

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**United States District Court**  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, in her official capacity as President of the University of California,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security,

Defendants.

No. C 17-05211 WHA  
No. C 17-05235 WHA  
No. C 17-05329 WHA  
No. C 17-05380 WHA

**ORDER RE MOTION TO COMPLETE ADMINISTRATIVE RECORD**

**INTRODUCTION**

Under the Administrative Procedure Act, plaintiffs seek to compel completion of the administrative record. Federal defendants oppose. For the reasons herein, plaintiffs' motion is **GRANTED IN PART** and **DENIED IN PART**.

**STATEMENT**

On June 15, 2012, the Secretary of the Department of Homeland Security issued a memorandum promulgating a deferred action policy for those without lawful immigration status who came to the United States as children, were continuous residents in the United States for at least five years, had graduated from high school, obtained a GED, or served in the military, and

1 met certain other criteria — a memorandum and policy known as Deferred Action for  
2 Childhood Arrivals, “DACA” for short (Dkt. No. 64-1 at 1–3).<sup>1</sup>

3 After the change in administrations in 2017, the new Secretary of DHS, John Kelly,  
4 announced that DACA would be continued notwithstanding the rescission of other immigration  
5 policies (*id.* at 230). This was done despite, and with the knowledge of, the decision of the  
6 Court of Appeals for the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015),  
7 invalidating a different deferred action policy and the Supreme Court’s affirmance of that  
8 decision by an equally divided vote, *United States v. Texas*, 136 S. Ct. 2271 (2016) (per  
9 curiam).

10 On September 5, 2017, however, the Acting Secretary of DHS, Elaine Duke, reversed  
11 the agency’s position and announced DACA’s end, effective March 5, 2018.

12 We now have five lawsuits in this district challenging that rescission.<sup>2</sup> Each action is  
13 proceeding on a parallel track and on the same schedule, which schedule was designed to reach  
14 a decision on the merits and to allow appellate review by the March 5 deadline.<sup>3</sup>

15 Pursuant to the scheduling order, the federal defendants filed the administrative record  
16 on October 6. It consisted of fourteen documents spanning 256 pages, each of which was  
17 already available to the public, and had, in fact, already been filed in this action (Dkt. No. 49  
18 ¶ 3; Dkt. No. 64-1).

19 In unison, plaintiffs now move to require completion of the administrative record in  
20 accordance with Section 706 of Title 5 of the United States Code. They argue that the current  
21 record is incomplete because it contains only documents personally considered by the Acting  
22 Secretary (and then only some considered by her) and excludes any and all other documents that  
23 indirectly led to the rescission.

---

24  
25 <sup>1</sup> All docket numbers herein refer to the docket in Case No. C 17-05211 WHA.

26 <sup>2</sup> There are two additional DACA lawsuits proceeding in the Eastern District of New York before  
27 Judge Nicholas Garaufis, *State of New York v. Trump*, Case No. 17-cv-05228 NGG, and *Vidal v. Baran*, Case  
28 No. 16-cv-04756 NGG.

<sup>3</sup> The fifth lawsuit, *County of Santa Clara v. Trump*, Case No. 17-cv-05813 HRL, was related after  
plaintiffs’ motion was fully briefed and argued.

1 The federal defendants oppose, arguing that they have already filed a complete  
2 administrative record, which they contend is properly limited to unprivileged documents  
3 actually considered by the “decision-maker,” here, the Acting Secretary (Opp. at 8–9).

4 This order follows full briefing and oral argument and the Court’s review of all  
5 materials *in camera* that appeared on the government’s privilege log.

