

The Honorable Marsha J. Pechman

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
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case No. 2:17-cv-01297-MJP

**DECLARATION OF DANIEL
SIEGFRIED IN SUPPORT OF
PLAINTIFFS' RENEWED MOTION TO
COMPEL DOCUMENTS WITHHELD
UNDER THE DELIBERATIVE PROCESS
PRIVILEGE**

NOTE ON MOTION CALENDAR:
September 27, 2019

ORAL ARGUMENT REQUESTED

I, Daniel Siegfried, swear under penalty of perjury under the laws of the United States to the following:

1. I am counsel of record for Plaintiffs in this action, am over the age of 18, and am competent to be a witness. I make this declaration in support of Plaintiffs' Renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege based on facts within my own personal knowledge.

A. Defendants' Discovery Responses and Privilege Logs

2. On December 29, 2017, Plaintiffs served their First Set of Requests for Production on Defendants, and Defendants served responses on February 9, 2018. A true and correct copy of those responses are attached hereto as Exhibit 1.

1 3. On April 26, 2018, Plaintiffs served their Second Set of Requests for Production on
2 Defendants, and Defendants served responses on May 29, 2018. A true and correct copy of those
3 responses are attached hereto as Exhibit 2.

4 4. On April 12, 2019, Plaintiffs served their Third Set of Requests for Production on
5 Defendants, and Defendants served responses on May 28, 2019. A true and correct copy of those
6 responses are attached hereto as Exhibit 3.

7 5. Over the course of the litigation, Defendants have produced 49 privilege logs on
8 behalf of the following entities: the Department of Defense, the Defense Health Agency, the
9 Navy, the Army, the Air Force, the Chairman of the Joint Chiefs of Staff, the White House, and
10 the Coast Guard. Native versions of Defendants' privilege logs are submitted as Exhibits 4 - 52.
11 Some of these logs constitute "revised" privilege logs for which Defendants revised a specific
12 subset of entries in prior logs and produced them as a separate log.

13 6. Based on Plaintiffs' review of these logs, Defendants have withheld or redacted over
14 50,000 documents based in whole or in part on the deliberative process privilege, and they have
15 withheld approximately 35,000 otherwise responsive and non-privileged documents solely on the
16 basis of the deliberative process privilege.

17 **B. The McHugh Documents**

18 7. In August 2018, Plaintiffs served a document subpoena on Dr. Paul McHugh seeking
19 communications he had with the government regarding the current administration's policies
20 toward transgender military service. Dr. McHugh refused to comply with the subpoena,
21 objecting that his communications with the government were privileged. Plaintiffs moved to
22 compel compliance in the District of Maryland in October 2018. *See Karnoski v. Trump*, No.
23 1:18-cv-03164-ELH (D. Md.). The dispute was subsequently transferred to this Court. *See*
24 *Karnoski v. Trump*, 2:19-cv-01206 (W.D. Wash.).

25 8. While the parties continue to dispute the applicability of the deliberative process and
26 executive privileges to Dr. McHugh's communications with the White House, Dr. McHugh has
27 produced the communications he had with the Department of Defense in February 2018. These
28 communications are attached hereto as Exhibits 53 and 54.

1 **C. The Parties' Conferences Regarding Defendants' Deliberative Process Privilege**
 2 **Claims**

3 9. Following the Ninth Circuit's June 19, 2019 opinion, the parties held a telephonic
 4 conference on July 17, 2019 regarding Defendants' continued invocation of the deliberative
 5 process privilege. I was one of the attorneys who participated on behalf of Plaintiffs.

6 10. First, Plaintiffs raised Defendants' boilerplate objections and failure to specify, for
 7 each request, whether responsive documents are being withheld on deliberative process grounds.
 8 Plaintiffs explained that Defendants' failure to do so violated Federal Rule of Civil Procedure
 9 34(b)(2)(C), and their failure to comply with the Rule makes it impossible to assess the scope of
 10 their privilege assertions or the actual contours of the parties' dispute.

11 11. Second, Plaintiffs asked Defendants to withdraw their privilege objections to
 12 document requests seeking purely factual, statistical, or other non-deliberative material.

13 12. Third, although not necessary under the Ninth Circuit's ruling, Plaintiffs offered to
 14 identify potential categories of documents for which it planned to challenge the privilege, so the
 15 parties could try to limit the scope of their dispute.

16 13. I memorialized these points in a letter I sent to Defendants' counsel on July 25, 2019.
 17 In that letter, I identified 41 specific document requests that sought purely factual material or
 18 non-policy-oriented decisions that do not implicate the privilege at all. I also identified 10
 19 categories of documents where Plaintiffs' need for the material overrides the government's
 20 interest in nondisclosure. A true and correct copy of my July 25, 2019 letter is attached hereto as
 21 Exhibit 55.

22 14. Defendants responded in a letter on August 2, 2019. A true and correct copy of that
 23 letter is attached hereto as Exhibit 56. In their letter, Defendants confirmed they would not
 24 identify whether documents were withheld under the deliberative process privilege for any
 25 specific request. They also confirmed they did not conduct searches for responsive documents
 26 based on Plaintiffs' actual requests, but instead conducted searches using terms they believed
 27 applied to the case as a whole, including "transgend*," "trans gender," and "gender dysphoria."

28 (*Id.* at 1.) Based on the search dates identified in the letter, it does not appear Defendants

1 undertook any search or collection for documents responsive to any of the 33 requests in
2 Plaintiffs’ third set of document requests.

3 15. In their letter, Defendants also rejected out of hand the categories Plaintiffs wished to
4 confer about, suggesting, without elaboration, that this was “not what the Ninth Circuit
5 contemplated in its recent ruling.” (*Id.* at 2.) Instead of discussing the applicability of the
6 privilege to this case or any categories of documents, Defendants told Plaintiffs to “identify
7 specific documents from Defendants privilege logs ... over which they would like Defendants to
8 consider waiving the deliberative process privilege.” (*Id.*)

9 16. Defendants also attached to their letter five excerpted privilege logs identifying 916
10 entries related to the so-called “Panel of Experts.” True and correct copies of these logs are
11 attached hereto as Exhibits 57 - 61. Defendants claimed that, out of the tens of thousands of
12 responsive documents withheld on deliberative process grounds, these 916 were the only ones
13 “even relevant” under the Ninth Circuit’s opinion or that “the Court’s inquiry should ... focus
14 on.” (*Id.* at 2–3.)

15 17. The parties held another telephone conference on August 9, 2019, during which
16 Defendants continued to insist that Plaintiffs should proceed only on a document-by-document
17 basis. Defendants declined to discuss the categories of documents identified in Plaintiffs’ July 25
18 letter.

19
20 I declare under the penalty of perjury that the foregoing is true and correct.

21
22 Executed this 22nd day of August, 2019.

