions of responses to GAO or TIGTA inquiries "were created to assist in GAO's or TIGTA's deliberative process or were independently part of the IRS's deliberative process."[8] *Id.*

The United States provided sufficient information from which Plaintiffs can put the withheld entries in context and determine that the material withheld does not include "a presentation of objective facts." The documents produced and the explanations in the privilege logs demonstrate that the withheld materials are not unentangled objective facts.[9] Indeed, if the United States were to provide the type of information they are requesting, the privilege would be thwarted.

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[8] Plaintiffs did not include these questions in previous correspondence with the government. Had the Plaintiffs raised these issues, the government could have addressed these concerns directly prior to Plaintiffs' motion.

[9] Plaintiffs point to several entries in the MITRE privilege log, none of which were previously identified in Plaintiffs' correspondence. *Compare* 163 at 6 "Entries 160, 170-172, 182" *and* 163-4 at 7 *with* Exhibit C, *Letter from Plaintiffs dated January 25, 2022*. Plaintiffs neglect to mention to the Court that MITRE produced several documents related to a

The challenge to the entries related to GAO and TIGTA demonstrates this point.[10] The processes for GAO and TIGTA audits are public information, as is the process for Service responses to these inquiries. *See*, https://www.irs.gov/irm/part11/irm_11-051-001. Documents describing this process were also provided to Plaintiffs, in unredacted form, by the United States. During a GAO or TIGTA audit, the Service has several opportunities to submit formal responses to GAO or TIGTA. *Id.* Those responses, understandably, require collaboration by Service employees, including discussions and deliberations over the drafts. *Id.* The final responses provided to GAO or TIGTA were not withheld in discovery, and Plaintiffs have those memorandums.

Plaintiffs' reliance on *Cause of Action Inst. v. Exp.-Imp. Bank of the U.S.*, to support their position is misplaced. That the case analyzes whether documents exchanged between GAO, a third party, and Congress are considered "intra-agency memoranda"

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project named "Fact Pack," including several memos released in full describing the project and identifying the title and date of the final project. Had Plaintiffs reviewed the information provided to them before filing their motion, they would have known this. They would also be able to determine from the privilege log that Entry 160 is a draft PowerPoint presentation created before the final version of the project. Doc. No. 163-4 at 7. Similarly, the privilege log informs Plaintiffs that Entries 170–72 and 182 are emails related to this project, ahead of its completion, which the United States has indicated contained comments among employees working on drafts of the project. *Id.* Again, had Plaintiffs reviewed the information, they would know that the individuals on the email chain were involved in developing the "Fact Pack" project. *Id.*

[10] For starters, most of these documents are emails, and Plaintiffs can see that the senders and recipients are Service employees. Plaintiffs cannot credibly claim they are unable to determine whether the documents "were created specifically to assist in the deliberative process of an entity other than the withholding entity" when the documents were not distributed to GAO or TIGTA.

for purposes of the Freedom of Information Act (FOIA). *Cause of Action Inst. v. Exp.-Imp. Bank of the U.S.*, 521 F. Supp. 3d 64, 89–90 (D.D.C. 2021). Specifically, because GAO is not an agency for purposes of FOIA, *Cause of Action Institute* analyzed whether the documents were provided to Congress to aid in congressional deliberations. *Id.* Conversely, the case before this Court does not involve a FOIA request, does not question whether the Service is an agency, and does not relate to congressional deliberations.

B. The "2012 User Fee Cost Model" is protected by deliberative process privilege.

Plaintiffs' motion also includes a request to compel the United States' production of what Plaintiffs call a "2012 user-fee cost model." Doc. No. 163 at 7. Plaintiffs do not contest the sufficiency of the United States' privilege description, rather they disagree that the model constitutes deliberative process. *Id.* Yet, Plaintiffs' own motion reveals that this information is subject to deliberative process privilege. *Id.* As Plaintiffs correctly note, the United States produced the final cost models from the 2013, 2015, and 2017 biennial user-fee reviews. *Id.* These formal reviews represent the final agency decisions, which Plaintiffs do not contest. The material Plaintiffs refer to as the 2012 cost model, in contrast, was not final. Plaintiffs' contention otherwise is flawed for several reasons.

