IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NICHOLAS HARRISON and OUTSERVE-SLDN, INC. *Plaintiffs*, v. PATRICK M. SHANAHAN, in his official capacity as acting Secretary of Defense; MARK ESPER, in his official capacity as the Secretary of the Army; and the UNITED STATES DEPARTMENT OF DEFENSE, *Defendants*.	NO. 1:18-CV-00641-LMB-IDD

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
DOCUMENTS AND INFORMATION WITHHELD
ON THE BASIS OF DELIBERATIVE PROCESS PRIVILEGE

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INTRODUCTION

This motion asks the Court to order the production of approximately 1,500 documents that Defendants admit are relevant and responsive to Plaintiffs' requests for production, but nevertheless will not produce because they involve Defendants' decision-making regarding policies affecting service members living with HIV. These documents are central to the issues in this case. Nonetheless, Defendants are attempting to prevent the Plaintiffs—and ultimately the fact-finder—from seeing these documents and from fully understanding the reasons for Defendants' discriminatory policies.

The Court has already held that Plaintiffs are entitled to discovery "to prove that the reasons that [Defendants] are saying they use are not justified and [do] not have a legitimate basis, [and] are only pretextual." Dkt. 85-8, Nov. 30, 2018 Hr'g at 18:23-25. The Court further explained that Plaintiffs are entitled to discovery regarding the evolution of the regulations at issue, including what was considered during the creation or amendment of those regulations. *See id.* at 31:24-32:22. Nevertheless, Defendants initially withheld 1,740 documents solely on the basis of the deliberative process privilege.[1] One hundred and seven additional documents have been redacted under the guise of that same privilege claim. The deliberative process privilege does not apply at all in this case. The government's intent is at issue in this case challenging the constitutionality of the Military's discriminatory practices as they concern people living with HIV. But even if the deliberative process privilege were applicable, that privilege is not absolute. The need for the withheld discovery outweighs any potential interests served by the

[1] In the meet and confer process, Defendants agreed to produce approximately 200 documents that they had originally withheld as privileged. This includes spreadsheets that contain deployability statistics, documents identified by Plaintiffs as relating to waivers, and some "staffing packets" related to specific DoDIs.

privilege. For these reasons, Plaintiffs move the Court for an order compelling Defendants to produce the following categories of documents that have been withheld on the grounds of the deliberative process privilege: (1) documents and information considered or relied upon in the drafting or updating of Department of Defense (DoD) and military branches' regulations pertaining to HIV and discussions regarding the same; (2) documents and information considered or relied upon in drafting two DoD reports to Congress regarding DoD's HIV policies and discussions regarding the same; and (3)[2] documents that provide only factual information, are peripheral to policy formulation, are essentially technical and facilitative, or are otherwise not covered by the deliberative process privilege.[3]

BACKGROUND

Plaintiffs are challenging the constitutionality of several Department of Defense Instructions (DoDIs) and Army Regulations (ARs) that ban the enlistment and appointment of HIV-positive individuals, as well as those limiting the deployability of individuals who seroconvert after entering the military. *See generally* Compl., Dkt. 1. These DoDIs and ARs, both individually and in the aggregate, have a disparate and unjust effect on individuals living with HIV and do not reflect decades of significant medical advancement. *Id.*

[2] Defendants agreed to produce a fourth category of documents identified by Plaintiffs: documents and information relating to the processing and grant or denial of medical waivers for individuals with HIV from all military branches. In the exchanges between the parties, these documents are identified as Category 3, and the documents in the third category in this motion were designated as Category 4.

[3] To the extent necessary, Defendants should be required to supplement prior responses to discovery requests accordingly and to offer any witnesses who were instructed not to answer questions on the basis of the deliberative process privilege to testify as to those matters.

