IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*, Plaintiffs, v. PATRICK SHANAHAN, in his official capacity as Secretary of the Department of Defense, *et al.*, Defendants.	)	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS IMPROPERLY WITHHELD BY DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 37, Plaintiffs Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, Jane Doe 6, Jane Doe 7, John Doe 1, John Doe 2, Regan V. Kibby, and Dylan Kohere (together, "Plaintiffs") move to compel the production of documents and information that Defendants Patrick Shanahan, in his official capacity as Secretary of Defense, Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff, the United States Department of the Army, Mark Esper in his official capacity as Secretary of the Army, the United States Department of the Navy, Richard V. Spencer in his official capacity as Secretary of the Navy, the United States Department of the Air Force, Heather A. Wilson, in her official capacity as Secretary of the Air Force, the United States Coast Guard, Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, the Defense Health Agency, Raquel C. Bono, in her official capacity as Director of the Defense Health Agency, and the United States of America (together, "Defendants") have withheld from production.

Specifically, Plaintiffs seek an order requiring Defendants to produce: (1) documents reflecting the raw data, personnel files, and field reports that underlie the statistical summaries and conclusions contained in the report of former Secretary of Defense James Mattis and other produced documents, including summary presentations provided to the review panel and the House Armed Services Committee, as well as other data relating to the readiness and ongoing service of active duty service members diagnosed with gender dysphoria as set forth in Exhibits A through E appended to the Declaration of Zachary D. Rosenbaum, Esq. ("Rosenbaum Decl."); (2) documents that relate to the decision to delay the date of implementation of the accessions component of former Secretary of Defense Ash Carter's policy ("Carter Policy") to January 1, 2018, and to any process that was purportedly already underway to review the Carter Policy before the President announced its reversal on July 26, 2017; (3) all documents considered or generated both during the panel review process and between the conclusion of the review process

and the adoption of Secretary Mattis' plan, including documents considered or generated by the review panel, communications to or from members of the review panel regarding their work, drafts of the review panel's report communicated to any third parties, and communications that post-date the review panel's report but pre-date the Mattis Plan, as set forth in Exhibits A through E appended to the Rosenbaum Declaration; and (4) select documents on the claw-back log provided by Defendants with their June 2018 claw-back notice, as set forth in Exhibit F appended to the Rosenbaum Declaration. Alternatively, if the Court does not order the production of the documents described above, Plaintiffs respectfully request the Court enter an order requiring Defendants to cure its deficient *Vaughn* Index and privilege log entries, as set forth in Exhibits A through F appended to the Rosenbaum Declaration, so that Plaintiffs can more specifically identify improperly withheld documents.

The grounds for this motion are set forth in the accompanying Memorandum of Law and the Rosenbaum Declaration. Plaintiffs have conferred with Defendants regarding the relief requested in this Motion as required by Local Civil Rule 7(m); Defendants oppose this Motion.

June 4, 2019

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF DOCUMENTS IMPROPERLY WITHHELD BY DEFENDANTS

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INTRODUCTION

Defendants contend that the Mattis plan was the product of independent military judgment and was supported by evidence considered by the review panel that recommended it. In order to rebut the government's contentions, Plaintiffs seek to compel the following documents, which Defendants have improperly withheld: (1) documents showing the raw data, personnel files, and field reports that underlie the statistical summaries and conclusions contained in Secretary Mattis' report and other prepared documents, including summary presentations provided to the review panel and the House Armed Services Committee, as well as any other data relating to the readiness and ongoing service of active duty service members diagnosed with gender dysphoria; (2) documents that relate to the decision to delay the date of implementation of the accessions component of the Carter Policy to January 1, 2018 and to any process that was purportedly already underway to review the Carter Policy before the President announced its reversal; and (3) documents considered or generated both during the panel review process and between the conclusion of the panel review process and the adoption of the Mattis plan, which the government has now logged on five *Vaughn* Indexes.

The government's production with respect to these categories is insufficient, and the government has improperly asserted the deliberative process privilege over many documents.

First, with respect to category one, the government has produced documents that merely contain summary statistics and conclusions regarding deployment, readiness, health care costs, and unit cohesion. However, the government has withheld the actual raw data and other information underlying those summary statistics and conclusions, which undermines Plaintiffs' ability to assess their accuracy and insulates the justifications for the Mattis plan from meaningful review.

Second, the government has withheld many documents relating to the decision to delay the implementation of the Carter Policy. Those documents are relevant because they may show that even before the President's Tweet, the government initiated a process with a predetermined result to reverse the Carter Policy. Plaintiffs' ability to demonstrate that the government put into place a process to review the Carter Policy that had a foreordained result, whether initiated before or after the President's Tweet, is directly related to the level of deference that applies in this case. [redacted]

It also underscores Plaintiffs' need for documents relating to any alleged pre-Tweet review process to reverse the Carter Policy.

Finally, the government's attempt to invoke the deliberative process privilege is unavailing with respect to documents relating to both the pre- and post-Tweet review process. As explained below, the government cannot simultaneously rely on the asserted independence of that process, whether pre- or post-Tweet, while shielding from discovery the documents that disclose the intent of the process. Independently, the deliberative process privilege is qualified,

and the Plaintiffs' need for the documents being withheld outweighs the government's interest in invoking it. Additionally, not only are the government's privilege assertions overbroad — for example, they encompass both facts and post-deliberative communications, neither of which is entitled to protection — the government's *Vaughn* Indexes also fail in many instances to provide sufficient information to probe the privilege assertion as to each document or communication.

