

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

NICHOLAS HARRISON and
OUTSERVE-SLDN, INC.
Plaintiffs,

v.

PATRICK M. SHANAHAN, in his official
capacity as acting Secretary of Defense; MARK
ESPER, in his official capacity as the Secretary
of the Army; and the UNITED STATES
DEPARTMENT OF DEFENSE,
Defendants.

NO. 1:18-CV-00641-LMB-IDD

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL DOCUMENTS
AND INFORMATION WITHHELD ON THE BASIS OF
DELIBERATIVE PROCESS PRIVILEGE**

INTRODUCTION

Plaintiffs Motion to Compel Documents and Information Withheld on the Basis of Deliberative Process Privilege should be granted. In opposition, Defendants make the following arguments: (1) that “Plaintiffs rely exclusively for [the proposition that the deliberative process privilege does not apply when the Government’s intent is at issue] on a single case from the D.C. Circuit”, Dkt. 111 at 7; (2) that even if Defendants had discriminatory intentions, their intent is irrelevant in this discrimination case, Dkt. 111 at 9-10; (3) Plaintiffs must separately brief and argue every one of the approximately 1,500 improperly withheld documents on a “document-by-document” basis and the Court must rule on each and every privilege claim individually, *id.* at 18; (4) while Defendants are withholding approximately 1,500 documents on the basis of the deliberative process privilege, they “*have not had an adequate opportunity to review*” the documents to determine if they really are privileged in light of Plaintiffs’ “objections,” *id.* at 3, and (5) the Court should not even look at a sample of the withheld documents *in camera* to determine whether they are properly claiming the privilege, *id.*

As to the first point, Defendants mischaracterize Plaintiffs’ opening brief. As to the second point, Defendants once again improperly ask for this Court to decide the question of the proper standard of review in the context of a discovery dispute—something this Court has already refused to do. As to the third point, Defendants misunderstand that they have the burden to show the privilege applies and discovery should not be provided. As to the fourth point, Defendants own words suggest they do not even know if they are properly withholding hundreds of documents that this Court has already ruled are relevant to this case. And, as to the fifth point, Defendants cite no authority that prevents an *in camera* review of withheld documents. Each of these points is addressed in further detail below.

COUNTERSTATEMENT OF FACTS CONCERNING MEET AND CONFER

Plaintiffs apologize for the length of this section. Plaintiffs are compelled to set the record straight about the meet and confer process on the issue presented in this motion. Reading Defendants' paper, one might think that Plaintiffs delayed weeks before raising the questionable nature of Defendants' privilege claims and then prematurely moved to compel. *See* Dkt. 111 at 2-3. That impression, however, would be wrong.

The parties have been discussing Defendants' privilege claims for almost two months. That process was delayed at *Defendants' request* twice.

Plaintiffs raised concerns about Defendants' assertions of the deliberative process privilege on November 28, 2018, December 5, 2018, and December 10, 2018. *See* Ex. 1 at 2. ("At this time, Plaintiffs cannot assess whether any documents have actually been withheld under the deliberative process privilege. However, to the extent that any documents are withheld on this basis, such withholding is improper because the privilege does not apply in cases involving claims where the government's intent is at issue, as here."); Ex. 2 ("Please confirm that you will produce any documents that have been withheld solely on [the deliberative process privilege]; otherwise, Plaintiffs intend to move to compel the production of such documents."); Ex. 3 (noting that the "Government stated they thought it would be best to table the issue until after a more fulsome production has occurred" but that Plaintiffs "may need to raise this with the Court sooner rather than later."). The meet and confer process was delayed at the *Defendants' request* because they were ordered to produce discovery and its objections to that order were overruled. Ex. 3

After Defendants' court-ordered production on December 28th, Plaintiffs sought to resume the meet and confer process on January 2. Ex. 4 at 1-2 (identifying exemplary

documents being “improperly withheld, despite being directly relevant based on their descriptions.”). Defendants waited more than a week to respond to this letter, which included a request for a meet and confer.¹ Ex. 5 at 7.

On January 11, 2019, the parties met and conferred telephonically. *Id.* at 7. Plaintiffs’ counsel then again followed-up with Defendants’ counsel, noting that “the parties are at an impasse.” *Id.* at 5. On January 17, Defendants’ counsel responded requesting the Plaintiffs’ counsel identify on a document-by-document basis the documents Plaintiffs intended to challenge. *Id.* at 3. ***On that same day***, Plaintiffs provided Defendants with the document-by-document categorization they requested and asked for a final call because Plaintiffs intended to file their motion the next day. *Id.* at 2. During the meet and confer call the next day, Defendants’ counsel requested that Plaintiffs not file until they had more time to review the document-by-document categorization. As a professional courtesy, Plaintiffs agreed to postpone the filing of the Motion to Compel to give the Defendants even more time to consider their position. *See* Ex. 5 at 1. Defendants’ representation to the Court that they have not had “an adequate opportunity to review the challenged documents individually to assess the validity of Plaintiffs’ objections,” Dkt. 111 at 3, can only be viewed as Defendants’ own fault. While Plaintiffs’ counsel recognize the effect of the government shutdown on the Government’s ability to achieve some of the necessary tasks in a timely manner, any blame for delay cannot be laid at Plaintiffs’ feet. There has been no lack of effort on Plaintiffs’ part to join issue on this point and move it towards some resolution.

¹ Plaintiffs recognize that Defendants’ counsel’s responsiveness was impacted by the Government shutdown. Nevertheless, Plaintiffs are not responsible for any delay as Defendants’ imply.

ARGUMENT

Plaintiffs' motion should be granted because: (1) courts throughout the country, including in the Fourth Circuit, have found that the deliberative process privilege does not apply when the Government's intent is at issue or when misconduct is alleged; (2) the Government's intent is relevant here; (3) Defendants have the burden to prove the documents are privileged; (4) Defendants did not "precisely and conservatively" apply the privilege; and (5), if the Court deems it necessary, an *in camera* review of a sample of documents is proper.

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

Defendants' argument that Plaintiffs rely exclusively on "a single case from the D.C. Circuit" for the proposition that the deliberative process privilege does not apply when the Government's intent is at issue or misconduct is verifiably wrong. Dkt. 111 at 7. Plaintiffs identified decisions from the Eastern District of Virginia, the District of Maryland, the D.C. Circuit, the Northern District of Georgia, the Northern District of Indiana, and the District of D.C. in support of their argument. *See* Dkt. 108 at 5-6. Defendants just ignore the cases that do not fit their world view as if they were never identified. For example, nowhere in the litany of cases they cite do they even substantively discuss *Stone v. Trump*, No. CV GLR-17-2459, 2018 WL 6305131, at *7 (D. Md. Nov. 30, 2018), which plainly contradicts their position in the clearest of terms: "[D]eliberative process privilege does not apply to the documents Plaintiffs requested [including documents relating to Transgender Service Member Ban] because the government's intent is at the heart of the issue in this case." *See also Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) ("Unlike other cases, where the deliberative process privilege or the legislative privilege may be employed to 'prevent [the

government's] decision-making process from being swept up unnecessarily into the public domain,' this is a case where the decisionmaking process 'is the case.'").

