

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

RICHARD ROE; VICTOR VOE; and )  
OUTSERVE-SLDN, INC., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
RICHARD V. SPENCER, 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. )  

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No. 1:18-cv-1565-LMB-IDD

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION  
TO COMPEL DOCUMENTS AND INFORMATION WITHHELD  
ON THE BASIS OF DELIBERATIVE PROCESS PRIVILEGE**

Defendants oppose Plaintiffs' latest motion to compel. Plaintiffs' motion is based on the premise that, because the Court has ruled previously that the Government must disclose privileged deliberative information, it must do so again. But that is not the correct standard. Rather, Plaintiffs must satisfy a heavy burden of demonstrating a particularized need for the documents and information they seek to compel through their motion. They have not met this burden. The eight redacted email chains at issue here are plainly predecisional and deliberative. And particularly given that the authors and recipients of these emails were some of the most senior Air Force officials, the *Cipollone* balancing test weighs in favor of upholding Defendants' privilege claims.

### **BACKGROUND**

In view of the Court's orders in this case and in *Harrison v. Spencer*, No. 1:18-cv-641, the Air Force produced to Plaintiffs all documents that were previously withheld by the agency solely on the basis of the deliberative process privilege except for eight email chains. The Air Force redacted certain portions of each of these eight email chains from three high ranking military officers: (1) Lieutenant General Gina Grosso, who was the Deputy Chief of Staff for Manpower, Personnel and Services; (2) Major General Robert LaBrutta, who was the Director of Military Force Management Policy, Deputy Chief of Staff for Manpower, Personnel and Services; and (3) then-Major General Brian Kelly, who was the Commander of the Air Force Personnel Center at Joint Base San Antonio-Randolph, Texas. The redactions contain frank and candid discussions between these senior military officers and members of their staff regarding how airmen with asymptomatic HIV should be evaluated using the Disability Evaluation System. Ex. A, Decl. of Brigadier General Stephen Rosenmeier (Rosenmeier Decl.) ¶ 8.

Each of these email exchanges predated one of the three memoranda that were issued by the Air Force concerning how airmen with asymptomatic HIV should be evaluated using the Disability Evaluation System. The Air Force's consideration of this issue began when it was brought to the

attention of the Air Force's Office of the Assistant Secretary for Manpower and Reserve Affairs. The first memorandum, dated October 11, 2017, was signed by Major General LaBrutta. Ex. B. Air Force staff officers subsequently assembled opinions and recommendations from various Air Force stakeholders, including the Air Force Personnel Center, the Air Force Directorate of Military Force Management Policy (AF/A1P), and the Air Force Medical Operations Agency (AFMOA). Those stakeholders each prepared detailed papers that explained their positions as to how airmen with asymptomatic HIV should be evaluated in the Air Force's Disability Evaluation System. Ex. C (position paper from A1P); Ex. D (position paper from AFPC); Ex. E (position paper from AFMOA). The assembled recommendations were presented to the Assistant Secretary, Mr. Shon Manasco for a decision concerning the policies. Assistant Secretary Manasco subsequently issued two additional memoranda formalizing the Air Force's implementation of its policy. Ex. F (memorandum dated June 6, 2018); Ex. G (memorandum dated September 26, 2018). Each of these position papers, as well as drafts of the papers, have been produced to Plaintiffs pursuant to this Court's previous discovery rulings.

### **LEGAL STANDARD**

The deliberative process privilege protects the Government's decision-making process by shielding from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). "This privilege is designed to protect the quality of administrative decisionmaking by ensuring that it is not done 'in a fishbowl.'" *City of Va. Beach v. Dep't of Commerce*, 995 F.2d 1247, 1252 (4th Cir. 1993) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)). "Thus, the privilege encourages free-ranging discussion of alternatives; prevents public confusion that might result from the premature release of such nonbinding deliberations; and

insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions, but for matters they considered before making up their minds.” *Id.* at 1252-53 (quotation omitted); *see also Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001) (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government.” (quotation omitted)).