## 6 ANALYSIS

### 7 1. SCOPE OF THE ADMINISTRATIVE RECORD.

8 Section 706 of the APA provides that judicial review of agency action shall be based  
9 on “the whole record.” The administrative record “is not necessarily those documents that the  
10 agency has compiled and submitted as the administrative record” but rather “consists of all  
11 documents and materials directly or *indirectly* considered by agency decision-makers and  
12 includes evidence contrary to the agency’s position.” *Thompson v. United States Dep’t of*  
13 *Labor*, 885 F.2d 551, 555–56 (9th Cir. 1989). This includes not only documents that “literally  
14 pass[ed] before the eyes of the final agency decision maker” but also documents that were  
15 considered and relied upon by subordinates who provided recommendations to the decision-  
16 maker. *People of State of Cal. ex rel. Lockyer v. United States Dep’t of Agriculture*, Nos.  
17 C05-3508 & C05-4038, 2006 WL 708914, at \*2 (N.D. Cal. Mar. 16, 2006) (Magistrate Judge  
18 Elizabeth Laporte) (internal citations and quotations omitted); *see also Amfac Resorts, L.L.C. v.*  
19 *United States Dep’t of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (Judge Royce  
20 Lamberth).

21 The requirement that a reviewing court consider “the whole record” before rendering a  
22 decision “ensures that neither party is withholding evidence unfavorable to its position and that  
23 the agencies are not taking advantage of post hoc rationalizations for administrative decisions.  
24 *Walter O. Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

25 While it is presumed that the administrative record submitted by defendants is complete,  
26 plaintiffs can rebut this presumption with “clear evidence to the contrary.” *Cook Inletkeeper v.*  
27 *EPA*, 400 F. App’x 239, 240 (9th Cir. 2010) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735,  
28 740 (10th Cir. 1993)).

1 Defendants contend a showing of bad faith or impropriety is required in order to compel  
2 a complete production of the administrative record. This is incorrect. True, bad faith is one  
3 basis for requiring supplementation of an administrative record, but it is not the exclusive basis.  
4 Our court of appeals has repeatedly recognized other grounds for requiring supplementation,  
5 including where it appears the “agency relied on documents not [already] included in the  
6 record.” *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *Fence Creek*  
7 *Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); *see also Lands*  
8 *Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

9 The “bad faith” standard of *Overton Park* applies where, though an administrative  
10 record exists, plaintiffs ask to go beyond the record that was before the agency and inquire into  
11 the thought processes of decision-makers — in *Overton Park*, by taking the testimony of  
12 agency officials. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)  
13 *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

14 Our plaintiffs are not seeking materials beyond what were already considered, directly  
15 or indirectly, by the decision-maker, and therefore need not show bad faith. Supplementation  
16 is appropriate if they show, by clear evidence, that the agency relied on materials not already  
17 included in the record. *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d  
18 1534, 1548 (9th Cir. 1993) (distinguishing between materials “never presented to the agency”  
19 and materials that were “allegedly [] before the agency”); *Fence Creek Cattle Co.*, 602 F.3d at  
20 1131.

21 Nor is defendants’ contention that it need only produce documents directly considered  
22 by the Acting Secretary correct. Documents reviewed by subordinates, or other agencies  
23 who informed her on the issues underlying the decision to rescind DACA, either verbally or  
24 in writing, should be in the administrative record. *See Lockyer*, 2006 WL 708914, at \*2.  
25 The threshold question is whether plaintiffs have shown, by clear evidence, that the record  
26  
27  
28

1 defendants produced is missing documents that were considered, directly or indirectly, by DHS  
 2 in deciding to rescind DACA.<sup>4</sup>

3 **2. PLAINTIFFS' SHOWING OF INCOMPLETENESS.**

4 Here, the tendered administrative record consists merely of fourteen documents  
 5 spanning 258 pages, which defendants contend constitute the entire record considered in  
 6 making the decision to rescind DACA. These are plainly pertinent materials, although all were  
 7 publicly known and already part of the pleadings herein.

8 Plaintiffs seek additional materials including emails, departmental memoranda, policy  
 9 directives, meeting minutes, materials considered by Secretary Duke's subordinates,  
 10 communications from White House officials or staff, communications from the Department of  
 11 Justice, and communications between DHS and state authorities, which they contend should  
 12 necessarily be part of the administrative record (Br. at 9–10).