Stone v. Trump is recent, in circuit, and on point. 2018 WL 6305131 at *1. There, Plaintiffs challenged the military's transgender ban and sought deliberative materials that had been withheld by defendants regarding the transgender service member ban, the implementation plan for the ban, and the DoD's panel of experts who were conducting studies to inform the implementation plan. *Id.* at *1-*2. The Court found that the magistrate judge did not act contrary to law in concluding that "the deliberative process privilege does not apply to the documents Plaintiffs requested because the government's intent is at the heart of the issue in the case." *Id.* at *7. Indeed, this conclusion fits squarely within the rule articulated by numerous courts when presented with this issue. The government's intent is at the heart of the issue in this case and the deliberative process privilege does not apply at all.²

II. The Government's Intent Is A Live Issue

This Court has already refused to rule on Defendants' argument that their intent is irrelevant. Yet, the crux of Defendants' argument relies on its position that rational basis review is the standard of review that must govern this case. Dkt. 111 at 9. But the appropriate standard to apply in evaluating Plaintiffs' Fifth Amendment challenge is an open legal question with respect to Plaintiffs' equal protection challenge. Dkt. 85-5, Sept. 14, 2018 Hr'g at 16:5-17. This

² To the extent Defendants argue Plaintiffs have made no clear showing of misconduct, this is simply not true. The central premise of the complaint is that the Defendants are discriminating against people living with HIV in violation of the Constitution of the United States. In fact, Defendants' own witness admitted during her deposition that "for the Army HIV policy to remain *lawful* and relevant, a major revision [of AR 600-110] is required." *See* Dkt. 110-3, Lute Tr. at 139:10-141:12 (emphasis added). As Judge Brinkema noted at the last hearing, "[Q]uite frankly, I'm not sure the defense truly understands what's at issue in this case." Dkt. 110-5, Dec. 21, 2018 Tr. 4:1-4.

Court has already correctly refused to rule on it in the context of discovery in this case. Dkt. 85-8, Nov. 30, 2018 Hr'g at 30:6-24. It should do so again here.³

Defendants in *Stone* made a similar argument regarding the level of scrutiny and the relevance or deference given to the government's intent in its decision-making process, which was also similarly rejected by the court there. 2018 WL 6305131 at *7 (holding that "the deference afforded to the government's military policy in [*Trump v. Hawaii*, 138 S.Ct. 2392 (2018)] does not apply in this case"). Furthermore, regardless of which standard of review applies, intent is something that can, and should be, considered by the Court in this context. *Windsor v. United States*, 570 U.S. 744, 770 (2013); *Romer v. Evans*, 517 U.S. 620, 634 (1996). The motion should be granted because the government's intent is at issue.

III. Defendants Bear The Burden To Prove The Privilege Applies

Defendants also mistakenly believe Plaintiffs carry the burden to show Defendants' privilege claims are wrong. In their proposed course of action under this mistaken view, they also would impose a tremendous burden on Plaintiffs and the Court to sift through the roughly 1500 documents on a "document-by-document" basis to evaluate Defendants' privilege claims. But, it is Defendants who bear the burden to show that discovery should not be permitted—even in the privilege context. *Singletary v. Sterling Transp. Co.*, 289 F.R.D. 237, 241 (E.D. Va. 2012). Indeed, Plaintiffs don't have access to these documents—Defendants do. And, ruling that a document-by-document discussion would incentivize the Government to log as many documents as possible to make it more difficult to challenge their privilege claims. Indeed, that is

³ The fact that Defendants are again raising this argument that has already been rejected by the Court is troubling and a waste of Plaintiffs' and the Court's resources.

what the Defendants appear to have done here because they claim they are only now reviewing the documents after Plaintiffs lodged objections to the privilege claims. Dkt. 111 at 3.

Even though Defendants bear the burden in resisting the discovery and establishing that the privilege applies, *English v. Wash. Metro. Area Transit Auth.*, 323 F.R.D. 1, 9 (D.D.C. 2017) (“When a party claims a privilege as the basis for withholding documents, that party ‘bears the burden of proving the communications are protected.’”) (citing *Felder v. Wash. Metro. Area Transit Auth.*, 152 F.Supp.3d 221, 224 (D.D.C. 2015)); *Rhodenizer v. City of Richmond Police Dept.*, 2009 WL 3334744, at *1 (E.D. Va. Oct. 14, 2009) (placing the burden “on the person objecting to the discovery . . . to demonstrate that such discovery is should not be permitted” in a dispute regarding executive privilege.) (citing *Castle v. Jallah*, 142 F.R.D. 618, 620 (E.D. Va. 1992)), Plaintiffs have identified and categorized the challenged documents in a meaningful way that allows the Court to efficiently decide these issues on a category-by-category basis and implement its rulings. For example, Defendants complain that “Plaintiffs have not explained their need for specific documents in a way that meaningfully permits balancing.” Dkt. 111 at 12. Yet the first two categories Plaintiffs identified – (1) documents and information considered or relied upon in the drafting or updating of DoD and military branches’ regulations pertaining to HIV and discussions regarding the same; and (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 – are categories of documents that the Court has already found to be relevant and has ordered Defendants to produce. Dkt. 85-8, Nov. 30, 2018 Hr’g at 43:21-44:4 (“If OutServe is arguing that the, the Navy’s regulation, the Marines’ regulation, and the Air Force regulation concerning how we commission or deploy, whatever, people who have HIV, then they have the right to get information concerning *what was considered in coming up with that regulation* to determine whether or not there’s a legitimate government interest that justifies that regulation in those other branches as well because their justification may be pretext.”) (emphasis added); Dkt. 110-5, Dec. 21, 2018 Tr. 4:1-5 (“The evidence that Judge Davis

found is relevant to the plaintiffs' case is in this Court's view absolutely relevant."'). The third category is equally precise and discrete—(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—and meaningfully disputes the applicability of the privilege.⁴ Defendants now bear the burden to prove the privilege applies. They cannot, and therefore the documents must be produced.

IV. Defendants Have Not Precisely And Conservatively Applied The Privilege

Defendants' representation that they "have not had an adequate opportunity to review the challenged documents individually to assess the validity of *Plaintiffs' objections*" to Defendants privilege claim exposes the problem here. Dkt. 111 at 3. This motion challenges Defendants' privilege claim. Presumably, before Defendants claimed these documents were privileged, they reviewed them. Defendants had an extra incentive to do so because they were on notice *before* the majority of these claims were logged that Plaintiffs would be challenging the claims. That Defendants now say they have not had an "adequate opportunity to review" to determine if the very documents *they claim are privileged* are in fact privileged punctuates the problem. The deliberative process privilege must "be *construed narrowly*, and the burden rests upon the government to be *precise* and *conservative* in its privilege claims." *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1248 (4th Cir. 1994) (emphasis added). That is not what happened here. Defendants cannot withhold almost half the documents they have identified to date and then feign burden

⁴ To the extent that Defendants argue that Plaintiffs arguments "only include conclusory and unsupported assertions" that the privilege does not apply, it is because Plaintiffs must rely solely on the descriptions provided by Defendants in the privilege log. It is Defendants that have access to these documents. This is a substantial part of the reason why it is Defendants' burden to show the privilege applies.

and argue it is too troublesome for them to review the documents they actually withheld. The documents should be produced.

V. Even If the Privilege Was Available In this Case, *In Camera* Review of a Sample of Withheld Documents Is Appropriate

Defendants finally say any *in camera* review of the documents they are withholding is improper. Dkt. 111 at 19. But these are not state secrets. No matter of national security—or even a matter of absolute privilege—has been raised. Instead, these documents pertain to Defendants’ decisions, policies and practices that discriminate against service members living with HIV. These documents are squarely at issue in this case. And Defendants were ordered to produce them. At the very least, assuming *arguendo* that the privilege even applies to the documents concerning the promulgation of the very regulations at issue here, the Court should review selected documents from the categories to evaluate the Government’s claims of privilege here.