On September 14, 2018, the Court denied Defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim, finding that the complaint "adequately alleges causes of action sufficient to let [the] case go forward to discovery." Dkt. 73-1 at 16:15-16. The Court noted that the parties needed to create a "fulsome record" to properly adjudicate the case. *Id.* at 16:18.

Plaintiffs served their First Set of Requests for Production on October 24, 2018. These requests sought, *inter alia*, documents pertaining to the drafting of the 2014 and 2018 reports to Congress, documents relied on in the drafting of the DoD and Army's HIV-related policies, and documents containing information about requests for medical waivers to deploy for individuals living with HIV. Defendants served their objections on November 8, 2018, which included a blanket objection to all discovery requests "to the extent they seek information protected by … the deliberative process privilege." Dkt. 73-3. Plaintiffs moved to compel on other grounds (Dkt. 72), but did not challenge the deliberative process privilege objection, because Defendants had not yet produced a privilege log and the extent to which Defendants would rely on this privilege was, therefore, not yet clear.

At the hearing on November 30, 2018, the Court specifically noted that Plaintiffs are entitled to discovery "to prove that the reasons that [Defendants] are saying they use are not justified or [do] not have a legitimate basis, [and] are only pretextual." Dkt. 85-8, Nov. 30 Hr'g at 18:23-25. The Defendants did not lodge objections to this portion of the Court's order. *See* Dkt. 85.

On November 16, 2018, Plaintiffs served their First Set of Interrogatories. On November 27, 2018, Plaintiffs Served their First Set of Requests for Admission, as well as their Second Set of Requests for Production. These RFPs looked for documents pertaining to how Military

Departments other than the Army were applying the DoD's HIV policies, as well as information and documents about the military's blood supply. *See* Ex. 1. Defendants objected to these all of these requests and are again withholding information based on the deliberative process privilege. *See* Ex. 2. Initially, 1,740 documents were withheld solely on the basis of the deliberative process privilege. *See* Ex. 3 (Combined Privilege Log). An additional 107 documents have been redacted based solely on the same privilege. *See id.*

During a recently held deposition, Defendants' counsel improperly instructed one of Defendants' Rule 30(b)(6) witnesses not to answer questions based on the deliberative process privilege. *See* Ex. 4, Lute Tr. at 140, 145, 160, and 230-31. Specifically, Plaintiffs sought to understand, among other things, the changes to AR 600-100 considered by the Army, the recommendations that have been or will be made, and the reasons for those recommended changes to this regulation pertaining to HIV, which has been under review since 2015. *See id.* at 144:22-145:3. For example, the witness testified that she had sought recommendations for changes to AR 600-110 and at that time had indicated that "for Army HIV policy to remain lawful and relevant, a major revision [of AR 600-110] is required." *Id.* at 139:10-141:12. When the witness was asked about this bases for this statement, Defendants' counsel instructed the witness not to answer based on the deliberative process privilege. *See id.* at 139:15-28.[4]

Plaintiffs and Defendants met and conferred on the deliberative privilege process on January 11, January 18, and January 23, 2019. Defendants indicated that they would "waive" the privilege as to approximately 200 documents including, spreadsheets that contain deployability statistics, documents identified by Plaintiffs as relating to waivers, and some "staffing packets"

[4] On January 23, 2019, Defendants informed Plaintiffs that the Army was considering withdrawing the privilege for documents relating to AR 600-110. However, a final decision has not been made by the Army.

related to specific DoDIs. However, the parties were unable to reach an agreement on the categories of documents that are the subject of this motion.

LEGAL STANDARD

By including the documents sought by Plaintiffs' motion on a privilege log, Defendants concede they are relevant and responsive to Plaintiffs' discovery requests.[5] To continue to withhold these documents, "the burden of proof is with the party objecting to the discovery to establish that the challenged production should not be permitted." *Singletary v. Sterling Transp. Co.*, 289 F.R.D. 237, 241 (E.D. Va. 2012).

