

INTRODUCTION

1
2 On March 14, 2018, the Court entered an order granting Plaintiffs' motion to compel initial
3 disclosures. ECF No. 204. In its order, the Court held that "Defendants cannot reasonably claim
4 there are *no* individuals likely to have discoverable information and *no* documents relevant to their
5 claims and defenses regarding the current policy." *Id.* at 3 (emphasis in original). In so holding,
6 the Court identified questions that it appears to believe required answers from the Defendants,
7 including the identification of whom the President consulted with and what information he relied
8 on before making his announcement on Twitter and issuing the Presidential Memorandum
9 regarding military service by transgender individuals. *Id.* at 3. The Court then ordered Defendants
10 to "identify all information Defendants may use to support their claims or defense with respect to
11 the *current* policy prohibiting military service by openly transgender persons." *Id.* (emphasis in
12 original).
13

14 Defendants seek clarification and, if necessary, reconsideration of the Court's order.
15 Specifically, Defendants ask the Court to clarify whether, by asking whom the President consulted
16 with, the Court intended to order Defendants to disclose potentially privileged information
17 regarding the President's deliberative process preceding his announcements regarding military
18 service by transgender individuals. If the Court intended to order Defendants to provide
19 potentially privileged information in their initial disclosures, Defendants respectfully request that
20 the Court reconsider its decision. Defendants are not required by Federal Rule of Civil Procedure
21 26(a)(1) to disclose potentially privileged information about the President's deliberative processes
22 because Defendants do not intend to use that information to support their defenses in this
23 litigation. Moreover, requiring the disclosure of information about presidential deliberations would
24 implicate sensitive and important issues of separation of powers and Executive privilege that have
25 not been presented to the Court or briefed by the parties.
26
27
28

1 Although Defendants continue to disagree with the Court's conclusion that they failed to
2 provide initial disclosures that meet the requirements of Rule 26(a)(1), ECF No. 204 at 3,
3 Defendants have complied with the Court's order to the extent possible and have served Second
4 Amended Initial Disclosures on Plaintiffs and Intervenor identifying additional information that
5 Defendants may use to support their defenses.¹ *See* Declaration of Ryan Parker ("Parker Decl."),
6 Exh. 1. However, Defendants should not be required to provide initial disclosures that include
7 information that is potentially subject to Executive privilege, particularly where Defendants are not
8 relying upon such information for their defenses. Defendants, therefore, respectfully request that
9 the Court clarify or, if necessary, reconsider its March 14, 2018 order.

11 BACKGROUND

12 Defendants served their initial disclosures in this case on February 9, 2018, and served
13 amended initial disclosures on February 16, 2018. ECF Nos. 191-2, 191-3. In both their initial and
14 amended initial disclosures, Defendants explained that the Department of Defense is undertaking a
15 study of policies concerning transgender service members. *Id.* Defendants also stated that, upon
16 the completion of that study and the development of any new policies resulting from that study,
17 Defendants would supplement their initial disclosures as appropriate, consistent with Federal Rule
18 of Civil Procedure 26(e). *Id.* In their amended initial disclosures, Defendants also identified
19 fourteen (14) individuals who may possess relevant discoverable information that may be relied
20 upon by Defendants in support of their defenses. ECF No. 191-3.
21
22
23
24

25 ¹ As the additional information that Defendants have included in their Second Amended Initial
26 Disclosures has already been made known to Plaintiffs and Intervenor in Defendants' various
27 filings in this case, Defendants were not required to disclose this information in their previous Rule
28 26(a) disclosures. *See* Fed. R. Civ. P. 26(e)(1)(A). Nevertheless, to comply with the Court's order,
Defendants have supplemented their disclosures to identify this information.