To the extent that Defendants argue against a *sampling* of documents, sampling is a common and effective practice in variety of privilege scenarios. Deliberative process privilege is no more fact intensive than attorney-client privilege or work product protection, where Courts have successfully used sampling. Defendants should not be allowed to hide behind the enormity of their privilege log.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court compel Defendants to produce all documents withheld or redacted solely on the basis of the deliberative process privilege, to supplement prior responses to discovery requests if necessary, and to offer any

witnesses who were instructed not to answer questions on the basis of the privilege to testify as to those matters, and for such further relief as this Court deems just and proper.

Dated: January 31, 2019

Respectfully submitted,

/s/ Andrew R. Sommer

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January 2019, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: January 31, 2019

Respectfully submitted,

/s/ Andrew R. Sommer
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EXHIBIT 1



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November 28, 2018

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Re: *Harrison et al. v. Mattis et al.*, Civil Action No. 1:18-CV-00641

Rob, Nate, & Trent,

We write regarding Defendants' Responses to Plaintiffs' First Set of Requests for Production of Documents and Things (Nos. 1-15) served on November 23, 2018. Defendants' responses are deficient for at least the reasons set forth below.

I. Defendants' "General Objections"

As already explained in Plaintiffs' Motion to Compel Production of Documents (*see* ECF No. 73 at 4 n.3), although Defendants styled them as "Objections Applicable to Each Request," Defendants improperly included general objections despite the Court's instruction not to do so. *See* Rule 16(b) Scheduling Order, ECF No. 68 at ¶3. Defendants have therefore waived these objections.



November 28, 2018
Page 2

II. Issues Applicable to Multiple Responses

Defendants' objections and responses indicate that materials may be withheld on the basis of attorney-client privilege, attorney work product, and/or deliberative process privilege. At this time, Plaintiffs cannot assess whether any documents have actually been withheld under the deliberative process privilege. However, to the extent that any documents are withheld on this basis, such withholding is improper because the privilege does not apply in cases involving claims where the government's intent is at issue, as here. *See, e.g., In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency*, 145 F.3d 1422 (D.C. Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place . . . in a constitutional claim for discrimination."). Plaintiffs will further address this issue after receiving Defendants' log of documents that have been withheld.

Defendants' objections and responses also indicate that Defendants may have improperly withheld documents that were "reviewed" but not relied upon in preparing certain reports or policies. *See* RFP Nos. 3-12. Defendants' withholding of any such documents is improper because even documents considered but not relied upon remain relevant to Plaintiff's claims. By way of analogy, Rule 26(a)(2)(B)(ii) requires that an expert report contain "the facts or data *considered* by the witness in forming them," even if the expert did not rely upon those facts or data. Fed. R. Civ. P. 26(a)(2)(B)(ii) (emphasis added). This is because "information considered, but not relied upon, can be of great importance in understanding and testing the validity of an expert's opinion." *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 282 (E.D. Va. 2001). Similarly, here, information reviewed or considered by those who prepared the reports and policies at issue is important to understanding the validity of the views or findings set forth in the same reports or policies.

Defendants' objections and responses further indicate that Defendants may have improperly withheld "materials 'reviewed or relied upon' in developing versions of policy documents that have been superseded and are thus no longer in effect." RFP Nos. 7-12. Defendants' withholding of any such documents is improper because materials reviewed or relied upon in developing prior versions of policy documents are relevant to Plaintiff's claims. Specifically, for example, Defendants claim that their policies related to service members living with HIV "[r]eflect existing evidence and adhere to current nationally-accepted, evidence-based guidelines, and assess evolving medical evidence and scientific understanding of the nature and risk of HIV transmission, available treatment regimens, and the latest HIV management approaches and practices." DoD 2018 Report to Congress, ECF No. 53-3 at 10. Plaintiffs must be allowed to understand and explore the evolution of Defendants' policies, including what specific materials Defendants previously considered and relied upon to formulate prior policies that, for example, placed even greater restrictions on the ability of service members with HIV to serve in the Military.



November 28, 2018
Page 3

III. Defendants' Specific Objections

- **RFP No. 1:** Defendants' response indicates that at least some documents may have been improperly withheld, including but not limited to the following:
 - First, with respect to Mr. Harrison's application materials submitted to the Army's Judge Advocate Recruiting Office, please confirm that Defendants will produce not only the application materials but also any materials related to Mr. Harrison's application, such as documents that may have been prepared in response to Mr. Harrison's application or internal communications discussing Mr. Harrison's application.
 - Second, with respect to Mr. Harrison's request for a medical waiver, Defendants indicate they have limited the scope of documents to be produced to "records in the custody of the National Guard Bureau." Please confirm that all documents related to Mr. Harrison's request are in the custody of the National Guard Bureau or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.
 - Third, with respect to documents concerning Mr. Harrison's request for an exception to policy, Defendants' response indicates that documents from only certain directorates or offices will be produced. Plaintiffs have not agreed to limit this request in this manner. Accordingly, please confirm that all documents related to Mr. Harrison's request for an exception to policy are within the custody of the listed directorates or offices or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.
 - Fourth, with respect to documents concerning Mr. Harrison's application to the Army Board for Correction of Military Records, please confirm that Defendants will produce not only the application itself but also any materials related to Mr. Harrison's application, such as documents that may have been prepared in response to Mr. Harrison's application or internal communications discussing Mr. Harrison's application.
- **RFP No. 2:** Defendants' response indicates that the scope of responsive documents has been improperly limited to the same documents that Defendants will be producing in response to RFP No. 1. As explained in Plaintiffs' Motion to Compel Production of Documents (ECF No. 73), Defendants' attempt to limit the scope of discovery to Mr. Harrison's attempt to secure a commission is entirely misguided. Plaintiffs will follow up on the scope of this request following a ruling from the Court on Plaintiffs' Motion.
- **RFP No. 3:** Defendants' response indicates that responsive documents may have been improperly withheld. For example, Defendants have agreed to produce "documents, dated between December 23, 2013, and September 22, 2014, used to prepare the 2014 Report to Congress, from the AP [Accession Policy Directorate] and OEPM [Officer and Enlisted Personnel



November 28, 2018
Page 4

Management Directorate] directorates[.]” To the extent that documents outside the AP and OEPM directorates were used to prepare the 2014 Report, Defendants’ limitations are improper, as those documents are relevant and should be produced. Please confirm either that only documents within those directorates were used to prepare the DoD 2014 Report to Congress or that Defendants will also produce documents from other locations that are nonetheless in Defendants’ possession, custody, or control. For example, the DoD 2014 Report to Congress indicates that “The [Assistant Secretary of Defense for Health Affairs] ASD(HA) reviewed DoD-level policies for enlistment or commissioning, retention, deployment, discharge and discipline of individuals with HIV or HBV.” ECF No. 53-2 at 10. Accordingly, any documents relied upon by the Assistant Secretary of Defense for Health Affairs should also be produced.

