



Plaintiffs served broad discovery requests touching on numerous policies and decisions made by Defendants, the Department of Defense (“DoD”) and the Secretary of the Army (“Army”), related to not only military service of Service members infected with Human Immunodeficiency Virus (“HIV”) but also the accessions, retention, deployment, and disability evaluation policies applicable to all Service members. Plaintiffs now seek an across-the-board ruling from the Court that the deliberative process privilege does not apply in this case, purely as a matter of law, to documents withheld or redacted on the basis of that privilege. As explained below, a generalized, broad-brushed ruling would be contrary to law. The deliberative process privilege is a critical protection that enables effective governmental decision-making, and the Court cannot set it aside *per se* as a matter of law.

By seeking for example, “[a]ll Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6490.07” in Request for Production No. 10, Plaintiffs intentionally target Defendants’ deliberative decision-making process. These broad requests predictably encompassed a large number of privileged deliberative and predecisional documents and materials, including, among other things: 466 draft documents; 173 documents described as policy information papers, briefs, briefings, or “talking points”; 118 documents containing “proposed” items; 107 documents containing “recommendations” or “recommended” revisions, or courses of action; 48 documents containing or relating to meeting minutes; 22 documents described as “unpublished,” and three recordings of DoD’s medical accessions policy working group. Plaintiffs challenged all of these privilege claims and more.

Further, although Defendants served the logs identifying most of the challenged privileged documents by December 24, 2018, Plaintiffs did not provide defendants with a list of their specific

challenges to Defendants' assertions of the deliberative process privilege until January 17, 2019 — more than a month-and-a half after Defendants' served their first privilege log and almost two weeks after Defendants' served their last privilege log. *See* Pls. Ex. 3. And Plaintiffs did nothing more than challenge every document withheld or redacted in Defendants' productions on the basis of the deliberative process privilege in general categories too broad to provide any meaningful explanation of Plaintiffs' particular objection to any particular document.<sup>1</sup> After providing this list, Plaintiffs provided Defendants with three business days to review 1,907 challenges before requesting a final meet-and-confer. Defendants therefore have not had an adequate opportunity to review the challenged documents individually to assess the validity of Plaintiffs' objections.

Accordingly, Plaintiffs have not identified specific documents that they presently seek to compel in any meaningful way. Nor do Plaintiffs seek to compel any document or information withheld on the basis of the presidential communications privilege (or other privileges, such as the attorney-client privilege). Rather, the only issue before the Court at this time is the threshold legal issue of whether the deliberative process privilege *per se* does not apply as a matter of law in this case.<sup>2</sup>

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<sup>1</sup> Because Category 3 included only 4 documents, Defendants were able to consider them directly.

<sup>2</sup> Plaintiffs claim to challenge only documents withheld or redacted on the basis of the deliberative process privilege. However, Plaintiffs' January 17, 2019 list of challenged documents includes 43 documents that were withheld or redacted by Defendants on additional grounds, such as attorney-client, work product, and presidential privilege. These documents include bates numbers US00009377, US00010744, US00010745, US00010765, US00010805, US00010823, US00010986, US00011012, US00011086, US00011105, US00011106, US00011107, US00011203, US00011204, US00011205, US00011206, US00011376, US00011470, US00012853, US00013857, US00013979, US00014284, US00015291, US00015930, US00018013, US00018200, US00019022, US00019050, US00019051, US00020049, US00020117, US00020120, US00020615, US00020903, US00020905, US00020913, US00020914, US00020915, US00021201, US00001951, US00025499, US00025503,

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Plaintiffs' motion relies primarily on their contention that the deliberative process privilege is unavailable in this case as a matter of law, and includes only conclusory and unsupported assertions that the challenged documents would not satisfy the privilege if it did apply. Plaintiffs do not meaningfully dispute that the documents the Government has withheld under the deliberative process privilege are predecisional and deliberative. *See City of Va. Beach v. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993). Instead, Plaintiffs contend that the privilege does not apply as a matter of law either because the Government's intent is at issue or because the Government's "discriminatory" policy amounts to misconduct. But Plaintiffs' contentions find no basis in Fourth Circuit precedent. Nor do Plaintiffs' overbroad and conclusory alternative claims permit the Court to meaningfully balance Plaintiffs' asserted need for deliberative documents with the Government's interest in non-disclosure of deliberative information concerning the development of a military policy. However, even if the Court chooses to balance Plaintiffs' general assertions of need with the Government's general interest in nondisclosure, rather than a document-by-document review, it is clear that the Government's interest outweighs Plaintiffs'.

### **I. The Deliberative Process Privilege Is A Well-Established Protection of Internal Government Functions.**

The deliberative process privilege protects the Government's decision-making process by

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US00025518, US00025544.

Moreover, Plaintiffs appear to implicitly contest the sufficiency of Defendants' privilege logs, *see* Pls.' Mem. (Dkt. 108) 14-16, but they do not move to compel Defendants to supplement the logs. Therefore, this response does not address the sufficiency of the privilege logs, aside from noting that to the extent there may be defects in the logs, it is a result of the broad discovery requests propounded by Plaintiffs. *See Rein v. Patent & Trademark Office*, 553 F.3d 353, 370 n.24 (4th Cir. 2009) ("Parties who frame massive and all-inclusive requests for documents should expect some fall-off from perfection when the agency responds.").

shielding from disclosure documents “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). “This privilege is designed to protect the quality of administrative decisionmaking by ensuring that it is not done ‘in a fishbowl.’” *City of Va. Beach*, 995 F.2d at 1252 (quoting *Env’tl Prot. Agency v. Mink*, 410 U.S. 73, 87 (1973)).

Thus, the privilege encourages free-ranging discussion of alternatives; prevents public confusion that might result from the premature release of such nonbinding deliberations; and insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions, “but for matters they considered before making up their minds.”

*Id.* at 1252-53 (citations omitted); *see also Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001) (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government.” (quotation omitted)).

“Documents withheld or redacted pursuant to the deliberative process privilege must be both ‘predecisional’ and ‘deliberative.’” *Rein*, 553 F.3d at 372 (quoting *City of Va. Beach*, 995 F.2d at 1253). “Predecisional documents are ‘prepared in order to assist an agency decisionmaker in arriving at his decision.’” *City of Va. Beach*, 995 F.2d at 1253 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975)). “Deliberative material ‘reflects the give-and-take of the consultative process,’ by revealing the manner in which the agency evaluates possible alternative policies or outcomes.” *Id.* (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

“The deliberative process privilege is a qualified one; that is, where a party can establish the existence of a sufficient need for the information that outweighs any harm from its production, the privilege may be overcome.” *Heyer v. Bureau of Prisons*, No. 5:11-CT-03118-D, 2014 WL 4545946, at \*3 (E.D.N.C. Sept. 12, 2014) (citing *Scott v. PPG Indus., Inc.*, 142 F.R.D. 291, 294 (N.D. W.Va. 1992)). “The burden of showing an overriding need for the information rests with the party seeking it.” *Id.* (citing *Redland Soccer Club, Inc. v. Dep’t of Army*, 55 F.3d 827, 853 (3d Cir. 1995) (“The party seeking discovery bears the burden of showing that its need for the documents outweighs the government’s interest.”)); *see also United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a “particularized need” for specific documents to overcome the privilege); *Marriott Int’l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a “compelling need” to overcome the privilege). Courts have used a four factor test in balancing the deliberative process privilege with the need of the party seeking disclosure: “(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 v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table) (quoting *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)); *see also Heyer*, 2014 WL 4545946, at \*3 (quoting *Scott*, 142 F.R.D. at 294).

## **II. Plaintiffs’ Contention That the Deliberative Process Privilege Does Not Apply As A Matter Of Law Is Meritless.**

### **A. No Fourth Circuit Authority Supports Plaintiffs’ Arguments.**

Plaintiffs argue that the deliberative process privilege does not apply as a matter of law to any deliberative materials at issue in this case because “Plaintiffs allege disparate treatment...and

proof of their claims is likely to involve the Defendants' intent and actual reasons for the disparate treatment." Pls.' Mem. at 8. Plaintiffs rely exclusively for this proposition on a single case from the D.C. Circuit and do not cite to any Fourth Circuit or Supreme Court authority indicating that the deliberative process privilege does not apply when a challenge is to the Government's intent. *See id.* at 7-8. Similarly, Plaintiffs point to no Fourth Circuit or superior authority holding that a mere allegation of government misconduct is sufficient to obviate the deliberative process privilege, and indeed their argument to that effect misrepresents both D.C. Circuit and Fourth Circuit law. *See e.g., Heyer v.* 2014 WL 4545946, at \*4-5 (collecting cases); *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999) ("[T]he deliberative process privilege does not apply if there is a *discrete factual basis* for the belief that the deliberative information sought may shed light on government misconduct." (emphasis added) (internal citation omitted)).

Plaintiffs' asserted blanket restriction is in fact contrary to the balancing test that courts in the Fourth Circuit actually employ to determine if an articulated need for specific deliberative documents should overcome the Government's interests in non-disclosure.<sup>3</sup> *See Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at \*3 (E.D. Va. Sept. 22, 2014) (finding that the court must analyze whether the deliberative process privilege applies "on a case-by-case basis by balancing the damage to the executive department or the public interest and the potential harm to the plaintiffs from nondisclosure"); *Spell v. McDaniel*, 591 F. Supp. 1090, 1116 (E.D.N.C. 1984) (finding that the deliberative process privilege "must be demonstrated on a case by case basis by

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<sup>3</sup> In footnote 6 of their motion, Pls.' Mot. p. 6, Plaintiffs seem to be arguing that the *Cipollone* analysis is not required in cases where the government is a party. However, various district courts in the Fourth Circuit have applied the same balancing test borrowed from other Circuits without reference to *Cipollone* or this purported restriction. *See, e.g., Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2016 WL 6902359, at \*4 (N.D. W. Va. July 20, 2016).

performance of a balancing function”); *see also Murray Energy Corp.*, 2016 WL 6902359, at \*4 (“[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.”) (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980))). District courts in this Circuit have routinely applied the balancing test outlined by *Cipollone* to determine whether the Government may avail itself of the deliberative process privilege’s protections, even when intent is at issue or misconduct is alleged. *See, e.g., Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2015 WL 7017009, at \*3 (N.D.W. Va. Nov. 12, 2015) (“[P]ossible government misconduct or deficiencies in the deliberative process are factored into any analysis and, where present, weigh in favor of denying the privilege.”); *F.D.I.C. v. Hatziyannis*, 180 F.R.D. 292, 294 (D. Md. 1998) (applying the balancing test even when defendants “raised allegations of bad faith and unfair dealing”); *Heyer*, 2014 WL 4545946, at \*5-6 (applying the balancing test even where plaintiffs alleged deliberate indifference); *cf. Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) (applying the balancing test from the deliberative process privilege context to the state legislative privilege context, even where plaintiffs alleged unlawful racial gerrymanders in violation of the Equal Protection Clause). To hold otherwise would have the extraordinary consequence of eviscerating the deliberative process privilege for broad categories of deliberative materials in any case in which plaintiffs challenge the Government’s intent as a *per se* legal matter, and without a party seeking any particular information or challenging its withholding. *See In re United States*, 678 F. App’x 981, 990 (Fed. Cir. 2017) (“The privilege would be meaningless if all a litigant had to do was raise a question of intent to warrant disclosure.”); *Utah Med. Prods. v. McClellan*, No. 2:03-cv-525-PGC, 2004 WL 988877, at \*8 (D. Utah Mar. 31, 2004) (finding that a *per se* rule that the deliberative process

privilege did not apply when a party challenges the decision-making process would lead plaintiffs to “recast [their] complaint[s] as a challenge to the decision-making process”).