“Documents withheld or redacted pursuant to the deliberative process privilege must be both ‘predecisional’ and ‘deliberative.’” *Rein v. PTO*, 553 F.3d 353, 372 (4th Cir. 2009) (quoting *City of Va. Beach*, 995 F.2d at 1253). “Predecisional documents are ‘prepared in order to assist an agency decisionmaker in arriving at his decision.’” *City of Va. Beach*, 995 F.2d at 1253 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975)). “Deliberative material ‘reflects the give-and-take of the consultative process,’ by revealing the manner in which the agency evaluates possible alternative policies or outcomes.” *Id.* (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

“The deliberative process privilege is a qualified one; that is, where a party can establish the existence of a sufficient need for the information that outweighs any harm from its production, the privilege may be overcome.” *Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-03118-D, 2014 WL 4545946, at \*3 (E.D.N.C. Sept. 12, 2014) (citing *Scott v. PPG Indus., Inc.*, 142 F.R.D. 291, 294 (N.D. W. Va. 1992)). “The burden of showing an overriding need for the information rests with the party seeking it.” *Id.* (citing *Redland Soccer Club v. Dep’t of Army*, 55 F.3d 827, 853 (3d Cir. 1995) (“The party seeking discovery bears the burden of showing that its need for the documents outweighs the government’s interest.”)); *see also United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a “particularized need” for specific documents to overcome the

privilege); *Marriott Int'l Resorts v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a “compelling need” to overcome the privilege). Courts have used a four factor test in balancing the deliberative process privilege with the need of the party seeking disclosure: “(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government’s role (if any) in the litigation, and (4) ‘the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.’” *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table) (quoting *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)) (disposition available at 1987 WL 36515).

### ARGUMENT

Plaintiffs make no effort in their motion to demonstrate a particularized need for the redacted information in the eight email chains, even though Plaintiffs have a heavy burden of showing a compelling and particularized need for the each of the documents and information they seek. For this reason alone, the Court should deny Plaintiffs’ motion because generalized arguments are not sufficient to overcome a deliberative process claim. And, because the redacted information in the eight email chains is plainly predecisional and deliberative, the information is protected by the deliberative process privilege. Once the *Cipollone* balancing test is applied to the eight redacted email chains at issue, it unmistakably weighs in favor of upholding Defendants’ privilege claims, especially in view of the personnel decisions at issue and the seniority of the Air Force officers involved in the email exchanges.

#### **I. Plaintiffs have not met their heavy burden of demonstrating particularized need for the documents and information they seek.**

Even though Plaintiffs have a heavy burden of showing a compelling and particularized need for the documents and information they seek, *see Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003); *Marriott Int'l Resorts*, 437 F.3d at 1307; *Farley*, 11 F.3d at 1389; *Viet. Veterans of Am. v. CIA*, No. 09-cv-

37, 2011 WL 4635139, at \*10 (N.D. Cal. Oct. 5, 2011), they make no effort in their motion to demonstrate a particularized need for the information redacted in each of the eight email chains withheld by the Air Force. Instead Plaintiffs make generic arguments about the balancing of the applicable factors. The premise underlying Plaintiffs' motion—that the *Cipollone* balancing test applies to a case, not a document, *see* Pls. Mem. 6 (stating “all factors set forth in *Cipollone* favor disclosure in this case”)—is incorrect. Generic arguments that do not specifically identify or address particular documents and instead apply the balancing test *en masse*, are insufficient to overcome Defendants' claims of deliberative process privilege. *See Karnoski v. Trump*, 926 F.3d 1180, 1206-07 (granting Defendants' petition for a writ of mandamus and vacating the district court's discovery order, which erroneously conducted the balancing test *en masse* to determine that the deliberative process privilege had been overcome for thousands of Defendants' deliberative documents); *In re United States*, 678 F. App'x 981, 987 (Fed. Cir 2017) (finding that a “document-by-document” analysis is required in assessing claims that the deliberative process privilege has been overcome). For this reason alone, the Court should deny the motion.