- **RFP No. 4:** For the same reasons set forth above with respect to RFP No. 3, Defendants’ response indicates that responsive documents may have been improperly withheld. Please confirm either that only documents within the AP and OEPM directorates were used to prepare the DoD 2018 Report to Congress or that Defendants will also produce documents from other locations that are nonetheless in Defendants’ possession, custody, or control. For example, the DoD 2018 Report to Congress indicates that “Service-level information was obtained from each of the Military Departments at the request of the Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)).” ECF No. 53-3 at 5. Accordingly, any documents relied upon by OASD(HA) should also be produced.
- **RFP No. 5:** With respect to documents Defendants reviewed or relied upon in writing the DOGO Instruction, Defendants indicate they have limited the scope of documents to be produced to information from the OEPM directorate “that were used during the review of the version of the DoDI 1332.45 effective July 30, 2018.” Please confirm that all documents reviewed or relied upon by Defendants in writing the DOGO Instruction are in the custody of the OEPM directorate or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants’ possession, custody, or control.
- **RFP No. 6:** With respect to documents Defendants reviewed or relied upon in writing the DOGO Policy, Defendants indicate they have limited the scope of documents to be produced to information from the OEPM directorate “that were used to prepare the DoD Retention Policy for Non-Deployable Service Members (February 14, 2018).” Please confirm that all documents reviewed or relied upon by Defendants in preparing the DOGO Policy are in the custody of the OEPM directorate or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants’ possession, custody, or control.
- **RFP No. 7:** With respect to documents Defendants reviewed or relied upon in writing or amending DoDI 6485.01, Defendants indicate they have limited the scope of documents to be produced to documents “dated before June 7, 2013, in the possession of OASD(HA)-HSPO and used during the review of the version of DoDI 6485.01 dated June 7, 2013.” Please confirm that all documents reviewed or relied upon by Defendants in preparing prior or current versions of



November 28, 2018
Page 5

DoDI 6485.01 are in the custody of the OASD(HA)-HSPO or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.¹ This response is also deficient with respect to documents review or relied upon to prepare prior versions of DoDI 6485.01, as explained above.

- **RFP No. 8:** With respect to documents Defendants reviewed or relied upon in writing or amending DoDI 6130.03, Defendants indicate they have limited the scope of documents to be produced to documents “dated between May 6, 2017, and May 6, 2018, that contain information about the accession or retention of individuals with HIV from OASD(HA)-HSPO or the OEPM directorate, and that were used during the review of the version of DoDI 6130.03 dated May 6, 2018.” Please confirm that all documents reviewed or relied upon by Defendants in preparing prior or current versions of DoDI 6130.03 are in the custody of the OASD(HA)-HSPO or the OEPM directorate or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.² This response is also deficient with respect to documents review or relied upon to prepare prior versions of DoDI 6130.03, as explained above.
- **RFP No. 9:** With respect to waivers granted under DoDI 6130.03 for people living with HIV, Defendants indicate they have limited the scope of documents to be produced to documents in the possession of “the National Guard Bureau, District of Columbia Army National Guard, OASD(HA)-HSPO, the OEPM directorate, and the Chief, Health Promotions Policy, of the Army's Office of the Deputy Chief of Staff, G-1, about Mr. Harrison's request for a waiver of DoDI 6485.01 [sic] § 3(a).” These limitations are entirely inappropriate. As clearly stated in the request, Plaintiffs are seeking documents related to *all* waivers granted under DoDI 6130.03 across all Military Departments, not just Mr. Harrison's request for a waiver. As explained in Plaintiffs' Motion to Compel Production of Documents (ECF No. 73), Defendants' attempt to limit the scope of discovery to Mr. Harrison's attempt to secure a commission is entirely misguided. Furthermore, to the extent there are relevant documents related to waivers granted under DoDI 6130.03 in locations other than “the National Guard Bureau, District of Columbia

¹ DoDI 6485.01 (June 7, 2013), Enclosure 2 indicates that various components have “RESPONSIBILITIES” related to the implementation of DoDI 6485.01, including the Under Secretary of Defense for Personnel and Readiness (USD(P&R)); the Assistant Secretary of Defense for Health Affairs (ASD(HA)); the Under Secretary of Defense for Policy (USD(P)); and the Secretaries of the Military Departments. At a minimum, therefore, documents should be collected from these components.

² DoDI 6130.03 (May 6, 2018) indicates the “Originating Component” was the Office of the Under Secretary of Defense for Personnel and Readiness, and “Section 2: Responsibilities” indicates that various components have responsibilities related to the implementation of DoDI 6130.03, including the Under Secretary of Defense for Personnel and Readiness (USD(P&R)); the Assistant Secretary of Defense for Health Affairs (ASD(HA)); the Secretaries of the Military Departments and the Commandant, United States Coast Guard. At a minimum, therefore, documents should be collected from these components.



November 28, 2018
Page 6

Army National Guard, OASD(HA)-HSPO, the OEPM directorate, and the Chief, Health Promotions Policy, of the Army's Office of the Deputy Chief of Staff, G-1," then such documents should be produced.

- **RFP No. 10:** With respect to documents Defendants reviewed or relied upon in writing or amending DoDI 6490.07, Defendants indicate they have limited the scope of documents to be produced to documents "dated between February 5, 2009, and February 5, 2010, that contain information about the accession or retention of individuals with HIV from OASD(HA)-HSPO, and that were used during the review of the version of DoDI 6490.07 dated February 5, 2010." Please confirm that all documents reviewed or relied upon by Defendants in preparing prior or current versions of DoDI 6490.07 are in the custody of the OASD(HA)-HSPO or otherwise confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.³ This response is also deficient with respect to documents review or relied upon to prepare prior versions of DoDI 6490.07, as explained above.
- **RFP No. 11:** With respect to waivers granted under DoDI 6490.07 for service members living with HIV, Defendants indicate they have limited the scope of documents to be produced to documents in the possession of "the Army, National Guard Bureau, District of Columbia Army National Guard, and OASD(HA)-HSPO about Mr. Harrison's request for a waiver to deploy." These limitations are entirely inappropriate. As clearly stated in the request, Plaintiffs are seeking documents related to *all* waivers granted under DoDI 6490.07 across all Military Departments, not just Mr. Harrison's request for a waiver. As explained in Plaintiffs' Motion to Compel Production of Documents (ECF No. 73), Defendants' attempt to limit the scope of discovery to Mr. Harrison's attempt to secure a commission is entirely misguided. Furthermore, to the extent there are relevant documents related to waivers granted under DoDI 6490.07 in locations other than "the Army, National Guard Bureau, District of Columbia Army National Guard, and OASD(HA)-HSPO," then such documents should be produced.
- **RFP No. 12:** With respect to documents Defendants reviewed or relied upon in writing or amending AR 600-110, Defendants indicate they have limited the scope of documents to be produced to "materials in the custody of the Chief, Health Promotions Policy, that the Army relied upon when developing the current version of AR 600-110, effective May 22, 2014." Please confirm that all documents reviewed or relied upon by Defendants in preparing prior or current versions of AR 600-110 are in the custody of the Chief, Health Promotions Policy, or otherwise

³ DoDI 6490.07 (February 5, 2010) indicates in Enclosure 4 that indicates that various components have responsibilities related to the implementation of DoDI 6490.07, including the Assistant Secretary of Defense for Health Affairs (ASD(HA)); the Under Secretary of Defense for Personnel and Readiness (USD(P&R)); the Secretaries of the Military Departments, the Commandant of the United States Coast Guard, the Directors of the Defense Agencies, the Chairman of the Joint Chiefs of Staff, and the Commander, United States Special Operations Command. At a minimum, therefore, documents should be collected from these components.

confirm that Defendants will also produce documents from other locations that are nonetheless in Defendants' possession, custody, or control.⁴ This response is also deficient with respect to documents review or relied upon to prepare prior versions of AR 600-110, as explained above.