While the Fourth Circuit has not directly addressed the issue, district courts in this circuit have limited the scope of the deliberative process privilege to circumstances where the government decision-making process is collateral to a plaintiff's claim and where the cause of action is not directed at the government's intent. *See Stone v. Trump*, No. CV GLR-17-2459, 2018 WL 6305131, at *7 (D. Md. Nov. 30, 2018) ("[D]eliberative process privilege does not apply to the documents Plaintiffs requested [including documents relating to Transgender Service Member Ban] because the government's intent is at the heart of the issue in this case."); *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) ("Unlike other cases, where the deliberative process privilege or the legislative privilege may be employed to 'prevent [the government's] decision-making process from being swept up unnecessarily into the public domain,' this is a case where the decisionmaking process 'is the

[5] If a party "believed that the documents . . . were irrelevant, it should not have produced them on its privilege log. The first consideration in responding to written discovery requests is whether the information or documents are" relevant. *Williams v. Corelogic Rental Property Solutions, LLC*, No. PX 16-58, 2016 WL 6277675, at *3 (D. Md. Oct. 26, 2016). Next, a privilege inquiry is made. *Id.* "[A]s defense counsel knows,[] when a party produces a privilege log, information on that log is presumed to be 'otherwise discoverable,' i.e., relevant. Fed. R. Civ. P. 26(5) . . . ." *Id.*

case.'"). This conclusion has been reached by a number of courts across the country. *See, e.g.*, *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (holding that the deliberative process privilege only applies when the government's decisionmaking process is "collateral" to the claim and not "when a cause of action is directed at the government's intent"); *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (the deliberative process privilege is "simply inapplicable" where government intent is "at the heart of the issue in this case"); *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) ("[T]he deliberative process privilege simply does not apply in civil rights cases in which the defendant's intent to discriminate is at issue."); *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) ("It is certainly true that this privilege yields when the lawsuit is directed at the government's subjective motivation in taking a particular action.").

When the deliberative process privilege has been applied, it is "not absolute and courts may balance the 'public interest in nondisclosure with the need for the information as evidence.'" *Stone v. Trump*, 2018 WL 6305131 at *6 (quoting *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400, 1987 WL 36515 (4th Cir. 1987) (unpublished table decision)). Under the balancing test, courts consider: "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Cipollone*, 1987 WL 36515 at *2.[6] When

[6] While lower courts have used the *Cipollone* balancing test in cases where the government is a defendant, the *Cipollone* court noted that this balancing test was only necessary "when a party to a *separate lawsuit* seeks agency material." 1987 WL 36515 at *2 (emphasis added). Thus *Cipollone* and *In re Subpoena Duces Tecum* are not in tension with each other.

applicable, the deliberative process privilege must "be construed narrowly, and the burden rests upon the government to be precise and conservative in its privilege claims." *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1248 (4th Cir. 1994). Additionally, it protects only *deliberative* and *predecisional* documents (*i.e.*, "policy-oriented judgment"). *Id.* Documents "peripheral to actual policy formation" are not protected. *Id.* Nor is information that is "essentially technical and facilitative." *Am. Bird Conservancy v. U.S. Fish & Wildlife Serv.*, No. 1:13-CV-723, 2014 WL 12662300, at *5 (E.D. Va. June 24, 2014). It covers only opinions, not facts. *Cipollone*, 1987 WL 36515 at *3. "One possible corollary of the fact/opinion distinction is that 'informational dialogue' such as that between the scientists who collaborated on [the reports] is not covered by the privilege at all." *Id.*

ARGUMENT

The approximately fifteen hundred documents sought by this motion are at the heart of this case and must be produced for three reasons. *First*, the deliberative process privilege cannot be invoked to hide or obfuscate the reasons for the unconstitutionally discriminatory regulations and conduct underlying Plaintiffs' claims. *Second*, even if the deliberative process privilege applies, that privilege is overcome by applying the four factor balancing test used in this circuit. *Third*, hundreds of documents withheld simply do not fall within the ambit of the privilege.