**II. The redacted information from the eight email chains at issue is protected by the deliberative process privilege.**

Plaintiffs do not meaningfully dispute that the information redacted from the eight email chains is predecisional and deliberative, the only conditions required by Fourth Circuit law. *See, e.g., Solers, Inc. v. IRS*, 827 F.3d 323, 329-30 (4th Cir. 2016); *City of Virginia Beach*, 995 F.2d at 1253.<sup>1</sup>

Unlike the other emails disclosed in this case, each of the email chains at issue here contain messages to, from, and including the three senior military officers in the Air Force responsible for personnel

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<sup>1</sup> Although the leading cases in this Circuit occur primarily in Freedom of Information Act (FOIA) cases, the deliberative process privilege recognized by FOIA Exemption 5 is the same privilege that is otherwise applicable in civil litigation. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (construing “Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.”).

policy, Lieutenant General Grosso, Major General LaBrutta, or Major General Kelly. The redacted documents include four email chains that were exchanged before Major General LaBrutta signed the first memorandum concerning the retention of airmen with Asymptomatic HIV, *see* A-341, including:

- US00040124 is a two-page email exchange between Lieutenant General Grosso and Major General LaBrutta, dated October 11, 2017. The redacted portions contain Major General LaBrutta's frank and candid recommendations to Lieutenant General Grosso regarding whether members with asymptomatic HIV should be evaluated through the Disability Evaluation System. Rosenmeier Decl. ¶ 8.a.
- US00040378\_0001-US00040378\_0003 and US00040414\_0001-US00040414\_0003 contain redactions in an email that Major General LaBrutta directed his staff to prepare a summary that he could send to Lieutenant General Grosso. Specifically, the redacted portions contain the candid recommendations of Major General LaBrutta and his staff regarding the evaluation of airmen with HIV through the Disability Evaluation System. Rosenmeier Decl. ¶ 8.h.
- US00040126-US00040128 is an email chain between Major General LaBrutta and a member of his staff, Colonel William Fischer. The redacted information contains details of Major General LaBrutta's discussion with the other generals, as well as a request and briefing information to Major General LaBrutta from his staff, Colonel William Fischer. Rosenmeier Decl. ¶ 8.b.

The remaining documents were exchanged between the signing of Major General Robert LaBrutta's memorandum and the two subsequent memoranda on this topic. Ex. F (memorandum dated June 6, 2018); Ex. G (memorandum dated September 26, 2018). Those four email chains include:

- US00040181-US00040182 is an email exchange between Colonel Fischer and Major General Labrutta regarding the evaluation of airmen with HIV through the Disability Evaluation System. The redactions cover analyses of regulations, recommendations based on these analyses, and a discussion of others' viewpoints, analyses, and recommendations regarding Air Force policy. Rosenmeier Decl. ¶ 8.c.
- US00040238\_0001-US00040238\_0002 contains a single redaction in an email Major General Labrutta to Colonel Fischer regarding his recommendation as to what the Air Force's policy on processing members with HIV through the Disability Evaluation System should be, and contains a representation of another general officer's opinion on the matter. Rosenmeier Decl. ¶ 8.e.
- US00040231\_0001-US00040231\_0002 contains a single redacted sentence that contains a proposed course of action for Major General Labrutta to adopt as well as a representation of what Colonel Fischer believed to be the opinion of a different Air Force organization regarding the evaluation of members with HIV through the Disability Evaluation System. Rosenmeier Decl. ¶ 8.d.
- US00040257-US00040259 is a three-page email chain between military officials in the Air Force Personnel Center. The redacted portion contains the recommendations and analysis of Major General Kelly regarding the evaluation of members with HIV through the Disability Evaluation System, including a discussion on a draft version of a policy memo and Major General Kelly's thoughts on the proposed policy. Rosenmeier Decl. ¶ 8.f.

In sum, the information redacted from the eight email chains at issue is clearly predecisional and deliberative, and therefore protected by the deliberative process privilege.

**III. The *Cipollone* balancing test weighs in favor of upholding Defendants' privilege claims to the eight email chains at issue.**

Once applied to the eight email chains at issue here, the *Cipollone* balancing test weighs heavily in favor of upholding Defendants' Privilege Claims.