- **RFP No. 13:** With respect to exceptions or waivers granted under AR 600-110 for service members living with HIV, Defendants indicate they have limited the scope of documents to be produced to documents in the possession of “the National Guard Bureau, District of Columbia Army National Guard, OASD(HA)-HSPO, the OEPM directorate, and the Chief, Health Promotions Policy, of the Army’s Office of the Deputy Chief of Staff, G-1, about Mr. Harrison’s request for a waiver or exceptions to policy.” These limitations are entirely inappropriate. As clearly stated in the request, Plaintiffs are seeking documents related to *all* exceptions or waivers granted under AR 600-110, not just Mr. Harrison’s request for a waiver. As explained in Plaintiffs’ Motion to Compel Production of Documents (ECF No. 73), Defendants’ attempt to limit the scope of discovery to Mr. Harrison’s attempt to secure a commission is entirely misguided. Furthermore, to the extent there are relevant documents related to waivers granted under DoDI 6490.07 in locations other than “the National Guard Bureau, District of Columbia Army National Guard, OASD(HA)-HSPO, the OEPM directorate, and the Chief, Health Promotions Policy, of the Army’s Office of the Deputy Chief of Staff, G-1,” then such documents should be produced.
- **RFP No. 14:** With respect to waivers to deploy referenced in the Lute Declaration (ECF No. 43-1), Defendants indicate there are no responsive documents in the possession, custody, or control of the Chief, Health Promotions Policy, of the Army’s Office of the Deputy Chief of Staff, G-1. However, to the extent there are relevant documents related to waivers in locations other than “the Chief, Health Promotions Policy, of the Army’s Office of the Deputy Chief of Staff, G-1,” then such documents should be produced. Moreover, such documents *must exist*, given Ms. Lute’s statement that she is “aware of multiple soldiers who have been granted COCOM waivers to deploy.” Please confirm that Defendants will produce these materials.
- **RFP No. 15:** Defendants’ response indicates that “Defendant [sic] stands on its objections” and that no documents will be produced in response to this request. To the extent Defendants are refusing to produce documents based on their objection to producing documents outside the possession, custody, or control of the Army, as explained in Plaintiffs’ Motion to Compel Production of Documents (ECF No. 73), Defendants’ attempt to limit the scope of discovery to the Army and not provide discovery from the other Military Departments is entirely misguided.

⁴ AR 600-110 (effective May 22, 2014) indicates that it was issued by “Headquarters” of the “Department of the Army” and that “[t]he proponent of this regulation is the Deputy Chief of Staff, G-1” and that various components are responsible for its implementation, including the Deputy Chief of Staff, G-1, the Surgeon General, the Chief of Public Affairs, the Chief, National Guard Bureau, Commanding General, U.S. Army Human Resources Command, and Commanding General, U.S. Army Reserve Command. At a minimum, therefore, documents should be collected from these components.



November 28, 2018
Page 8

Plaintiffs will follow up on the scope of this request following a ruling from the Court on Plaintiffs' Motion.

As discussed during our last meet and confer, Plaintiffs are willing to try to work with Defendants to narrow the scope of certain of the aforementioned requests. For example, as you suggested, it may be possible to narrow the scope using search terms. But Defendants appear to have improperly limited many of these requests to exclude discovery to which Plaintiffs are entitled.

Please advise when you are available to meet and confer about the above deficiencies. We are available both tomorrow or Friday. Depending on the Court's ruling on Plaintiffs' Motion, we are also available early next week to continue the discussion.

Regards,

Cyrus T. Frelinghuysen

Cyrus T. Frelinghuysen



November 28, 2018
Page 9

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 28th day of November, 2018 to the following counsel of record via electronic mail.

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/s/ Cyrus T. Frelinghuysen

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VIA EMAIL

December 5, 2018

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Re: *Harrison et al. v. Mattis et al.*, Civil Action No. 1:18-CV-00641

Rob, Nate, & Trent,

We write regarding certain issues related to Defendants' first production of documents that we received on Monday, November 26, 2018, and Defendants' privilege log that we received on Friday, November 30, 2018.

I. Defendants' Document Production

Defendants' first production of document consisted of 379 documents bearing Bates numbers US00000001-US00001966. At least 47 of these documents indicate "File Unreadable / Technical Issue." A full listing of such files appears at the end of this letter. The file names suggest these documents are relevant and should be produced. For example, the file with Bates number US00001173 has "FW_Policy Update IAW HIV ALARACT (UNCLASSIFIED).pdf" as its file name. Please investigate and resolve whatever technical issue(s) prevented the production of these files and produce them to us.



December 5, 2018
Page 2

In addition, multiple documents indicate “Document Is Not Responsive.” These include at least the following documents:

| Bates Number | File Name |
|--------------|---------------------------------|
| US00001165 | AR 600-110 revision.msg |
| US00001327 | RAR ¹ AR 600-110.msg |
| US00001586 | AR 600-110 RAR 2013.msg |
| US00001858 | Warning.txt |
| US00001862 | Warning.txt |
| US00001865 | Warning.txt |

Again, based on certain of the file names, at least some of these files appear to be responsive. For example, US00001165 indicates the file name is “AR 600-110 revision.msg.” The subject of revisions to AR 600-110 falls squarely within the scope of discovery in this case. Please therefore confirm you will produce these files. Moreover, going forward, to the extent Defendants determine to withhold documents on the basis of alleged lack of responsiveness, please ensure that the Defendants do so taking into account the Court’s ruling on Plaintiffs’ motion to compel, which ordered production of documents related to the prior versions and revisions to the regulations at issue.

Based on the Court’s ruling last Friday, November 30, 2018 (ECF No. 81), please confirm Defendants will supplement their Responses to Plaintiffs’ First Set of Requests for Production of Documents and Things (Nos. 1-15) and will continue to produce documents on a rolling basis prior to the December 28, 2018, deadline for compliance set by the Court.

II. Defendants’ Privilege Log

There is also at least one issue with Defendants’ privilege log that must be addressed. As indicated in my November 28, 2018, letter, the Defendants’ withholding of documents based solely on a claim of deliberative process privilege is improper. At least some of the entries on Defendants’ log indicate documents were withheld entirely on the basis of this privilege. *See, e.g.*, US00001169 and US00001905-1907. However, that privilege does not apply in cases involving claims where the government’s intent is at issue, as here. The government’s attempt to invoke the privilege in similar types of cases has been rejected. *See Stone v. Trump*, No. CV GLR-17-2459, 2018 WL 3866676, at *3 (D. Md. Aug. 14, 2018) (ordering production of documents withheld on the grounds of the deliberative process privilege and explaining because the “compelled documents [are] likely to contain evidence reflecting Defendants’ intent. [And] Defendants’ intent—whether it was for military purposes or whether it was purely for political and discriminatory purposes—is at the very heart of this litigation.”). Please confirm that you

¹ We understand that “RAR” refers to Rapid Action Revision.



December 5, 2018
Page 3

will produce any documents that have been withheld solely on this basis; otherwise, Plaintiffs intend to move to compel the production of such documents.

Please let us know when you are available to meet and confer on the issues set forth above.