I. The Deliberative Process Privilege is Inapplicable Because of the Nature of Plaintiffs' Constitutional Challenges

Plaintiffs are challenging the constitutionality of DoD and Army regulations that prevent or limit the military service of people living with HIV, in light of the medical advancements rendering this diagnosis irrelevant to their ability to serve (Dkt. 1 ¶1). Specifically, Plaintiffs allege that these regulations violate the equal protection guarantee incorporated by the Due Process Clause of the Fifth Amendment, because they impermissibly discriminate against people

living with HIV. *Id.* ¶72. Plaintiffs have further alleged that this discrimination "bears all the indicia of a suspect classification requiring heightened scrutiny by the courts." *Id.* ¶ 76. The appropriate level of scrutiny to apply to Plaintiffs' equal protection claims remains a live issue in this case. To prove their case, Plaintiffs will need to establish that the justifications offered for the Defendants' disparate treatment of people living with HIV are pretextual to conceal an improper animus or purpose, or that those justifications are not appropriately related to a legitimate, important, or compelling governmental interest, depending on the level of scrutiny applied. Because the Plaintiffs allege disparate treatment under the Constitution and proof of their claims is likely to involve the Defendants' intent and actual reasons for the disparate treatment, the deliberative process privilege is *per se* inapplicable.

A. Deliberative Process Privilege is Inapplicable Because the Government's Intent Is at Issue.

The deliberative process privilege applies only "to circumstances where the government decisionmaking process is 'collateral' to a plaintiff's claim" and where the cause of action is not directed at the "government's intent[.]" *See In re Subpoena Duces* 156 F.3d at 1279. Defendants' intent is material to the Plaintiffs' claims in this case. Plaintiffs argue that heightened scrutiny is appropriate because the group against whom the Defendants are discriminating—people living with HIV— bears all the indicia of a suspect classification. Dkt. 26 at 9-19. If the Court decides that heightened scrutiny is appropriate, the actual intent and reasons for the Defendants' disparate treatment of people living with HIV is directly at issue and the offering of pretextual justifications would indicate an equal protection violation. *See United States v. Virginia*, 518 U.S. 515, 535–36 (1996) ("In cases of this genre [equal protection cases applying heightened scrutiny], our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must

describe actual state purposes, not rationalizations for actions in fact differently grounded."); *Califano v. Goldfarb*, 430 U.S. 199, 212–13 (1977) (Engaging in an "'inquiry into the actual purposes' of the discrimination. . .") (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)) . But even under rational basis review, inequitable treatment "motivated by an improper animus or purpose" is unconstitutional. *Windsor v. United States*, 570 U.S. 744, 770 (2013). In analyzing a challenged policy under rational basis review, "the disadvantage imposed" on a discrete group of individuals may not be "born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634. Making either of the showings above necessarily requires Plaintiffs to take discovery directed at Defendants' intent when crafting and implementing the regulations at issue here. The Court understood this when it ordered that Plaintiffs are entitled to discovery "to prove that the reasons that [Defendants] are saying they use are not justified and [do] not have a legitimate basis, [and] are only pretextual." Dkt. 85-8, Nov. 30 Hr'g at 18:23-25. This encompasses discovery regarding the evolution of the regulations at issue, including the information considered and the intent and reasons for the decisions that were made during the creation or amendment of those regulations. *See id.* at 31:24-32:22. Defendants should not be allowed to withhold this critical discovery under the guise of the deliberative process privilege, because in effect they are seeking to preclude Plaintiffs from understanding their true motives.