BACKGROUND

A. The Mattis Plan

In June 2016, the Department of Defense ("DoD") adopted a policy permitting transgender individuals to serve openly in the armed forces. Dkt. 13-10, Ex. C. That policy reflected the conclusion of a thorough, reasoned, and evidence-based process in which senior military and civilian officials considered a wide range of evidence and determined that there was no basis to exclude qualified individuals from military service simply because they were transgender. Dkt. 13-3, ¶¶ 10-27. In addition to establishing standards for retaining transgender service members, this policy also provided for the open accession of qualified transgender service members beginning on July 1, 2017. Dkt. 13-6, Ex. B.

On June 30, 2017, Secretary Mattis announced that implementation of the accessions policy would be delayed by six months. Dkt. 106 ¶ 73. On July 26, 2017, President Trump Tweeted that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Dkt. 61 at 14 & n.3 ("President's Tweet" or the "Tweet"). The President memorialized his decision in a directive to Secretary Mattis dated August 25, 2017. Dkt. 13-2, Ex. A ("2017 Presidential Memorandum").

The 2017 Presidential Memorandum ordered Secretary Mattis to submit "a plan for implementing" the President's directive by February 21, 2018. *Id.* § 3. On August 29, 2017, Secretary Mattis stated that DoD had "received the [2017] Presidential Memorandum" and

would "carry out the president's policy direction," noting that DoD would "develop a study and implementation plan." Dkt. 128-21. Specifically, DoD would establish a review panel "to provide advice and recommendations on the implementation of the president's direction," and, following the receipt of that advice and recommendations, Secretary Mattis would "provide [his] advice to the president concerning implementation of [the president's] policy direction." *Id.*

The review panel convened by Secretary Mattis (the "Review Panel") issued its recommendations in February 2018, and Secretary Mattis delivered a plan (the "Mattis Plan") to the President on February 22, 2018. Dkt. 96-1. On March 23, 2018 — the date the 2017 Presidential Memorandum's prescribed ban on military service by transgender persons was to take effect — President Trump issued an order that "revoked" his 2017 Memorandum and accepted the Mattis Plan. Dkt. 13-2, Dkt. 96-3.

B. Relevant Developments in This Litigation

Plaintiffs are current and aspiring transgender service members who filed suit in August 2017, alleging that the military's policy violates their rights to equal protection, liberty, and privacy guaranteed by the Fifth Amendment of the U.S. Constitution. Dkt. 1. After the Mattis Plan took effect, Plaintiffs filed a second amended complaint, which included additional plaintiffs and challenged the Mattis Plan together with the earlier actions taken by the government to ban transgender military service. Dkt. 106.

On August 24, 2018, this Court denied the parties' cross-motions for summary judgment, noting that "[d]espite the Court's orders, discovery remains unfinished because Defendants have asserted that a substantial portion of the documents and information sought by Plaintiffs are privileged[.]" Dkt. 160 at 3. The Court found that the process leading to the development of the Mattis Plan was "material [because it] go[es] to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case." *Id.* at 13. Given the centrality of the

deliberative process underlying the Mattis Plan, the Court concluded that factual disputes precluded the grant of summary judgment, and further discovery was required. *Id.* at 15.

On January 4, 2019, in a *per curiam* decision, the U.S. Court of Appeals for the District of Columbia Circuit reversed and vacated the preliminary injunction entered by this Court without prejudice, noting that "the parties dispute whether [the review process leading to the Mattis plan was] independent of the policy announced in the 2017 Presidential Memorandum." *Doe 2 v. Shanahan*, 755 Fed. App'x 19, 23 (D.C. Cir. 2019).

C. The Process Leading To This Motion

On January 30, 2019, the Court ordered the "parties to meet and confer regarding the scope and breadth of discovery as the case now stands[,]" in light of the D.C. Circuit's *per curiam* opinion. Dkt. 188. Throughout February and March of this year, the parties met and conferred in an effort to narrow or eliminate discovery disputes. Dkt. 200 at 1. As reflected in the March 28, 2019 joint status report, the parties remained at impasse concerning discovery. *Id.* at 7. As set forth in the Joint Status Report, Plaintiffs reported to the Court that they continue to seek documents and information concerning: (1) data concerning accession, deployment, costs and other aspects of service of transgender and non-transgender servicemembers from the adoption of the Carter Policy to the present; (2) Secretary Mattis' decision to delay implementation of the open accessions policy; (3) emails between Secretary Mattis and third parties that the government had previously withheld as privileged; and (4) the development of the Mattis Plan, including documents provided to, considered, or generated by the Review Panel or members of the Review Panel.

The Court held a teleconference on April 9, 2019 in an effort to narrow the outstanding disputes. In the resulting April 9, 2019 and April 16, 2019 Minute Orders, the Court directed the government to produce documents relating to the first three categories. *See* Minute Order (Apr.

9, 2019). The Court noted that, as to the fourth category, the parties still dispute Plaintiffs' entitlement to documents considered and generated during the Review Panel process, as well as communications to or from the Review Panel members regarding their work, drafts of the Review Panel's report communicated to third parties, and communications that followed the submission of the Review Panel's report but pre-dated the publication of the implementation of the Mattis Plan. The Court directed Defendants to produce a *Vaughn* Index[1] concerning this category and directed Plaintiffs to review the government's document production and the *Vaughn* Index, and to include any remaining disputes in a motion to compel, to be filed by June 4, 2019. *See* Minute Order (Apr. 16, 2019).