23
24 s/ Daniel Siegfried
25 Daniel Siegfried

Exhibit 1

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY MATTIS AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the Western District of Washington, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to Defendant James N. Mattis, in his official capacity as Secretary of Defense, and the United States Department of Defense, served December 29, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance,

¹ These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

Objection to Definitions

Defendants object to Plaintiffs' Definition 6 of "Document" as encompassing "every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections and Responses to Requests for Production

RFP No. 1:

All Documents and Communications related to the Policy.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All

Documents and Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 2:

All Documents supporting, refuting, or relating to Your contention that transgender service members hinder military readiness and lethality.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents” purports to require Defendants to search for and produce documents in any and all

locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 3:

All Documents supporting, refuting, or relating to Your contention that transgender service members disrupt unit cohesion.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 4:

All Documents supporting, refuting, or relating to Your contention that transgender service members tax military resources.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 5:

All documents relating to any justification considered by Defendants for the Policy other than those identified in Requests for Production Nos. 1-4.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

RFP No. 6:

All Documents and Communications relating to, including all drafts of, the August 25, 2017, memorandum entitled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents and Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 7:

All Documents and Communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that "consultation" is vague and undefined.

RFP No. 8:

All studies, reports, instructions, directives, or other Documents relating to the "panel of experts serving within the Departments of Defense and Homeland Security to provide advice and

recommendations on the implementation of the president's direction." Statement of Secretary Jim Mattis, Release No: NR-312-17.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All studies, reports, instructions, directives, or other Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 9:

All Documents and Communications between January 20, 2017 and July 28, 2017 related to military spending on gender confirmation surgeries.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 10:

For the period starting January 20, 2017 up to and including July 28, 2017, all Communications between any member of Congress and President Trump or any individual within the Executive Office of the President concerning military service by transgender people or healthcare for current or prospective transgender service members, and any Documents constituting, summarizing, reflecting, or evidencing such Communications.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 11:

All Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object to the extent that “reflecting” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 12:

All Documents related to, and Communications with, President Trump’s Evangelical Advisory Board members or his campaign’s Evangelical Advisors related to transgender military service or healthcare for current or prospective transgender service members.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents related to, and Communications with” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 13:

All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 14:

All Documents and Communications relating to the RAND Report.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

RFP No. 15:

All documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents or Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 16:

All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 17:

With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, Documents sufficient to show the number of such waivers requested, the number of such waivers granted, and the number of such waivers denied.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or

information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object to the extent that “sufficient to show” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 18:

With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, all Documents or Communications relating to the purpose or bases for the denial of such waivers.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which

describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 19:

All Documents or Communications, between June 30, 2017 and the present, relating to discharge proceedings against any transgender service member serving in the U.S. military.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 20:

All Documents or Communications, between June 30, 2017 and the present, relating to any transgender person who has applied to join the U.S. military.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 21:

All Documents and Communications produced by You to any party in any of the following lawsuits: *Doe v. Trump*, No. 17-cv-1597 (D.D.C.); *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.); *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), and any cases consolidated therewith.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 22:

All Documents and Communications relating to the subject matter set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents and Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that “subject matter set forth in” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 23:

All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents or Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that “reasons, grounds, or bases” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 24:

All Documents or Communications relating to the cost of implementing the policy set forth in the August 25, 2017, memorandum entitled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 25:

All estimates or calculations, and related Documents and Communications, relating to the cost of separating currently serving transgender people from the military.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan Parker

RYAN B. PARKER
ANDREW E. CARMICHAEL
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

Vanessa Barsanti
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200
vanessa.barsanti@kirkland.com

Jordan M. Heinz
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200
jordan.heinz@kirkland.com

Peter Renn
Senior Attorney
Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org
www.lambdalegal.org

La Rond Baker
Assistant Attorney General
Wing Luke Civil Rights Unit
Office of the Washington Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.516.2999
206.464.6451 (fax)
LaRondB@ATG.WA.GOV

/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

Exhibit 2

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' SECOND SET OF
REQUESTS FOR PRODUCTION TO SECRETARY MATTIS AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' Second Set of Requests for Production of Documents to Defendant James N. Mattis, in his official capacity as Secretary of Defense, and the United States Department of Defense, served April 26, 2018.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions

¹ These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case.

2. Defendants object to Definition 2 of “President Trump” and the “President” as substantially overbroad, ambiguous, and disproportionate to the needs of the case because “indirectly by” or “under the control of Donald J. Trump” is overbroad, ambiguous, and disproportionate to the needs of the case because these terms would encompass all employees of every Executive Branch Department and agency. In these objections, Defendants will construe the terms “President Trump” and the “President” to refer only to employees of the Executive Office of the White House.

3. Defendants object to Definition 3 of “Vice President Pence” and the “Vice President” as overbroad, unduly burdensome and disproportionate to the needs of the case to the extent that it includes “persons engaged . . . indirectly by” and “under the control of Michael R. Pence.” In these objections, Defendants will construe the terms “Vice President Pence” and the “Vice President” to refer only to employees of the Office of the Vice President.

4. Defendants object to Plaintiffs’ Definition 9 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

5. Defendants object to Plaintiffs' Definition 10 of "Document" and "documents" as encompassing "ESI," and "computer data," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

Specific Objections and Responses to Requests for Production

RFP No. 26: Documents sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members for each of fiscal years 2015, 2016, and 2017, and for the year to date of fiscal year 2018, including without limitation hormone therapy for the treatment of hypogonadism, hypothyroidism, hyperthyroidism, prostate cancer, breast cancer, growth hormone deficiency, menopause, osteoporosis, and transgender hormone therapy.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Department of Defense also objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for

“[d]ocuments sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members” embraces the primary medical records for service members over a four-year period, requiring a search of potentially millions of records. Consequently, the Department of Defense construes this request as excluding service member medical records and information, and as limited to seeking documents that contain summaries of “total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members” for fiscal years 2015 through and including 2018.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 27: All Documents or Communications relating or referring to Secretary James Mattis’s February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals (the “February 22, 2018, Memorandum”), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the February 22, 2018, Memorandum; and (b) all drafts of the February 22, 2018, Memorandum.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by

the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 28: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the final draft of the February 22, 2018, Memorandum.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 29: All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the "Report and Recommendations"), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender

Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 30: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the Report and Recommendations.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 31: All Documents and Communications relating or referring to any person or group providing analysis, advice, or recommendations to Secretary Mattis, the Department of Defense, and/or the Panel of Experts concerning the Report and Recommendations, military service by transgender people or any restrictions on such service, including the Transgender Service Policy Working Group and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 32: All Documents or Communications relating or referring to President Trump's March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals (the "March 23, 2018, Memorandum"), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the March 23, 2018, Memorandum; and (b) all drafts of the March 23, 2018, Memorandum.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 33: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the March 23, 2018, Memorandum.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 34: All Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, and/or the Office of the Vice President, on the one hand, and Secretary Mattis and/or the Department of the Defense, on the other hand, relating or referring to military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Secretary Mattis and the United States Department of Defense will not produce any documents responsive to this RFP.

RFP No. 35: All Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, the Office of the Vice President, Secretary Mattis, the Department of Defense, and/or the Panel of Experts, on the one hand, and non-government third parties, including but not limited to the Heritage Foundation, Heritage Action for America, the Family Research Council, the Center for Military Readiness, the Liberty Council, lobbyists, think tanks, nonprofit organizations, religious organizations, and individuals, on the other hand, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material

the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Secretary Mattis and the United States Department of Defense will not produce any documents responsive to this RFP.