B. Since Governmental Misconduct Is Alleged In This Case, The Deliberative Process Privilege is Inapplicable.

The deliberative process privilege also "disappears altogether when there is any reason to believe government misconduct occurred." *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997). That is because "public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative." *Alexander v. FBI*,

186 F.R.D. 170, 177–78 (D.D.C. 1999). Discrimination against a discrete and insular minority, like HIV-positive individuals, creates a suspicion of governmental misconduct. *See Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 162–63 (D.D.C. 2003) ("it is inconceivable" that Congress intended deliberative process privilege to apply to information bearing on alleged agency discrimination); *see also Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 268 (D.D.C. 1995) (holding that allegations of decision-making based on "illegitimate political motives" raised questions of governmental misconduct sufficient to place deliberative processes in issue); *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003) (finding documents alleged to show unlawful "discrimination against non-liturgical chaplains" implicated misconduct exception and could not be withheld under deliberative process privilege), *rev'd in part, vacated in part on other grounds sub nom.*, *In re England*, 375 F.3d 1169 (D.C. Cir. 2004).

Because Plaintiff have alleged misconduct in violation of the Constitution on the part of the Defendants, the deliberative process privilege does not apply in this case. Plaintiffs have alleged and argued that the military's HIV policy does not arise from a sound review of relevant medical and military concerns, but stems from the stigma surrounding people living with HIV. As alleged in the Complaint and further explained in the Plaintiffs' Memo in Support of a Preliminary Injunction, there is a history of fear and discrimination against individuals with HIV in the United States. *See* Dkt. 1 at ¶¶ 26 and 76; Dkt. 26 at 9-14. Plaintiffs' claims are sufficient to implicate the misconduct exception to the deliberative process privilege.

This should end the inquiry and Plaintiffs submit that the Court should order the production of the documents withheld solely on the basis of the deliberative process privilege.

II. Even if the Deliberative Process Privilege Applies, the Balancing Test Still Compels Production of These Documents.

Even if the deliberative process privilege were applicable, the balancing test used in the Fourth Circuit favors production of the withheld documents. Under the balancing test, courts consider: "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Cipollone*, 1987 WL 36515 at *2 The balancing test favors discovery where the crux of the lawsuit is the process that led to a particular governmental decision. *See Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016) ("Where a plaintiff directly challenges a government agency's deliberative process, courts routinely find that there is a particularized need for disclosure[,]" particularly where the issue "is the deliberative process."); *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) ("[W]hen the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery."); *United States v. Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699−700 (N.D. Ill. 1985) (a party "make[s] a very powerful showing of necessity" where "the decisionmaking process … is the case"). All factors set forth in *Cipollene* favor disclosure in this case.

A. The Requested Information is Highly Relevant to This Case.

The "deliberative process privilege should seldom be upheld in a case where there is any need for the evidence because it rests on such a puny instrumental rationale." § 5680 Official Information—Deliberative Process Privilege, 26A Fed. Prac. & Proc. Evid. § 5680 (1st ed.). There is certainly a need here. The following categories are absolutely needed in this case: (1) documents and information considered or relied upon in the drafting or updating of Department of Defense (DoD) and military branches' regulations pertaining to HIV and discussions regarding the same; (2) documents and information considered or relied upon in drafting two

DoD reports to Congress regarding DoD's HIV policies and discussions regarding the same.[7] The Court has already found as much. *See* Dkt. 85-8, Nov. 30, 2018 Hr'g at 43:21-44:4 ("If OutServe is arguing that the, the Navy's regulation, the Marines' regulation, and the Air Force regulation concerning how we commission or deploy, whatever, people who have HIV, then they have the right to get information concerning ***what was considered in coming up with that regulation*** to determine whether or not there's a legitimate government interest that justifies that regulation in those other branches as well because their justification may be pretext.")(emphaisis added); Ex.5, Dec. 21, 2018 Tr. 4:1-5 ("You know, I've looked at the pleadings in this case, and quite frankly, I'm not sure the defense truly understands what's at issue in this case. The evidence that Judge Davis found is relevant to the plaintiffs' case is in this Court's view absolutely relevant."). The requested information is relevant because these materials likely will reveal whether the military has maintained discriminatory regulations against persons living with HIV by ignoring significant medical advancements and/or recommendations that such regulations be updated in light of such advancements. Accordingly, the first factor weighs in favor of disclosure of the documents sought.