Additionally, during the April 9, 2019 conference, the parties separately addressed the government's prior request to claw back certain documents pursuant to the deliberative process privilege. Specifically, on June 28, 2018, the government identified 62 documents it asserted were inadvertently produced and provided privilege log information for those documents. Plaintiffs sequestered those documents, have not reviewed them further, and do not rely on their content for purposes of this motion.[2] The Court directed Plaintiffs to oppose the government's claw-back request in this motion.

Since the Minute Orders were entered, the government identified 1,425 responsive documents, of which 760 were withheld entirely on the basis of one or more privileges, and 80 of

[1] For the Court's convenience, in addition to identifying the specific entries that Plaintiffs challenge, Plaintiffs have also categorized the *Vaughn* Index entries per the four sub-categories identified in the April 9, 2019 Minute Order. Note that no documents on the *Vaughn* Indexes appear to fall under sub-category three: "drafts of the Panel's report communicated to any third parties."

[2] As detailed below and in Exhibit F to the Rosenbaum Declaration, Plaintiffs seek to compel the production of certain of the clawed back documents on the basis of the government's deficient privilege assertions. To the extent the Court declines to rule on the claw-back issue without viewing the disputed documents *in camera*, Plaintiffs reserve the right to file a sealed motion to compel their production pursuant to the stipulated Fed. R. Evid. 502(d) order. Dkt. 85.

which are copies of documents previously produced. The remaining 585 documents, many of which are partially redacted, largely consist of gender transition plans for individual service members, and updates concerning the total number of transgender individuals currently serving or in the process of enlisting. Also, on May 14, 2019, the government produced *Vaughn* Indexes on behalf of DoD, the Army, the Navy, the Air Force, and the Coast Guard, with 1,000 individual entries.[3]

ARGUMENT

Defendants bear the burden of demonstrating why Plaintiffs are not entitled to the documents and information sought in this motion. That is because, as a general matter, "the party resisting discovery . . . must show 'why discovery should not be permitted.'" *United States v. All Assets Held at Bank Julius Baer & Co.*, 202 F. Supp. 3d 1, 6 (D.D.C. 2016). With respect to privilege assertions, "the proponent bears the burden of demonstrating the applicability of any asserted privilege." *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 153 (D.D.C. 2012) (Kollar-Kotelly, J.); *see also Cobell v. Norton*, 213 F.R.D. 1, 4 (D.D.C. 2003). Plaintiffs respectfully submit that the government cannot meet this burden, and that Plaintiffs' motion to compel should be granted.

[3] Although the Court's April 9, 2019 and April 16, 2019 Minute Orders did not contemplate a motion to compel documents included on the government's previously produced privilege logs, many of the arguments contained herein are equally applicable to many entries on those logs. For example, and as set forth below, the privilege logs contain a total of 5,962 entries consisting of documents dated prior to the President's Tweets on July 26, 2017. Likewise, there appear to be approximately 600 post-decisional documents improperly withheld on the basis of the deliberative process privilege, as they are dated after February 22, 2018 (the date the Mattis Plan was published). Should the Court accept Plaintiffs' arguments that the deliberative process privilege does not apply to such documents (by way of example), Plaintiffs respectfully request the opportunity to provide the Court with annotated copies of Defendants' privilege logs providing document-by-document challenges, as they have done with the *Vaughn* Indexes on this Motion.

POINT I
THE GOVERNMENT'S DOCUMENT PRODUCTION IS INCOMPLETE AND INSUFFICIENT

A. The Government Has Failed to Produce Data, Personnel Files, and Field Reports That Purportedly Support the Statistical Summaries and Conclusions Contained in the Mattis Report and Other Documents, Such as Summary Presentations Provided to the Review Panel and to the House Armed Services Committee, As Well As Any Other Data Relating to the Readiness and Ongoing Service of Active Duty Servicemembers Diagnosed with Gender Dysphoria.

Plaintiffs are challenging the factual justifications for the Mattis Plan — in particular, the government's claim that permitting transgender troops to serve openly under the Carter Policy undermines military readiness, imposes burdensome medical costs, and disrupts unit cohesion. Plaintiffs consequently are entitled to the documents and information that the government relied on to generate the summary statistics and conclusions included in the report accompanying the Mattis Plan, considered by the Review Panel, and presented to the House Armed Services Committee. Specifically, Plaintiffs seek the raw data, personnel files that include performance evaluations and assessments (with redactions to protect personal privacy), and reports from the field that would allow a meaningful evaluation of the government's conclusions. Plaintiffs also seek updated data regarding the readiness and performance of active duty service members diagnosed with gender dysphoria. This is material that the Court directed the government to produce in the April 9, 2019 Minute Order and that was only partially produced on April 30th.

Instead, the government's April 30th production consists primarily of documents reflecting gender transition plans for individual service members and email updates about the total number of transgender individuals currently serving or in the process of enlisting. In addition, the government produced a ten-page PowerPoint presentation summarizing the costs of medical treatment of transgender service members apparently provided in response to a request from the House Armed Services Committee (*see* Rosenbaum Decl., Ex. G (USDOE00284622),

as well as a document entitled "Data Extracts," which purports to include "Key information used by the Review Panel to make recommendations." (*id.*, Ex. H (USDOE00088637_001)).