Regards,

Cyrus T. Frelinghuysen

Cyrus T. Frelinghuysen



December 5, 2018
Page 4

Files indicating “File Unreadable / Technical Issue”

1. US00001173
2. US00001249
3. US00001325
4. US00001326
5. US00001328
6. US00001572
7. US00001573
8. US00001818
9. US00001831
10. US00001832
11. US00001833
12. US00001834
13. US00001835
14. US00001836
15. US00001837
16. US00001838
17. US00001839
18. US00001840
19. US00001841
20. US00001842
21. US00001843
22. US00001844
23. US00001845
24. US00001870
25. US00001891
26. US00001892
27. US00001893
28. US00001904
29. US00001920
30. US00001921
31. US00001922
32. US00001923
33. US00001925
34. US00001929
35. US00001935
36. US00001936
37. US00001942
38. US00001943
39. US00001944
40. US00001945
41. US00001946
42. US00001947
43. US00001948
44. US00001949
45. US00001950
46. US00001951
47. US00001961



December 5, 2018
Page 5

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above document was served on this 5th day of December, 2018 to the following counsel of record via electronic mail.

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/s/ Cyrus T. Frelinghuysen

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December 12, 2018

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Re: *Harrison et al. v. Mattis et al.*, Civil Action No. 1:18-CV-00641

Rob, Nate, Carrie, & Trent:

We write to follow up on our meet and confer call yesterday, December 10, and memorialize what was discussed and provide responses to any outstanding issues.

I. Modifying Expert Dates

As Judge Davis recommended, the parties met and conferred about moving expert dates in light of the Court's production deadline. The Government's initial position is that, under Judge Davis' Order, all that it is required to produce is the other branches HIV regulations and this material would not be necessary for expert reports. Plaintiffs disagree and offered to provide citations to the transcript were that position is refuted:

Regarding waivers, "So then you're going to the justification aspect of whether or not their concerns or whatever why they, why they adopted the

instruction and the regulation is legitimate government interest.
MR. HARDING: Correct, Your Honor.
THE COURT: All right. Tr. 26:3-8.

“If OutServe is arguing that the, the Navy’s regulation, the Marines’ regulation, and the Air Force regulation concerning how we commission or deploy, whatever, people who have HIV, then they have the right to get information concerning *what was considered in coming up with that regulation to determine whether or not there’s a legitimate government interest that justifies that regulation in those other branches as well because their justification may be pretext.*” Tr. 43:21-44:4 (emphasis added).

[T]he justification of that regulation becomes relevant because the government is required in order to defend to prove that it had a legitimate basis in interest, governmental, in developing that regulation, and if they can show through discovery that no, you didn't, then you can't defend their attack on the constitutionality of those regulations. Tr. 46:3-9.

Additionally, at the Government’s request, Plaintiffs provide the following proposed schedule for experts that will allow the experts to consider the material produced by the Government:

- Plaintiffs’ reports – January 9, 2019
- Defendants’ reports – January 30, 2019
- Rebuttal – February 6, 2019

Plaintiffs intend to call 3-4 experts.

III. 30(b)(6) Depositions Deadline

The Government requested that the noticed 30(b)(6) deposition be rescheduled to January 21, 2019. The Plaintiffs do not agree to the Defendants’ proposal because the deposition should occur prior to the deadline for expert reports, which may necessitate supplementing reports. Plaintiffs remain willing to find an alternative date prior to the date expert reports are due.

IV. Errors in Initial Production

The parties discussed several errors in Defendants’ initial production. Defendants noted that the “File Unreadable / Technical Issue” emails are encrypted and the Government is working to unencrypt those emails and include them in subsequent productions. Plaintiffs also informed the Government that they believed there was an error in the metadata in the production because the “extracted text” was still visible in withheld documents. The Government believed this was in error and Plaintiffs agreed not to

review the extracted text from the production until new data can be provided. Plaintiffs confirm that they will return the DVD containing the load file and delete all copies.

Additionally, Plaintiffs noted that many documents were withheld as non-responsive. The Government explained that these were actually privileged communications that did not need to be logged consistent with the Parties' Protective Order. Plaintiffs requested and the Government agreed that these documents will be marked privileged (but not logged) in the future instead of marked non-responsive.

V. Deliberative Process Privilege

Each party stated their position on the deliberative process privilege. The Government stated that they originally intended to produce documents on December 15, but, because December 15 is a Saturday, the Government would produce on December 14 or December 16. Plaintiffs agreed that December 16 was acceptable. The Government stated they thought it would be best to table the issue until after a more fulsome production has occurred. Plaintiffs recognized the benefit of waiting for additional production, but noted the need to get through discovery quickly and that they may need to raise this with the Court sooner rather than later.

VI. Objections to Interrogatories

Plaintiffs noted that the Government waived their APA objection because it wasn't raised in the initial objections or at oral argument before Judge Davis. The Government is continuing to object under the APA to preserve the issue, but will not withhold documents based on this objection. Plaintiffs believe many of the Government's objections fly in the face of Judge Davis' ruling. The Government cannot at this time state whether it will object to the Magistrate's ruling for certain, and, if it does, the extent of the objections. However, the Government stated that it would not object to the Magistrate's ruling that documents relating to the regulation(s) regarding deployment (DoDI 6490.07) are discoverable. The Government stated it will produce documents and respond to interrogatories consistent with any objections it files with Judge Brinkema.

Regarding their sub-part objection, the Government noted that it will likely not respond to some of the interrogatories based on its sub-part objection. The Government suggested that Plaintiffs prioritize their interrogatories, which Plaintiffs have done. For purposes of this prioritization, the Government should ignore the portion of the interrogatories asking for the identification of documents and should answer the interrogatories in the following order: 1-11, 16-23, 13, 15, 12, and 14. Plaintiffs are still contemplating moving to compel based on the government's sub-part objections.

VII. Time Limitation on Versions

Based on the Government's representation regarding the cycles under which the HIV-related regulations and policies are reviewed, the Plaintiffs assent to limiting the discovery regarding prior versions of regulations and policies to 2006 and later. Plaintiffs note, however, that their claims do not hinge upon the availability of single tablet regimens (STRs) to treat HIV, but rather on the relative ease of providing and adhering to most, if not all, of the antiretroviral therapy regimens currently prescribed to members of the military.

WINSTON
& STRAWN
LLP

December 12, 2018
Page 4

Sincerely,

John W.H. Harding
John W.H. Harding

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Re: *Harrison et al. v. Mattis et al.*, Civil Action No. 1:18-CV-00641

Dear Rob,

We have received and reviewed Defendants' document productions (Nos. 2-5), as well as the logs that you served last week. Of the 2,210 responsive documents identified by Defendants thus far, Defendants have withheld 1,304 documents and redacted 78 documents based on various claims of privilege. In other words, Defendants have so far withheld more documents (1,304) than they have actually produced (906).

Of the 1,304 documents withheld, 1,184 were withheld solely on the basis of the deliberative process privilege. As explained in my December 5, 2018, letter, the deliberative process privilege does not apply in this particular case because the government's intent is directly at issue in Plaintiff's equal protection claim. Specifically, the Court has explained that Plaintiffs are entitled to discovery "to prove that the reasons that [Defendants] are saying they use are not justified or [do] not have a legitimate basis, [and] are only pretextual." Nov. 30, 2018 Hr'g Tr. 18:23-25. The Court further explained that Plaintiffs are entitled to discovery regarding the evolution of the regulations at issue, including what was considered during the creation or amendment of those regulations. *See id.* at 31:24-32:22. In other words, the Plaintiffs are entitled to understand the Defendants' intent in creating or amending the policies at issue



January 2, 2019
Page 2

and any deliberations concerning the military's HIV policies generally and specifically whether they should be changed. Attached to this letter is a table providing just a few examples of documents that have been improperly withheld, despite being directly relevant based on their descriptions. If Defendants will not agree to produce these and other documents currently being withheld on the grounds of the deliberative process privilege, Plaintiffs will need to seek relief from the Court.