B. Defendants are the Only Source of this Information.

[7] During the meet and confer process, Defendants argued that the categories of documents identified by Plaintiffs were too expansive. Defendants' position, rather, was that a document-by-document review was required. Alternatively, Defendants argued that the documents within the first category should be separated by regulation and then sub-categorized by type of document (*i.e.*, discussion, working group documents, draft memoranda, formal feedback, and staff packets). Plaintiffs do not understand why Defendants believe the particular regulation at issue or format/type of document containing the allegedly deliberative material is relevant, and have found no case law supporting Defendants' argument regarding distinctions drawn based on types of documents. Plaintiffs believe that the categories into which they have divided the documents are sufficient to apply the *Cipolonne* balancing test, if application of this test is necessary.

Like the information at issue in *Cipollone*, the need for this information "cannot be satisfied in other ways." 1987 WL 36515 at *3. Defendants are the only source of this information. This situation is "on all fours" with *Stone v. Trump*, where the court noted that "no alternative evidence on government intent is available to Plaintiffs" which "weigh[ed] strongly in favor of disclosure." 2018 WL 6305131 at *7. This factor therefore also weighs in favor of disclosure.

C. The Government Is Integral to the Case.

The Government is integral to this case because the Defendants are the governmental entities that promulgated and enforce the regulations being challenged by the Plaintiffs. Again, this case is "on all fours" with *Stone v. Trump*, where the court found that "the Government plays a central role in the litigation because Defendants—the parties being sued—are government officials and the parties that created the challenged [regulations]." *Id.* The third factor thus weighs in favor of disclosure.

D. Disclosure Would Not Hinder Frank and Independent Discussion Regarding the Alleged Discriminatory Policies.

The court in *Stone v. Trump* held that the first three factors weighed so strongly in favor of disclosure that they overpowered the "risk that disclosure will chill future policymaking discussions." *Id.* It also noted that something more than mere speculation of a chilling effect was necessary. *Id. at* n.10. Here, too, there is no risk of chilling. As in *Cipollone*, there is a protective order in this case, which would prevent the public disclosure of any documents to the extent they are appropriately designated as confidential. The only risk to Defendants is that the production would provide evidence of their animus toward and discriminatory treatment of people living with HIV, which is again highly relevant to the case. The Government's interest in nondisclosure is "de minimis at best." 1987 WL 36515 at *3.

In sum, considering all four factors of the *Cipollone* balancing test, the deliberative process privilege is inapplicable to the case.

III. Defendants' Privilege Logs Show They Have Withheld Documents Not Subject To The Deliberative Process Privilege.

Even if the Court finds that the deliberative process privilege is applicable here, despite the clear mandate of the case law on this subject, a significant number of documents Defendants claim privilege over fall outside the confines of the deliberative process privilege, because they contain only factual information, are peripheral to policy formulation, are essentially technical and facilitative, or are otherwise not covered by the deliberative process privilege. Review of Defendants' redactions to certain documents and privilege logs demonstrates that Defendants are withholding approximately 500[8] documents based on improper assertions of deliberative process privilege. That suggests neither a narrow construction nor a "precise and conservative" application. The following are examples of the types of documents Defendants are improperly withholding based on the deliberative process privilege.

Defendants withheld a document "regarding a proposed response to a media story concerning HIV and non-deployability" on the grounds of deliberative process privilege. (*See* Ex.3, US00011100). Additionally, Defendants heavily redacted a series of email conversations that appear to discuss a possible response to a Bloomberg News article about how the "Deploy or Get Out" policy will effect HIV-positive service members. (*See* Ex. 6, US00011104). This was categorized as a "Deliberative email conversation between DoD personnel regarding a response

[8] Plaintiffs originally identified 713 documents that contained only factual information, were peripheral to policy formulation, were essentially technical and facilitative, or were otherwise not covered by the deliberative process privilege. Defendants to date have withdrawn their claim as to approximately 200 of those documents, but have not yet made a final decision on the remaining challenged documents.

to a media article concerning DoDI 1332.45." Neither are related to *policy formulation* at all, but rather a response to an already formulated policy.

