

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

NICHOLAS HARRISON, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
PATRICK M. SHANAHAN, in his official)	
capacity as Acting Secretary of Defense;, <i>et</i>)	
<i>al.</i> ,)	
)	
Defendants.)	

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

**DEFENDANTS’ PUBLIC MEMORANDUM IN SUPPORT
OF MOTION TO FILE UNDER SEAL AND *EX PARTE***

For the reasons set forth in detail below, Defendants move the Court pursuant to Local Civil Rule 5(c) for leave to file under seal and *ex parte* hard copies of 32 documents and one DVD containing an audio file, as directed by the Court’s February 8, 2019 order. In support of this motion, Defendants state:

1. On January 25, 2019, Plaintiffs moved to compel the production of documents and information withheld by Defendants on the basis of the deliberative process privilege. Dkt. 107. Defendants opposed the motion. Dkt. 111.

2. The Court held a hearing on Plaintiffs’ motion on February 1, 2019, and continued the hearing until February 8, 2019. The Court then held the motion in abeyance to conduct an *in camera* review of the documents at issue in this case to determine whether the deliberative process privilege applies and whether the documents have been properly withheld. Dkt. 118. The Court directed the parties to randomly select documents for an *in camera* review and to produce those documents to the Court on Tuesday, February 12, 2019, by 5 p.m.

3. The parties randomly selected 33 documents (representing about a 5 percent sample

of the withheld and redacted documents) to submit for the Court's review.¹

4. As directed, Defendants have provided the Court with hard copies of 32 documents and one DVD containing an audio file for *in camera* review of the documents at issue in this case.

5. Submission of these 33 documents under seal and *ex parte* is appropriate to protect the deliberative process privilege while the court reviews the materials and resolves the discovery dispute in this matter. *See Ethyl Corp. v. EPA*, 25 F.3d 1241, 1249 (4th Cir. 1994) (noting that *in camera* review allows a producing party to “demonstrat[e] confidentiality without breaching the confidence” protected by the deliberative process privilege).

DATE: February 12, 2019

Respectfully submitted,
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¹ During the random selection process, Plaintiffs learned for the first time that many of documents withheld in Defendants' fifth category concerning “DoDI 1332.45/Military Personnel Policy Working Group (MPP WG) and related discussions” did not relate to the impact of that policy on soldiers living with HIV. Once they understood this, Plaintiffs agreed to withdraw their challenge to the 757 documents in this category that did not relate to HIV, reducing the total number of documents in dispute by more than half.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

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