First, Plaintiffs misrepresent the testimony of Christopher Kurtz. *Id.* ("The individual who prepared the 2013 biennial user-fee review testified that the model "inherited" data or included data "carried over" from the 2012 cost model.") Mr. Kurtz said that the *graphs* were "inherited," not the *data*, and that the *budget exhibits* were "carried over," again, not the *data*. Doc. No. 163-8 at 161:18 and 227:1. Plaintiffs have all

this information because the United States produced the final 2013 biennial user-fee review. *Id.*

Second, Plaintiffs misrepresent the case law. *Compare* Doc. No. 163 at 7 *with Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003). Whether or not the information was eventually used in the final decision does not matter in determining that the information in a pre-decisional form is in fact pre-decisional. *Cobell*, 213 F.R.D. at 4. Information is pre-decisional if it was prepared before the agency decision or policy and prepared to assist the agency in making a decision or policy. *Id.* Plaintiffs' own motion proves that the 2012 information they seek pre-dates the agency decision, as it was used to create the 2013 cost model. Doc. No. 163 at 7. Furthermore, nothing in Mr. Kurtz's testimony suggests that the 2013 cost model fully adopts any of the information from the 2012 document. *See, generally,* Doc. No. 163-8. In fact, Mr. Kurtz's testimony establishes that the preliminary 2012 analysis was a recommendation by Booz Allen Hamilton, which the Service used in creating the 2013 cost model, making this information clearly deliberative. *Id.*; *Cobell*, 213 F.R.D. at 5 ("the statement or document must have been 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."). All this information was conveyed to the Plaintiffs when they requested the document. Doc. No. 163-9.

C. <u>The United States is not required to produce declarations to Plaintiffs to properly claim deliberative process privilege.</u>

Plaintiffs incorrectly seem to argue that because the United States did not produce a declaration for each of the 1,362 contested claims of deliberative process privilege, that

privilege has not been properly claimed. Again, not true. While agencies commonly rely on a combination of privilege logs and declarations from agency officials, declarations are not mandatory. *See Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 267 F.R.D. 1, 4 (D.D.C. 2010) (reviewing a claim of deliberative process privilege based on the privilege logs alone); *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 307 (D.D.C. 2009) (same); *A.N.S.W.E.R. Coalition v. Jewell*, 292 F.R.D. 44, 50–51 (D.D.C. 2013) (relying only on the agency's privilege log to determine documents were protected by the law enforcement privilege). The privilege logs produced here by the United States include descriptions which explain "what the documents are and how they relate to the [agency] decision," as required. *Ascom Hasler Mailing Sys., Inc.*, 267 F.R.D. at 4.

The United States also objected to all of Plaintiffs' requests as overbroad and unduly burdensome, as they have requested, in many instances "all documents" related to a specific topic within the Return Preparer Office, some dating prior to 2010. Such open requests would impose an undue and disproportionate burden on the United States to prepare individual declarations over the thousands of documents the United States could reasonably be expected to possess after over a decade, particularly when most of these documents are not relevant to the issue this Court must decide. *See Dell, Inc. v. DeCosta*, 233 F. Supp. 3d 1, 3–4 (D.D.C. 2017) (finding that a subpoena requesting "all documents" imposed an undue and disproportionate burden on the defendants to prepare a mere *privilege log* to claim privilege over thousands of documents).

Even so, the United States recognizes its obligation to provide the Court with "a specific articulation of the rationale supporting the privilege," and has thus attached the

declaration of Richard Goldman to support the Service's claim of deliberative process privilege. *See U.S. Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 222 F. Supp. 3d 38, 42 (D.D.C. 2016). This declaration formally asserts the deliberative process privilege over the documents identified in Plaintiffs' correspondence. Exhibit D, *Goldman Decl.*

II. The United States has not Waived Deliberative Process Privilege.

Plaintiffs have no legal argument to suggest that the United States has waived its claims of deliberative process privilege. Plaintiffs rely solely on the holding in *Pension Benefit Guar. Corp.* to argue that the United States has waived privilege, yet the only time any variation of the word "waive" is mentioned is when the court is restating the parties' arguments. *See U.S. Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 222 F. Supp. 3d 38, 42 (D.D.C. 2016). The Court granted the motion to compel discovery from the Department of Treasury, but not because the privilege was waived. *Id.* at 44–45.