**B. The Government’s Intent Is Not At Issue In This Case.**

Even if there were a rule recognized by this Circuit that prohibited reliance on the deliberative process privilege when intent was at issue, Plaintiffs are simply incorrect that the Government’s intent is at issue in this case. The Plaintiffs’ challenges to the Defendants’ regulations in no way rely on or put at issue the Defendants’ intent in promulgating or applying those regulations because those regulations are subject only to rational basis review. Contrary to Plaintiffs’ assertion, the proper level of scrutiny is not “a live issue” in this case.

The Fourth Circuit has determined that only rational basis review applies to disability classifications, including those related to individuals living with HIV, and that decision is binding on this Court. *Doe v. Univ. of Md. Medical Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995). Plaintiffs’ claim that actual intent is still relevant to challenges subject to rational basis review, Pls.’ Mem. 9, is baseless. It is beyond dispute that under rational basis review it is “constitutionally irrelevant [what] reasoning in fact underlay the legislative decision. . . .” *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (internal citation omitted). Indeed when rational basis review applies, “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation *unsupported by evidence* or empirical data.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)(emphasis added). The Court’s review only “require[s] that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker.” *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *see also, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2420-21 (2018) (applying rational basis review in the national security context and stating that it is satisfied unless “it is impossible to discern a relationship to legitimate state interests or...the policy

is inexplicable by anything but animus.”); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (holding that under rational basis review a government classification “must be sustained if there is any reasonably conceivable state of facts that could provide a rational basis,” and “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” (internal citations omitted)).

Because evidence of the Government’s actual intent in promulgating the challenged regulations is not material to any of Plaintiffs’ claims, it is not at issue in this case and cannot prohibit the Government’s reliance on the deliberative process privilege.

**C. Plaintiffs Have Made No Clear Showing Of Misconduct.**

Plaintiffs’ also argue that the deliberative process privilege is unavailable because they have alleged “misconduct in violation of the Constitution on the part of the Defendants.” Pls.’ Mem. 10. Assuming that such a restriction is recognized in this Circuit, Plaintiffs have entirely failed to show that it should apply to prevent Defendants, as a matter of law, from relying on the deliberative process privilege in this case. First, Plaintiffs do not cite to any such allegations in their Complaint because they have not in fact made any. Their general statement that “there is a history of fear and discrimination against individuals with HIV in the United States,” *id.*, is not a claim of any relevant or specific wrongdoing by any of the Defendants, nor does it sufficiently allege facts that could make such a claim facially plausible. Moreover, even if Plaintiffs had made such an allegation, they have made no showing of any basis for that claim and a naked assertion of unspecified misconduct is plainly insufficient to preclude the government’s use of the deliberative process privilege. *See, e.g., Heyer*, 2014 WL 4545946, at \*4-5 (collecting cases); *Worsham v. Dep’t of the Treasury*, Case No. ELH-12-2635, 2013 WL 5274358, at \*14 n.10 (D. Md. Sept. 17, 2013). The out-of-circuit cases cited by Plaintiffs for this proposition do not suggest that a bald claim of

misconduct is sufficient to negate the privilege. *See Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, 257<sup>4</sup> (D.D.C. 2003) (“To invoke the government-misconduct exception, the party seeking discovery must provide an adequate factual basis for believing that the requested discovery would shed light upon government misconduct.”); *Alexander*, 186 F.R.D. at 164 (“[T]he deliberative process privilege does not apply if there is a discrete factual basis for the belief that the deliberative information sought may shed light on government misconduct.” (internal citation omitted)).<sup>5</sup> Moreover, it is the law of this Circuit that a “presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” *Almy v. Sebelius*, 679 F.3d 297, 309 (4th Cir. 2012) (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926)); *see also e.g., Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975) (“There is a presumption of regularity in the performance by a public official of his public duty.”). Plaintiffs have alleged no facts to overcome this presumption—much less provided clear evidence—so as to permit a finding that alleged government misconduct should prohibit application of the deliberative process privilege in this case.

### **III. The Documents Withheld By Defendants Satisfy The Conditions Of The Deliberative Process Privilege.**

Plaintiffs do not meaningfully dispute that the documents withheld by Defendants are predecisional and deliberative, the only conditions required by controlling Fourth Circuit law. *See, e.g., Solers, Inc. v. IRS*, 827 F.3d 323, 329-30 (4th Cir. 2016); *City of Virginia Beach*, 995 F.2d at

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<sup>4</sup> Rev’d in part, vacated in part on other grounds sub nom., *In re England*, 375 F.3d 1169 (D.C. Cir. 2004).

<sup>5</sup> Plaintiffs cite another opinion in the same case, decided the same day, *Alexander v. FBI*, 186 F.R.D. 170 (D.D.C. 1999).

1253<sup>6</sup>; *Christian Coalition Int'l v. United States*, 90 A.F.T.R.2d (RIA) 2002-6010, at \*4-7 (E.D.Va.). And as discussed *infra*, the documents withheld by the defendants satisfy those conditions. However, Plaintiffs do contend that if their blanket arguments concerning intent and misconduct fail, the Court should balance their alleged need for the properly withheld information against the Government's interest in non-disclosure using the factors outlined in *Cipollone*. The Court should deny Plaintiffs' motion based on the failure of their claim that the privilege is generally inapplicable without reaching the balancing analysis because Plaintiffs have not explained their need for specific documents in a way that meaningfully permits balancing.

Even if the Court does reach the balancing test, Plaintiffs' motion should still be denied because in general the factors weigh heavily in favor of applying the privilege to the documents withheld by Defendants. Although there is no binding Circuit precedent requiring this balancing, district courts have occasionally applied the same balancing test borrowed from other Circuits. *See, e.g., Murray Energy Corp.*, 2016 WL 6902359, at \*4. Pursuant to 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*, 812 F.2d at 1400 (citation omitted). To the extent this analysis applies, it is clear that the factors weigh in favor of permitting reliance on the deliberative process

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<sup>6</sup> Although the leading cases in this Circuit occur primarily in the FOIA context, the deliberative process privilege recognized by FOIA Exemption 5 is the same privilege that is otherwise applicable in civil litigation. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (construing "Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.").

privilege.<sup>7</sup>

**A. The Withheld Information Is Immaterial To Plaintiffs' Case.**

As discussed *supra*, Plaintiffs' Equal Protection claims must be evaluated under rational basis review. Because intent has no bearing on a determination of rational basis, the content of Defendants' deliberative materials cannot assist Plaintiffs in establishing any of their claims. The Court must evaluate Defendants' regulations to determine if they are rational under any conceivable set of facts regardless of the actual reasons underlying their promulgation. Indeed under this level of scrutiny, the "deference afforded to the government . . . is so deferential that even if the government's actual purpose in creating classifications is not rational, a court can uphold the regulation if the court can *envision* some rational basis for the classification." *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991). Regardless of the Government's actual intent, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)). And in the context of military personnel decisions, even facially discriminatory policies must be upheld "so long as [they] can reasonably be understood to result from a justification independent of unconstitutional grounds." *Trump*, 138 S. Ct. at 2420. Therefore, the information Plaintiffs seek to compel is entirely immaterial to their claims in this case and this factor weighs heavily in favor of maintaining the deliberative process privilege.

Even if Plaintiffs could show that there was some value to information concerning Defendants intent in this case, they have not established a need for the particular deliberative

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<sup>7</sup> It is undisputed that the Government's role in this lawsuit is as a party. Plaintiffs have not explained why they believe this factor weighs in favor of disclosure, nor does their cited authority, *Stone v. Trump*, Case No. CV GLR-17-2459, 2018 WL 6305131 (D. Md. Nov. 30, 2018), explain this aspect of the balance.

materials sought in their motion. For example, Defendants have voluntarily withdrawn their claim of privilege to a substantial portion of the final staff packages for DoDI 6485.01, DoDI 6490.07, and DoDI 6130.03, including the official comments from the services provided to the official who decided to adopt these policies. Shell Decl. ¶ 10. The materials sought by Plaintiffs are significantly more removed from the decision-making process than the staffing packages, and much more likely to reflect an individual's personal opinion rather than the policy recommendations of their service. *See, e.g., Solers*, 827 F.3d at 329. Thus, the information Plaintiffs already have is more relevant to their arguments than the additional information they are seeking.

**B. Evidence Relevant To Plaintiffs' Claims Is Otherwise Available.**

Plaintiffs' claim that Defendants' regulations are unconstitutional because the regulations are arbitrary and capricious in view of the current state of medical advancement related to HIV. *See* Pls.' Compl. ¶¶ 71-78 (Dkt. 1). Because these claims are subject to rational basis review, Plaintiffs must establish that there is no possible rational relationship between the content of Defendants' regulations and a legitimate government interest in light of the state of medical science. Defendants' regulations, and indeed Defendants' explanations and justifications for their regulations, in the form of the 2014 and 2018 Reports to Congress, are publicly available. The medical and scientific information that Plaintiffs purport to base their claims on is either publicly available or available to Plaintiffs through their retention of medical experts. For Plaintiffs' Equal Protection challenge to prevail, they must prove that these publicly available explanations and justifications are not rationally related to the government's interests under any conceivable set of facts. The information necessary to support that challenge is already available to Plaintiffs and information concerning Defendants' intent is immaterial. Therefore this factor also weighs in favor

of applying the deliberative process privilege to Defendants' withheld documents.

**C. Disclosure Of Defendants' Withheld Documents Would Greatly Hinder Frank And Independent Discussion.**

Plaintiffs' brief barely acknowledges the existence of the fourth factor of the balancing test and ignores the extensive body of law concerning the purpose of the deliberative process privilege. First, it is clear that the first two factors, relevance and availability, will not "overpower" the risk to future policy making in this case. Both weigh in favor of applying the privilege. Second, Plaintiffs' facile attempt to suggest that there is no possible risk of chilling future policy making because a protective order is in place is facially unsupportable. If this were indeed the standard, the deliberative process privilege would not exist because a protective order could simply be entered in every case. It is "[m]anifestly the ultimate purpose of this long-recognized privilege . . . to prevent injury to the quality of agency decisions." *NLRB*, 421 U.S. at 151. The privilege "is designed to protect the quality of administrative decisionmaking by ensuring that it is not done 'in a fishbowl.'" *City of Va. Beach*, 995 F.2d at 1252 (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

Although the deliberative process privilege protects against the public release of nonbinding deliberations, it is not so narrowly conceived. "[T]he privilege encourages free-ranging discussion of alternatives . . . and insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions but 'for matters they consider before making up their minds.'" *Id.* at 1252-53 (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc)). For the core issue implicated by Plaintiffs' lawsuit—military service and HIV—it is unreasonable for Plaintiffs to contend that individuals making difficult and far-reaching decisions in this complicated and delicate area would not be chilled in the exercise of their expertise and discretion by the threat of disclosure. *See, e.g., Hinckley v. United States*, 140 F.3d 277, 285 (D.C. Cir. 1998)

(explaining that in cases of “substantial public interest” the possibility of outside scrutiny “would almost certainly hamper the candor of future discussions”). Indeed, all of the declarations submitted with this opposition explain the significant chilling effect that release of deliberative information will have on policy development within DoD. Bahdi Decl. ¶ 5; Beland Decl. ¶¶ 6, 8-9; Ciminera Decl. ¶¶ 12-13; Huibregtse Decl. ¶¶ 9-10; Melillo Decl. ¶¶ 17-18; Shell Decl. ¶¶ 11-12.