**A. The withheld information is immaterial to Plaintiffs' case.**

Relying on this Court's prior rulings, Plaintiffs argue that the redacted information is relevant to their case and therefore must be disclosed. Pls. Mem. 7-8. This argument merely reiterates Plaintiffs' argument that the deliberative process privilege does not apply in this case. But Plaintiffs' generalized assertion of need is far from the "strong showing of relevance" and particularized need required to overcome the privilege for each of the eight redacted email chains. *Viet. Veterans of Am. v. CIA*, 2011 WL 4635139, at \*10 (N.D. Cal. 2011); *see also Marriott Int'l Resorts*, 437 F.3d at 1307. Documents are not susceptible to a one-size-fits-all analysis. *See Karnoski*, 926 F.3d at 1206 (explaining that the district court "should consider classes of documents separately when appropriate" and that conducting a single deliberative process privilege analysis for multiple categories of documents was improper); *Coastal States Gas Corp.*, 617 F.2d at 867 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process."); *In re United States*, 678 F. App'x at 987 (noting "document-by-document" analysis required in assessing claims that the deliberative process privilege has been overcome).

Additionally, the redacted information at issue here is immaterial to Plaintiffs' claims. Indeed, under the applicable level of scrutiny, the "deference afforded to the government . . . is so deferential that even if the government's actual purpose in creating classifications is not rational, a court can uphold the regulation if the court can *envision* some rational basis for the classification." *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991). Thus, regardless of the Government's actual intent, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be

conceived to justify it.” *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)). And in the context of military personnel decisions, even facially discriminatory policies must be upheld “so long as [they] can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Hawaii v. Trump*, 138 S. Ct. 2392, 2420 (2018). Particularly given this most highly deferential standard of review, the seniority of the military officials at issue, and the previous production of the position papers of the various Air Force offices, disclosure of these internal deliberations would be plainly improper.

**B. The withheld information is available from other sources.**

Plaintiffs fail to acknowledge the significant discovery that has already taking place in this lawsuit and the *Harrison* lawsuit. Discovery in these matters has been extensive, including more than 28 fact and expert witness depositions, the production of thousands of pages of records, and the recently granted extension of discovery to permit the deposition of four additional fact witnesses, and covers a wide range of deliberative information. Indeed, at least two of witnesses that the Court authorized deposed, Colonel Patrick Danaher and Colonel Karen Downes, are alternative sources of the redacted information. In fact, Colonel Danaher is the co-author of the position paper submitted on behalf of the Air Force Medical Operations Agency.

Plaintiffs argue only that “Defendants are the only source of the information sought.” Pls. Mem. 8 (quotation omitted). But that argument misses the point. When evaluating this factor, the focus is on the availability of other non-privileged evidence to which Plaintiffs have access, not whether Plaintiffs can obtain precisely the same privileged deliberative information from another source. *See Hinckley v. United States*, 140 F.3d 694, 286 (D.C. Cir. 1998)) (declining to find that the deliberative process privilege was overcome upon noting that “the Hospital has already given Hinckley access to a tremendous amount of information, including all of the evidence that was before the Review Board as well as the Review Board’s final decision and explanation for it”). For

example, as Judge Wilkins explained in *Doe v. Mattis* in connection with a challenge to another military personnel policy, information protected by the deliberative privilege should not be disclosed where plaintiffs could depose agency officials and ask them “to explain the operation and purpose” of the new policy without “improperly intrud[ing] upon [the Executive Branch’s] mental processes.” 917 F.3d 694, 705 (D.C. Cir. 2019) (explaining that “[i]t is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on” (quoting 3 *Weinstein’s Fed. Evidence* § 509.23 (2019))).