Deliberative process privilege *can* be waived, but any waiver must be explicit and should not be lightly inferred. *In re Sealed Case*, 121 F.3d 729, 740–41 (D.C. Cir. 1997) (quoting *SCM Corp. v. United States*, 473 F. Supp. 791, 796 (Cust. Ct. 1979) and citing *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)). When the government waives privilege for a document protected by deliberative process, the government "only waives these privileges for the document or information specifically released, and not for related materials." *Id*. (citations omitted). Courts have permitted the government to voluntarily disclose privileged material without fear of exposing other, more sensitive documents. *Id.* Plaintiffs concede that the United States has claimed deliberative process privilege to

withhold this information and have not alleged the information was otherwise released. Doc. No. 163.

III. Plaintiffs Have Failed to Establish that the Need for Disclosure Outweighs the Protection of the Deliberative Process Privilege.

Deliberative process privilege is qualified, and therefore once the Court determines that deliberative process privilege applies, the requesting party must establish that "the private need for disclosure outweighs the public interest in non-disclosure." *In re Anthem, Inc. Data Breach Litigation*, 236 F. Supp. 3d 150, 159 (D.D.C. 2017) (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)). In balancing those interests, the Court considers (a) the relevance of the evidence sought to be withheld, (b) the availability of other evidence, (c) the seriousness of the litigation, (d) the role of the government in the litigation, and (e) the possibility of future timidity by government employees. *Id.* Plaintiffs neglected to even mention the necessity to balance these interests, much less meet their burden of proving that their need for disclosure of the information would outweigh the public interest in non-disclosure. Doc. No. 163. As the first and fifth factors weigh heavily in the United States' favor, and the remaining three factors lend no support to the Plaintiffs, the Court should sustain the United States' deliberative process privilege claims.

A. The materials sought to be withheld are irrelevant to the merits of this litigation because the deliberations and internal discussions of the Service provide no evidence for how much the PTIN program costs.

As discussed above, the only relevant question before this Court is whether the amount of the PTIN fee is reasonable and consistent with the Independent Offices

Appropriations Act. *Montrois v. United States*, 916 F.3d 1056, 1068 (D.C. Cir. 2019). Plaintiffs' attempt to review and dissect all discussions leading up to the establishment of that fee has no relevance to whether the fee unreasonably exceeds the costs to the Service.

B. Even though the materials sought by Plaintiffs are in the Service's sole control, this factor carries little to no weight in the determination because such is true for all cases involving deliberative process privilege.

Again, Plaintiffs do not even address this factor, much less assert that no other source could provide the information protected by the deliberative process privilege. Doc. No. 163. To the extent that Plaintiffs seek information related to whether the amount of the PTIN fee unreasonably exceeds the costs to the Service to issue and maintain PTINs, the United States has produced thousands of final documents demonstrating these costs.

If, instead, Plaintiffs seek insight into the internal discussions among Service employees, it is true that those materials are within the Service's sole control. But this is necessarily true in every case in which the Government claims deliberative process privilege. Consequently, this factor alone carries little or no weight in determining whether disclosure is required.

C. No high public interest is at stake; only self-interest fuels Plaintiffs' demand for the withheld materials which in any event are not relevant to serve those goals.

This litigation and the issues involved are serious, particularly as over $300 million is at stake. But financially speaking, the Plaintiffs' interest in recovering the $300 million exactly equals the United States' interest in retaining that revenue.

Nor is there any public purpose to motivate Plaintiffs' demand for deliberative information. True, Plaintiffs represent a large class of return preparers which might *seem* as though disclosure would benefit the public. But unlike in other contexts where courts have found a public interest in the information, such as antitrust cases, the requested information would have no public purpose. *See, e.g.*, *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 771 (D.C. Cir. 1965) (the "fact that this is an antitrust case is relevant," as "the informer in antitrust matters has material incentives to give information, in addition to his general concern for the public welfare"). Plaintiffs' demand for the Service's deliberative materials would not affect the public at large.

D. The role of the Service in the litigation is immaterial, as Plaintiffs have raised no plausible charge of government misconduct.

Though the United States is a party to the litigation, nothing about the IRS's role in this litigation even remotely suggests a basis for overruling the deliberative process privilege. "Here, unlike the situation in some cases," Plaintiffs have not alleged and thus raise no plausible "charge of governmental misconduct or perversion of governmental power." *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 329 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967) (*per curiam*) (citing *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 401-03 (E.D. Mich. 1965), *aff'd*, 377 F.2d 496 (6th Cir. 1967)). At most, Plaintiffs merely suggest that the Service may have considered less expensive options for providing PTINs to return preparers.