Consequently, three of the four balancing factors weigh heavily in favor of applying the deliberative process privilege to Defendants’ withheld documents.

**IV. The Deliberative Process Privilege Applies To All Documents Withheld By Defendants On That Basis, And To The Extent Plaintiffs Claim It Does Not, Those Documents Must Be Individually Assessed.**

Plaintiffs finally argue that if the deliberative process privilege is available in this case it still should not cover many of the documents withheld by Defendants because those documents “contain only factual information, are peripheral to policy formation, are essentially technical and facilitative, or are otherwise not covered by the deliberative process privilege.” Plaintiffs appear to apply this argument only to what they have identified as “category 3,” “documents that provide only factual information, are peripheral to policy formation, are essentially technical and facilitative, or are otherwise not covered by the deliberative process privilege.” Pls.’ Mem. 15-16. In other words, if the privilege is available as described *supra*, Plaintiffs have not contested that it has been appropriately asserted for the documents they have categorized as “(1) documents and information considered or relied upon in the drafting or updating of . . . regulations pertaining to HIV; [and] (2) documents and information considered or relied upon in drafting two DoD reports to Congress regarding DoD’s HIV policies.” *Id.* at 15.

As for purported “factual” documents in Category 3, Plaintiffs’ attempts to impose blanket restrictions on the application of the deliberative process privilege again are unsupported by law.

Plaintiffs primarily argue here that numerous documents have no deliberative content because their descriptions include terms like “information,” “data,” and “numbers.” *See id.* It is true that “purely factual material” is not protected by the privilege; however, when facts are “inextricably intertwined with the policymaking processes’ such that revelation of the factual material would simultaneously expose protected deliberation,” the privilege applies. *City of Va. Beach*, 995 F.2d at 253 (quoting *Mink*, 410 U.S. at 92).<sup>8</sup> Moreover, courts have determined that certain informational documents that may appear to be purely factual are entitled to protection because they incorporate judgment calls and other decisions-making. *See, e.g., Florida House of Representatives v. Dep’t of Commerce*, 961 F.2d 941, 949-50 (11th Cir. 1992); *Quarles v. Dep’t of Navy*, 893 F.2d 390, 392-93 (D.C. Cir. 1990); *Chem. Weapons Working Group v. EPA*, 185 F.R.D. 1, 2-3 (D.D.C. 1999).<sup>9</sup>

Plaintiffs’ codification of hundreds of documents as unprivileged by the mere implication in their titles that they might contain facts is based entirely on unsupported assumptions and ignores

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<sup>8</sup> Plaintiffs do not explain what types of information they believe would be considered “essentially technical and facilitative,” but they would logically be subject to the same considerations as factual information.

<sup>9</sup> The Fourth Circuit has not directly addressed this issue; however, other Circuits also recognize that even purely factual material can be privileged where its disclosure “may . . . expose the deliberative process within an agency.” *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977); *see also Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1227-28 (10th Cir. 2007); *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) (adopting a “process-oriented” or “functional” test that exempts “[f]actual materials . . . to the extent that they reveal the mental processes of decisionmakers”); *Brockway v. Dep’t of the Air Force*, 518 F.2d 1184, 1194 (8th Cir. 1975); *Montrose Chem. Corp. of Cal. v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *see also Cofield v. City of LaGrange*, 913 F. Supp. 608, 615 (D.D.C. 1996) (“If the act of compiling information, such as separating significant facts from those that are insignificant, would require the exercise of judgment by agency personnel, the facts are privileged under the deliberative process privilege.”).

Fourth Circuit authority. The clear import of the Fourth Circuit’s standards is that withheld information should be considered on a document-by-document basis and assessed for its actual content rather than what Plaintiffs speculate it might contain. For these same reasons, Plaintiffs’ request that they be allowed to identify a “representative sample” of withheld documents for the Court to review *in camera* is not appropriate and does not sufficiently protect the Defendants’ entitlement to privilege. First, Plaintiffs’ overbroad categorization does not properly identify documents that contain “facts,” or otherwise make meaningful analytical distinctions among groups of withheld documents. For instance, Plaintiffs content to the assertion of privilege over a document described in the Navy’s privilege log as “Coordination Sheet dated 27 Feb 2018 in re DoD Retention Policy for Non-Deployable Service Members, *to wit: recommendation*”<sup>10</sup> is improper because the document allegedly contains factual information. (Dkt. 110-2 at 152, Navy Priv. Log (emphasis added)). However, as explained in the accompanying declaration, that document does not contain primarily factual information but rather the opinions and recommendations of a senior Navy official to DoD regarding options on DoD’s policy for non-deployable service members, as described in the privilege log. Beland Decl., ¶ 7.d. Thus, contrary to Plaintiffs’ speculative and overbroad characterizations the titles of withheld documents alone are insufficient to indicate whether those documents contain deliberative information, factual information, or both.

Second, even if Plaintiffs had categorized the withheld documents in a manner that would have allowed a sample of discrete categories to be considered, the degree to which factual information is intertwined with deliberative information in any given document would be

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<sup>10</sup> Bates number US00020069

impossible to predict from other documents in that category. For example, Defendants were able to isolate a group of spreadsheets containing non-deployability reports from among the “factual” documents designated by Plaintiffs, and eventually determined that they would withdraw their privilege claims over those spreadsheets. These spreadsheets contain factual information that when aggregated over time reveal part of the Defendants’ deliberative process through changes in categorization and treatment. Contrary to Plaintiffs’ assertions, this set of documents is not substantively similar to the other documents in their broad “factual” category, nor are the documents within the category sufficiently similar to each other to allow generalization. Moreover, because Defendants were able to consider these documents separately from other materially different “factual” documents, they were willing to rescind the claim of privilege even though the documents qualified as deliberative. Therefore, it is clear that document by document review of challenged assertions of the privilege is necessary and should be addressed by the parties before a motion to compel.

In the parties’ conference concerning Plaintiffs’ Motion to Compel, Defendants suggested that the withheld documents be subdivided into relevant categories to assist Plaintiffs in formulating their claims of need for those documents and to assist Defendants in reassessing their claims of privilege for certain types of documents. Plaintiffs indicated that they did not believe Defendants’ categories were legally relevant to assessing the applicability of the privilege, but this claim is belied by controlling law. For example, Defendants suggested that email conversations be distinguished from official briefing materials. It is clear that the privilege “protects recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Solers*, 827 F.3d at

329 (emphasis in original) (citation omitted). Therefore, separating informal communications from formal presentations to decisionmakers might allow the parties to reach agreement on releasing additional materials. Similarly, Defendants suggested that drafts become a separate category so they could be reviewed individually to determine whether they contained personal or official views. “[D]raft material...particularly when presented by a subordinate to a superior for revision, is likely to receive deliberative process protection.” *City of Va. Beach*, 995 F.2d at 1253. Instead, Plaintiffs presented Defendants with a spreadsheet divided into only four broad categories, two of which together contained over eighteen hundred documents. Proper categorization of meaningfully different types of documents would have substantially narrowed the number of assertions of privilege for which the parties cannot reach a negotiated solution, but Plaintiffs refused to proceed in such an orderly course and opted instead to move to compel deliberative materials *en masse*.

Finally, Plaintiffs contend that materials containing deliberations about responses to press briefings are not protected by the deliberative process privilege. Plaintiffs do not attempt to comprehensively identify what documents they contend are press briefing. Moreover, this argument fails as well because drafts and discussions relating to when, how, and what to disclose to respond to press inquiries are protected by the deliberative process privilege.

“Courts have routinely found that drafts and discussions relating to how to respond to press inquiries are covered by the deliberative process privilege.” *Judicial Watch, Inc. v. Dep’t of Homeland Sec.*, 880 F.Supp.2d 105, 111-12 (D.D.C. 2012); *see e.g., ICM Registry, LLC v. Dep’t of Commerce*, 538 F.Supp.2d 130, 136 (D.D.C. 2008); *Sierra Club v. Dep’t of Interior*, 384 F.Supp.2d 1, 19 (D.D.C. 2004); *Thompson v. Dep’t of the Navy*, No. CIV. A. 95-347 (RMU), 1997 WL 527344, at \*4–5 (D.C.C. Aug. 18, 1997). The *Judicial Watch* court reasoned, “[e]ven if the

documents are created after the underlying policy they discuss is finalized, ‘these documents are generated as part of a continuous process of agency decision making, viz., how to respond to on-going inquiries.’” *Judicial Watch, Inc.*, 880 F. Supp. 2d at 112. The First and Second Circuit Courts of Appeals also follow this approach. The First Circuit held that that “documents [that] deal with the [agency’s] decision of how and what to communicate to the public” are pre-decisional because that decision “is a decision in and of itself.” *New Hampshire Right to Life v. Dep’t of Health & Human Servs.*, 778 F.3d 43, 54 (1st Cir.), cert. denied, 136 S.Ct. 383 (2015). Likewise, the Second Circuit has held that a draft, never published, op-ed article, is a pre-decisional draft that can be protected by the deliberative process privilege. *ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016); *but see Seife v. Dep’t of State*, 298 F. Supp. 592, 615 (S.D.N.Y. 2018) (limiting application of the privilege to draft press responses “when draft statement would reveal the agency’s deliberations regarding the underlying substantive policy that these courts find that the privilege applies.”). In this case, the draft press responses are pre-decisional in nature and, in themselves, contain deliberative steps in the decision making process on how to respond to the press. The court should adopt the view of D.D.C., the First Circuit, and the Second Circuit, and find that the draft press responses are covered by the deliberative process privilege.

### **CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiffs’ motion to compel.





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

|                              |   |  |
|------------------------------|---|--|
| NICHOLAS HARRISON, et al.,   | ) |  |
|                              | ) |  |
| Plaintiffs,                  | ) |  |
| v.                           | ) | Civil Action No. 1:18-cv-00641 (LMB/IDD) |
|                              | ) |  |
| PATRICK M. SHANAHAN, et al., | ) |  |
|                              | ) |  |
| Defendants.                  | ) |  |
|                              | ) |  |

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**DECLARATION OF LTC EDWARD BAHDI**

I, Edward Bahdi, hereby state and declare as follows:

1. I am a Lieutenant Colonel (LTC) in the U.S. Army currently assigned as the Chief, Military Personnel Law Branch, U.S. Army Litigation Division, within the U.S. Army Legal Services Agency, Fort Belvoir, Virginia. I have been in this position since July 2017. I am responsible for overseeing all civil litigation concerning challenges to the Army’s military personnel policies. As a part of my duties, I am responsible for supervising the assertion of privileges in accordance with the Federal Rules of Civil Procedure on behalf of the Army, for those cases within my branch.