The government's production is insufficient because it does not provide the underlying data, personnel files, field reports and other back-up documentation that Plaintiffs seek. For example, the government has not produced the underlying data summarized in the presentation given to the House Armed Services Committee or in the "Data Extracts" document. The government also has not produced the data referenced in Footnotes 64, 65, 66, 121, and 143 of the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons ("Mattis Report"), which refer to the alleged suicidality of transgender service members, mental health visits by active duty transgender service members, the non-deployability of transgender troops, and an equal opportunity report lodged by a transgender service member. Similarly, the government provides a chart comparing average costs for active duty service members with and without gender dysphoria, but it has not produced the underlying data on which the chart is based. *See* Rosenbaum Decl., Ex. I (USDOE00283408). In addition, while the Mattis Report refers to reports from commanders in the field about alleged problems with unit cohesion, the government has not produced those reports. For example, the Mattis Report describes a series of "dueling equal opportunity complaints" concerning a transgender service member's access to shower facilities. The Mattis Report's citation for this information is the October 13, 2017 Review Panel minutes, but Defendants' production of those minutes consists of a mere summary of the issue, referring to "EO complaint[s]." *See* Rosenbaum Decl., Ex. J (Administrative_Record_002821). Plaintiffs seek production of the underlying complaints reflected in the Mattis Report and Review Panel minutes (with appropriate redactions for personal information). Without the underlying data and information on which the government

relies, Plaintiffs are restricted in being able to assess Defendants' asserted justifications for the Mattis Plan.

In addition, while the government has provided agendas and minutes from the Review Panel meetings (some of which contain heavy redactions, including redactions of non-deliberative material such as the names of certain attendees), the government has also improperly withheld a significant volume of factual material considered during the review process. For example, the government has produced a document entitled "Summary of Information Presented to the Panel," which contains summary information, such as the number of gender dysphoria diagnoses from June 1, 2016 through October 3, 2017. Rosenbaum Declaration, Ex. K (USDOE00088638_009, at 3). However, the government has not provided the underlying data to support such summary.

In sum, Plaintiffs are entitled to the facts that underlie the government's proffered justifications for the Mattis Plan, and the government's production of these materials is incomplete.

B. The Government Has Improperly Withheld Documents Relating to the Decision to Delay Implementation of the Carter Accession Policy and the Pre-Tweet Review Process.

Defendants have asserted that even before the President's Tweet, Secretary Mattis had initiated an independent process to review the Carter Policy. Defendants make this claim in order to argue that their decision to reverse the Carter Policy was based on independent military judgment. Plaintiffs seek documents relating to the scope and purpose of that pre-Tweet review in order to rebut the government's assertions. Plaintiffs have a specific basis for seeking information relating to the scope and purpose of that review, because information already produced by the government indicates that the object of the pre-Tweet process was to justify reversing the Carter Policy.

[redacted] Other documents also strongly support that inference.[5] For that reason, Plaintiffs are entitled to documents that address or refer

[4] [redacted]

[5] For example, on May 28, 2017, Heather Wilson, Secretary of the Air Force, wrote, "with such small numbers, it is hard to make the case that this change in policy [transgender accessions] would cause readiness problems that would lesson our ability to fight and win on the battlefield." Rosenbaum Decl., Ex. N (USDOE00003204).

to that pre-Tweet review which Defendants have improperly withheld based on the deliberative process privilege.

C. The Government Has Improperly Withheld Documents That Show the Options Considered by the Review Panel, Thereby Thwarting Plaintiffs' Ability to Show That the Process Was Constrained.

Plaintiffs seek to show that the Mattis Plan was not based on independent military judgment, but rather on a process designed to justify reversing the open service policy. Plaintiffs are therefore entitled to documents generated by and presented to the Review Panel that refer to or include information relating to the policy options the Review Panel considered.

The government has withheld key documents that set out the parameters of the Review Panel's work, including a PowerPoint presentation from the Review Panel's "Kickoff Meeting" in October 2017, which the government has now clawed-back in part, claiming deliberative process privilege.[6] Dkt. 124. The clawed-back material includes redactions of the slides entitled "Assumptions" and "Courses of Action" — which are plainly relevant to determining the purpose of the process and the range of options considered or ignored. Dkt. 124-2. Similarly, the government has withheld numerous documents that refer to "questions" being asked of the Review Panel. For example, in an email dated November 16, 2017, Air Force Colonel Douglas A. Schiess asked Martha Soper, Assistant Deputy of Health Care Policy for the Air Force, to review the email's attachment, entitled "Transgender Review Panel – Questions", and determine "if these are the right questions to ask? Are they worded correctly?" Rosenbaum Decl., Ex. S (USDOE00003252). The attachment was withheld under the deliberative process privilege, as were numerous other documents pertaining to "questions" posed to the Review Panel, even though the scope and purpose of those questions are directly at issue in this case. *See*

[6] As reflected in Exhibit F to the Rosenbaum Declaration, Plaintiffs seek to compel production of other documents that Defendants seek to claw back for the bases set forth in that Exhibit.

Rosenbaum Decl., Ex D at 6-7 (entries for USDOE00000644, USDOE00000583, USDOE00000591, USDOE00000627). And, with respect to the dissenting opinion from the Review Panel, the government has produced it only in heavily redacted form. Rosenbaum Decl., Ex. P.

In sum, Plaintiffs are entitled to know the scope of work performed by the Review Panel and the assumptions it was given, in order to test the government's assertion that the process undertaken by the Review Panel was an exercise of independent military judgment, unconstrained by predetermined goals or a prescribed set of possible outcomes. Defendants' production improperly withheld many documents that are directly relevant to that inquiry.