There are also documents that appear to have been improperly redacted based on the deliberative process privilege. An example is the document bearing Bates number US00006402, which is an email dated June 28, 2018, with an attachment (US00006403). The email is from the Air Force's Assistant Deputy, Military Force Management and appears to be providing a "Monthly Non-deployable Report." The substantive part of the email is entirely redacted, however, and the attachment has been withheld, both on the grounds of deliberative process privilege. The privilege log entry indicates the email has been withheld as follows: "Deliberative FOUO email conversation between DoD personnel regarding specific update from the Air Force on their non-deployable numbers from May 2018." And the attachment has been withheld as: "Deliberative spreadsheet tracking numbers and categories of non-deployable service members." Merely describing the email and spreadsheet as "deliberative" does not protect them under the deliberative process privilege. The provision of data regarding the number of non-deployable service members simply does not implicate the deliberative process privilege, nor does the data itself constitute "deliberative" material. Please agree that Defendants will remove the redactions from these and similar types of documents immediately.

Unless Defendants are willing to withdraw their claims of privilege on all of the documents described above, please let us know when you are available to meet and confer about these issues.

Regards,

Cyrus T. Frelinghuysen

Cyrus T. Frelinghuysen



January 2, 2019
Page 3

| | | | | | | | |
|------------|------------|----|------------|--|---|---------------------------|---|
| US00003262 | US00003262 | No | 10/17/2014 | Marsh, K Elizabeth LTC USARMY OSD OUSD P-R (US) <kathleen.e.genest.mil@mail.mil> | Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil> | DP - Deliberative Process | Deliberative email conversation between DoD personnel regarding commissions HIV positive personnel at military academies. |
| US00003408 | US00003408 | No | 8/14/2018 | Haywood, William P. LCDR BUMED | | DP - Deliberative Process | Draft document: ACCESSIONS OF APPLICANTS OR CANDIDATES ON HIV PROPHYLAXIS DATE: July 31, 2018; includes background on and key points on the topic |
| US00005338 | US00005338 | No | 8/14/2018 | Haywood, William P. LCDR BUMED | | DP - Deliberative Process | Deliberative Draft Information Paper titled: ACCESSIONS OF APPLICANTS OR CANDIDATES ON HIV PROPHYLAXIS |
| US00005421 | US00005421 | No | 2/22/2017 | Marsh, K Elizabeth LTC USARMY OSD OUSD P-R (US) <kathleen.e.genest.mil@mail.mil> | Brown, Gary LTC | DP - Deliberative Process | Deliberative email chain between DoD personnel discussing proposed updates to DoD medical policy including HIV policy |
| US00006119 | US00006119 | No | 10/30/2015 | Kathleen Marsh | | DP - Deliberative Process | Deliberative Spreadsheet tracking proposed changes to accession standards with commentary including HIV. |
| US00011084 | US00011084 | No | 8/2/2018 | David C. Miller, DO, MPH | | DP - Deliberative Process | Deliberative Report titled: HIV Policy Summary |
| US00011088 | US00011088 | No | 6/20/2018 | MSG ROBERSON | | DP - Deliberative Process | Unsigned info memo titled: Response to Your Questions about the Deployment of HIV Positive Service Members |
| US00011277 | US00011277 | No | 8/2/2018 | Unknown | Unknown | DP - Deliberative Process | Deliberative draft of AMSWG Meeting Minutes for 6-8 October 2015 covering various accession topics including HIV. |



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/s/ Cyrus T. Frelinghuysen

EXHIBIT 5

From: [Harding, John](#)
To: ["Norway, Robert M. \(CIV\)"; Frelinghuysen, Cyrus T.; McCotter, Trent \(USAVAE\); Berman, Keri L. \(CIV\)](#)
Cc: [Sommer, Andrew R.](#); ["Scott Schoettes"](#); [Hemmings, Allie](#)
Subject: RE: Harrison et al. v. Mattis et al. - Deliberative Process Privilege and Defs." Interrogatory Responses
Date: Friday, January 18, 2019 3:15:16 PM

Rob,

Thanks for the call this afternoon. If Defendants are able to have a meaningful meet and confer on the specific categories on Wednesday, then we will wait to file until after that. This will provide your clients time today and Tuesday to review our categories. Please let us know if this is agreeable to you.

Thanks,
John

John Harding

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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Friday, January 18, 2019 12:02 PM
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Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Hemmings, Allie <AHemmings@winston.com>
Subject: RE: Harrison et al. v. Mattis et al. - Deliberative Process Privilege and Defs.' Interrogatory Responses

John,

Keri and I are available for a call from 2:30 to 3 pm today.

Best,
Rob N.

From: Norway, Robert M. (CIV)
Sent: Friday, January 18, 2019 11:11 AM
To: 'Harding, John' <JWHarding@winston.com>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>
Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes'

<sschoettes@lambdalegal.org>; Hemmings, Allie <AHemmings@winston.com>

Subject: RE: Harrison et al. v. Mattis et al. - Deliberative Process Privilege and Defs.' Interrogatory Responses

John,

Thank you for providing the spreadsheet last night. I will forward it to my clients but will not be able to have meaningful responses to specific documents for you today. I have limited availability for a call. I will let you know if I can move my schedule around shortly.

Best,
Rob N.

From: Harding, John <JWHarding@winston.com>

Sent: Thursday, January 17, 2019 7:56 PM

To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>

Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Hemmings, Allie <AHemmings@winston.com>

Subject: RE: Harrison et al. v. Mattis et al. - Deliberative Process Privilege and Defs.' Interrogatory Responses

Rob,

Thank you for the email. Are you available for a call tomorrow to discuss the categories of documents? We are free any time except 11-12 EST.

I've attached an annotated version of your privilege logs. On the far right column it identifies whether the document falls into one of the categories where we believe the privilege does not apply. The categories are: (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 and information relating to the processing and grant or denial of medical waivers for individuals with HIV from all military branches; and (4) documents that provide only factual information, or are peripheral to policy formulation, or are essentially technical and facilitative, or otherwise not covered by the deliberative process privilege.

Thanks,
John

John Harding

Winston & Strawn LLP

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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Thursday, January 17, 2019 12:54 PM
To: Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Harding, John <JWHarding@winston.com>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>
Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Hemmings, Allie <AHemmings@winston.com>
Subject: RE: Harrison et al. v. Mattis et al. - Deliberative Process Privilege and Defs.' Interrogatory Responses

Cyrus,

Thank you for following up. As we discussed on Friday, DoD is willing to waive its claim of deliberative process privilege to some documents and information that were withheld or redacted in Defendants' productions. First, DoD will waive its deliberative process claim to two emails identified your January 2, 2019 letter. DoD will waive its claim of privilege to the email Bates stamped US00006402 and one email identified in the chart attached to your January 2, 2019 letter. The later email is Bates stamped US00005421.

Second, DoD will waive its claim of privilege to spreadsheets that contain monthly non-deployability reports such as the report Bates stamped US00006403. DoD is currently verifying the Bates numbers of those reports, which we will provide once DoD's verification is complete. We believe this category includes about 200 withheld records. Because these spreadsheets contain controlled, but unclassified, information, our production images will be marked confidential under the terms of the protective order.