2. From my official duties related to these responsibilities, I have an understanding of the Army’s assertions of privilege in the above-titled litigation. I make this declaration based upon my personal knowledge and upon information that has been provided to me in the course of my official duties. I submit this declaration in support of the Defendants’ opposition to the Plaintiffs’ motion to compel documents and information withheld on the basis of the deliberative process privilege in the above-titled case. In particular, I address below the Army’s basis for withholding documents and information that were withheld solely on the basis of the deliberative process privilege in response to Plaintiffs’ requests

for production.

3. The Army is expressly asserting privilege over approximately 89 documents withheld or redacted solely on the basis of the deliberative process privilege in response to Plaintiffs' First and Second Sets of Requests for Production of Documents. These documents were created as part of the Army's process for revising and updating current or prior versions of Army Regulation 600-110, *Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus*, Rapid Action Revision dated April 22, 2014 ("AR 600-110"),<sup>3</sup> or related processes. A majority of the documents pertain to an ongoing revision of AR 600-110 that is currently in the Army's internal staffing process and has not been approved, and the documents include sensitive recommendations or proposals that are still subject to further review and potential change before final approval and publication.

4. Exhibit A, attached to this declaration, lists the 89 documents withheld or redacted by the Army pursuant to the deliberative process privilege, along with a brief description of the document and the Army's basis for asserting the privilege. The withheld documents include working drafts of unpublished versions of AR 600-110; summaries of recommendations from working groups of medical specialists in infectious disease treatments and public health policy concerning proposed changes to Army policy, specifically AR 600-110; DA Form 2028s, *Recommended Changes to Publications and Blank Forms*, or summaries thereof, containing recommendations for updating AR 600-110 as part of the regulation's staffing process; and various media summarizing or discussing the substance of the aforementioned

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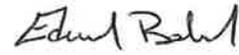
<sup>3</sup> The current version of AR 600-110 is publicly available at <https://armypubs.army.mil/ProductMaps/PubForm/AR.aspx>.

documents and information, or the recommendations or proposals provided therein.

5. The withheld documents record the frank and candid recommendations, proposals, opinions, and suggested courses of action for developing Army policy by those staff personnel directly responsible for reviewing and revising the Army's policies on the military service of personnel infected with HIV, including the Office of the Deputy Chief of Staff, G-1; the Army Public Health Center; the Infectious Disease Service, Walter Reed National Military Medical Center; the Office of the Surgeon General of the Army; and other personnel whose recommendations and opinions were solicited by the regulation's proponents as part of the AR 600-110 revision process. These documents and communications were made under an expectation that they were confidential and would be protected from disclosure by federal law, regulations, and legal privilege. The Army depends on the frank and candid discussions and deliberations of its staff in order to develop or revise its personnel policies, especially those involving the military service of personnel with service- and deployment-limiting medical conditions. Disclosure would, therefore, have a chilling effect on the Army's personnel when developing forthcoming policies, and thus an adverse effect on the quality and integrity of the Army's future decision making processes.

6. As of the signing of this filing, the Army is considering whether to withdraw its assertions of privilege for those documents and information withheld solely under the deliberative process privilege, with due consideration for the chilling effect and other adverse consequences that disclosure would have on the Army's future policy developments.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of January 2019.



Edward G. Bahdi  
Lieutenant Colonel, U.S. Army  
Fort Belvoir, Virginia

# **EXHIBIT A**

*Harrison v. Mattis*,  
 No. 1:18-cv-641 (E.D. Va.)  
 Defendants' Privilege Log for Production 1

| BEGIN BATES | END BATES  | REDACTED DOCUMENT | DATE      | AUTHOR            | RECIPIENT(S)         | PRIVILEGE(S)              | PRIVILEGE BASIS   |
|-------------|------------|-------------------|-----------|-------------------|----------------------|---------------------------|---|
| US00001169  | US00001169 | No                | 4/25/2014 | LTC Branda Ruhrer | LTC Christine Ludwig | DP - Deliberative Process | Printout of an email to LTC Ludwig, the staff proponent within the G-1 for HIV policy, from another staff official forwarding an email chain from 23-24 April 14 between staff officials discussing a proposed change to AR 600-110 while it was being revised regarding the HIV testing requirements for Reserve Component members, including recommendations regarding whether the Army should adopt the proposed change and how it could implement the change. |
| US00001905  | US00001907 | Yes               |           | See document      | See document         | DP - Deliberative Process | Redacted an official's opinion/position on whether accessions policy in DoDI 6485.01 should or would be changed during a potential policy review.   |

| BEGIN BATES | END BATES  | REDACTED DOCUMENT | DATE         | AUTHOR  | RECIPIENT(S)                             | PRIVILEGE(S)              | PRIVILEGE BASIS   |
|-------------|------------|-------------------|--------------|---|--|---------------------------|---|
| US00002124  | US00002127 | Yes               | 4/21/2017    | Brown, Gary W LTC<br>USARMY OSD OUSD P-R<br>(US)<br><gary.w.brown.mil@mail.mil> | Lute, Lisa M LTC MIL USA<br>HQDA DCS G-1 | DP - Deliberative Process | The redacted language includes summaries of predecisional policy recommendations or courses of action from within the agency concerning whether certain policies should change, in relation to ongoing and periodic reviews of DoDI 6485.01 and DoDI 6130.03. |
| US00002371  | US00002375 | Yes               | See document | See document  | See document                             | DP - Deliberative Process | Summary of ongoing policy discussions during the development of HIV policy regarding issues/concerns with allowing HIV+ applicants to serve.  |
| US00002428  | US00002433 | Yes               | See document | See document  | See document                             | DP - Deliberative Process | Summary of ongoing policy discussions during the development of HIV policy regarding issues/concerns with allowing HIV+ applicants to serve.  |

*Harrison v. Mattis,*  
 No. 1:18-cv-641 (E.D. Va.)  
 Defendants' Privilege Log for Production 11

| BEGIN BATES | END BATES  | REDACTED | DATE       | AUTHOR  | RECIPIENT(S)  | PRIVILEGE(S)              | PRIVILEGE BASIS   |
|-------------|------------|----------|------------|---|---|---------------------------|---|
| US00025569  | US00025569 | No       | 3/25/2015  | COL Stephen Thomas, Infectious Diseases Consultant to the U.S. Army Surgeon General | LTC Conreau L. Williams, Chief, Health Promotions Officer Office of the Deputy Chief of Staff, G1, U.S. Army MEDCOM | DP - Deliberative Process | Memorandum dated 25 Mar 15 from the ID Consultant to TSG regarding recommendations to potential policy revisions in AR 600-110 from various ID specialists throughout the Army and the ID Consultant, as part of a policy review process for revising the regulation. |
| US00025570  | US00025575 | Yes      | 10/10/2018 |   |   | DP - Deliberative Process | Redacted recommendations from a working group assessing potential policy revisions to AR 600-110 as part of the policy review process.  |
| US00025576  | US00025576 | No       | 3/25/2015  | COL Stephen Thomas, Infectious Diseases Consultant to the U.S. Army Surgeon General | LTC Conreau L. Williams, Chief, Health Promotions Officer Office of the Deputy Chief of Staff, G1, U.S. Army MEDCOM | DP - Deliberative Process | Memorandum dated 25 Mar 15 from the ID Consultant to TSG regarding recommendations to potential policy revisions in AR 600-110 from various ID specialists throughout the Army and the ID Consultant, as part of a policy review process for revising the regulation. |
| US00025577  | US00025580 | Yes      | 10/10/2018 |   |   | DP - Deliberative Process | Redacted references to policy concerns and recommendations proposed by participants in a working group during the policy revision process for AR 600-110.   |
| US00025588  | US00025588 | No       | 3/25/2015  | COL Stephen Thomas, Infectious Diseases Consultant to the U.S. Army Surgeon General | LTC Conreau L. Williams, Chief, Health Promotions Officer Office of the Deputy Chief of Staff, G1, U.S. Army MEDCOM | DP - Deliberative Process | Memorandum dated 25 Mar 15 from the ID Consultant to TSG regarding recommendations to potential policy revisions in AR 600-110 from various ID specialists throughout the Army and the ID Consultant, as part of a policy review process for revising the regulation. |
| US00025595  | US00025596 | Yes      | 3/4/2015   |   |   | DP - Deliberative Process | Redacted summaries of policy concerns with AR 600-110 for review during the revision process, as well as policy recommendations from a medical WG that reviewed proposed revisions to AR 600-110.   |
| US00025600  | US00025600 | No       | 8/6/2018   | Blaylock, Jason M LTC MIL USA WRNMMC  |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110, with edits and comments included in "track changes" throughout.  |
| US00025601  | US00025601 | No       | 6/2/2017   |   |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110, with edits and comments included in "track changes" throughout.  |
| US00025602  | US00025602 | No       | 11/14/2017 |   |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110, with edits and comments included in "track changes" throughout.  |
| US00025603  | US00025603 | No       | 8/6/2018   | Blaylock, Jason M LTC MIL USA WRNMMC  |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110, with edits and comments included in "track changes" throughout.  |
| US00025646  | US00025648 | Yes      | 11/17/2015 | mimi.eng  |   | DP - Deliberative Process | Redacted recommended changes to DA Form 5669 as part of the ongoing policy review process for AR 600-110.   |
| US00025649  | US00025668 | Yes      | 11/17/2015 | mimi.eng  |   | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |

*Harrison v. Mattis,*  
No. 1:18-cv-641 (E.D. Va.)  
Defendants' Privilege Log for Production 11

| BEGIN BATES | END BATES  | REDACTED | DATE       | AUTHOR                                    | RECIPIENT(S) | PRIVILEGE(S)              | PRIVILEGE BASIS   |
|-------------|------------|----------|------------|---|--------------|---------------------------|---|
| US00025669  | US00025669 | No       | 9/11/2018  | Rosie                                     |              | DP - Deliberative Process | Slideshow summarizing specific recommended revisions to AR 600-110 as a result of the policy review process for revising the regulation, including proposed courses of action for how to implement certain policy revisions.                    |
| US00025670  | US00025670 | No       | 9/13/2018  | Rosie                                     |              | DP - Deliberative Process | Slideshow summarizing specific recommended revisions to AR 600-110 as a result of the policy review process for revising the regulation.  |
| US00025675  | US00025675 | No       | 11/21/2018 | Blaylock, Jason M LTC MIL USA<br>WRNMMC   |              | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110, with edits included.   |
| US00025676  | US00025676 | No       | 10/3/2018  | Blaylock, Jason M LTC MIL USA<br>WRNMMC   |              | DP - Deliberative Process | Working draft of Appendix B to an unpublished version of AR 600-110.  |
| US00025689  | US00025690 | Yes      | 11/29/2018 |   |              | DP - Deliberative Process | Redacted discussion about a recommended change to AR 600-110, which summarizes positions regarding whether SMS with HIV should be allowed to participate in certain athletic events, as part of the policy review process for AR 600-110.       |
| US00025692  | US00025693 | Yes      | 10/26/2018 | APD                                       |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.                       |
| US00025694  | US00025694 | No       | 10/26/2018 | Coy, Mary Janet LTC USARMY<br>USARAF (US) |              | DP - Deliberative Process | Continuation form for DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. |
| US00025695  | US00025697 | Yes      | 12/18/2018 |   |              | DP - Deliberative Process | Redacted summaries of deliberations/discussions of policy considerations concerning the draft of AR 600-110 during the policy review process.   |
| US00025698  | US00025698 | No       | 10/24/2018 | Blaylock, Jason M LTC MIL USA<br>WRNMMC   |              | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025699  | US00025699 | No       | 10/24/2018 | Blaylock, Jason M LTC MIL USA<br>WRNMMC   |              | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025700  | US00025700 | No       | 10/2/2018  | Blaylock, Jason M LTC MIL USA<br>WRNMMC   |              | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025701  | US00025701 | No       | 10/23/2018 | Bolish, Beth A MAJ MIL NG<br>NGB ARNG     |              | DP - Deliberative Process | Continuation form for DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. |
| US00025711  | US00025711 | Yes      | 11/14/2017 |   |              | DP - Deliberative Process | Redacted a summary of a proposed policy change recommendation as part of the AR 600-110 review process.   |