13 Plaintiffs drew this list, in part, from a United States Department of Justice Guidance,  
 14 which sets forth non-binding recommendations for how to compile an administrative record and  
 15 what to include. United States Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal  
 16 Agencies on Compiling the Administrative Record (Jan. 1999). Specifically, the Guidance  
 17 states that the administrative record should "[i]nclude all documents and materials prepared,  
 18 reviewed, or received by agency personnel and used by or available to the decision-maker,  
 19 even though the final decision-maker did not actually review or know about the documents  
 20 and materials." *Id.* at 3. It further provides that the record should include "communications  
 21 the agency received from other agencies . . . documents and materials that support *or* oppose  
 22 the challenged agency decision . . . minutes of meetings or transcripts thereof . . . [and]

---

23  
 24  
 25 <sup>4</sup> Defendants also argue that they should not be required to produce any administrative record  
 26 whatsoever because the Department of Homeland Security's decision to end DACA was an exercise of  
 27 prosecutorial discretion not subject to judicial review (Opp. at 1). Earlier in these actions, our defendants  
 28 agreed to produce the administrative record by October 6, and were then ordered to do so. They may not now  
 renege on that commitment. At this stage, defendants are required to produce an administrative record. Should  
 they prevail on this argument on their eventual motion to dismiss, it will be with the benefit of a proper  
 administrative record.

1 memorializations of telephone conversations and meetings, such as memorandum or  
2 handwritten notes.”<sup>5</sup>

3 Plaintiffs contend that communications from DOJ and the White House are a critical  
4 part of “the whole record” due to their significant public participation in the process of  
5 rescinding DACA. Plaintiffs first point to Attorney General Sessions’ September 4 letter,  
6 which DHS expressly relied upon in its memorandum terminating the program (*see* Dkt. No.  
7 64-1 at 251, 255). Despite this critical and publicly disclosed role in the decision, the only DOJ  
8 document defendants include in the record is this one-page September 4 letter. This, plaintiffs  
9 contend, is clear evidence that defendants omitted documents supporting (or contradicting) the  
10 opinions set forth in Attorney General Sessions’ letter, in particular the opinion that DACA was  
11 unlawfully implemented.

12 Additionally, the White House has repeatedly emphasized the President’s direct role  
13 in decisions concerning DACA. For example, a September 5 White House press release  
14 announced “President Donald J. Trump Restores Responsibility and the Rule of Law to  
15 Immigration” by rescinding DACA, and repeatedly stated that “President Trump” had acted to  
16 end the program. Press Release, The White House Office of the Press Secretary, President  
17 Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept. 5, 2017),  
18 [https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-](https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law)  
19 [responsibility-and-rule-law](https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law). Other articles likewise emphasize White House officials’ roles  
20 in decision-making regarding DACA. *See, e.g.*, Michael D. Shear & Julie Hirschfeld Davis,  
21 Trump Moves to End DACA and Calls on Congress to Act, *New York Times* (Sept. 5, 2017).  
22 Moreover, defendants concede in their response that Secretary Duke “received advice from  
23 other members of the executive branch” in making her decision (Opp. at 17) and refer to “White  
24 House memorandum” in their privilege log (Dkt. No. 71-2). And at oral argument, counsel for

---

25  
26 <sup>5</sup> A 2008 DOJ memorandum specifically notes that the 1999 Guidance is a non-binding internal  
27 document, which does not “limit the otherwise lawful prerogatives of the Department of Justice or any other  
28 federal agency” (Dkt. No. 71-1 at 3). In particular, the 2008 memorandum takes issue with outside parties’ use  
of the Guidance in litigation to advocate for a particular composition of the administrative record or process for  
its assembly (*ibid.*). Recognizing that the 1999 Guidance is not binding upon agencies, this order finds that the  
Guidance nevertheless provides helpful insight into the types of documents and materials an agency should  
consider when assembling an administrative record.