Dated: May 29, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Andrew E. Carmichael

RYAN B. PARKER
Senior Trial Counsel
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on May 29, 2018, a copy of the document above was served by email on the following:

Vanessa Barsanti KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200
vanessa.barsanti@kirkland.com

Jordan M. Heinz KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200
jordan.heinz@kirkland.com

Peter Renn Senior Attorney Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280 Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org www.lambdalegal.org

La Rond Baker
Assistant Attorney General Wing Luke Civil Rights Unit
Office of the Washington Attorney General 800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.516.2999
206.464.6451 (fax) LaRondB@ATG.WA.GOV

Dated: May 29, 2018

/s/ Andrew E. Carmichael
RYAN B. PARKER
Senior Trial Counsel
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

Exhibit 3

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' THIRD SET OF
REQUESTS FOR PRODUCTION TO SECRETARY SHANAHAN AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' Third Set of Requests for Production of Documents to Defendant Patrick Shanahan, in his official capacity as acting Secretary of Defense, and the United States Department of Defense, served April 12, 2019.¹ In presenting these objections, Defendants do not waive any further

¹ These objections and responses are limited to Secretary Shanahan and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case. Plaintiffs have defined “You,” “your,” and “yours” to encompass all “current and former employees agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants,” thus covering millions of people.

2. Defendants object to Plaintiffs’ Definition 6 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

3. Defendants object to Plaintiffs’ Definition 7 of “Document” and “documents” as encompassing “ESI,” and “computer data,” insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

4. Defendants object to Plaintiffs' Definition 8 of "Identify" as encompassing individuals' "full name[s], job title[s], and employer[s] during the period referred to, and current or last-known address[es] and telephone number[s] and business address[es] and telephone number[s]" as being overbroad and disproportionate to the needs of the case. Defendants further object on the grounds that this definition is an unwarranted invasion of the privacy of non-parties and seeks information protected by the Privacy Act, 5 U.S.C. § 552a, et seq.

5. Defendants object to Instruction 12 directing Defendants to produce "all documents in the possession, custody, or control of any United States government employee, agent, representative, consultant, attorney, accountant, advisors, or other persons directly or indirectly connected with you or subject to your control, any government department, agency or any other government subdivision" as being overbroad and disproportionate to the needs of the case.

General Objection to All Requests for Production

Defendants object to Plaintiffs' requests that purport to seek information outside of the administrative record as discovery beyond the limits of the Administrative Procedure Act is inappropriate in this case. The Department of Defense's administrative processes resulted in final agency action supported by the administrative record. In making its determination whether those policies are "contrary to constitutional right," 5 U.S.C. § 706(2)(B), the Court "shall review the whole record," *id.* § 706. The Court's review is therefore limited to "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

Further, as recently emphasized by the D.C. Circuit in a challenge to the same military policy at issue in this litigation, the Court must give great deference to the judgment of military officials. *Doe 2 v. Shanahan*, 755 F. App'x 19, 24–25 (D.C. Cir. 2019) (per curiam). Such deference means that neither the Plaintiffs, Plaintiffs' witnesses, nor the Court may undertake an independent evaluation of the evidence as Plaintiffs propose to do through these discovery requests. *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (“In relying on this testimony . . . the District Court palpably exceeded its authority when it ignored Congress’ considered response to this line of reasoning.”); *id.* at 82-83 (“The District Court was quite wrong in undertaking an independent evaluation of this evidence.”); *Goldman v. Weinberger*, 475 U.S. 501, 508 (1986) (“[W]hether or not expert witnesses may feel that religious exceptions to [the challenged military regulation] are desirable is quite beside the point.”); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008) (“We accept these officers’ assertions [that a certain practice] is of the utmost importance to the Navy and the Nation.”). Accordingly, the discovery sought cannot be considered by the Court and therefore Plaintiffs’ requests are overbroad, unduly burdensome, and disproportionate to the needs of the case. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point” (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986))); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)). Moreover, as the Supreme Court recently emphasized in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), the Court’s review of the Department of Defense policy must

focus on the stated justifications for the policy—which are set forth in the Secretary of Defense’s Memorandum dated February 22, 2018 and its accompanying report—not on underlying communications or deliberations, particularly as to prior policy statements. Accordingly, Plaintiffs’ discovery requests that seek to conduct a fishing expedition into allegations of animus are overbroad, unduly burdensome, and disproportionate to the needs of the case.

Specific Objections and Responses to Requests for Production

RFP No. 36: All documents reflecting, referring, or relating to any complaints arising from or attributed to open service by transgender service members, accessions by transgender individuals, or the Carter Policy.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent

evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to the use of the term "complaint" as it is overboard, unduly burdensome, vague, ambiguous, and undefined. Specifically, the Department of Defense is an organization consisting of over two million employees stationed throughout the world and the Department does not maintain a central repository of "complaints" pertaining to the Carter Policy.

Defendants also object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. The substance of the information considered by the Panel of Experts in forming its policy recommendations to the Secretary of Defense is summarized in the administrative record previously provided to Plaintiffs, *see* ECF No. 249-1, and further "complaints" containing sensitive personally identifiable information are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections and subject to applicable privileges, the Department of Defense has produced materials responsive to Plaintiffs' request between June 30, 2016 and March 23, 2018.

RFP No. 37: Documents sufficient to show the number of persons accessed into the military while known by military officials to be transgender, and the number of persons retained by the military after becoming known as transgender, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanaban*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for

‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the Department of Defense objects to the language “known by military officials” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. Specifically, the term “military officials” could encompass millions of employees stationed throughout the world.

Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. Documents sufficient to “the number of persons accessed into the military while known by military officials to be transgender, and the number of persons retained by the military after becoming known as transgender, since June 30, 2016” even if such information existed, are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 38: Documents sufficient to show both the number of persons accessed into the military while known by the military to have a diagnosis of gender dysphoria, and the number of persons retained by the military after a diagnosis of gender dysphoria while in military service, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses, nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for

‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Further, Defendants object to this request because it includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and medical information stored in electronic databases. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Moreover, the Department of Defense objects to the language “known by the military” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. Specifically, the term “military” could encompass millions of employees stationed throughout the world.

Response: Subject to and without waiving the above objections, Defendants will produce nonprivileged documents containing general treatment and cost data for current service members with a diagnosis of gender dysphoria and data regarding applicants for accession with a diagnosis of gender dysphoria through February 2019 that are responsive to this request and prepared at the request of the House Armed Service Committee in Defendants' possession, custody, or control.

RFP No. 39: All documents relating to numbers or estimates of persons with gender dysphoria (whether or not presently diagnosed) currently serving in the military, or who are in the process of accessing.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent

evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Defendants object to this request because it includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and medical information stored in electronic databases. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files "containing personal information such as health screenings, pre-employment testing, and background checks")

because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Moreover, the Department of Defense objects to the language “whether or not presently diagnosed” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. Specifically, the Department of Defense has no way of identifying persons serving in the military, or in the process of accessing in the military who may have undiagnosed gender dysphoria. Further, the Department objects to the language “in the process of accessing” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined.