*Harrison v. Mattis,*  
 No. 1:18-cv-641 (E.D. Va.)  
 Defendants' Privilege Log for Production 11

| BEGIN BATES | END BATES  | REDACTED | DATE       | AUTHOR                                    | RECIPIENT(S) | PRIVILEGE(S)              | PRIVILEGE BASIS   |
|-------------|------------|----------|------------|---|--------------|---------------------------|---|
| US00025712  | US00025712 | No       | 10/26/2018 | Coy, Mary Janet LTC USARMY<br>USARAF (US) |              | DP - Deliberative Process | Continuation form for DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025713  | US00025720 | Yes      | 10/27/2015 | Kris Nicholas                             |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025722  | US00025722 | No       | 9/26/2016  |   |              | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025723  | US00025726 | Yes      | 11/14/2017 |   |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025727  | US00025727 | No       | 11/16/2017 |   |              | DP - Deliberative Process | Excel spreadsheet consolidating comments from DA Form 2028s, Recommended Changes to Publications and Blank Forms, collected from the field providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. |
| US00025728  | US00025729 | Yes      | 9/22/2015  | APD                                       |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025759  | US00025760 | Yes      | 7/27/2017  | APD                                       |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025762  | US00025763 | Yes      | 7/27/2017  | APD                                       |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025773  | US00025783 | Yes      | 11/30/2017 |   |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |

*Harrison v. Mattis,*  
 No. 1:18-cv-641 (E.D. Va.)  
 Defendants' Privilege Log for Production 11

| BEGIN BATES | END BATES  | REDACTED | DATE       | AUTHOR                                       | RECIPIENT(S) | PRIVILEGE(S)              | PRIVILEGE BASIS  |
|-------------|------------|----------|------------|--|--------------|---------------------------|--|
| US00025795  | US00025797 | Yes      | 11/30/2017 |  |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025803  | US00025804 | Yes      | 9/17/2018  | Lute, Lisa M LTC USARMY<br>HQDA DCS G-1 (US) |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025805  | US00025805 | Yes      | 9/17/2018  |  |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025806  | US00025807 | Yes      | 11/30/2017 |  |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025809  | US00025818 | Yes      | 11/30/2017 |  |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025819  | US00025830 | Yes      | 11/30/2017 |  |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025838  | US00025840 | Yes      | 11/30/2017 |  |              | DP - Deliberative Process | Email providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. Includes handwritten notes on the hardcopy email.   |
| US00025841  | US00025842 | Yes      | 11/30/2017 |  |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. Also redacted a summary of the policy recommendations from the DA 2028 on the email. |
| US00025844  | US00025845 | Yes      | 11/30/2017 |  |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |

*Harrison v. Mattis,*  
 No. 1:18-cv-641 (E.D. Va.)  
 Defendants' Privilege Log for Production 11

| BEGIN BATES | END BATES  | REDACTED | DATE       | AUTHOR | RECIPIENT(S) | PRIVILEGE(S)              | PRIVILEGE BASIS  |
|-------------|------------|----------|------------|--------|--------------|---------------------------|--|
| US00025852  | US00025857 | Yes      | 11/30/2017 |        |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025858  | US00025861 | Yes      | 11/30/2017 |        |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. Also includes a DA 2028 for an unrelated regulation. |
| US00025863  | US00025874 | Yes      | 11/30/2017 |        |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025875  | US00025886 | Yes      | 11/30/2017 |        |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025887  | US00025888 | Yes      | 10/1/2015  | APD    |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025889  | US00025890 | Yes      | 10/29/2015 | APD    |              | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.  |
| US00025891  | US00025891 | Yes      | 10/27/2015 |        |              | DP - Deliberative Process | Word document substituting for a DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.                     |
| US00025892  | US00025894 | Yes      | 10/27/2015 |        |              | DP - Deliberative Process | Word document substituting for a DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.                     |

Harrison v. Mattis,  
 No. 1:18-cv-641 (E.D. Va.)  
 Defendants' Privilege Log for Production 11

| BEGIN BATES | END BATES  | REDACTED | DATE       | AUTHOR  | RECIPIENT(S)  | PRIVILEGE(S)              | PRIVILEGE BASIS   |
|-------------|------------|----------|------------|---|---|---------------------------|---|
| US00025895  | US00025896 | Yes      | 10/30/2018 | APD   |   | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025897  | US00025897 | No       | 11/30/2017 |   |   | DP - Deliberative Process | Excel spreadsheet consolidating comments from DA Form 2028s, Recommended Changes to Publications and Blank Forms, collected from the field providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. |
| US00025906  | US00025909 | Yes      | 9/17/2018  |   |   | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025910  | US00025911 | Yes      | 11/9/2017  |   |   | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025912  | US00025912 | No       | 3/25/2015  | COL Stephen Thomas, Infectious Diseases Consultant to the U.S. Army Surgeon General | LTC Conreau L. Williams, Chief, Health Promotions Officer Office of the Deputy Chief of Staff, G1, U.S. Army MEDCOM | DP - Deliberative Process | Memorandum dated 25 Mar 15 from the ID Consultant to LTC Conreau Williams regarding recommendations to potential policy revisions in AR 600-110 from various ID specialists throughout the Army and the ID Consultant, as part of a policy review process for revising the regulation.            |
| US00025917  | US00025917 | No       | 10/30/2018 | Blaylock, Jason M LTC MIL USA WRNMMC  |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025920  | US00025921 | Yes      | 9/12/2018  | APD   |   | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025922  | US00025922 | No       | 11/8/2018  |   |   | DP - Deliberative Process | Excel spreadsheet consolidating comments from DA Form 2028s, Recommended Changes to Publications and Blank Forms, collected from the field providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. |

Harrison v. Mattis,  
No. 1:18-cv-641 (E.D. Va.)  
Defendants' Privilege Log for Production 11

| BEGIN BATES | END BATES  | REDACTED | DATE       | AUTHOR   | RECIPIENT(S)   | PRIVILEGE(S)              | PRIVILEGE BASIS   |
|-------------|------------|----------|------------|--|--|---------------------------|---|
| US00025923  | US00025923 | No       | 10/25/2018 |  |  | DP - Deliberative Process | Excel spreadsheet consolidating comments from DA Form 2028s, Recommended Changes to Publications and Blank Forms, collected from the field providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. |
| US00025924  | US00025925 | Yes      | 9/20/2018  |  |  | DP - Deliberative Process | Summary of a proposed revision to AR 600-110 as part of the policy review process, providing a recommended course of action to change Army policy.  |
| US00025926  | US00025927 | Yes      | 10/26/2018 | APD  |  | DP - Deliberative Process | DA Form 2028, Recommended Changes to Publications and Blank Forms, providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110.   |
| US00025928  | US00025928 | No       | 9/19/2018  | Blaylock, Jason M LTC MIL USA<br>WRNMMC  |  | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025929  | US00025929 | No       | 9/19/2018  | Blaylock, Jason M LTC MIL USA<br>WRNMMC  |  | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025930  | US00025930 | No       | 9/19/2018  |  |  | DP - Deliberative Process | Excel spreadsheet consolidating comments from DA Form 2028s, Recommended Changes to Publications and Blank Forms, collected from the field providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. |
| US00025937  | US00025937 | Yes      | 8/10/2018  | Frazier, Scott T COL USARMY<br>HQDA ASA MRA (US)   |  | DP - Deliberative Process | Document providing an update from TSG to the SA outlining proposed courses of action for revising Army policy in response to changes in DoD policy.   |
| US00025954  | US00025954 | No       | 9/20/2018  | Blaylock, Jason M LTC MIL USA<br>WRNMMC  |  | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025955  | US00025955 | No       | 9/20/2018  | Blaylock, Jason M LTC MIL USA<br>WRNMMC  |  | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025956  | US00025956 | No       | 9/21/2018  | Blaylock, Jason M LTC MIL USA<br>WRNMMC  |  | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025957  | US00025957 | No       | 9/27/2018  | Blaylock, Jason M LTC MIL USA<br>WRNMMC  |  | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00025961  | US00025961 | Yes      | 7/23/2015  |  |  | DP - Deliberative Process | Redacted proposed courses of action from a working group assessing and recommending changes to AR 600 110 for consideration by senior leaders as part of the ongoing policy revision process for the 2014 version of AR 600-110.  |
| US00025969  | US00025969 | No       | 3/25/2015  | COL Stephen Thomas,<br>Infectious Diseases Consultant<br>to the U.S. Army Surgeon<br>General | LTC Conreau L. Williams, Chief,<br>Health Promotions Officer Office<br>of the Deputy Chief of Staff, G1,<br>U.S. Army MEDCOM | DP - Deliberative Process | Memorandum dated 25 Mar 15 from the ID Consultant to TSG regarding recommendations to potential policy revisions in AR 600-110 from various ID specialists throughout the Army and the ID Consultant, as part of a policy review process for revising the regulation.                             |