Third, although not requested by Plaintiffs, DoD will voluntarily waive its claim of deliberative process privilege to portions of the final staffing packages, including the official comments from the services, for DoDi 6490.07, DoDi 6130.03, and DoDi 6485.01 to the extent they relate to HIV. This waiver is limited to deliberative information related to HIV. DoD is not waiving the portion of those documents that were withheld because the information is protected by the attorney-client privilege. DoD is also not waiving the portion of those documents that include deliberative information about subjects other than HIV policy. The Bates ranges for the staffing packets are US00013857 to US0013977 for DoDi 6130.03, US00013978 to US00013978 for DoDi 6485.01, and US00013979 to US00014029 for DoDi 6490.07. We will provide a new load file with new images for these three DoDi's as well as revised privilege logs.

Fourth, the Army has informed us that it is willing to consider waiving its deliberative process claims to information and materials related to the current revision of AR 600-110. Counsel for the Army has informed us that he is raising the issue through his chain of command for consideration.

Defendants are willing to continue to consider plaintiffs' requests to waive particular deliberative

process claims on a document-by-document basis. We disagree that the parties have reached an impasse over the three categories of documents that you mention in your email, that is: (1) documents and information considered in drafting or updating the relevant DoDI and Army Regulations; (2) documents and information considered in drafting the 2014 and 2018 DoD Reports to Congress; and (3) documents and information regarding the processing and grant/denial of waivers for individuals with HIV. The parties have not discussed these categories. Rather, last Friday we discussed Defendants' deliberative process claims generally, and the parties' reached an impasse only as to plaintiffs' contention that the deliberative process privilege does not apply when intent is at issue. Discussions to particular documents were limited to the documents specifically identified in your letter by Bates number, the matrices containing the official comments from the services (that Defendants will voluntarily produce, as discussed above), deliberative information related to the revision of AR 600-110, and three records withheld in Defendants' sixth production.

Plaintiffs have not identified the documents that they believe to be included in the three categories of documents listed in your email. And we have not had an opportunity to review those particular documents to determine whether Defendants will maintain their privilege claims. Further, this is the first time Plaintiffs have raised the withholding of documents concerning the processing and grant/denial of waivers for individuals with HIV. What waivers are plaintiffs referring to? Are you seeking to compel to deployment waivers or accessions waivers? Or documents related to waiver policies? Are you seeking to compel documents identified on Defendants' privilege logs? If so, please identify the documents so that the parties can have a meaningful discussion regarding these documents.

Lastly, as we indicated on last Friday's call, the parties agreed previously that next Friday is Defendants' deadline to respond to Plaintiffs' motion for a preliminary injunction in a case that has been consolidated with Harrison. We will not be able to simultaneously brief that opposition and prepare an opposition to a new motion to compel. Furthermore, because next Monday is a federal holiday, our clients will need additional time to prepare declarations perfecting their claims of deliberative process privilege. If Plaintiffs file a motion to compel, we ask that you notice the motion for hearing on February 1, 2019, and as discussed last Friday, are willing to agree to a special setting.

Before we can respond to your final point, I will have to confer with my clients and review our interrogatory objections and responses.

Best,
Robert M. Norway
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-353-0889 | robert.m.norway@usdoj.gov

From: Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>

Sent: Wednesday, January 16, 2019 4:41 PM

To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Harding, John

<JWHarding@winston.com>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri

L. (CIV) <kberman@CIV.USDOJ.GOV>

Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Hemmings, Allie <AHemmings@winston.com>

Subject: RE: Harrison et al. v. Mattis et al. - Deliberative Process Privilege and Defs.' Interrogatory Responses

Rob,

We have yet to hear back from you about whether Defendants will waive the deliberative process privilege as to any categories of documents that have been withheld or redacted on that basis. We understood from our call last Friday, for example, that Defendants may waive the privilege as to documents related to communications and data regarding non-deployable service members. We believe that the privilege does not apply to such documents at all, as set forth in my 1/2/2019 letter. In addition, we understand that the parties are at an impasse over the following categories of materials Defendants have withheld on the basis of the privilege: (1) documents and information considered in drafting or updating the relevant DoDI and Army Regulations; (2) documents and information considered in drafting the 2014 and 2018 DoD Reports to Congress; and (3) documents and information regarding the processing and grant/denial of waivers for individuals with HIV. Plaintiffs plan to file a motion to compel this Friday, January 19th, seeking production of documents and information as to these categories, as well as documents to which the privilege does not apply at all.

In addition, on December 17, 2018, we received Defendants' interrogatory responses, which contain both general and specific objections regarding "[i]nformation in the custody or control of Military Departments to which Plaintiff Harrison does not belong[.]" See Gen. Obj. No. 3 and Specific Objs. to Interrog. Nos. 16, 17, 20, 21, and 22. On December 21, 2018, Judge Brinkema affirmed Judge's Davis's ruling that information in the custody or control of the Military Departments other than the Army falls within the scope of discovery. Please therefore confirm that Defendants will supplement their interrogatory responses accordingly or let us know that Defendants believe their responses do not require supplementation.

Thank you,
Cyrus

Cyrus Frelinghuysen

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WINSTON
& STRAWN
LLP

From: Frelinghuysen, Cyrus T.
Sent: Thursday, January 10, 2019 11:41 PM
To: 'Norway, Robert M. (CIV)' <Robert.M.Norway@usdoj.gov>; Harding, John <JWHarding@winston.com>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>
Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Hemmings, Allie <AHemmings@winston.com>
Subject: RE: Harrison et al. v. Mattis et al.

Rob,

We can do 11 a.m. I'll circulate an invite.

Best,
Cyrus

Cyrus Frelinghuysen

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From: Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>
Sent: Thursday, January 10, 2019 3:30 PM
To: Harding, John <JWHarding@winston.com>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>
Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Hemmings, Allie <AHemmings@winston.com>
Subject: RE: Harrison et al. v. Mattis et al.

My apologies John. I became tied up on another matter yesterday after LTC Lute's deposition. We are available for a meet-and-confer on the DPP issue tomorrow at 11 am.

Best,
Rob N.

From: Harding, John <JWHarding@winston.com>
Sent: Thursday, January 10, 2019 2:10 PM
To: Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>
Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>

Hemmings, Allie <AHemmings@winston.com>

Subject: RE: Harrison et al. v. Mattis et al.

Rob,

I never heard back from you regarding a time for a meet and confer. Can we have a call later this afternoon or tomorrow morning?

John Harding

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From: Harding, John

Sent: Monday, January 07, 2019 9:12 PM

To: 'Norway, Robert M. (CIV)' <Robert.M.Norway@usdoj.gov>; 'McCotter, Trent (USAVAE)' <Trent.McCotter@usdoj.gov>; 'Berman, Keri L. (CIV)' <Keri.L.Berman@usdoj.gov>

Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Hemmings, Allie <AHemmings@winston.com>

Subject: RE: Harrison et al. v. Mattis et al.

Rob,

I just wanted to follow-up on this letter. Please let us know when you are available for a meet and confer on the deliberative process privilege.

John Harding

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From: Harding, John

Sent: Wednesday, January 02, 2019 9:48 PM

To: 'Norway, Robert M. (CIV)' <Robert.M.Norway@usdoj.gov>; McCotter, Trent (USAVAE) <Trent.McCotter@usdoj.gov>; Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>

Cc: Sommer, Andrew R. <ASommer@winston.com>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Frelinghuysen, Cyrus T. <CFrelinghuysen@winston.com>; Hemmings, Allie <AHemmings@winston.com>

Subject: Harrison et al. v. Mattis et al.

Rob,

Please see attached correspondence re deliberative process privilege.

Thanks,
John

John W.H. Harding

Associate Attorney

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