POINT II
THE GOVERNMENT HAS IMPROPERLY WITHHELD SCORES OF DOCUMENTS BASED ON IMPROPER ASSERTIONS OF THE DELIBERATIVE PROCESS PRIVILEGE

A. Because The Government's Deliberative Process Is Squarely "At Issue" The Deliberative Process Privilege Is Unavailable.

"[P]rivilege cannot be used both as a sword and as a shield." *Recycling Solutions, Inc. v. D.C.*, 175 F.R.D. 407, 408 (D.D.C. 1997). While most often cited in the attorney-client privilege context, this principle applies equally to the deliberative process privilege. *Id.* at 408 n.2. The government asserts that deference is owed to the Mattis Plan because it resulted from an exercise of the military's independent judgment. *See, e.g.*, Dkt. 115 at 1, 17-22; Dkt. 116 at 1-2, 13-20; Dkt. 174 at 12-17. Yet, as reflected in the appended copies of the *Vaughn* Indexes and privilege logs, the government refuses to produce documents and information to support that defense. *See* Dkt. 200 at 2-12. These withheld documents are important to Plaintiffs' (and the Court's) ability to evaluate "the Mattis Plan anew." *Doe 2 v. Shanahan*, 917 F.3d 694, 704-06 (D.C. Cir. 2019) (Wilkins, J., concurring).

Because a core question in this case is whether and to what extent the Mattis Plan was the product of independent military judgment, the deliberative process privilege does not apply. *See* Dkt. 160 at 12; *see also, e.g.*, *In re Subpoena Duces Tecum Served on the Off. of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) ("The privilege was fashioned in cases where the governmental decisionmaking process is collateral to the plaintiff's suit"). The government cannot seek deference to its decision-making process as a sword to establish the independence of its review process while at the same time invoking the deliberative process privilege to shield that process from disclosure. *See, e.g.*, *Coleman v. Schwarzenegger*, No. CIV S–90–0520, 2007 WL 4328476, at *8 (E.D. Cal. Dec. 6, 2007) (noting that relying on the deliberative process as a defense "will result in a waiver of the deliberative process privilege").[7]

This established law applies equally to Defendants' improper assertion of privilege over materials relating to the decision to delay implementation of the open accessions policy and the pre-Tweet process. Defendants claim that their decision to review the Carter Policy predated the President's Tweet and was based on independent military judgment, not on a predetermined goal of reversing the Carter Policy. Defendants cannot invoke that process as a sword to justify their policy while at the same time shielding documents that would permit Plaintiffs and this Court to evaluate the scope and intent of that process.

Here, because the government is using its deliberations — both before and after the President's Tweets — as a sword to defend its policy, it must produce discovery pertaining to those deliberations. The government, however, continues to withhold documents concerning the delay of open accessions and the pre-Tweet process, as well as the post-Tweet process, the work

[7] *See also* Point V, *supra* (arguing subject matter privilege waiver); *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) (noting that attorney-client privilege is implicitly waived when "the client places otherwise privileged matters in controversy").

of the Review Panel and the development of the Mattis Plan, among other relevant documents. *See* Rosenbaum Decl. Exs. A-F.

B. The Deliberative Process Privilege Does Not Apply When Plaintiffs Allege That the Process Is Discriminatory.

The deliberative process privilege is also inapplicable here because Plaintiffs' allege that the process was discriminatory. As the D.C. Circuit has held, the deliberative process privilege does not apply when "the Constitution . . . makes the nature of governmental officials' deliberations *the* issue . . . ." *In re Subpoena Duces Tecum Served on the Off. of the Comptroller of the Currency*, 145 F.3d at 1424 (holding that the "deliberative process privilege is not appropriately asserted . . . when a plaintiff's cause of action turns on the government's intent.").

Courts in this District and across the country have held the privilege inapplicable when plaintiffs claim unconstitutional discrimination by government defendants. *See, e.g.*, *Waters v. U.S. Capitol Police Bd.*, 218 F.R.D. 323, 324 (D.D.C. 2003) ("This Circuit does not permit the application of the deliberative process privilege to thwart discovery of information in a case in which a plaintiff challenges governmental action as discriminatory"); *Jones v. City of College Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (holding privilege "simply inapplicable" in Title VII racial discrimination case); *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) ("[T]he deliberative process privilege simply does not apply in civil rights cases in which the defendant's intent to discriminate is at issue."); *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) ("[T]his privilege yields when the lawsuit is directed at the government's subjective motivation in taking a particular action.").

Two courts examining similar discovery issues have concluded that the material withheld by the government is not protected by the deliberative process privilege. *See Stone v. Trump*, 356 F. Supp. 3d 505, 510, 514 (2018) ("The deliberative evidence Plaintiffs seek on government

intent is highly relevant to the lawsuit because it may explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest"); *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1161-62 (W.D. Wash. 2018) (same).[8]

POINT III
THE PLAINTIFFS' NEED FOR THE INFORMATION WITHHELD BY THE GOVERNMENT OVERCOMES THE DELIBERATIVE PROCESS PRIVILEGE

Even if the deliberative process privilege applies, it "is a qualified privilege [that] can be overcome by a sufficient showing of need." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The factors relevant to measuring that need include: (i) "the relevance of the evidence" sought; (ii) "the availability of other evidence"; (iii) "the seriousness of the litigation"; (iv) "the role of the government"; and (v) "the possibility of future timidity by government employees." *Id.* at 737-38 (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992)). Each of these factors weighs in Plaintiffs' favor.