*Harrison v. Mattis,*  
No. 1:18-cv-641 (E.D. Va.)  
Defendants' Privilege Log for Production 11

| BEGIN BATES | END BATES  | REDACTED | DATE       | AUTHOR  | RECIPIENT(S)  | PRIVILEGE(S)              | PRIVILEGE BASIS   |
|-------------|------------|----------|------------|---|---|---------------------------|---|
| US00025970  | US00025973 | Yes      | 10/10/2018 |   |   | DP - Deliberative Process | Redacted references to policy concerns and recommendations proposed by participants in a working group during the policy revision process for AR 600-110.   |
| US00025981  | US00025981 | No       | 3/25/2015  | COL Stephen Thomas, Infectious Diseases Consultant to the U.S. Army Surgeon General | LTC Conreau L. Williams, Chief, Health Promotions Officer Office of the Deputy Chief of Staff, G1, U.S. Army MEDCOM | DP - Deliberative Process | Memorandum dated 25 Mar 15 from the ID Consultant to TSG regarding recommendations to potential policy revisions in AR 600-110 from various ID specialists throughout the Army and the ID Consultant, as part of a policy review process for revising the regulation.                             |
| US00026004  | US00026004 | No       | 10/1/2018  | Blaylock, Jason M LTC MIL USA WRNMMC  |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00026005  | US00026005 | No       | 10/1/2018  | Blaylock, Jason M LTC MIL USA WRNMMC  |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00026008  | US00026008 | No       | 10/11/2018 |   |   | DP - Deliberative Process | Excel spreadsheet consolidating comments from DA Form 2028s, Recommended Changes to Publications and Blank Forms, collected from the field providing recommended changes to AR 600-110 (2014) with explanations for the proposed change, produced as part of the revision process for AR 600-110. |
| US00026019  | US00026020 | Yes      | 7/27/2018  |   |   | DP - Deliberative Process | Redacted proposed courses of action from a working group assessing and recommending changes to AR 600 110 for consideration by senior leaders as part of the ongoing policy revision process for the 2014 version of AR 600-110.  |
| US00026021  | US00026021 | Yes      | 11/9/2017  |   |   | DP - Deliberative Process | Redacted proposed courses of action from a working group assessing and recommending changes to AR 600 110 for consideration by senior leaders as part of the ongoing policy revision process for the 2014 version of AR 600-110.  |
| US00026029  | US00026029 | No       | 3/25/2015  | COL Stephen Thomas, Infectious Diseases Consultant to the U.S. Army Surgeon General | LTC Conreau L. Williams, Chief, Health Promotions Officer Office of the Deputy Chief of Staff, G1, U.S. Army MEDCOM | DP - Deliberative Process | Memorandum dated 25 Mar 15 from the ID Consultant to TSG regarding recommendations to potential policy revisions in AR 600-110 from various ID specialists throughout the Army and the ID Consultant, as part of a policy review process for revising the regulation.                             |
| US00026033  | US00026033 | No       | 2/20/2018  |   |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00026150  | US00026150 | No       | 3/22/2012  | arrietam  |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00026151  | US00026151 | No       | 3/28/2012  | arrietam  |   | DP - Deliberative Process | Working draft of an unpublished version of AR 600-110.  |
| US00027746  | US00027746 | Yes      | 7/7/2016   |   |   | DP - Deliberative Process | Redacted proposed courses of action from a working group assessing and recommending changes to AR 600 110 for consideration by senior leaders as part of the ongoing policy revision process for the 2014 version of AR 600-110.  |

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

NICHOLAS HARRISON and  
OUTSERVE-SLDN, INC.

Plaintiffs,

v.

PATRICK M. SHANAHAN, *et al.*,

Defendants.

No. 1:18-cv-641-LMD-IDD

**DECLARATION OF RUSSELL BELAND IN SUPPORT OF DEFENDANTS'  
OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

I, Russell Beland, do hereby declare as follows:

1. I currently serve as the Deputy Assistant Secretary of the Navy (Military Manpower and Personnel), Office of the Secretary of the Navy. I have held this position intermittently since 2011. I act on behalf of the Secretary of the Navy in regard to military manpower and personnel. I am responsible for the establishment and oversight of policies related to Navy and Marine Corps active duty service members and their families. This includes topics such as recruiting and retention, compensation, quality of life, healthcare, and training and education. I have previously served as the Deputy Assistant Secretary (Manpower Analysis and Assessment) and, prior to joining the Office of the Secretary of the Navy, served as a Senior National Security Analyst at the Congressional Budget Office and, prior to that, in the Office of the Secretary of Defense as the Director of Economic and Manpower Analysis.

2. In the exercise of my duties, I have been made aware of this lawsuit by counsel from the Office of Navy General Counsel and the Office of the Judge Advocate General of the Navy (General Litigation Division).

3. I submit this declaration in support of the Defendant's Response to the Plaintiffs' January 25, 2018 Motion to Compel. I base this declaration on my personal knowledge and on information made available to me in the performance of my duties.

**Purpose of this Declaration**

4. This declaration is submitted in support of Defendant's Reply to Plaintiffs' Motion to Compel. In their January 25, 2019 Memorandum in Support of Plaintiff's Motion to Compel, Plaintiffs state "[p]laintiffs 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) 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."

**Information Subject to the Deliberative Process Privilege**

5. In response to these and Plaintiffs' other broad Requests, the Department of the Navy (DON) has identified 356 responsive documents. Of those responsive documents, 89 were identified as privileged solely pursuant to the deliberative process privilege.

6. I hereby formally assert the deliberative process privilege, on behalf of the DON, over certain information described in and sought by Plaintiff's motion to compel. Release of DON information protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within the DON.

7. The documents that have been withheld pursuant to the deliberative process privilege contain highly sensitive material reflecting the pre-decisional thought processes of DON officials. The following examples illustrate the DON's analysis and implementation of the deliberative process privilege:

a. Of the 89 documents identified as privileged solely pursuant to the deliberative process privilege, 50 are draft documents. These draft documents are important to our collection of privileged documents and serve a critical function in DON policy development through the collaboration and deliberation they engender from action officers to principals and senior leaders: US00014079, US00014114, US00014115, US00014116, US00014117, US00015328, US00015490, US00015495, US00015523, US00015569, US00015572, US00015580, US00015598, US00015599, US00015602, US00015605, US00015609, US00015915, US00015929, US00017774, US00017781, US00017787, US00017798, US00017831, US00017841, US00017846, US00017878, US00017865, US00017866, US00017878, US00017918, US00017946, US00017947, US00017957, US00017982, US00017990, US00018199, US00018203, US00018204, US00018206, US00019117, US00019118, US00019783, US00019784, US00019785, US00019858, US00020067, US00020112, US00020151, US00020154.

b. There are 17 responsive DON documents that are partially redacted for deliberative process privilege. For example, one document is US00015352 which is

an internal letter dated 7 Feb 2014 from the Branch Head, Manpower Military Policy, Headquarters United States Marine Corps providing comments to the Marine Corps Forces Reserves pertaining to a Reserve Affairs letter regarding a request for policy clarification on the assignment of Marine Corps Forces Reserve Marines with HIV infection.

c. Another example of the proper assertion of deliberative process privilege is US00015318 which is a comment matrix for DoD Issuances: DTM 08-033 "Interim guidance for Clinical Case Management for the Wounded, Ill, and Injured Service Member in the Military Health System." The matrix pertains to proposed regulatory guidance and includes internal comments and recommendations regarding Marines or Sailors with HIV.

d. A third example of the proper assertion of deliberative process privilege is US00020069. This is the only DON document withheld pursuant to the deliberative process privilege that Plaintiffs assert is purely factual; however, the document is a coordination sheet comprising opinions and recommendations by a senior-level DON principal to the Secretary of the Navy regarding options on DoD retention policy for non-deployable service members.

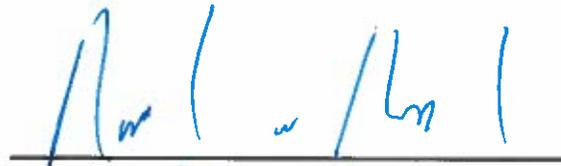
8. The DON decision-making apparatus is reliant on open and candid conversations between leadership, advisors, and policy analysts to advise and inform DON policy makers across the service on various courses of action for any decision. Due to the geographically dispersed nature of DON activities and the high operational tempo with which many of the DON's activities are conducted, deliberative and pre-decisional conversations frequently occur over email. The forced release of such communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and opinions on various topics, both related to

DoD HIV policy and other non-HIV policies, would be open to scrutiny, regardless of any judicial protective order.

9. Without assurance that their opinions on aspects of HIV policy would be protected from disclosure, medical providers, policy makers, and other leaders will be much more likely to withhold participation in policy discussions and honest views in the future. This is especially true given the high-profile and controversial nature of some DON personnel issues, as well as the allegations of irrational discriminatory treatment made by Plaintiffs against DoD in this matter. Subject matter experts, including those with battlefield experience, may decline to lend their unique expertise for fear that they would be subject to unfair accusations and opprobrium. As a result, the DON's decision-making process would suffer because it would not benefit from the practical first-hand experiences of those most qualified to opine on unique aspects of military experience.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED this 30<sup>th</sup> day of January 2019, Arlington, Virginia.



RUSSELL BELAND, PH.D.  
DEPUTY ASSISTANT SECRETARY OF  
THE NAVY (MILITARY MANPOWER  
AND PERSONNEL) OFFICE OF THE  
SECRETARY OF THE NAVY

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

NICHOLAS HARRISON and  
OUTSERVE-SLDN, INC.

Plaintiffs,

v.

PATRICK M. SHANAHAN, *et al.*,

Defendants.

No. 1:18-cv-641-LMD-IDD

**DECLARATION OF PAUL CIMINERA IN SUPPORT OF DEFENDANTS'  
OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

I, Paul Ciminera, do hereby declare as follows:

1. I currently serve as Director, Medical Accessions and Retention Policy. I have held this position since December 2017. In this capacity, I act on behalf of The Deputy Assistant Secretary of Defense for Health Services Policy and Oversight to accomplish health policy development and oversight and other matters as assigned. I am further responsible for coordination of proposed DoD-wide accession medical standards with the Military Departments. Finally, I also serve as a co-Chair of the DoD Accessions Medical Standards Working Group ("AMSWG").

2. In the exercise of my duties, I have been made aware of this lawsuit by counsel from the DOD Office of the General Counsel.

3. I submit this declaration in support of the Defendant's Response to the Plaintiffs' January 25, 2018 Motion to Compel. I base this declaration on my personal knowledge and on information made available to me in the performance of my duties, my background, training, and

experience, and my review and consideration of information available to me in the course of my official duties, including information furnished by DoD military and civilian personnel in the course of their official duties..

**Purpose of this Declaration**

4. In the January 25, 2019 Memorandum in Support of Plaintiff's Motion to Compel, Plaintiffs state that they "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) 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."

**Plaintiffs' Broad Discovery Requests**

5. The discovery sought by Plaintiffs in this case has been extremely broad. Plaintiffs sought the discovery of documents dating back to 2006. Several of Plaintiff's Requests for Production span nearly 12 years of policy development and reach several multiple components of DoD, including each of the Military Services, the Office of the Secretary of Defense (OSD), the Defense Health Agency (DHA), and the Armed Services Blood Program Office (ASBPO). For example, in Document Request No. 10, Plaintiff's sought, "[a]ll Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6490.07," a regulation that was issued in 2010. Likewise, in Document Request

No. 21, Plaintiff's sought "[d]ocuments sufficient to show the number of service members since 2000, broken down by Military Service, who have been diagnosed as HIV positive and: (a) have been deployed to a combat zone; (b) have been deployed on a contingency deployment; (c) have been deployed anywhere outside the continental United States."

**Deliberative Process Privilege**

7. I hereby formally assert the deliberative process privilege, on behalf of DoD, over certain information described in and sought by Plaintiffs' motion to compel.

8. As discussed in more detail below, disclosure of the deliberative process information Plaintiffs seek would discourage open and candid exchange of information between DoD and the Military Services by exposing recommendations, proposals, and considered opinions to public scrutiny and therefore have a chilling effect on the military's ability to effectively develop personnel policies. These documents contain preliminary judgments subject to further refinement, debate, and revision. If released, DoD military and civilian personnel would likely hesitate to provide candid information and opinions to a policy-specific action officer, who is dependent upon the experience, knowledge, and assistance of other DoD employees to perform his duties.

9. The documents marked with bates number US00005764 to US00006135 and US00012347 to US00012349, and were collected from my official DoD email account and an organizational shared drive I have use to store documents. I use the email account to communicate in my official capacity and in the course of my official duties. I also use the shared drive to store materials that are generated pursuant to my official duties.