Here, Plaintiffs could avoid seeking the information subject to the deliberative process privilege at issue in Plaintiffs’ motion (such as Major General LaBrutta’s comments) by asking targeted questions about the position papers that were prepared by the various Air Force offices and forwarded to the deciding official, Assistant Secretary Manasco. These papers, and the decision packet that included them, make up the administrative record for the Air Force’s decision regarding how airmen with asymptomatic HIV should be evaluated using the Disability Evaluation System. *See Doe*, 917 F.3d at 737 (Williams, J., concurring in result) (explaining that the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point” (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also Hawaii*, 138 S. Ct. at 2420 (upholding presidential proclamation based solely on its text). Taken together, the availability of other evidence strongly undercuts Plaintiffs’ demand for the disclosure of the limited redactions in the eight email chains at issue. *See Hinckley*, 140 F.3d at 286 (declining to find that the deliberative process privilege was overcome upon noting that “the Hospital has already given Hinckley access to a tremendous amount of information, including all of the evidence that was before the Review Board as well as the Review Board’s final decision and explanation for it”); *Utah Med. Prods. V. McClellan*, No. 2:03-CV-00525 PGC, 2004 WL 988877, at \*5 (D. Utah 2004) (finding that even though the requested document was relevant to plaintiff’s claims, the production of an

administrative record and other documents “all provided [the plaintiff] with a clear explanation” as to why the agency took an enforcement action).<sup>2</sup>

**C. The disclosure of the withheld information would significantly hinder frank and independent discussion regarding contemplated policies and decisions.**

The final factor strongly weighs against piercing the deliberative process privilege. The limited redactions in the eight email chains are all directly related to communications to and from senior Air Force officers responsible for advising the Assistant Secretary of the Air Force on changes to personnel policies. The privileged information are comments from, to, and between the Air Force’s most senior military officers responsible for implementing personnel policies. These officers were responsible for guiding the preparation of recommendations to that were ultimately provided to the decisionmaker, Mr. Manasco. To do this efficiently, the military relies on the confidentiality of its internal communication systems, including email, to quickly coordinate the staff process. Rosenmeier Decl. ¶ 7. As Brigadier General Rosenmeier explains in the attached declaration, disclosure of the redacted information in these eight emails could cause these individuals, who were some of the most senior Air Force officials, “to refrain from using email in communication with their staffs regarding potentially controversial issues,” and use more inefficient communications instead. *Id.* If senior military officials are chilled from providing their candid views on future policy matters, the overall quality of the decision-making process will be affected,

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<sup>2</sup> The third factor in the balancing test are the role of the Government in the litigation and the seriousness of the litigation. *See Hinckley*, 140 F.3d at 286 (quoting *In re Sealed Case*, 121 F.3d at 737–38). There is no dispute that the Government’s policy is at issue or that this case, which involves a military personnel policy, is a serious one. But this factor does not outweigh the Government’s strong interests in non-disclosure, especially given the availability of other evidence and Plaintiffs’ failure to articulate a need for any particular document. *See Hinckley*, 140 F.3d at 286 (“[T]he balance weighs strongly against granting . . . access to the [agency’s] internal deliberations, notwithstanding the seriousness of the present litigation.”); *Agility Pub. Warehousing Co. v. Dep’t of Def.*, 110 F. Supp. 3d 215, 222 (D.D.C. 2015) (finding that although the case was serious, “this single factor cannot outweigh the others stacked against it”).



# EXHIBIT A

*Declaration of  
Brigadier General Stephen Rosenmeier*

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

RICHARD ROE, VICTOR VOE and  
OUTSERVE-SLDN, INC.

Plaintiffs,

v.

MARK ESPER, *et al.*,

Defendants.

No. 1:18-cv-1565-LMB-IDD

**DECLARATION OF BRIGADIER GENERAL STEVEN ROSENMEIER ASSERTING  
THE DELIBERATIVE PROCESS PRIVILEGE**

I, Brigadier General Steven Rosenmeier, do hereby declare as follows:

1. I am currently the Mobilization Assistant to the Air Force Deputy Chief of Staff, Manpower, Personnel, and Services. I have held this position since February 2018. In this position I assist in providing comprehensive plans and policies covering all life cycles of military and civilian personnel management, which includes military and civilian end strength management, education and training, compensation, resource allocation, and the worldwide Air Force Services program. Prior to assuming this position, I served as the Director of Personnel, Office of Air Force Reserve in Washington, D.C.