Response: Subject to and without waiving the above objections, Defendants will produce nonprivileged documents containing general treatment and cost data for current service members with a diagnosis of gender dysphoria and data regarding applicants for accession with a diagnosis of gender dysphoria through February 2019 that are responsive to this request and prepared at the request of the House Armed Service Committee in Defendants’ possession, custody, or control.

RFP No. 40: All documents relating to the numbers or estimates of transgender persons (whether or not open about their gender identity) currently serving in the military, or who are in the process of accessing.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Further, the Department objects to the language “in the process of accessing” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. The Department of Defense also objects to the language “whether or not open about their gender identity” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined.

Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. Documents sufficient to “the numbers or estimates of transgender persons (whether or not open about their gender identity) currently serving in the military, or who are in the process of accessing” even if such information existed, are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections and subject to applicable privileges, the Department of Defense has produced materials responsive to Plaintiffs’ request between January 1, 2016 and March 23, 2018.

RFP No. 41: All documents describing or relating to differences in the number of transgender persons in the military and the number of persons with gender dysphoria in the military, if a difference in those numbers exists.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections and subject to applicable privileges, the Department of Defense has produced materials responsive to Plaintiffs' request between January 1, 2016 and March 23, 2018.

RFP No. 42: Documents sufficient to show, for each service branch since June 30, 2016, the name, rank, and service unit of each service member a) who requested a change to their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and b) whose gender marker in DEERS has been changed.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the

court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. A request for the "name, rank, and service unit of each service member a) who requested a change to their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and b) whose gender marker in DEERS has been changed[,]" would require the review of more than a thousand medical and service records of current and former service members and this information is irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 43: Documents sufficient to show the number, identity, service branch and military unit, theatre, and circumstances of any transgender service member evacuated from theatres of deployment due to medical and/or mental health reasons since June 30, 2016, including the nature of the medical or mental health reason and the circumstances that led to the decision to evacuate.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender

individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, Defendants object to this request, on the grounds that even if such information did exist, it is overbroad, unduly burdensome, and disproportionate to the needs of the case because it seeks medical records and sensitive privacy data from both current and former service members. This information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 44: Documents sufficient to show, for each service branch since June 30, 2016, the name, rank, and service unit of each transgender service member rendered non-deployable on account of gender dysphoria or transition-related medical care, and the duration of and specific reason(s) for such non-deployability.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, Defendants object to this request, on the grounds that even if such information did exist, it is overbroad, unduly burdensome, and disproportionate to the needs

of the case because it seeks medical records and sensitive privacy data from both current and former service members. This information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 45: Documents sufficient to show, for each service branch for the period since June 30, 2016, the name, rank, and service unit of each transgender service member who was deployed overseas, and the duration, location, and nature of their deployment.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. Documents sufficient to "show, for each service branch for the period since June 30, 2016, the name, rank, and service unit of each transgender service member who was deployed overseas, and the

duration, location, and nature of their deployment” even if such information existed, are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 46: Documents sufficient to show the considerations the military takes into account, and the process it utilizes, in determining which medical and mental health conditions and treatments should be included in Department of Defense Instruction (DODI) 6130.03.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and

discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense Instruction (DODI) 6130.03 itself which is publically available online at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf?ver=2018-05-04-113917-883> and the references identified therein show the considerations the military takes into account, and the process it utilizes, in determining which medical and mental health conditions and treatments should be included in Department of Defense Instruction (DODI) 6130.03. Moreover, the Accessions Medical Standards and Research Activity (AMSARA) produces an evidence-based evaluation of accessions medical standards annually to assist the Accessions Medical Standards Working Group in making these determinations which is publically available at: <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will conduct a reasonable search for official guidance from the Department of Defense pertaining to the considerations taken into account when determining whether to revise DoDI 6130.03.

RFP No. 47: Documents sufficient to show, for each service branch, the considerations the branch takes into account, and the process(es) it utilizes, both as to accession into military service and with respect to retention in service of current service members, when determining whether to grant applications for waivers of disqualifying mental or medical conditions including: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; post-traumatic stress disorder; and history of malignancy, including prostate, testicular, ovarian and breast malignancies.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the

court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, the Department objects to this request because the language pertaining to "waivers" for "retention" is vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at: <https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.

Response: Subject to and without waiving the above objections, Defendants will conduct a reasonable search for current, official guidance from the Military Services pertaining to the review of medical accession waivers and the Department of Defense Disability Evaluation System as it is applied to each Military Service.

RFP No. 48: Documents sufficient to show the total number of applications granted, and number of applications denied, for waiver of disqualifying conditions listed in DODI 6130.03, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for "[d]ocuments sufficient to show the total number of applications granted, and number of applications denied, for waiver of disqualifying conditions" includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files "containing personal information such as health screenings, pre-employment testing, and background checks" because plaintiff had not demonstrated a "compelling need for such a broad disclosure of personal information").

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 49: Documents sufficient to show the number of waivers granted upon accession, and number of waivers denied upon accession, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See*

Doe 2 v. Shanahan, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for "[d]ocuments sufficient to show the number of waivers granted upon accession, and number of waivers denied upon accession, for each of the following conditions..." includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition.

See, e.g., Hemphill v. ARAMARK Corp., No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 50: Documents sufficient to show the number of waivers granted for service members seeking retention, and number of waivers denied for service members seeking retention, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress

disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, the Department objects to this request because the language pertaining to "waivers" for "retention" are vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at:

<https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.

Further, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments sufficient to show the number of waivers granted for service members seeking retention, and number of waivers denied for service members seeking retention, for each of the following conditions...,” even if such documents existed, would include medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11).

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 51: Documents sufficient to show the number of openly transgender individuals granted waivers for non-gender-dysphoria conditions or histories, and allowed to be accessed or retained pursuant to those waivers, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does

not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, the Department objects to this request because the language pertaining to “waivers” for “retention” are vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at: <https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.” Further, Defendants object to the term “openly transgender individuals” because it is vague and undefined.

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments sufficient to show the number of openly transgender individuals granted waivers for non-gender-dysphoria conditions or histories, and allowed to be accessed or retained pursuant to those waivers, since June 30, 2016[,]” even if such information does exist, includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from

disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce documents responsive to this request.

RFP No. 52: Documents sufficient to show the number of openly transgender individuals denied waivers for non-gender-dysphoria conditions or histories, and denied accession or retention absent those waivers, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does

not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, the Department objects to this request because the language pertaining to “waivers” for “retention” are vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at: <https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.” Further, Defendants object to the term “openly transgender individuals” because it is vague and undefined.

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments sufficient to show the number of openly transgender individuals denied waivers for non-gender-dysphoria conditions or histories, and denied accession or retention absent those waivers, since June 30, 2016[,]” even if such information does exist, includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health

Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce documents responsive to this request.