1 defendants said it was likely Secretary Duke had received verbal input before making her  
2 decision. Despite this, defendants have failed to provide even a single document from any  
3 White House officials or staff.

4 Plaintiffs further observe that not a single document from one of Secretary Dukes’  
5 subordinates is in the record. It strains credulity to suggest that the Acting Secretary of DHS  
6 decided to rescind a program covering 800,000 enrollees without consulting one advisor or  
7 subordinate within DHS. Again, at oral argument, government counsel represented that she  
8 had likely received verbal input. The government’s *in camera* submission confirms that she  
9 did receive substantial DACA input.

10 Finally, former DHS Secretary John Kelly issued a memorandum in February 2017,  
11 in which he rescinded all DHS memoranda that conflicted with newly stated immigration  
12 enforcement policies — *but expressly declined to rescind DACA* (Dkt. No. 64-1 at 229–30).  
13 This decision, of course, is directly contrary to that taken by Acting Secretary Duke seven  
14 months later. The administrative record, however, omits all materials explaining the change  
15 in position from February to September, with two exceptions — (1) a June 29 letter from Ken  
16 Paxton, the Attorney General of Texas, to Attorney General Sessions, in which he threatens  
17 to amend the suit challenging DAPA to also challenge DACA if it is not rescinded by  
18 September 5, and (2) Attorney General Sessions’ September 4 letter to Secretary Duke  
19 expressing the opinion that DHS should rescind DACA. Reasoned agency decision-making  
20 ordinarily “demand[s] that [the agency] display awareness that it is changing position” and  
21 “show that there are good reasons for the new policy.” *F.C.C. v. Fox Television Stations, Inc.*,  
22 556 U.S. 502, 515 (2009). Accordingly, “the whole record” would ordinarily contain materials  
23 giving a “reasoned explanation . . . for disregarding the facts and circumstances that underlay or  
24 were engendered by the prior policy.” *Ibid.* It is simply not plausible that DHS reversed policy  
25 between February and September because of one threatened lawsuit (never actually filed)  
26 without having generated any materials analyzing the lawsuit or other factors militating in favor  
27 of and against the switch in policy.  
28



1           Based on the foregoing, plaintiffs have clearly shown that defendants excluded highly  
2 relevant materials from the administrative record and in doing so have rebutted the presumption  
3 that the record is complete.

4           Defendants' argument to the contrary is unpersuasive. Their position that only selected  
5 documents that Acting Secretary Duke personally reviewed need be part of the administrative  
6 record must yield to legal authority requiring both directly and *indirectly* considered documents  
7 be included in the record, *see, e.g., Thompson*, 885 F.2d at 555–56, and by public statements  
8 illustrating both DOJ and the White House's direct involvement in the decision to rescind  
9 DACA. The rule that government counsel advocates would allow agencies to contrive a record  
10 that suppresses information actually considered by decision-makers and by those making  
11 recommendations to the decision-makers, information that might undercut the claimed rationale  
12 for the decision.

13           As stated, privilege log entries reveal several documents that were considered in arriving  
14 at the decision to rescind DACA. For example, at least seven entries refer to commentary in  
15 media articles regarding DACA. At oral argument, government counsel admitted that the  
16 Acting Secretary had seen several media items on the issue. There were not, however, any  
17 media articles on DACA in the administrative record, but those that came to the Acting  
18 Secretary should, of course, be included.<sup>6</sup>

19           Here, plaintiffs have rebutted the presumption of completeness. It is evident that Acting  
20 Secretary Duke considered information directly, or indirectly, through the advice of other  
21 agencies and others within her own agency. These documents, as set forth in detail below,  
22 should be made part of the administrative record and must be produced by defendants in an  
23 amended administrative record by **NOON ON OCTOBER 27**.