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

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

4. I submit this declaration in support of the Defendant's Response to the Plaintiffs' July 12, 2019 Motion to Compel. I base this declaration on my personal knowledge and on information made available to me in the performance of my duties, my background, training, and experience, and my review and consideration of information available to me in the course of my official duties, including information furnished by DoD military and civilian personnel in the course of their official duties..

**Purpose of this Declaration**

5. I hereby formally assert the deliberative process privilege, on behalf of Air Force, with respect to the 8 documents described in and sought by Plaintiffs' motion to compel.

6. As discussed in more detail below, disclosure of the deliberative process information Plaintiffs seek would discourage open and candid exchange of information between senior military leadership and their staffs by exposing recommendations, proposals, and considered opinions to public scrutiny and therefore have a chilling effect on the military's ability to effectively and efficiently develop personnel policies. These emails contain preliminary judgments subject to further refinement, debate, and revision.

7. If released, Air Force General Officers would likely hesitate to provide candid information and opinions regarding even the most remotely controversial matters to their staffs through email. Every senior officer in the Air Force utilizes email as a means to quickly and efficiently communicate with his or her staff. As such, email is a vital communication tool that allows the Air Force's senior officers to provide direction and conduct debates over policy matters without the need to coordinate schedules for meetings or phone calls. There is a very real danger that disclosure of the emails in this case will cause senior Air Force officials to refrain from using email in communication with their staffs regarding potentially controversial issues. In turn, the Air Force's policy making process would thereby suffer because issues that

could have been handled by convenient email exchanges will require inefficient processes of coordinating schedules to set up in person or telephonic communications. Furthermore, the emails sought by this motion are qualitatively different from the thousands of other documents that the plaintiffs have obtained through discovery in this case. The information that has been redacted in these eight emails is authored by some of the most senior uniformed officials in the Air Force. These individuals must be able to communicate efficiently with their staffs in order to effectively fulfill their roles and disclosing these emails will chill their ability to do so and will ultimately lead to an ineffective policy making process.

8. The eight documents subject to this motion generally deal with the development of the Air Force's policy on evaluating members with HIV for continued military service. All of these documents were created prior to the creation of the policy that is challenged in this lawsuit, and exclusively deal with two policy memos that were created prior to the policy memo that is actually at issue in this case. The following is a description of each of the documents at issue in this motion:

a. Document 40124 is a 2 page email exchange between Lieutenant General Gina Grosso and Major General Robert LaBrutta dated October 11, 2017. The portions that have been redacted contain Major General LaBrutta's frank and candid recommendations to Lieutenant General Grosso regarding the question of whether members with asymptomatic HIV should be evaluated through the Disability Evaluation System. The redacted portions also contain Major General Labrutta's analysis of various viewpoints provided to him by others involved in the policy review process. Where there is factual information presented, the factual information is intertwined with deliberative discussions and recommendations.

b. Document 40126 is a 3 page email discussion between Major General Labrutta and Colonel William Fischer dated October 11, 2017. It contains lengthy communications between Major General Labrutta and Colonel Fischer regarding a recommended course of action for the evaluation of airmen with HIV through the Disability Evaluation System. The redacted portions contain an analysis of applicable regulations, policies, and procedures and culminate in a recommended course of action for both Major General Labrutta and Air Force policy as a whole. Where there is factual information redacted, it is intertwined with deliberative information.

c. Document 40181 is a 2 page email exchange between Major General Labrutta and Colonel William Fischer dated December 27, 2017. The email contains a lengthy communication between Colonel Fischer and Major General Labrutta regarding the evaluation of airmen with HIV through the Disability Evaluation System. The redacted portions contain analyses of regulations and recommendations based on these analyses. The redacted portions also contain a discussion of others' viewpoints, analyses, and recommendations regarding this policy. Where there is factual information redacted, it is intertwined with the deliberative material. The redacted portions also contain a representation of other General Officers' viewpoints.

d. Document 40231 is a 2 page email between Major General Labrutta and Colonel William Fischer dated January 8, 2018. The one sentence that has been redacted contains a proposed recommendation for Major General Labrutta to adopt as well as a representation of what was believed to be the opinion of a different Air Force organization regarding the evaluation of members with HIV through the Disability Evaluation System. No purely factual information has been redacted.

e. Document 40238 is a 2 page email between Major General Labrutta and Colonel William Fischer dated December 28, 2017. The redacted portion of this email contains an instruction from Major General Labrutta to Colonel Fischer regarding his recommendation as to what the Air Force's policy on processing members with HIV through the Disability Evaluation System should be, and contains a representation of another general officer's opinion on the matter. There is no purely factual information redacted in this document.