This is neither an allegation of government misconduct nor the applicable test for reviewing the amount charged for a PTIN. By arguing that the Court should open up

this type of review, Plaintiffs invite a flood of litigation requesting Courts conduct an in-depth accounting of all user fee revenue and funding, from the fees charged to enter national parks to the fees charged to issue passports, from the fees charged to apply for a patent to the fees charged to rent a picnic area at Fort Dupont Park for the day.[11] The D.C. Circuit already determined that the Service acted within its authority to charge a fee for the PTIN program, and that the Service's decision to charge a fee was not arbitrary and capricious. *Montrois v. United States*, 916 F.3d 1056, 1058 (D.C. Cir. 2019). The discussions and deliberations by employees are irrelevant to the ultimate questions before this Court: a determination of whether the amount of the PTIN fee unreasonably exceeds the cost to the Service of administering the PTIN program. *Id.* Nothing about the Service's role here suggests a basis for overruling the deliberative process privilege.

E. Compelled production of the Service documents protected by the deliberative process privilege would inhibit the frank and honest discussion of policy matters, and thus would adversely affect the quality of the Service's decisions and policies. Sustaining the Service's deliberative process claims would avert this chilling effect.

Courts have long recognized that compulsory disclosure of pre-decisional intra-agency deliberations has a chilling effect on governmental policy formulation and decision-making. To this end, the deliberative process privilege "protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions." *Accord. Jud. Watch, Inc. v. U.S. Dep't of Justice*, 487 F.

[11] This is not an exhaustive list of the user fees charged by the United States. In 2019 alone, while the Service was not collecting a fee for providing PTINs to return prepares, the executive branch agencies of the United States collected approximately $105 billion in dedicated user fee revenue. https://www.gao.gov/assets/gao-21-104325.pdf.

Supp. 3d 38, 45 (D.D.C. 2020), *reversed and remanded on other grounds*, 20 F.4th 49 (D.C. Cir. 2021). As Justice Reed explained:

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. . . . There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 945–46 (Ct. Cl. 1958); *see also Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 207 (D.D.C. 2010) ("the purpose of the deliberative process privilege . . . encourage[s] the frank discussion of legal and policy issues by ensuring that agencies are not forced to operate in a fishbowl") (internal citations and quotations omitted).

Further, the deliberative process privilege "protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds." *Judicial Watch, Inc.*, 487 F. Supp. 3d at 45 (quoting *Machado Amadis v. Dep't of Justice*, 388 F. Supp. 3d 1, 18–19 (D.D.C. 2019).

Thus, courts agree that "the cerebrations and mental processes of government officials, leading to admittedly proper exercises of power, can never be a factor in a judicial proceeding and, therefore, need not be disclosed." *See, e.g.*, *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 329 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967) (*per curiam*) (cleaned up). Here, compelled production of the Service's documents

protected by the deliberative process privilege would inhibit the frank and honest discussion of policy matters, and thus would adversely affect the quality of the Service's decisions and policies. Disclosure of the withheld information would adversely affect the Service's ability to administer and enforce the law under the Internal Revenue Code at all levels, from voluntary compliance and examination to appeals and litigation. Exhibit D, *Goldman Decl.*, ¶¶ 8–12. By sustaining the Service's deliberative process privilege claims, the Court will avert this chilling effect.

IV. Conclusion

Despite Plaintiffs' assertions, the United States' privilege log is sufficient under settled law. Plaintiffs have unbelievably requested that the Court review all 1,362 claims of deliberative process, with little attempt to narrow their requests. Even so, the United States has provided sufficient information such that Plaintiffs objectively should be able to determine that the information withheld is privileged by deliberative process (even if they claim, subjectively, they are unable to do so). The Plaintiffs have failed to mention, much less meet their burden of establishing, that the benefits of disclosure outweigh the United States' claims of privilege. As a result, the Court should deny Plaintiffs' motion to compel.

[Signature block on the following page.]

Dated: February 18, 2022

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONSE IN OPPOSITION TO MOTION TO COMPEL was filed with the Court's ECF system on February 18, 2022, which system serves electronically all filed documents on the same day of filing to all counsel of record.

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