A. The Discovery Plaintiffs Seek Is Highly Relevant.

The evidence Plaintiffs seek is squarely relevant to their claims and the defense the government has asserted. Information concerning the delay of the open accessions policy, the work of the Review Panel, and the development of the Mattis Plan go "to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case" because "the constitutionality of the challenged policy 'necessarily turns on facts related to Defendants' deliberative process.'" Dkt. 160 at 13 (internal citations omitted). This Court has already determined that "Defendants may not simultaneously claim that deference is owed to the Ban

[8] Discovery is currently stayed in both the *Karnoski* and *Stone* cases pending a ruling on the government's appeal to the Ninth Circuit in *Karnoski*.

because it is the product of 'considered reason [and] deliberation,' 'exhaustive study,' and 'comprehensive review' by the military . . . while also withholding access to information concerning these deliberations[.]" *Id.* at 13-14 (internal citations omitted); *see also Doe v. Shanahan*, [slip. op.] at 20-21 (D.C. Cir. 2019); *Stone*, 356 F. Supp. 3d at 515. Thus, the evidence Plaintiffs seek is highly relevant to their claims, and this factor strongly weighs in favor of disclosure.

B. The Discovery Is Not Available From Other Sources.

Plaintiffs have no reason to expect that the evidence concerning the deliberations that resulted in the Mattis Plan exist anywhere other than in Defendants' possession. While the government suggests that Plaintiffs can obtain that information through depositions, that argument fails for two reasons.

First, until this Court resolves this privilege dispute, the government will simply instruct its witnesses not to answer Plaintiffs' questions about the scope or intention of either the pre-Tweet or Review Panel process. For example, during the deposition of Colonel Mary Krueger, the Assistant Deputy for Health Affairs in the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs, Plaintiffs asked whether the Review Panel considered a return to the 2016 open service policy as a potential option, and Defendants instructed the witness not to answer, notwithstanding the fact that the government has represented in briefing that the Review Panel operated without any given assumptions or presumptions for or against certain outcomes. Rosenbaum Decl. Ex. Q at 95:3-97:18; Dkt. 115 at 43. Because Defendants' intent in the pre- and post-Tweet process is central to Plaintiffs' claims, the government may not shield this relevant information from discovery.

Similarly, during the February 1, 2018 deposition of Martha Soper, the Assistant Deputy for Health Policy in the Office of the Deputy Assistant Secretary of the Air Force for Reserve

Affairs and Airman Readiness, Plaintiffs asked what process was followed to determine the scope of the standards and practices that would govern accessions of transgender service members during the development of the Carter Policy. Rosenbaum Decl. Ex. R at 92:12-93:3. Defendants again instructed the witness not to answer. *See id.*; *see also* Dkt. 96-1. Plaintiffs are unable to probe the scope of Defendants' review process without discovery into such core facts.

Second, Plaintiffs are entitled to fulsome document production from the government *before* deposing its witnesses. To hold otherwise would require litigation by ambush. Thus, this factor also weighs in favor of disclosure.

C. Plaintiffs' Constitutional Claims Are of the Utmost Importance.

Claims of unconstitutional discrimination are of the highest importance, particularly when the government discriminates on the basis of a suspect or quasi-suspect classification, as is the case here. Accordingly, courts frequently find that this factor weighs in favor of disclosure in cases concerning discrimination claims. *See*, *e.g.*, *Texas v. Holder*, No. 12-128, 2012 WL 13070113, at *2 (D.D.C. June 7, 2012) (claim regarding the right to vote); *Newport Pac., Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001) ("[T]his is an action alleging violations of federal constitutional magnitude. The tendency is therefore to allow discovery."). The seriousness of these constitutional claims weighs in favor of disclosure.

D. The Government's Actions Are Central to Plaintiffs' Claims.

"The fact that a governmental entity's action is the focal point of litigation weighs against upholding the deliberative process privilege." *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1028 (E.D. Cal. 2010) (collecting cases). Here, Defendants are government agencies and officials whose conduct Plaintiffs challenge. This case thus stands in contrast to one "where privileged government documents are sought pursuant to a third-party subpoena and the government did not

serve a central role in the allegedly unlawful conduct." *Winfield v. City of New York*, No. 15-cv-05236, 2018 WL 716013, at *12 (S.D.N.Y. Feb. 1, 2018).

E. Discovery Will Not Chill Future Government Deliberations.

Disclosure here will not chill government deliberations in future policy discussions that follow appropriate procedures and are based on legitimate policy concerns. And, even if disclosure could hypothetically chill future deliberations concerning implementation of discriminatory policies, that concern weighs in favor of disclosure and is not a reason to shield such documents and information from discovery. *Newport Pac., Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001) ("[I]f because of this case, members of government agencies acting on behalf of the public at large are reminded that they are subject to scrutiny, a useful purpose will have been served."). At a minimum, the balance of the other factors at issue outweighs this one factor. *See Stone*, 356 F. Supp. 3d at 515. And, the Court may order an *in camera* review of any particularly sensitive documents to ensure any concern regarding a chilling effect of future government deliberations is minimized.

POINT IV
THE GOVERNMENT'S INVOCATION OF THE DELIBERATIVE PROCESS PRIVILEGE IS OVERBROAD

Even if the deliberative process privilege applies in some manner, the government has improperly withheld post-decisional communications and factual information, which are not entitled to protection from disclosure.[9]

[9] Plaintiffs have reviewed the government's *Vaughn* Indexes to identify post-decisional and/or factual documents improperly withheld. Entries that contain post-decisional material and documents are highlighted in purple. Entries that contain factual material are highlighted in orange. Rosenbaum Decl. ¶ 11.