RFP No. 53: All documents reflecting, referring or relating to any request by transgender persons for medical and/or mental health waivers of conditions disqualifying them from accession to or retention in the military, including without limitation all

documents reflecting the date of and grounds for such request, whether the request was for accession or retention, whether the request was granted or denied, and the basis for such decision.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does

not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, the Department objects to this request because the language pertaining to “waivers” for “retention” are vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at: <https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.”

Further, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments reflecting, referring or relating to any request by transgender persons for medical and/or mental health waivers of conditions disqualifying them from accession to or retention in the military, including without limitation all documents reflecting the date of and grounds for such request, whether the request was for accession or retention, whether the request was granted or denied, and the basis for such decision [.]” even if such information does exist, includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of

Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files "containing personal information such as health screenings, pre-employment testing, and background checks" because plaintiff had not demonstrated a "compelling need for such a broad disclosure of personal information").

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce documents responsive to this request.

RFP No. 54: All documents reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive the disqualifying condition of gender dysphoria, including without limitation documents reflecting criteria that will inform decisions upon those waiver requests, documents reflecting the date of and grounds for each such request, documents showing whether each request was granted or denied and the basis for such decision, and documents showing whether those decisions were made upon the subject individual's attempted accession into, or instead retention by, the military.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and

discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive the disqualifying condition of gender dysphoria, including without limitation documents reflecting criteria that will inform decisions upon those waiver requests, documents reflecting the date of and grounds for each such request, documents showing whether each request was granted or denied and the basis for such decision, and documents showing whether those decisions were made upon the subject individual’s attempted accession into, or instead retention by, the military[.]” includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and

information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will conduct a reasonable search for official guidance from the Department of Defense and the Military Services pertaining to accession waivers for the medical condition of gender dysphoria in accordance with Directive-type Memorandum (DTM) 19-004.

RFP No. 55: Documents sufficient to show the total number of mental health visits by all service members for each branch of service, by month, since July 13, 2015.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for "[d]ocuments sufficient to show the total number of mental health visits" includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of

non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files "containing personal information such as health screenings, pre-employment testing, and background checks" because plaintiff had not demonstrated a "compelling need for such a broad disclosure of personal information").

Defendants have already provided medical utilization data of service members (to include utilization of mental health service) from October 1, 2015 to October 3, 2017. Accordingly, Plaintiffs request to expand this data from July 13, 2015 to present is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' requests from October 1, 2015 to October 3, 2017, and will not produce further responsive documents.

RFP No. 56: Documents sufficient to show, for each branch of service since June 30, 2016, the number of exceptions to or exemptions made from sex-based standards for

non-transgender females, and the reason(s) for such exceptions, including without limitation exceptions for standards respecting: physical fitness tests; body fat; dress standards; and/or boxing and combatives.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, the Department of Defense objects to the use of the language "exceptions to or exemptions made from sex-based standards for non-transgender females" as it is

overboard, unduly burdensome, vague, ambiguous, and undefined. Specifically, the Department of Defense is an organization consisting of over two million employees stationed throughout the world and the Department does not maintain a central repository of “exceptions” or “exemptions” to “sex –based standards” for “non-transgender females.”

Further, Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. Documents sufficient to show “for each branch of service since June 30, 2016, the number of exceptions to or exemptions made from sex-based standards for non-transgender females, and the reason(s) for such exceptions, including without limitation exceptions for standards respecting: physical fitness tests; body fat; dress standards; and/or boxing and combatives[.]” even if such information existed, are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 57: Documents sufficient to show, for each branch of service since June 30, 2016, the branch’s policies with respect to “limited duty,” including without limitation the reasons for and/or circumstances under which a service member will or may be placed on limited duty.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants will conduct a reasonable search for current, official guidance from the Department of Defense

and the Military Services pertaining to the designation or placement of a service member on limited duty.

RFP No. 58: All documents reflecting, referring, or relating to the reasons that transgender service members were placed on “limited duty” in the Army and Air Force over the “one-year period” referenced on page 33 of the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and

discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request because the phrase “[d]ocuments reflecting, referring, or relating to the reasons that transgender service members were placed on ‘limited duty’ in the Army and Air Force” includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Consequently, Defendants construe this request as excluding medical records and medical information stored in electronic databases. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all Service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Nor does page 33 of the Department of Defense Report refer to “transgender service members...placed on ‘limited duty’ in the Army and Air Force” as stated in Plaintiffs’ request. Accordingly, this request is vague, ambiguous, overbroad, unduly burdensome, and disproportionate to the needs of the case.

Defendants have already provided documents responsive to this request considered by the Panel of Experts. Accordingly, Plaintiffs’ request seeking further documents “reflecting, referring, or relating to the reasons” those service members were placed on “limited duty” is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs’ request that were considered by the Panel of Experts and will not produce further responsive documents.

RFP No. 59: Documents sufficient to show, for each service branch by fiscal year from October 1, 2014 to the present, the name, rank, and service unit of each service member who has been discharged from military service due, in whole or in part, to their transgender status or diagnosis of gender dysphoria, including without limitation documents showing the date and specific stated reason for their discharge.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all Service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender

individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, Plaintiffs’ request seeks medical records and sensitive privacy data from both current and former service members that are not parties to this litigation and is irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Further, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11).

Department of Defense also objects to the time period of the request as overboard and unduly burdensome as it encompasses a time period years prior to the effective date of the challenged policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 60: All documents reflecting or relating to the “policy recommendations and a proposed implementation plan for the Panel’s consideration” that were developed and/or provided to the Panel of Experts by the “Transgender Service Policy Working Group,” as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 61: All documents reflecting or relating to the “analysis of accession standards, multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition related medical care” that was provided to the Panel of Experts by the “Medical and Personnel Executive Steering Committee,” as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for

‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs’ request or withheld documents responsive to Plaintiffs’ request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 62: All documents reflecting or relating to the reports and the responses to “queries for additional information and analysis to support the Panel’s review and deliberations” by the “Transgender Service Policy Working Group” and/or the “Medical and Personnel Executive Steering Committee,” as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above,

neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanaban*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 63: All documents reflecting or relating to the "input" the Panel of Experts received "from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals," as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and

expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 64: All documents reflecting or relating to the "information and analyses about gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and

resources” that was received and/or reviewed by the Panel of Experts as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 65: All documents reflecting or relating to "the Department's own data and experience obtained since the Carter policy took effect" that is referenced at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the

court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 66: All documents reflecting or relating to the following references in the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons ("Report"): (a) the "[d]ata retrieved from [the] Military Health System data repository" cited at pages 21-22, footnotes 64-66, and page 41, footnote 161; (b) the "[d]ata reported by the Departments of Army, Navy, and Air Force" cited at page 31, footnotes 114-115, as well as at page 33, footnote 121 and page 41, footnote 163, and (c) the "Defense Health Agency, Supplemental Health Care Program Data" cited at pages 31-32, footnotes 119-120, and page 41, footnote 162.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege;