---

24  
25           <sup>6</sup> Many documents were evidently excluded in their entirety based on an assertion of “deliberative-  
26 process” privilege. Any “[f]actual portions of documents covered by the deliberative process privilege,  
27 [however], must be segregated and disclosed unless they are so interwoven with the deliberative material” that  
28 they are not segregable. *See Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir 2008) (citations  
and quotations omitted). Accordingly, to the extent that media articles or other non-privileged factual materials  
were considered, they should have been included in the administrative record, and shall be filed as part of the  
amended administrative record, even if passages are redacted as deliberative, and called out as such in the  
privilege log.



1           **3. WAIVER OF ATTORNEY-CLIENT PRIVILEGE.**

2           Plaintiffs next argue that defendants have waived attorney-client privilege because they  
3 have put their attorneys’ legal opinions at issue by arguing that the rescission was required due  
4 to concerns over DACA’s legality (Br. at 15–16). Indeed, one of DHS’s primary rationales for  
5 rescinding DACA was its purported illegality (*see* Dkt. No. 64-1 at 253–56 (Rescission  
6 Memorandum)).

7           Parties are not permitted to advance conclusions that favor their position in litigation,  
8 and at the same time shield the information that led to those conclusions from discovery.  
9 *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). Put differently, “[t]he  
10 privilege which protects attorney-client communications may not be used both as a sword and a  
11 shield.” *Ibid.* Where a party raises a claim, which in fairness to its adversary requires it to  
12 reveal the information or communication that claim is predicated upon, it has implicitly waived  
13 any privilege over that communication.

14           Here, defendants argue that DHS had to rescind DACA because it exceeded the lawful  
15 authority of the agency. They cannot, therefore, simultaneously refuse to disclose the legal  
16 research that led to that conclusion. Defendants indeed, have included the September 4 legal  
17 opinion of the Attorney General, pithy as it may be — yet they seek to conceal all other legal  
18 analysis available to the Acting Secretary and to the Attorney General.

19           Significantly, defendants slide into a backup argument that the agency’s legal worry was  
20 “reasonable” even if wrong. If this backup argument comes into play (as government counsel  
21 posits) then the “reasonableness” of taking an incorrect legal position would heavily turn on the  
22 underlying legal analysis so far withheld from view. In other words, assessing the  
23 reasonableness of the Secretary’s legal rationale would turn, in part, on how consistent the  
24 analysis has been in the runup to the rescission.

25           Defendants’ arguments to the contrary are unavailing. They first argue, without citation  
26 to any legal authority, that “[w]ere plaintiffs’ argument accepted, the government would be  
27 deemed to have waived all privileges any time an assessment of the legal landscape informed an  
28 agency’s decisionmaking” (Opp. at 21). This argument vastly exaggerates plaintiffs’ position,

1 and misrepresents the position defendants have staked out in this litigation. DHS specifically  
2 relied upon DOJ's assessment that DACA "was effectuated . . . without proper statutory  
3 authority," "was an unconstitutional exercise of authority by the Executive Branch" and "has  
4 the same legal and constitutional defects that courts recognized as to DAPA" (Dkt. No. 64-1 at  
5 254). Plaintiffs are entitled to challenge whether this was a reasonable legal position and thus a  
6 reasonable basis for rescission. In making that challenge, plaintiffs are entitled to review the  
7 internal analyses that led up to this change in position.

8 Defendants further argue that the decisions cited by plaintiffs are inapplicable because  
9 they arose in different contexts than the present action. True, the decisions plaintiffs cite did  
10 not arise in identical circumstances. *E.g. Chevron Corp.*, 974 F.2d at 1162 (defendant  
11 prohibited from relying on legal opinion that tax position was reasonable while refusing to  
12 disclose the attorney communications leading to that conclusion). They still, however, stand for  
13 the widely-accepted proposition that it is unfair for a litigant to defend his action with a  
14 selective disclosure of evidence. This principle carries no less force here.