A. Post-Decisional Documents Must Be Produced.

Documents protected by the deliberative process privilege must be "predecisional," meaning they must be "generated before the adoption of an agency policy." *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 160 (D.D.C. 2012) (Kollar-Kotelly, J.); *see also Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007). A significant number of the documents withheld by the government fail this foundational requirement.

For example, many of the documents appearing on the government's *Vaughn* Indexes are described as "deliberations regarding the implementation of the transgender policy." *See, e.g.*, Rosenbaum Decl. Ex. B at 1 (emphasis added). It appears that many of the entries relate to the Services' efforts to prepare for open accessions, which was set to start on January 1, 2018 by court order. For example, Defendants have withheld on the basis of deliberative process privilege communications exchanged during the last two weeks of December 2017 concerning [redacted] *See* Rosenbaum Decl., Ex. A at 7 (entries for USDOE00083070; USDOE00083071). In other words, the Services were discussing how to implement a set, unchangeable policy. Similarly, Defendants have withheld later December 2017 communications concerning [redacted] (*id.* at 5 (entry for USDOE00083056)) and communications [redacted] Rosenbaum Decl., Ex. D at 3 (entry for USDOE00000383).

The government's withholding of these documents is improper because they are not pre-decisional. Documents merely "reflecting [an agency's] formal or informal policy on how it carries out its responsibilities" are not privileged, and "an agency's application of a policy to

guide further decision-making does not render the policy itself predecisional." *See Public Citizen, Inc. v. Off. of Mgmt. and Budget*, 598 F.3d 865, 875-76 (D.C. Cir. 2010); *see also, e.g., Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (noting that to qualify for deliberative process privilege, a document must be "generated before the adoption of an agency policy"); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) ("The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made . . . ."); *Public Employees for Environmental Responsibility v. E.P.A.*, 288 F. Supp. 3d 15, 26-27 (D.D.C. 2017) (holding that "explanations and clarifications relating to published EPA studies" were by definition post-decisional and not privileged). The documents withheld here by the government concerning "implementation" of a policy are, by definition, post-decisional and thus not deliberative, and should be produced. The government has similarly withheld documents concerning the "rescission" of the transgender policy, which, by definition, means that a decision had already been made to rescind the policy. *See* Rosenbaum Decl., Ex. B at 41.

Finally, the government has also improperly withheld documents concerning the Review Panel's work that are plainly not pre-decisional because they are dated *after* the final Review Panel vote. For example, the government has withheld two emails and corresponding attachments that appear on the *Vaughn* Index produced on behalf of the Navy; they are logged as January 10, 2018 communications between Thomas Dee, acting Undersecretary of the Navy and a member of the Review Panel, and Robert Woods, the Principal Deputy Assistant Secretary for Manpower and Reserve Affairs. Rosenbaum Decl., Ex. C at 2. These emails post-date both the final Review Panel report and Mr. Dee's dissenting opinion from that report, and thus, are post-

decisional and must be produced.[10] The government has even withheld 600 documents that post-date the Mattis Report on the basis of deliberative process privilege. *See, e.g.*, Rosenbaum Decl. Ex. D at 47 (entry for USDOE00191076). These post-decisional documents must be produced.

B. Factual Material Must Be Produced.

To be afforded deliberative process protection, a document must be "deliberative," meaning that it "reflects the give-and-take of the consultative process" and "the personal opinions of the writer rather than the policy of the agency." *Judicial Watch*, 841 F. Supp. at 160; *see also Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983) ("Factual material that does not reveal the deliberative process is not protected by this exemption."). Factual information cannot be withheld "unless it is inextricably intertwined with the deliberative material." *Judicial Watch*, 841 F. Supp. 2d at 161.

The government has improperly withheld a substantial number of documents that contain factual material. For example, a document considered by the Review Panel appears on the *Vaughn* Index produced by the Coast Guard, logged as a November 15, 2017 "pre-decisional" PowerPoint presentation entitled "Non-deployable working group information briefing to the Review Panel of experts." Defendants have withheld this document on the basis of deliberative process privilege, noting that it contains deliberations regarding the "formulation" and "implementation" of the transgender service policy. Rosenbaum Decl., Ex. E at 2. However, an "information briefing" is indicative of factual content that can be separated from any deliberative material and produced.

[10] The government also notes as a basis for withholding each of these documents that they contain "background information for briefings on the transgender policy." As set forth below in section IV(B), "background information" is not itself deliberative, and certainly not when it post-dates the decision at issue. This provides a separate basis for producing these documents to Plaintiffs.

By way of further example, the government has withheld two late November 2017 emails from Admiral William F. Moran, the Vice Chief of Staff for Naval Operations and a member of the Review Panel, to a number of Naval officers with the subject line "Transgender framework questions." The Navy has withheld these documents pursuant to the deliberative process privilege, asserting that they are communications between DoD personnel "regarding transgender policy and implementation" and regarding "the development of requests for information for transgender accessions." Rosenbaum Decl., Ex. C at 18. Plaintiffs are entitled to the documents exchanged between the Review Panel and the Services to the extent they contain factual information.