(d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 67: All documents referring or relating to the equal opportunity complaints discussed at page 37 of the Report, including copies of the complaints, email or other

correspondence related to the complaints, and documents reflecting how the complaints were resolved.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Department of Defense further objects on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Defendants also object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. The substance of the communications that Plaintiffs request is summarized in the administrative record previously provided to Plaintiffs, *see* ECF No. 249-1, and the personally identifiable information from the equal opportunity complaints themselves is irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections and subject to applicable privileges, the Department of Defense has produced materials responsive to Plaintiffs' request considered by the Panel of Experts or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 68: Documents sufficient to show the basis for, and all data underlying or relating to, the purported increase in medical costs for service members with gender dysphoria as compared to service members without gender dysphoria, referenced at page 41 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege;

(d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Department of Defense further objects on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

Dated: May 28, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on May 28, 2019, a copy of the document above was served by email on the following:

Vanessa Barsanti KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200
vanessa.barsanti@kirkland.com

Jordan M. Heinz KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200
jordan.heinz@kirkland.com

Peter Renn Senior Attorney Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280 Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org www.lambdalegal.org

La Rond Baker
Assistant Attorney General Wing Luke Civil Rights Unit
Office of the Washington Attorney General 800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.516.2999
206.464.6451 (fax) LaRondB@ATG.WA.GOV

Dated: May 28, 2019

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants

Exhibit 4

Filename: Karnoski - Prod. Nos. 1-3 - Air Force -
Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 5

Filename: Karnoski - Air Force Privilege Log for
Production 14 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 6

Filename: Karnoski - Air Force Privilege Log for
Production 15 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 7

Filename: Karnoski - Air Force Privilege Log for
Production 16 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 8

Filename: 2018-10-15 Karnoski v. Trump - Revised
Priv Log for Air Force.XLSX

This document will be distributed in native
format for party review.

Exhibit 9

Filename: Karnoski - Prod. Nos. 1-3 - Army -
Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 10

Filename: Karnoski - Privilege Log for Prod. No. 8-Army.XLSX

This document will be distributed in native format for party review.

Exhibit 11

Filename: Karnoski - Privilege Log for Prod. No. 9 -
Army.XLSX

This document will be distributed in native
format for party review.

Exhibit 12

Filename: Karnoski - Priv Log For Production 10
(Army)_Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 13

Filename: Karnoski - Army Privilege Log for
Production 12 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 14

Filename: Karnoski - Army Privilege Log for
Production 14 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 15

Filename: Karnoski - Army Privilege Log for
Production 15 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 16

Filename: 2018-10-18 Karnoski v. Trump - Revised
Priv Log for Army.XLSM

This document will be distributed in native
format for party review.

Exhibit 17

Filename: 2018-10-18 Karnoski v. Trump - Army
Privilege Log Prod 20.XLSX

This document will be distributed in native
format for party review.

Exhibit 18

Filename: Karnoski - CJCS Index for Production 14
- Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 19

Filename: Karnoski - CJCS Index - Copy.XLSX

This document will be distributed in native format for party review.

Exhibit 20

Filename: 2018-09-17 Karnoski v. Trump - Revised
Index for CJCS Docs.XLSX

This document will be distributed in native
format for party review.

Exhibit 21

Filename: 2018-12-21 Karnoski v. Trump - Coast
Guard Privilege Log.XLSX

This document will be distributed in native
format for party review.

Exhibit 22

Filename: Karnoski - DHA Privilege Log -
Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 23

Filename: Karnoski - Prod. No. 4 - DoD -
Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 24

Filename: Karnoski - Prod. No. 4 - DoD - Revisions
- Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 25

Filename: Karnoski - Prod. No. 5 - DoD -
Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 26

Filename: Karnoski - Prod. No. 6 - DoD -
Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 27

Filename: Karnoski - Privilege Log for Prod No. 7 -
DoD.XLSX

This document will be distributed in native
format for party review.

Exhibit 28

Filename: Karnoski - Priv Log For Production 10
(DoD)_Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 29

Filename: Karnoski - DoD Privilege Log for
Production 11 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 30

Filename: Karnoski - DoD Privilege Log for
Production 14 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 31

Filename: Karnoski v. Trump - Privilege Log -
Served 6.4.18.XLSX

This document will be distributed in native
format for party review.

Exhibit 32

Filename: Karnoski - DoD Privilege Log for Soper
Depo Docs - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 33

Filename: 2018-09-17 Karnoski v. Trump - Revised
Priv Log for DoD Soper Docs.XLSX

This document will be distributed in native
format for party review.

Exhibit 34

Filename: 2018-11-16 Karnoski v. Trump - DoD
Revised Priv Log for Prods. 4 and 5.XLSX

This document will be distributed in native
format for party review.

Exhibit 35

Filename: 2018-12-13 Karnoski v. Trump - Revised
Log for DoD Prods. 6 7 and 10.XLSX

This document will be distributed in native
format for party review.

Exhibit 36

Filename: 2018-11-21 Karnoski v. Trump - DoD
Revised Privilege Log for Prod. 11.XLSX

This document will be distributed in native
format for party review.

Exhibit 37

Filename: 2018-10-18 Karnoski v. Trump - Revised
Priv Log for DoD Prod 14.XLSX

This document will be distributed in native
format for party review.

Exhibit 38

Filename: 2018-11-09 Defs' Revised Priv Log for
DoD Prod #18.XLSX

This document will be distributed in native
format for party review.

Exhibit 39

Filename: 2018-12-13 Karnoski v. Trump - DoD
privilege log for Production 23.XLSX

This document will be distributed in native
format for party review.

Exhibit 40

Filename: Karnoski - Navy Production 1 Privilege
Log - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 41

Filename: Karnoski - Navy Production 2 Privilege
Log - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 42

Filename: Karnoski - Navy Production 3 Privilege
Log - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 43

Filename: Karnoski - Navy Production 4 Privilege
Log - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 44

Filename: Karnoski - Navy Production 1 Redaction
Log - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 45

Filename: Karnoski - Navy Production 2 Redaction
Log - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 46

Filename: Karnoski - Navy Production 3 Redaction
Log - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 47

Filename: Karnoski - Navy Production 4 Redaction
Log - Copy.XLSX

This document will be distributed in native
format for party review.

Exhibit 48

Filename: Karnoski - Priv Log for Production 13
(Navy)_Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 49

Filename: Karnoski - Navy Privilege Log for
Production 14 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 50

Filename: Karnoski - Navy Redaction Log for
Production 14 - Scrubbed.XLSX

This document will be distributed in native
format for party review.

Exhibit 51

Filename: 2018-10-15 Karnoski v. Trump - Revised
Priv Log for Navy.XLSX

This document will be distributed in native
format for party review.

Exhibit 52

Filename: Karnoski v. Trump - Trump-WH Priv Log
- Served 2018-07-16.PDF

This document will be distributed in native
format for party review.