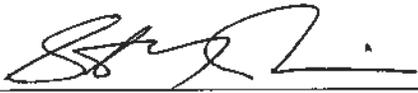
f. Document 40257 is a 3 page email chain within the Air Force Personnel Center. The redacted portion contains the recommendations and analysis of then Major General Brian Kelly regarding the evaluation of members with HIV through the Disability Evaluation System. Specifically, the redacted comments discuss a draft version of a policy memo and include Major General Kelly's thoughts on the proposed policy. Where factual information has been redacted it is intertwined with deliberations.

g. Document 40378 is a 3 page email chain dated October 11, 2017. The redacted portions contain substantially similar information as contained in Document 40126. Specifically, the redacted portions of this document contain the candid recommendations of Major General Labrutta and his staff regarding the evaluation of airmen with HIV through the Disability Evaluation System. Where factual information is redacted, it is intertwined with deliberative information.

h. Document 40414 is essentially the same document with the same redactions as Document 40378.

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

EXECUTED THIS 17 of July 2019, Arlington VA.



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STEVEN R. ROSENMEIER  
Brigadier General, USAF

# EXHIBIT B

*Oct. 11, 2017 Memorandum from  
Major General Robert LaBrutta*



DEPARTMENT OF THE AIR FORCE  
WASHINGTON DC



11 Oct 17

MEMORANDUM FOR AFPC/CC

FROM: HQ USAF/A1P

SUBJECT: Retention of Airmen with Asymptomatic HIV

Airmen with asymptomatic HIV infection, defined as laboratory evidence of Human Immunodeficiency Virus (HIV) infection without the presence of progressive clinical illness or immunological deficiency, shall be referred to Air Force Personnel Center (AFPC) Medical Standards Branch in the Medical Service Officer Management Division (DP2NP) for a case review.

AFPC/DP2NP will determine if the Airman may be returned to duty with an Assignment Limitation Code (ALC-C) or if medically necessary, be referred to the Integrated Disability Evaluation System (IDES). Asymptomatic HIV alone is not unfitting for continued service.

Airmen with laboratory evidence of HIV infection and with the presence of progressive clinical illness or immunological deficiency shall be referred into the IDES.

Our points of contact are Lt Col Matthew Huibregtse, AF/A1PPP (703-571-0827, [matthew.j.huibregtse.mil@mail.mil](mailto:matthew.j.huibregtse.mil@mail.mil)) and Col Patrick Danaher, AFMOA/SGHM, (210-395-9140, [patrick.j.danaher6.mil@mail.mil](mailto:patrick.j.danaher6.mil@mail.mil)).

ROBERT D. LABRUTTA  
Major General, USAF  
Director, Military Force Management Policy

cc:  
AFMOA/CC

BREAKING BARRIERS...SINCE 1947

# EXHIBIT C

[FILED UNDER SEAL]

# EXHIBIT D

[FILED UNDER SEAL]

# EXHIBIT E

[FILED UNDER SEAL]

# EXHIBIT F

*June 6, 2018 Memorandum from  
Assistant Secretary Shon Manasco*



DEPARTMENT OF THE AIR FORCE  
WASHINGTON DC

OFFICE OF THE ASSISTANT SECRETARY

JUN 06 2018

MEMORANDUM FOR AIR FORCE PERSONNEL CENTER/CC  
AIR FORCE MEDICAL STANDARDS BRANCH  
AIR FORCE MEDICAL OPERATIONS AGENCY/CC

FROM: Assistant Secretary of the Air Force (Manpower and Reserve Affairs)

SUBJECT: Appropriate Evaluation of Fitness for Continued Service for Airmen with Asymptomatic Human Immunodeficiency Virus (HIV)

This memo will provide guidance for the Air Force Personnel Center (AFPC) Medical Standards Branch in the Medical Service Officer Management Division (DP2NP) for the evaluation for fitness for Airmen with asymptomatic HIV.