POINT V

[redacted]

11 [redacted]

12 [redacted]

[redacted]

POINT VI
THE VAUGHN INDEXES AND CLAW-BACK LOGS ARE INSUFFICIENT TO EVALUATE ALL ITEMS BEING WITHHELD BY THE GOVERNMENT

At a minimum, the Court should order the government to revise all *Vaughn* Index entries and claw-back log entries that lack the required specificity, as reflected in Exhibits A through F of the Rosenbaum Declaration.[14]

A *Vaughn* Index "must adequately describe each withheld document or deletion from a released document," and "must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant." *Summers v. Dep't of Justice*, 140 F.3d

[13] [redacted]

[14] The *Vaughn* Index and claw-back log entries that lack specificity are highlighted in blue.

1077, 1080 (D.C. Cir. 1998) (quoting *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1989). "Specificity is the defining requirement of the *Vaughn* index." *King v. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987). Accordingly, conclusory and generalized allegations of exemptions are impermissible.[15] *Morey v. CIA*, 508 F.3d 1108, 1115 (D.C. Cir. 2007).

A *Vaughn* Index is adequate only if the requester and the trial judge are able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure. *Public Employees for Envtl. Responsibility v. Off. of Sci. & Tech. Policy*, 881 F. Supp. 2d 8, 13 (D.D.C. 2012); *King*, 830 F.2d at 219 (holding that a *Vaughn* index should allow the trial court "to make a rational decision [about] whether the withheld material must be produced without actually viewing the documents themselves … [and] to produce a record that will render [its] decision capable of meaningful review on appeal.").

A *Vaughn* index must also address whether the agency has reviewed the documents to identify reasonably segregable information. *Schoenman v. F.B.I.*, 841 F. Supp. 2d 69 (D.D.C. 2012) (citing *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977)). Indeed, an agency bears the burden of proving that the withheld documents are completely exempt from disclosure with reasonable specificity and cannot rely on "conclusory statements to support its claim that the non-exempt material in a document is not reasonably segregable." *Mead Data Cent.*, 566 F.2d at 269.

Like *Vaughn* Indexes, privilege logs must provide sufficient information about the document such that a reviewer can, from a review of the log itself, assess whether the claimed

[15] Plaintiffs have endeavored to identify examples of entries on the *Vaughn* Indexes with descriptions that are inadequate to assess the privilege asserted and policy being deliberated. However, other entries on the *Vaughn* Indexes and privilege logs provided by Defendants suffer from the same problem.

privilege is valid. *See Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 98 (D.D.C. 2012) (holding that a privilege log was insufficient where identical information and blanket statements were repeated for each log entry); *see also Vento v. IRS*, 714 F. Supp. 2d 137, 151 (D.D.C. 2010); *N.L.R.B. v. Jackson Hospital Corp.*, 257 F.R.D. 302, 306-07 (D.D.C. 2009). Indeed, Federal Rule of Civil Procedure 26(b)(5)(A) specifically requires that a party claiming privilege must "describe the nature of the documents . . . not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." The *Vaughn* Indexes and claw-back logs are inadequate for several reasons.

First, many of the log entries do not contain enough information to evaluate the privilege basis or the policy allegedly being deliberated. Indeed, some entries are missing a document title or description, and simply state, "deliberations regarding the formulation of the transgender policy" or "deliberations regarding the implementation of the transgender policy," which provide no information Plaintiffs or this Court could use to test the government's assertions of privilege. *See*, *e.g.*, Rosenbaum Decl., Ex. A at 9, 22; *see also Judicial Watch*, 841. F. Supp. 2d at 162 (stating that "legal boilerplate . . . so generic and non-specific that . . . the Court cannot meaningfully assess whether the information withheld is predecisional and deliberative" is insufficient to support privilege assertions).

Second, the *Vaughn* Indexes do not indicate whether the documents have been reviewed to identify reasonably segregable information, such as data. Indeed, as set forth in Exhibits A through F to the Rosenbaum Declaration, a substantial number of documents appear to contain factual material that should have been produced to Plaintiffs; Plaintiffs have identified such

entries by shading them blue. Such entries are insufficient under well-settled law in this Circuit and must be remedied.[16]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter an order requiring Defendants to produce: (1) documents reflecting the raw data, personnel files, and field reports that underlie the statistical summaries and conclusions contained in the Mattis Report and other produced documents, including summary presentations provided to the Review Panel and the House Armed Services Committee, as well as other data relating to the readiness and ongoing service of active duty service members diagnosed with gender dysphoria as set forth in Exhibits A through E appended to the Rosenbaum Declaration; (2) documents that relate to the decision to delay the date of implementation of the accessions component of the Carter Policy to January 1, 2018, and to any process that was purportedly already underway to review the Carter Policy before the President announced its reversal on July 26, 2017; (3) all documents considered or generated both during the Review Panel review process and between the conclusion of the Review Panel review process and the adoption of the Mattis Plan, including documents considered or generated by the Review Panel, communications to or from members of the Review Panel regarding their work, drafts of the Review Panel's report communicated to any third parties, and communications that post-date the Review Panel's report but pre-date the Mattis Plan as set forth in Exhibits A through E appended to the Rosenbaum Declaration; and (4) select documents on the claw-back log provided by Defendants with their June 2018 claw-back notice, as set forth in Exhibit F appended to the Rosenbaum Declaration. If the Court does not

[16] Plaintiffs reserve their rights to dispute additional documents that Defendants have withheld and included on their privilege logs, to the extent the Court declines to order production of documents categorically.

order the production of the documents described above, Plaintiffs respectfully request the Court enter an Order requiring Defendants to cure their deficient *Vaughn* Index and privilege log entries, as set forth in Exhibits A through F appended to the Rosenbaum Declaration.

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Respectfully Submitted,

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