Exhibit 53

Subject: FW: [EXT] Fwd: FW: attachments
Attachments: witches mpd.pdf; Hayes Directory.pdf; 20170619_TNA52HruzMayerMcHugh.pdf; Long-Term Follow-Up of Transsexual Persons - Sweden.pdf

From: Paul McHugh
Sent: Monday, February 5, 2018 2:51 PM
To: 'william.bushman@sd.mil' <william.bushman@sd.mil>
Subject: attachments

Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis. I've attached them all here . Do tell me if they get through. Paul McHugh

Exhibit 54

Subject: FW: [EXT] Fwd: FW: attachments
Attachments: j.1365-2265.2009.03625.x.pdf

From: Paul McHugh
Sent: Tuesday, February 13, 2018 12:34 PM
To: 'Bushman, William CIV SD' <William.Bushman@sd.mil>
Subject: RE: attachments

Mr. Bushman I've attached a copy of the study you wanted. Also I realize that I sited Tom Wise in Fairfield. I of course meant Fairfax Virginia. Sorry Paul McHugh

From: Bushman, William CIV SD [<mailto:William.Bushman@sd.mil>]
Sent: Monday, February 12, 2018 6:00 PM
To: Paul McHugh <pmchugh1@jhmi.edu>
Subject: RE: attachments

Thank you, sir. This is most helpful.

One additional question: do you have access to a copy of the following study?

- Mohammad Hassan Murad et al., "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes," *Clinical Endocrinology* 72 (2010): 214-231.

Thank you again for your help.

Best,
Will

William G. Bushman

Office of the Secretary of Defense

Office: 703.571.8935

Cell: 703.216.5782

NIPR: william.bushman@sd.mil

SIPR: william.bushman@sd.smil.mil

JWICS: william.bushman@sd.ic.gov

From: Paul McHugh [<mailto:pmchugh1@jhmi.edu>]
Sent: Monday, February 12, 2018 2:12 PM
To: Bushman, William CIV SD <William.Bushman@sd.mil>
Subject: RE: attachments

Mr. Bushman, You might contact Dr. Chester Schmidt here at Hokins and Dr. Thomas Wise at Fairfield. PM

From: Bushman, William CIV SD [<mailto:William.Bushman@sd.mil>]
Sent: Sunday, February 11, 2018 3:30 PM
To: Paul McHugh <pmchugh1@jhmi.edu>
Subject: RE: attachments

Dr. McHugh,

Thank you again for speaking to us and providing additional information. During our call, I believe you mentioned there were other individuals who could also serve as resources for our policy review. Do you know of any other persons we should consider reaching out to?

Thanks,

Will Bushman

William G. Bushman

Office of the Secretary of Defense

Office: 703.571.8935

Cell: 703.216.5782

NIPR: william.bushman@sd.mil

SIPR: william.bushman@sd.smil.mil

JWICS: william.bushman@sd.ic.gov

From: Paul McHugh [<mailto:pmchugh1@jhmi.edu>]
Sent: Monday, February 5, 2018 2:51 PM
To: Bushman, William CIV SD <William.Bushman@sd.mil>
Subject: attachments

Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis. I've attached them all here . Do tell me if they get through. Paul McHugh

Exhibit 55

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Daniel I. Siegfried
To Call Writer Directly:
+1 312 862 3813
daniel.siegfried@kirkland.com

300 North LaSalle
Chicago, IL 60654
United States

+1 312 862 2000

www.kirkland.com

Facsimile:
+1 312 862 2200

July 25, 2019

By E-mail

Andrew Carmichael
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
andrew.e.carmichael@usdoj.gov

Re: Documents Withheld Under the Deliberative Process Privilege – *Karnoski v. Trump*, 2:17-cv-01297-MJP (W.D. Wash.)

Dear Drew:

I write to follow up on our July 17, 2019 telephone conference regarding responsive documents Defendants withheld under the deliberative process privilege.

First, you indicated during our call that you would provide a document production containing documents over which Defendants are waiving their deliberative process privilege assertion. Please confirm you have sent this production. You also indicated we would receive revised privilege logs excluding these newly produced documents and providing additional detail regarding certain privilege assertions. Please provide these logs as soon as possible so Plaintiffs can better understand the current state and scope of Defendants' privilege claims.

Second, on our July 17 call we expressed concerns about Defendants' boilerplate assertion of the deliberative process privilege in response to every single one of Plaintiffs' requests for production. I noted that none of Defendants' responses states whether Defendants are withholding any responsive documents based on this objection, as Federal Rule of Civil Procedure 34 expressly requires.¹ Defendants' failure to comply with Rule 34 leaves Plaintiffs unable to assess the scope of Defendants' privilege assertion for purposes of a motion to compel.

¹ See Fed. R. Civ. P. 34(b)(2)(C) (“An objection must state whether any responsive materials are being withheld on the basis of that objection.”); *Weidenhamer v. Expedia, Inc.*, 2015 WL 1292978, at *9 (W.D. Wash. Mar. 23, 2015) (ordering party to “prepare new responses” that state “with reasonable specificity, the extent to which [it] is withholding responsive documents based on those objections”).

KIRKLAND & ELLIS LLP

Mr. Andrew Carmichael
July 25, 2019
Page 2

Please revise all of Defendants' responses to Plaintiffs' document requests to state with specificity whether any responsive documents have been withheld under the deliberative process privilege. If Defendants have not withheld any documents under the deliberative process privilege in response to a particular request, please withdraw the privilege objection.

Third, and relatedly, many of Plaintiffs' document requests seek documents and information that do not implicate the privilege at all, and Defendants should at the very least withdraw their privilege assertions regarding these requests. As you know, the deliberative process privilege is limited to policy-oriented opinions and deliberations that directly contribute to the formulation of public policy. *E.g.*, *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540 (W.D. Wash. 2000). It does not shield non-deliberative information, including factual material, and it does not apply to non-policy-oriented decisions. Many of Plaintiffs' document requests exclusively seek documents that fall into these categories and do not possibly warrant a deliberative process privilege objection. These requests include, at a minimum, RFP Nos. 9, 11-13, 16-19, 24-26, 31, 35-45, 47-59, 63, 65-68.² Please confirm that Defendants will withdraw their assertion of privilege for each of these requests. If you intend to maintain your assertion of privilege, please explain your basis for doing so.

Finally, Plaintiffs continue to maintain that the deliberative process privilege does not apply at all in this case because Plaintiffs' constitutional claims "turn[] on the government's intent." *See, e.g., In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). Independently, however, Plaintiffs identify the following categories of documents where either the privilege does not apply at all or Plaintiffs' "need for the materials ... override[s] the government's interest in nondisclosure" under *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, (9th Cir. 1984):

- Documents related to the formulation of the Carter Policy;
- Documents related to the implementation of the Carter Policy;

² We understand that Defendants believe the presidential communications privilege protects some of this factual information—for instance: "Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs" (RFP 11). While Plaintiffs disagree that the presidential communications privilege applies to this information—and Plaintiffs reserve all rights regarding the presidential communications privilege, which is beyond the scope of this meet and confer—at present we ask only that Defendants withdraw any deliberative process objection regarding this purely factual information, as there is no conceivable claim it is deliberative.

KIRKLAND & ELLIS LLP

Mr. Andrew Carmichael
July 25, 2019
Page 3

- Documents related to military service by transgender individuals between President Trump's inauguration and the President's July 2017 tweets;
- Documents related to the formation and work of the so-called Panel of Experts;
- Communications by or among the Panel of Experts' members, or members of its working group, related to Panel's work;
- Testimony, documents, data, and other information received by the Panel of Experts;
- Documents reflecting the Panel of Experts' deliberations and decisions;
- Documents related to the February 2018 Department of Defense Report and Recommendation on Military Service by Transgender Persons and Secretary Mattis' February 23, 2018 memorandum;
- Documents related to President Trump's March 2018 memorandum;
- Documents related to the implementation of Secretary Mattis' February 2018 memorandum and transgender military service since February 2018.