15 In the related context of FOIA, the Court of Appeals for the Second Circuit held that  
16 "the attorney-client privilege may not be invoked to protect a document adopted as, or  
17 incorporated by reference into an agency's policy." *Nat'l Council of La Raza v. Dep't of*  
18 *Justice*, 411 F.3d 350, 360 (2d Cir. 2005). There, DOJ invoked the reasoning of an OLC  
19 memorandum to justify its new position on an immigration issue. *Id.* at 357. The court held  
20 that the agency's "view that it may adopt a legal position while shielding from public view the  
21 analysis that yielded that position is offensive to FOIA." *Id.* at 360. So too here.

22 Defendants have waived attorney-client privilege over any materials that bore on  
23 whether or not DACA was an unlawful exercise of executive power and therefore should be  
24 rescinded.

#### 25 **4. DELIBERATIVE-PROCESS PRIVILEGE BALANCING.**

26 Defendants further assert the deliberative-process privilege over many documents.

27 The deliberative-process privilege, however, is qualified and will yield when the need  
28 for materials and accurate fact-finding "override the government's interest in non-disclosure."

1 *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). “Among factors to  
 2 be considered in making this determination are: (1) the relevance of the evidence; (2) the  
 3 availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to  
 4 which disclosure would hinder frank and independent discussion regarding contemplated  
 5 policies and decisions.” *Ibid.*

6 As set forth below, the judge has personally reviewed *in camera* all materials on the  
 7 privilege log and applied the foregoing test to each document for which the deliberative-process  
 8 privilege is claimed.<sup>7</sup>

9 **5. PRIVILEGE LOG REQUIREMENT.**

10 While defendants did not file a privilege log with their original production, they have  
 11 since, pursuant to order, filed a privilege log claiming attorney-client or deliberative-process  
 12 privilege over 84 documents considered by Secretary Duke but not included in the  
 13 administrative record (Dkt. Nos. 67; 71-2). Nevertheless, defendants argue that privilege logs  
 14 are not generally required in connection with an administrative record and that one should not  
 15 be required here.

16 Our court of appeals has not spoken on the issue. Every court in this district  
 17 considering the issue, however, has required administrative agencies to provide a privilege log.  
 18 *See, e.g., Ctr. for Food Safety v. Vilsack*, No. 15CV01590HSGKAW, 2017 WL 1709318, at \*5  
 19 (N.D. Cal. May 3, 2017) (Magistrate Judge Kandis Westmore) (“[C]ourts in this district have  
 20 required parties withholding documents on the basis of the deliberative process privilege to, at a  
 21 minimum, substantiate those claims in a privilege log.”); *Inst. for Fisheries Res. v. Burwell*, No.  
 22 16-CV-01574-VC, 2017 WL 89003, at \*1 (N.D. Cal. Jan. 10, 2017) (Judge Vince Chhabria);  
 23 *Lockyer*, 2006 WL 708914, at \*4.

---

24  
 25  
 26  
 27 <sup>7</sup> Although not addressed in the brief or at oral argument, the privilege log referenced personal privacy  
 28 and executive privilege objections for certain documents. No substantial privacy interest is implicated in any of  
 the documents ordered to be produced below, nor do any of these documents fall within the executive privilege.

1 “If a privilege applies, the proper strategy isn’t pretending the protected material wasn’t  
 2 considered, but withholding or redacting the protected material and then logging the privilege.”  
 3 *Inst. for Fisheries Res.*, 2017 WL 89002 at \*1.<sup>8</sup>

4 Courts outside this district that have determined no privilege log was required have done  
 5 so on the grounds that the defendants’ judgment of what constitutes the administrative record is  
 6 entitled to a presumption of correctness. *See San Luis & Delta-Mendota Water Auth. v. Jewell*,  
 7 No. 115CV01290LJOGSA, 2016 WL 3543203, at \*19 (E.D. Cal. June 23, 2016) (Judge  
 8 Lawrence O’Neill); *Nat’l Ass’n of Chain Drug Stores v. United States Dep’t of Health &*  
 9 *Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009). Here, however, that presumption has  
 10 been overcome by plaintiffs’ showing that defendants failed to include documents considered in  
 11 arriving at the final decision to rescind DACA in the administrative record. Therefore, even  
 12 applying those courts’ logic, a privilege log would still be appropriate here.