1 On February 22, 2018, Plaintiffs filed a motion to compel asking the Court to order
2 Defendants to provide “complete initial disclosures.” ECF No. 190 at 6. Defendants filed an
3 opposition to Plaintiffs’ motion to compel on March 5, 2018, stating explicitly that they “have
4 provided in their initial disclosures all of the witnesses and documents that they intend to rely upon
5 to support their defenses.” ECF No. 199 at 1. Defendants also explained that Federal Rule of
6 Civil Procedure 26(a)(1) does not require Defendants to identify information or witnesses that may
7 be relevant to *Plaintiffs’* claims. *Id.* at 6. Rather, Rule 26(a)(1) requires only that Defendants
8 identify information or witnesses that they may use to support *their own* defenses. *Id.* Defendants
9 are basing their defense on the policy that will result from the study contemplated in the
10 Presidential Memorandum and, as such, tailored their initial disclosures accordingly. As
11 Defendants have identified the information and witnesses that they may use to support their
12 defenses in their initial disclosures and amended initial disclosures, they asked the Court to deny
13 Plaintiffs’ motion to compel. *Id.* at 6-7. Plaintiffs filed their reply on March 9, 2018. ECF No.
14 203.
15

16
17 On March 14, 2018, the Court entered an order granting Plaintiffs’ motion to compel.
18 Rather than bar Defendants from later relying upon previously undisclosed evidence, as
19 contemplated by Rule 37(c)(1), the Court instead ordered Defendants to identify additional
20 witnesses and documents, regardless of whether Defendants are actually relying upon such
21 evidence. Specifically, in the order, the Court quoted the President’s July 26, 2017 Tweet while
22 observing that, “President Trump’s own announcement states ‘[a]fter consultation with my Generals and
23 *military experts*, please be advised that the United States Government will not accept or allow . . .
24 Transgender individuals to serve in any capacity in the U.S. Military.’” ECF No. 204 at 3
25 (emphasis in original) (quoting ECF No. 149, Ex 1). The Court also observed that Defendants
26 have asserted that, “well before the President made statements on Twitter, Secretary Mattis
27
28

1 received counsel from the Service Chiefs and Secretaries and determined that additional time was
2 needed to study whether accession of transgender individuals into the military would impact
3 readiness and lethality.” *Id.* (quoting ECF No. 194 at 18). The Court then posed three questions.
4 “Which Generals and military experts were consulted? Which Service Chiefs and Secretaries
5 provided counsel? What information did they review or rely upon in formulating the current
6 policy?” *Id.* Finally, the Court stated that, if it were “to credit Defendants’ Initial Disclosures and
7 Amended Disclosures, the answer to these questions apparently would be ‘none.’” *Id.*

8
9 The Court then granted Plaintiffs’ motion to compel and gave the Defendants “five days
10 from the date of this Order to produce the required disclosures, which shall identify all
11 information Defendants may use to support their claims or defense with respect to the current
12 policy prohibiting military service by openly transgender persons (i.e., the policy announced on
13 Twitter by President Trump on July 26, 2017 and formalized in an August 25, 2017 Presidential
14 Memorandum).” *Id.*

15
16 On March 19, 2018, Defendants served Second Amended Initial Disclosures on Plaintiffs
17 and Intervenor identifying additional information that Defendants may use to support their
18 defenses. *See Parker Decl.*, Exh. 1.

19 ARGUMENT

20 Defendants seek clarification that the Court’s March 14, 2018 order does not require them
21 to include potentially privileged information about the President’s deliberative processes in their
22 initial disclosures, where Defendants are not relying upon this information for their defenses in this
23 litigation. If the Court intended to require Defendants to include the President’s deliberative
24 information in their initial disclosures, the Court has erred and should reconsider its decision for at
25 least two important reasons. *See Marlyn Natraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d
26
27
28

1 873, 880 (9th Cir.2009) (Reconsideration is appropriate when a Court has “committed clear
2 error.”).

