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

RICHARD ROE; VICTOR VOE; and OUTSERVE-SLDN, INC., Plaintiffs, v. MARK T. ESPER, in his official capacity as Acting Secretary of Defense; MATTHEW P. DONOVAN, in his official capacity as acting Secretary of the Air Force; and the UNITED STATES DEPARTMENT OF DEFENSE, Defendants.	No. 1:18-cv-1565-LMB-IDD

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO FILE UNDER SEAL TWO CONFIDENTIAL RECORDS ATTACHED TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY THE COURT'S SCHEDULING ORDER FOR THE LIMITED PURPOSE OF TAKING A DEPOSITION OUT OF TIME

Pursuant to Local Civil Rule 5, Defendants move the Court to seal two confidential records attached to Defendants' Opposition to Plaintiffs' Motion to Modify the Court's Scheduling Order for the Limited Purpose of Taking a Deposition Out of Time. In support of their motion, Defendants state as follows:

1. Exhibit F is a talking paper on the retention of airmen with HIV that includes communications made by Air Force personnel in the course of their official duties during internal policy deliberations, as well as certain unclassified military information.

2. Exhibit G is an email, dated April 11, 2018, from Colonel Danaher to Lieutenant Colonel Okulicz and Colonel Downes that includes communications made by Colonel Danaher in the course of his official duties in connection with the Air Force's consideration concerning its policies regarding Airmen with HIV.

The unredacted versions of these records contain disclosures that were made by Air Force personnel in the course of their official duties during internal policy deliberations. Under established Fourth Circuit precedent, there are three requirements for sealing court filings: (1) public notice of the request to seal with an opportunity to object; (2) consideration of less drastic alternatives; and (3) a statement of specific findings supporting a decision to seal and rejecting alternatives to seal. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000).

Defendants have complied with the first *Ashcraft* factor because Defendants have also filed a Notice of Under Seal Filing, this public memorandum, and a Proposed Order to seal the materials pursuant to Local Rule 5. Should Plaintiffs, or any interested member of the public object to the instant motion, he or she may raise his or her objections with the Court.

Second, this is the least drastic alternative available in compliance with the second *Ashcraft* factor. Defendants have filed redacted versions of Exhibits F and G.

Third, considering the information redacted from Exhibit F and G, the decision to seal is supported by existing Fourth Circuit precedent and in accordance with this Court's rulings in this case and *Harrison v. Esper*, No. 1:18-cv-641.

The first category of information that should be sealed are certain non-public details of the Air Force's disability evaluation system. Public access to judicial records is a "qualified right" that "springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." *Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014). But the common law presumption in favor of public access can be overcome by a showing that a litigant has "some significant interest that outweighs the presumption." *Rushford v. New Yorker Magazine*, Inc., 846 F.2d 249, 253 (4th Cir. 1988). Likewise, litigants can overcome the First Amendment right of public access to documents by showing that "denial of access [is] . . . necessitated by a compelling government interest and narrowly tailored to serve that interest." *Id.*; *see In re Washington Post Co.*, 807

F.2d 383, 391 (4th Cir. 1986). Here, Defendants do not seek an order to seal most of the non-public information about the Air Force's disability evaluation system, but rather seek a much more narrowly tailored order that prevents the unveiling of specific information about the rates and types of disability determinations that is included in Exhibit F. It is a compelling government interest to protect this unclassified information, which would, if made public, could provide insight into the composition and manning of the Air Force.

The second category of information that should be sealed are the internal policy discussions that are contained in Exhibits F and G. The Court has already determined in *Harrison v. Esper*, No. 1:18-cv-641, which is consolidated with this case for discovery purposes, that certain Air Force deliberative documents should be disclosed to Plaintiffs in this case pursuant to a protective order. *See Harrison v. Esper*, No. 1:18-cv-641, ECF Nos. 128, 175; *Roe v. Esper*, No. 1:18-cv-1565, ECF No. 158. The deliberative discussions redacted from Exhibits F and G should be sealed because they reflect the pre-decisional thought processes of Air Force officials. Public release of the records would have a chilling effect on policy deliberation and development by the Air Force in the future. *City of Va. Beach v. Dep't of Commerce*, 995 F.2d 1247, 1252-53 (4th Cir. 1993) ("[T]he privilege encourages free-ranging discussion of alternatives . . . and insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions but 'for matters they consider before making up their minds.'" (quoting Jordan v. DOJ, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (*en banc*)); *see also Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1226 (10th Cir. 2007); *Hinckley v. United States*, 140 F.3d 277, 285 (D.C. Cir. 1998) (explaining that in cases of "substantial public interest" the possibility of outside scrutiny of agency deliberations "would almost certainly hamper the candor of future discussions").

Accordingly, Defendants respectfully request that the Court enter an order sealing Exhibits F and G.

DATE: July 10, 2019

Respectfully submitted,

G. ZACHARY TERWILLIGER
United States Attorney

/s/
R. TRENT MCCOTTER
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3845
Fax: (703) 299-3983
trent.mccotter@usdoj.gov

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

JOSHUA C. ABBUHL
KERI L. BERMAN
REBECCA CUTRI-KOHART
ROBERT M. NORWAY
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0889
Facsimile: (202) 616-8460
robert.m.norway@usdoj.gov

Counsel for Defendants