In order to treat every Airman equitably and with dignity and respect, the appropriate treatment and medical evaluation of fitness for continued service for asymptomatic HIV Airmen will be accomplished in the same manner as any Airman with a chronic and/or progressive disease, and IAW with DoDI 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members*, dated 7 June 2013. Asymptomatic HIV alone is not unfitting for continued service. Airmen will not be referred into IDES unless the criteria for referral, in accordance with DoDI 1332.18, *Disability Evaluation System*, Enclosure 3, Appendix 1, paragraph 2, are met.

Our point of contact is Col Karen Downes at karen.m.downes2.mil@mail.mil or 703-697-8822.

Shon J. Manasco  
Assistant Secretary  
(Manpower and Reserve Affairs)

# EXHIBIT G

*Sept. 26, 2018 Memorandum from  
Assistant Secretary Shon Manasco*



DEPARTMENT OF THE AIR FORCE

WASHINGTON, D.C. 20330-1000

SEP 26 2018

OFFICE OF THE ASSISTANT SECRETARY

MEMORANDUM FOR AIR FORCE REVIEW BOARDS AGENCY  
AIR FORCE PERSONNEL CENTER  
AIR FORCE MEDICAL STANDARDS BRANCH  
AIR FORCE MEDICAL OPERATIONS AGENCY

FROM: Assistant Secretary of the Air Force (Manpower and Reserve Affairs)

SUBJECT: Airmen with Asymptomatic Human Immunodeficiency Virus (HIV) Disposition

References: (a) Department of Defense Instruction 1332.18 *Disability Evaluation System*, dated 5 Aug 2014, Incorporating Change 1, 17 May 2018  
(b) Department of Defense Instruction 6490.07, *Deployment –Limiting Medical Conditions for Service Members and DoD Civilian Employees*, dated 5 Feb 2010  
(c) Department of Defense Instruction 6485.1 *Human Immunodeficiency Virus (HIV) in Military Service Members*, dated 7 June 2013  
(d) *Appropriate Evaluation of Fitness for Continued Service for Airman with Asymptomatic Human Immunodeficiency Virus (HIV) Memorandum*, dated 6 June 2018

1. This memo provides additional guidance for the evaluation of fitness for duty for Airman with asymptomatic HIV.
2. Airmen identified with asymptomatic HIV will be evaluated through the Medical Retention Standards office (AFPC/DP2NP) and, based on the determination of DP2NP, will either be referred to the Integrated Disability Evaluation System (IDES) or returned to duty with an assignment limitation code.
3. When evaluating Airman with any chronic and/or progressive condition (to include HIV), the decision authority or boards will use the criteria in DoDI 1332.18, Enclosure 3, Appendix 1 and 2 as well as an assessment of the current career point of the Airman. Additionally, further evaluate the disability to see if it (1) represents a decided medical risk to the health of the member or to the welfare or safety of other members; or (2) the Airman's disability imposes unreasonable requirements on the military to maintain or protect the Service member.
4. Airmen with Asymptomatic HIV may be retained or separated on a case by case basis in accordance with DoDI 1332.18, *Disability Evaluation System* and DoDI 6485.1 *Human Immunodeficiency Virus*.
5. The phrase "asymptomatic HIV alone is not unfitting for continued Service" in Reference (d), is not a policy statement that asymptomatic HIV Airman are not to be referred into DES.

A-00339

Referral into the DES system requires a further determination that the member is unfit for continued Service under the criteria in DoDI 1332.18.

6. Our point of contact is Col Karen Downes at 703-697-8822 or via email at karen.m.downes2.mil@mail.mil.



Shon J. Manasco  
Assistant Secretary  
(Manpower and Reserve Affairs)