3 First, Defendants do not intend to use potentially privileged information about the
4 President’s deliberations to support their defenses to what the Court has deemed the “current”
5 policy. Rule 26(a)(1) simply does not apply to information or individuals that the disclosing party
6 does not intend to use to support its defenses. *See* Fed. R. Civ. P. 26(a)(1)(A)(i) (stating that a party
7 must disclose information “that the disclosing party may use to support its claims or defenses”)
8 (emphasis added); *Kumar v. Williams Portfolio 7, Inc.*, No. C14-657RAJ, 2015 WL 11714566, at *4
9 (W.D. Wash. Aug. 13, 2015) (Rule 26(a)(1) does not apply “when an individual is not being used to
10 support the *disclosing party’s* claims or defenses” (emphasis added)). Defendants should not be
11 required under Rule 26(a)(1) to identify in their initial disclosures information about the President’s
12 deliberations or any other information that they do not intend to use to support their defenses.²
13

14 Second, requiring Defendants to identify information about Presidential deliberations in
15 their initial disclosures would implicate sensitive and important separation of powers and privilege
16 issues that are not properly before the Court and have not been briefed by the parties.³ The
17 Supreme Court has observed that assertions of Executive privilege “push[] to the fore difficult
18 questions of separation of powers and checks and balances” and counseled that “[t]hese occasions
19 for constitutional confrontation between the two branches should be avoided whenever possible.”
20
21

22 ² In its March 14, 2018 order, the Court asked, “[w]hich Service Chiefs and Secretaries provided
23 counsel” to Secretary Mattis before he determined that additional time was needed to study
24 whether the accession of transgender individuals into the military would impact readiness and
25 lethality. ECF No. 204 at 3. But Secretary Mattis has stated that he made his decision “after
26 consulting the Service Chiefs and Secretaries.” ECF No. 197, Parker Declaration, Exhibit 4. The
27 identities of the Service Chiefs and Secretaries are publicly available, and Defendants have not
28 listed them on Defendants’ initial disclosures because they are not likely to have discoverable
information that Defendants may use to support their defenses.

³ In contrast, the parties in the related case *Doe v. Trump*, No. 1:17-cv-1597 (D.D.C.), are in the
process of briefing issues related to Defendants’ assertion of executive privileges in response to
discovery requests served by the *Doe* Plaintiffs. *See* Parker Decl., Exh. 2.

1 *Cheney v. U.S Dist. Ct.*, 542 U.S. 367, 389-90 (2004). This Court should not order Defendants to
2 identify information in their initial disclosures that implicates the separation-of-powers concerns
3 outlined in *Cheney* or Executive privileges, especially when the application of those privileges has
4 not been raised with the Court or briefed by the parties.

5 **CONCLUSION**

6 For the reasons set forth above, Defendants respectfully request that the Court clarify that
7 its March 14, 2018 order does not require Defendants to identify in their initial disclosures
8 potentially privileged information that Defendants are not relying upon for their defenses in this
9 litigation. If the Court intended to order Defendants to provide such information, Defendants
10 respectfully request that the Court reconsider its decision. If the Court clarifies that it intended to
11 order Defendants to disclose potentially privileged information about Presidential deliberations
12 and declines to reconsider its decision, Defendants respectfully request that the Court stay
13 Defendants' disclosure obligations so Defendants can consider their appellate options.

14 Dated: March 19, 2018

15 Respectfully submitted,

16 CHAD A. READLER
17 Acting Assistant Attorney General
18 Civil Division

19 BRETT A. SHUMATE
20 Deputy Assistant Attorney General

21 JOHN R. GRIFFITHS
22 Branch Director

23 ANTHONY J. COPPOLINO
24 Deputy Director

25 /s/ Ryan B. Parker
26 RYAN B. PARKER
27 Senior Trial Counsel
28 ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch

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

Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2018, I electronically filed the foregoing document, causing a notice of filing to be served upon all counsel of record.

Dated: March 19, 2018

/s/ Ryan Parker

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

Counsel for Defendants

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