This list is not intended to be exhaustive, but rather meant to identify key categories of documents that Plaintiffs will seek to compel if Defendants continue to assert the deliberative process privilege. Please let me know if Defendants intend to withdraw or otherwise waive the privilege on any of these categories of documents.

As you know, Plaintiffs' motion to compel on these issues is due on August 22, 2019. To allow Plaintiffs to evaluate Defendants' positions on these issues and hopefully narrow the issues in dispute before that deadline, please immediately provide revised privilege logs and revised responses to Plaintiffs' three sets of requests for production that comply with Rule 34(b)(2)(C). We look forward forward to your responses on the remaining issues in this letter as soon as possible.

KIRKLAND & ELLIS LLP

Mr. Andrew Carmichael
July 25, 2019
Page 4

Sincerely,

A handwritten signature in black ink that reads "Daniel" followed by a stylized monogram "DS".

Daniel I. Siegfried

Exhibit 56



U.S. Department of Justice
Civil Division, Federal Program Branch

Andrew E. Carmichael
Trial Attorney

Tel: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

August 2, 2019

By Email

Daniel I. Siegfried
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

Counsel for Plaintiffs

Re: Documents Withheld Under the Deliberative Process Privilege – *Karnoski v. Trump*, 2:17-cv-01297-MJP (W.D. Wash.)

Dear Daniel,

Thank you for your letter of July 25, 2019. Regarding the first issue you raised in your letter, Defendants previously sent you a production of documents via Fed Ex on May 28, 2019. Please verify that you received the package from May 28, 2019. If you have not received it, we will resend that production.

Regarding the second issue you raised in your letter, as I explained on our July 17, 2019 telephone call, Defendants did not conduct separate searches for each of Plaintiffs' requests for production, and Defendants only applied the deliberative process privilege after it conducted a search for responsive records. For example, in response to Plaintiffs' first and second set of discovery requests and the discovery requests propounded in the related litigation, the Department of Defense Office of General Counsel ("DoD OGC") conducted multiple electronic searches on several network domains to gather potentially responsive documents. Searches were conducted at the server level by DoD IT personnel in consultation with DoD OGC attorneys and, in some cases, with assistance from the Office of Secretary of Defense Records Management Office and Defense Information Systems Agency personnel. Data was digitally gathered from current and former DoD officials who were involved in the development of the Carter and/or Mattis policies. Broadly crafted search terms, like "transgend*," "trans gender," or "gender dysphoria" were used to capture all potentially responsive data. Additionally, some custodians conducted a self-collection of their data to meet urgent discovery deadlines. For these custodians, the broader digital search supplemented their self-collections and any duplicates from the data sets were retained.

DoD IT personnel applied relevant search parameters while conducting their digital searches as directed by DoD OGC attorneys. The only parameters applied were date range, search term(s), and custodian email address. No additional filters were applied by DoD IT. After collection, DoD OGC staff reviewed the collected documents using Relativity and made privilege determinations for privileges such as the deliberative process privilege. Accordingly, in each instance where DoD or the Military Services assert the deliberative process privilege, it is specifically noted in one of the privilege logs Defendants have provided. Defendants have complied with their discovery obligations under the Federal Rules of Civil Procedure. *See* Committee Notes on the 2015 Amendment to Rule 34(b)(2)(C) (explaining that stating “the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been ‘withheld’”); *Rowan v. Sunflower Elec. Power Corp.*, 2016 WL 3743102, at *5 (D. Kan. July 13, 2016) (explaining that a party’s discovery responses “state the limits that controlled its search for responsive documents” and that “[c]onsequently, the Advisory Committee’s note makes clear that [the party’s] responses are sufficient”).

Regarding the third issue you raised in your letter, as explained above, Defendants applied the deliberative process privilege based on a document-by-document review and did not apply the privilege categorically to any of Plaintiffs’ discovery requests. For example, from February 2018 to July 2018, a document review team of DoD OGC attorneys, trained legal support personnel, and other offices within DoD OGC reviewed documents responsive to your first and second set of discovery requests in Relativity. As to each document withheld for the deliberative process privilege, DoD OGC staff determined that the document contained pre-decisional and deliberative material that would chill agency deliberations if released. Accordingly, if a document was responsive to Plaintiffs’ discovery requests and contained purely factual material, it was not withheld on the basis of the deliberative process privilege. However, where the factual material was “so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations,” Defendants properly withheld such material, and the withholding is noted in one of Defendants’ privilege logs. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

Regarding your final point, the categories you have identified appear to cover virtually all deliberative documents from July 2015 to present. This is certainly not what the Ninth Circuit contemplated in its recent ruling. We believe it would be more productive for Plaintiffs to identify specific documents from Defendants’ privilege logs (or, at the very least, discrete categories of documents) over which they would like Defendants to consider waiving the deliberative process privilege. Further, the Ninth Circuit specifically questioned the relevance of much of the material you have identified in your letter and indicated that the Court’s inquiry should instead focus on the military’s justifications for the Department’s 2018 Policy. *Karnoski v. Trump*, Nos. 18-35347, 18-72159, slip op. at 54-56 (9th Cir. June 14, 2019). To that end, Defendants have prepared revised privilege logs that I am sending by email along with this correspondence. These privilege logs were revised for the related *Doe* litigation and specifically include documents considered or generated by the Panel of Experts as well as communications to or from members of the Panel regarding their work over which Defendants have asserted the deliberative process privilege. *See Doe v. Esper*, 17-cv-01597-CKK (D.D.C.), Minute Order, Apr. 16, 2019. Although Defendants maintain that Plaintiffs cannot make the requisite showing of need to overcome the deliberative process privilege as to any

of these documents, the documents identified on these logs are the only ones that are even relevant under the standard of review articulated by the Ninth Circuit.

Accordingly, Defendants propose that Plaintiffs review the attached logs from *Doe* and identify specific documents (or narrow categories of documents) over which you would like Defendants to reconsider their assertion of the deliberative process privilege.

Sincerely,

/s/ Andrew E. Carmichael

Andrew E. Carmichael

Exhibit 57

Filename: Doe v. Shanahan - Air Force Vaughn
Index.XLSX

This document will be distributed in native
format for party review.

Exhibit 58

Filename: Doe v. Shanahan - Army Vaughn
Index.XLSX

This document will be distributed in native
format for party review.

Exhibit 59

Filename: Doe v. Shanahan - Coast Guard Vaughn
Index.XLSX

This document will be distributed in native
format for party review.

Exhibit 60

Filename: Doe v. Shanahan - DoD Vaughn
Index.XLSX

This document will be distributed in native
format for party review.

Exhibit 61

Filename: Doe v. Shanahan - Navy Vaughn
Index.XLSX

This document will be distributed in native
format for party review.

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

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on August 22, 2019.



Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800