Other examples of factual, or technical or facilitative documents and information include the following:

- "Deliberative *information paper* on the monthly non-deployable report for the DoD to the SECDEF." (US00006154) (emphasis added).
- "Deliberative email between DoD personnel *gathering data* on and discussing non-deployable service members." (US00006190) (emphasis added).
- "FOUO deliberative document that *outlines the total non-deployable population* across the DoD as of February 2018." (US00006353) (emphasis added).
- "Deliberative slides *tracking numbers and categories* of non-deployable service members." (US00006419) (emphasis added).
- "Deliberative unsigned action memo titled: *Aggregate Numbers of Non-Deployable Service Members* from each Service." (US00007011) (emphasis added).

Merely describing the email and spreadsheet as "deliberative" does not make them so. The provision of data regarding the number of non-deployable service members is "essentially technical and facilitative" and is entirely factual, not the rendering of an opinion.

Plaintiffs have fully reviewed and analyzed Defendants privilege logs and have coded the documents withheld on the grounds of deliberative process privilege according to the three categories identified in this motion: (1) documents and information considered or relied upon in the drafting or updating of Department of Defense (DoD) and military branches' regulations pertaining to HIV; (2) documents and information considered or relied upon in drafting two DoD reports to Congress regarding DoD's HIV policies; and (3) documents that provide only

factual information, are peripheral to policy formulation, are essentially technical and facilitative, or are otherwise not covered by the deliberative process privilege.[9] *See* Ex. 3. Should the Court wish to perform an *in camera* review of less than all of the documents being withheld by Defendants within Category 3, Plaintiffs request they be allowed to identify a representative sample of 75 (5%) of the withheld for the Court to review to determine whether the Category 3 documents are subject to withholding based on the deliberative process privilege.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court compel Defendants to produce all documents withheld or redacted solely on the basis of the deliberative process privilege, to supplement prior responses to discovery requests if necessary, and to offer any witnesses who were instructed not to answer questions on the basis of the privilege to testify as to those matters, and for such further relief as this Court deems just and proper.

[9] Defendants have withdrawn their claim of privilege over an additional category identified by Plaintiffs: documents and information relating to the processing and grant or denial of medical waivers for individuals with HIV from all military. In the coded privilege log these documents are identified as Category 3, and the documents in the third category in this motion were designated as Category 4.

Dated: January 25, 2019

Respectfully submitted,

/s/ *Andrew R. Sommer*
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January 2019, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: January 25, 2019

Respectfully submitted,

/s/ *Andrew R. Sommer*
Andrew R. Sommer

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NICHOLAS HARRISON, ET AL., Plaintiffs, v. PATRICK M. SHANAHAN, ET AL., Defendants.	NO. 1:18-CV-00641-LMB-IDD

[Proposed] ORDER COMPELLING PRODUCTION OF DOCUMENTS AND INFORMATION

Upon consideration of Plaintiffs' Motion to Compel Documents and Information Withheld on the Basis of Deliberative Process Privilege, it is hereby

ORDERED that the Plaintiffs' motion is GRANTED; and it is further

ORDERED that on or before February ____, 2019, at 5:00 p.m., Defendants shall supplement their production of documents and things to provide documents and information withheld on the basis of deliberative process privilege; and it is further

ORDERED that Defendants shall offer witnesses who were instructed not to answer questions on the basis of the deliberative process to be redeposed as to those matters.

Date: _____ _____

UNITED STATES MAGISTRATE JUDGE