10. The DoD documents that have been withheld pursuant to the deliberative process privilege contain highly sensitive material reflecting the pre-decisional information and thought

processes of DoD officials. For example, one document is the audio recording of a meeting of the Accessions Standards Medical Working Group (“AMSWG”) which were occasionally recorded (US00012347). Another example are the meeting minutes from the October 6-8, 2015 AMSWG meeting which contains by-name statements on a wide variety of medical accessions topics, to include debate the DoD HIV policy (US00006131). A third example is an email conversation between DoD personnel regarding white papers that were prepared by the services on how the DoD HIV accessions policy is necessary for Navy personnel and personnel in the aviation community (US00006034). A final example is the 14 page draft comment matrix that was created by compiling written comments from the Services, the Joint Staff, and other DoD Agencies as part of the formal review process of recent changes to the entirety of the DoD Instruction 6130.03 (US00006135). Before these documents can be released, a careful document-by-document review to assess the burden of release and the effect of disclosure on the senior leaders’ decision making-process must be completed.

11. In addition to the above production and personnel concerns discussed above, and perhaps most importantly, release of DoD information protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within DoD. This is especially true with members of the AMSWG who are generally medical professionals and who typically provide their candid medical opinions on various accessions related medical topics. The forced release of such communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and medical opinions on various topics, both related to DoD HIV policy and other non-HIV policies, would be open to scrutiny, regardless of any judicial protective order.

9. Without assurance that their opinions on aspects of HIV policy would be protected from disclosure, medical providers, policy makers, and other leaders will be much more likely to withhold participation in policy discussions and honest views in the future. This is especially true given the high-profile and controversial nature of DoD personnel issues, as well as the accusations of discrimination that Plaintiffs include in their motion to compel. Subject matter experts, including those with battlefield experience identifying requirements not equivalent in the civilian setting, will decline to lend their unique expertise for fear that they would be subject to unfair accusations and public notoriety with lasting negative effects. As a result, DoD's decision-making process would suffer because it would not benefit from the practical first-hand experiences of those most qualified to opine on unique aspects of military experience.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED this 30th day of January 2019, Fall Church, Virginia.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

PAUL CIMINERA, MD, MPH  
Director, Medical Accessions and Retention  
Policy

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

NICHOLAS HARRISON and  
OUTSERVE-SLDN, INC.

,

Plaintiffs,

v.

PATRICK M. SHANAHAN, *et al.*,

Defendants.

No. 1:18-cv-641-LMD-IDD

**DECLARATION OF LIEUTENANT COLONEL MATTHEW J. HUIBREGTSE**  
**ASSERTING THE DELIBERATIVE PROCESS PRIVILEGE**

I, Lieutenant Colonel Matthew J. Huibregtse, do hereby declare as follows:

1. I am currently the Chief of Retirement, Separation, and Force Management in the Office of the Air Force's Deputy Chief of Staff for Manpower, Personnel, and Services ("AF/A1"). I have held this position since July 2017. In this capacity, I am responsible for assisting the AF/A1, with developing, reviewing, and analyzing Air Force policies related to the separation and retirement of Air Force military personnel, as well as policies related to force management actions. My duties include assisting with the development and implementation of policies and programs that relate to the implementation of DoD Instruction 1332.45, Retention Determinations for Non-Deployable Service Members, and DoD Instruction 1332.18, Disability Evaluation System. Prior to assuming this position, I served as the Commander of the 786<sup>th</sup> Force Support Squadron, Ramstein, Air Base, Germany.

2. In the exercise of my official duties, I have been made aware of this lawsuit by counsel from the Air Force's Litigation Division.

3. The information in this declaration is based on my personal knowledge and upon my personal review of information made available to me in my official capacity.

4. I submit this declaration in support of the Defendant's Response to the Plaintiffs' January 25, 2018 Motion to Compel. I base this declaration on my personal knowledge and on information made available to me in the performance of my duties, my background, training, and experience, and my review and consideration of information available to me in the course of my official duties, including information furnished by DoD military and civilian personnel in the course of their official duties..

#### **Purpose of this Declaration**

5. I hereby formally assert the deliberative process privilege, on behalf of Air Force, with respect to the 417 documents described in and sought by Plaintiffs' motion to compel.

6. As discussed in more detail below, disclosure of the deliberative process information Plaintiffs seek would discourage open and candid exchange of information between DoD and the Military Services by exposing recommendations, proposals, and considered opinions to public scrutiny and therefore have a chilling effect on the military's ability to effectively develop personnel policies. These documents contain preliminary judgments subject to further refinement, debate, and revision. If released, DoD military and civilian personnel would likely hesitate to provide candid information and opinions to an policy-specific action officer, who is dependent upon the experience, knowledge, and assistance of other service members to perform his duties.

7. The documents that have been withheld pursuant to the deliberative process privilege contain highly sensitive material reflecting the pre-decisional information and thought

processes of Air Force and DoD officials. I am unable to conduct a complete review of all of the documents that the plaintiffs have identified as improperly withheld due to the limited amount of time available to prepare this declaration. However, I have conducted a careful review of a 20 document subset of the 417 documents that the plaintiffs are asking to be produced. The documents that I have reviewed are marked with bates numbers: US00020198; US00020618; US00020623; US00020656; US00020721; US00020743; US00020758; US00020772; US00020775; US00020795; US00020803; US00020829; US00020832; US00020866; US00020869; US00020931; US00021000; US00021011; US00021283; US00021290.

8. The documents that I reviewed generally deal with the Air Force's recommendations to the Department of Defense ("DoD") on its development of a retention policy for non-deployable service members, the Air Force's implementation of the DoD's retention policy for non-deployable service members, and the development of policy relating to the evaluation of airmen diagnosed with HIV through the Disability Evaluation System. All of the documents that I reviewed were created prior to any final decision being made in regard to the respective policies, practices, or procedures that they discuss. All of the documents I reviewed contain assessments of potential courses of action that could be taken. For example, documents 20198, 20656, 20721, and 20743 generally discuss how the Air Force should address a DoD requirement to reduce the percentage of its force that was considered "non-deployable." These documents do not contain any formulation of a final policy, but rather only contain proposals and discussions of possible methods of addressing the DoD's requirement. Documents 21011, 21283, and 21290 likewise are a series of documents that were created during a review of the Air Force's evaluation of HIV positive airmen through the Disability Evaluation System. These documents contain proposals and arguments for and against adopting differing points of

view held by different officials involved in implementing the policies, practices, and procedures at issue. Other documents that I reviewed were draft versions of DoD and Air Force instructions and Personnel Services Delivery Guides that contain tracked changes with individual comments regarding what language should or should not be included in a final version of the policy or procedure. In each of the documents that I reviewed, when there were factual bases for policies were discussed, those were intertwined with deliberations regarding what policies, practices, or procedures should be adopted.

9. In addition to the production and personnel concerns discussed above, and perhaps most importantly, the release of Air Force information protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within Air Force. The documents that I reviewed contain frank and candid initial assessments of possible courses of action covering several different Air Force and DoD policies. If these documents were released there would be a chilling effect on future formulations and deliberations regarding Air Force personnel policies. The forced release of such communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and medical opinions on various topics, both related to DoD HIV policy and other non-HIV policies, would be open to scrutiny, regardless of any judicial protective order.

10. Without assurance that their opinions on aspects of HIV policy would be protected from disclosure, medical providers, policy makers, and other leaders will be much more likely to withhold participation in policy discussions and honest views in the future. This is especially true given the high-profile and controversial nature of Air Force personnel issues, as well as the accusations of discrimination that Plaintiffs include in their motion to compel.

Subject matter experts, including those with battlefield experience identifying requirements not equivalent in the civilian setting, will decline to lend their unique expertise for fear that they would be subject to unfair accusations and public notoriety with lasting negative effects. As a result Air Force's decision-making process would suffer because it would not benefit from the practical first-hand experiences of those most qualified to opine on unique aspects of military experience.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 30 of January, 2019

A handwritten signature in blue ink, appearing to read "Matthew J. Huibregtse", is written over a horizontal line.

MATTHEW J. HUIBREGTSE  
Chief, Retirement, Separation, and Force Management

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

NICHOLAS HARRISON and  
OUTSERVE-SLDN, INC.

Plaintiffs,

v.

PATRICK M. SHANAHAN, *et al.*,

Defendants.

No. 1:18-cv-641-LMD-IDD

**DECLARATION OF MICHAEL R. MELILLO IN SUPPORT OF DEFENDANTS'  
OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

I, Michael R. Melillo, do hereby declare as follows:

1. I currently serve as Deputy Director, Force Management in the Officer and Enlisted Personnel Management Directorate. I have held this position since March, 2013. I act on behalf of Office of the Secretary of Defense to develop total force military personnel and policies and provide departmental oversight on force management policies to improve readiness and lethality of the force. I am responsible for providing policy recommendations related to military personnel.

2. In the exercise of my duties, I have been made aware of this lawsuit by counsel from the DOD Office of the General Counsel.

3. I submit this declaration in support of the Defendant's Response to the Plaintiffs' January 25, 2018 Motion to Compel. I base this declaration on my personal knowledge my background, training, and experience, and my review and consideration of information available

to me in the course of my official duties, including information furnished by Department of Defense (“DoD”) military and civilian personnel in the course of their official duties.

**Purpose of this Declaration**

4. In the January 25, 2019 Memorandum in Support of Plaintiff’s Motion to Compel, Plaintiffs state that they “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) 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.”

**Plaintiffs’ Broad Discovery Requests**

5. The discovery sought by Plaintiffs in this case has been extremely broad. Plaintiffs have sought the discovery of documents dating back to 2006. Several of Plaintiff’s Requests for Production span nearly 12 years of policy development and reach several multiple components of DoD, including each of the Military Services, the Office of the Secretary of Defense (OSD), the Defense Health Agency (DHA), and the Armed Services Blood Program Office (ASBPO). For example, in Document Request No. 10, Plaintiff’s sought, “[a]ll Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6490.07,” a regulation that was issued in 2010. Likewise, in Document Request No. 21, Plaintiff’s sought “[d]ocuments sufficient to show the number of service members since 2000, broken down by Military Service, who have been diagnosed as HIV positive and: (a) have

been deployed to a combat zone; (b) have been deployed on a contingency deployment; (c) have been deployed anywhere outside the continental United States.”

6. In response to these and Plaintiffs’ other broad Requests, OSD has identified 1,644 responsive documents. Of those responsive documents, Plaintiffs specifically challenge 1,252 documents that were withheld or redacted on the basis of the deliberative process privilege.

7. I hereby formally assert the deliberative process privilege, on behalf of DoD, over certain information described in and sought by Plaintiffs’ motion to compel.

8. As described in more detail below, the disclosure of the deliberative process information Plaintiffs seek would discourage open and candid exchange of information between DoD and the Military Services by exposing recommendations, proposals, and considered opinions to public scrutiny and therefore have a chilling effect on the military’s ability to effectively develop personnel policies. These documents contain preliminary judgments subject to further refinement, debate, and revision. If released, DoD military and civilian personnel would likely hesitate to provide candid information and opinions to an policy-specific action officer, who is dependent upon the experience, knowledge, and assistance of other service members to perform his duties.

9. The documents marked with bates numbers US00006136 to US00010743 were collected from a shared folder where I stored all documents created as DoDI 1332.45 was being developed. The documents were filed in separate folders which I submitted to DoD Counsel who then submitted to Department of Justice Counsel.