13 Going forward, defendants shall comply with the standing order in this case and provide  
 14 a privilege log for all documents withheld on grounds of privilege, which log shall include all  
 15 authors and recipients of privileged documents, as well as other information set forth in the rule  
 16 (*see* Dkt. No. 23 ¶ 18).

### 17 RELIEF ORDERED

18 Plaintiffs’ motion to complete the administrative record is **GRANTED** to the extent now  
 19 stated. Defendants are directed to complete the administrative record by adding to it all emails,  
 20 letters, memoranda, notes, media items, opinions and other materials directly or indirectly  
 21 considered in the final agency decision to rescind DACA, to the following extent: (1) all  
 22 materials actually seen or considered, however briefly, by Acting Secretary Duke in connection  
 23 with the potential or actual decision to rescind DACA (except as stated in the next paragraph  
 24 below), (2) all DACA-related materials considered by persons (anywhere in the government)  
 25 who thereafter provided Acting Secretary Duke with written advice or input regarding the

---

26  
 27 <sup>8</sup> In a memorandum opinion, our court of appeals denied a plaintiff’s request to require a privilege log.  
 28 *See Cook Inletkeeper v. EPA*, 400 F. App’x 239, 240 (2010). In that decision, however, our court of appeals  
 first denied a motion to supplement the record, and finding that the plaintiffs had not presented evidence that the  
 agency had considered the documents the plaintiffs sought to compel, only then denied the accompanying  
 motion for preparation of a privilege log without further explanation.

1 actual or potential rescission of DACA, (3) all DACA-related materials considered by persons  
2 (anywhere in the government) who thereafter provided Acting Secretary Duke with verbal input  
3 regarding the actual or potential rescission of DACA, (4) all comments and questions  
4 propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual  
5 or potential rescission of DACA and their responses, and (5) all materials directly or indirectly  
6 considered by former Secretary of DHS John Kelly leading to his February 2017 memorandum  
7 not to rescind DACA.

8 The undersigned judge has balanced the deliberative-process privilege factors and  
9 determined *in camera* that the following materials from the government's *in camera*  
10 submission, listed by tab number, shall be included in the administrative record: 1–6, 7 (only  
11 the header and material on pages 3–4 concerning DACA), 12, 14, 17–25, 27–30, 36, 39, 44, 47,  
12 49 (only the first paragraph, and the paragraph captioned “General”), 69–70, 73–74, 77, 79, 81,  
13 84. The remainder of the *in camera* submission need not be included.

14 If the government redacts or withholds any material based on deliberative-process, or  
15 any other privilege in its next filing, it shall simultaneously lodge full copies of all such  
16 materials, indicating by highlighting (or otherwise) the redactions and withholdings together  
17 with a log justification for each. The judge will review and rule on each item.

18 Plaintiffs' insistence that defendants scour the Department of Justice and the White  
19 House for documents for inclusion in the administrative record is overruled except to the  
20 limited extent that DOJ or White House personnel fall within the category described in the first  
21 paragraph above as someone who gave verbal or written input to the Acting Secretary. Nor do  
22 defendants have to search for DACA materials below the agency levels indicated in the first  
23 paragraph above. These are intended as practical limits on what would otherwise be a bone-  
24 crushing expedition to locate needles in haystacks.

25 This order, however, is not intended to limit the scope of discovery (as opposed to the  
26 scope of the administrative record). The scope of discovery over and above the administrative  
27 record continues to be managed by Magistrate Judge Sallie Kim.  
28

1           The federal defendants shall file an amended administrative record in conformity with  
2 this order by **NOON ON OCTOBER 27**.

3           If any party plans to seek a writ of mandate and wants a stay pending appellate review,  
4 then a fresh motion to that effect must be made very promptly.

5  
6           **IT IS SO ORDERED.**

7  
8 Dated: October 17, 2017.



---

WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28