10. The first group of documents I provided is from a folder entitled, “ND Report.” Documents from this folder that were withheld pursuant to the deliberative process privilege

generally concern documents from the various Services regarding their number of non-deployable personnel which includes briefing slides depicting a summary of non-deployable services members, analysis of the information, and assumptions used to arrive at specific conclusions (US00006172). Another example of documents from this folder is a deliberative email conversation between DoD personnel setting forth detailed “due outs” from OSD to staff after a meeting of the Personnel Policies Working Group (US00006190). This folder also contained a document that was withheld pursuant to the deliberative process privilege because the document contains the Secretary of Defense’s handwritten feedback and policy questions on an information memorandum that discusses the number of non-deployable Service members from each Service (US00006154).

11. The next of group of documents I provided is from a folder entitled, “NDS Implementation Review.” A sample document from this folder that was withheld pursuant to the deliberative process privilege is a PowerPoint presentation detailing Lethality/Personnel Recruiting problem statements, systemic issues related to those problem statements, and further actions for each Service (US00006492).

12. The next group of documents I provided is from a folder entitled, “DoDI.” This folder generally contains the informal comments from the force that were collected as the draft Instruction was circulated for review. A sample document from this folder that was withheld pursuant to the deliberative process privilege is a draft version of DoDI 1332.45 which contains over fifty annotations, candid comments, and edits to the draft language in the regulation from staff officers and civilians (US00006617).

13. Another group of documents I provided is from a folder entitled, “PA-LA information.” This folder generally contains documents that were used to create talking points

for the public affairs staff and for the legislative affairs staff if there were inquiries. A sample document from this folder that was withheld pursuant to the deliberative process privilege is a “draft” document for public affairs staff providing a summary on DoD policy on the retention of non-deployable service members that includes talking points and potential questions and answers (US00006906).

14. Another group of documents I provided is from a folder entitled, “Info Memo for SD.” This folder generally contains documents that were used to create an information memorandum for the Secretary of Defense on the monthly non-deployable report. A draft information memorandum contains background, analysis, key points, details on the various categories, and information on future reports (US00007032). Another document contained in this folder is an unsigned version of an action memorandum to the Under Secretary of Defense for Personnel and Readiness from the Deputy Assistant Acting Secretary of Defense for Military Personnel Policy regarding creation of an information report to discuss aggregate numbers of non-deployable Service members from each Service (US00007011).

15. Another group of documents I provided is from a folder entitled, “Military Personnel Policies WG.” This folder generally contains documents that were created in connection with the Military Personnel Policies Working Group (“MPPWG”). A sample document from this folder is a “draft” document entitled, “Personnel Policies to Enhance Readiness and Lethality – 30 Day Update Information Paper,” which provides a problem statement, describes obstacles, and provides recommendations on the way forward (US00009615). Another example is a working paper from the MPPWG drafted to provide the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff information on the actions and recommendations from MPPWG’s meetings as it considered the non-deployable

Service member cohort (US00009778). A final example is a PowerPoint presentation entitled “Lethality in Administrative and Personnel Policies,” dated November 17, 2017 which provides an overview of the MPPWG report regarding non-deployable personnel, the applicable deliverables, and a summary of the progress made by the Services (US00009867).

16. Before each of these documents is released, a careful document-by-document review to assess the burden of release and the effect of disclosure on the senior leaders’ decision making-process must be completed.

17. In addition to the production and personnel concerns discussed above, and perhaps most importantly, release of DoD information protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within DoD. The DoD decision-making apparatus is reliant on open and candid conversations between leadership, advisors, and policy analysts to advise and inform DoD policy makers across the military services on various courses of action for any decision. Due to the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted, deliberative and pre-decisional conversations frequently occur over email. The forced release of such communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and opinions on various topics would be open to scrutiny, regardless of any judicial protective order.

18. Without assurance that their opinions on aspects of policy development would be protected from disclosure to any outside party, policy makers and other leaders will be much more likely to decline to participate in policy discussions and present honest views in the future. This is especially true given the high-profile nature of DoD personnel issues, including DoDI

1332.45, as well as the allegations of discriminatory treatment made by Plaintiffs in their motion to compel. Subject matter experts, including the few with first-hand battlefield experience, will decline to lend their unique expertise in policy development for fear that they would be subject to unfair accusations. As a result, DoD's decision-making process would suffer because it would not benefit from the practical first-hand experiences of those most qualified to opine on unique aspects of military experience.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED this 30<sup>th</sup> day of January 2019, Arlington, Virginia.



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MICHAEL R. MELILLO  
Deputy Director, Force Management

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

NICHOLAS HARRISON and  
OUTSERVE-SLDN, INC.,

Plaintiffs,

v.

PATRICK M. SHANAHAN, *et al.*,

Defendants.

No. 1:18-cv-641-LMD-IDD

**DECLARATION OF DONALD SHELL IN SUPPORT OF DEFENDANTS'  
OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

I, Donald Shell, do hereby declare as follows:

1. I currently serve as Director of Disease Prevention, Disease Management and Population Health Policy & Oversight in Health Services Policy and Oversight, in the Office of the Assistant Secretary of Defense (Health Affairs). I have held this position since March 23, 2015. I act on behalf of the Deputy Assistant Secretary of Defense - Health Services Policy and Oversight, Office of the Assistant Secretary of Defense (Health Affairs) to execute health policy. I am responsible for oversight of the human immunodeficiency virus policies. In this role, I was also responsible for staffing and drafting the "Department of Defense Personnel Policies Regarding Members of the Armed Forces Infected with Human Immunodeficiency Virus: Report to the Committees on the Armed Services of the Senate and House of Representatives," dated August 2018.

2. In the exercise of my duties, I have been made aware of this lawsuit by counsel from the DOD Office of the General Counsel.

3. I submit this declaration in support of the Defendant's Response to the Plaintiffs' January 25, 2018 Motion to Compel. I base this declaration on my personal knowledge, my background, training, and experience, and my review and consideration of information available to me in the course of my official duties, including information furnished by DoD military and civilian personnel in the course of their official duties.

**Purpose of this Declaration**

4. In the January 25, 2019 Memorandum in Support of Plaintiff's Motion to Compel, Plaintiffs state that they "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) 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."

**Plaintiffs' Broad Discovery Requests**

5. The discovery sought by Plaintiffs in this case has been extremely broad. Plaintiffs have sought the discovery of documents dating back to 2006. Several of Plaintiff's Requests for Production span nearly 12 years of policy development and reach several multiple components of DoD, including each of the Military Services, the Office of the Secretary of Defense (OSD), the Defense Health Agency (DHA), and the Armed Services Blood Program Office (ASBPO). For example, in Document Request No. 10, Plaintiff's sought, "[a]ll

Documents that Defendants reviewed or relied upon, either directly or indirectly, in writing or amending DoDI 6490.07,” a regulation that was issued in 2010. Likewise, in Document Request No. 21, Plaintiff’s sought “[d]ocuments sufficient to show the number of service members since 2000, broken down by Military Service, who have been diagnosed as HIV positive and: (a) have been deployed to a combat zone; (b) have been deployed on a contingency deployment; (c) have been deployed anywhere outside the continental United States.”

6. In response to these and Plaintiffs’ other broad Requests, OSD identified more than 1,500 responsive documents. Of those responsive documents, Plaintiffs specifically challenge 1,252 documents that were withheld or redacted on the basis of the deliberative process privilege.

**Deliberative Process Privilege**

7. I hereby formally assert the deliberative process privilege, on behalf of DoD, over certain information described in and sought by Plaintiffs’ motion to compel.

8. As discussed in more detail below, disclosure of the deliberative process information Plaintiffs seek would discourage open and candid exchange of information between DoD and the Military Services by exposing recommendations, proposals, and considered opinions to public scrutiny and therefore have a chilling effect on the military’s ability to effectively develop personnel policies. These documents contain preliminary judgments subject to further refinement, debate, and revision. If released, DoD military and civilian personnel would likely hesitate to provide candid information and opinions to an policy-specific action officer, who is dependent upon the experience, knowledge, and assistance of other service members to perform his duties.

9. The documents marked with bates numbers US00010744 to US00011921 were collected from my official DoD email account. I use that account to communicate and gather information from DoD personnel and service members in the course of my official duties. The documents in my email account contain deliberative information such as the personal opinions or individual service members, and the information concerning the pre-decisional thought processes of DoD officials. For example, one document contains an undated written response from the Under Secretary of Defense for Personnel and Readiness to the Secretary of Defense on his question about deployment of HIV positive Service members (US00010758). Another example is a September 2015 information paper authored by senior uniformed infectious disease medical providers from the U.S. Navy, U.S. Army, and the U.S. Air Force on the accession qualifications standards for HIV infection, dated September 2015 (US00010766) which contains background discussion and recommendations for the accessions of individuals with HIV. Before these documents can be released, a careful document-by-document review to assess the burden of release and the effect of disclosure on the senior leaders' decision making-process as well as the candid opinions of senior military subject matter experts.

10. In addition to the documents above, I also provided the final staff packages for DoDI 6130.03 (US00013857 to US000138977) and DoDI 6490.07 (US00013979 to US00014029), and the comments matrix for DoDI 6485.01 (US00013978.001 to US00013978.007). These documents contain the official comments from the Services that were provided to the deciding official together with the proposed changes to the final policy documents in the most recent revision of each document. DoD has withdrawn its claim of deliberative process over the material within those documents that concerned DoD's HIV policy; however, DoD maintains its privilege claims to some information in those document that was

withheld on the basis of the attorney-client privilege. DoD also continued to withhold some information from those documents on the basis of the deliberative process privilege because the withheld information pertains to a non-HIV related policy process that is currently in active litigation and which cannot be released in this litigation.

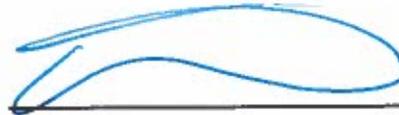
11. In addition to the above production and personnel concerns, and perhaps most importantly, release of DoD information protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within DoD. The DoD decision-making apparatus is reliant on open and candid conversations between leadership, advisors, and policy analysts to advise and inform DoD policy makers across the military services on various courses of action for any decision. Due to the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted, deliberative and pre-decisional conversations frequently occur over email. The forced release of such communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and opinions on various topics, both related to DoD HIV policy and other non-HIV policies, would be open to scrutiny, regardless of any judicial protective order.

12. Without assurance that their opinions on aspects of HIV policy would be protected from disclosure, medical providers, policy makers, and other leaders will be much more likely to withhold participation in policy discussions and honest views in the future. This is especially true given the high-profile and controversial nature of DoD personnel issues, as well as the accusations of discrimination that Plaintiffs include in their motion to compel. Subject matter experts, including those with battlefield experience, will decline to lend their unique

expertise for fear that they would be subject to unfair accusations and opprobrium. As a result, DoD's decision-making process would suffer because it would not benefit from the practical first-hand experiences of those most qualified to opine on unique aspects of military experience.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED this 30 day of January 2019, Arlington, Virginia.



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DONALD SHELL, MD, MA  
Director, Disease Prevention, Disease  
Management and Population Health Policy  
& Oversight