

**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	)	No. 1:18-cv-1565-LMB-IDD
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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**PUBLIC MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION  
TO FILE CERTAIN RECORDS UNDER SEAL, AND CERTAIN RECORDS UNDER  
SEAL AND *EX PARTE***

For the reasons set forth in detail below, Defendants move the Court pursuant to Local Civil Rule 5(c) for leave to file under seal Exhibits C, D, and E to Defendants’ opposition to Plaintiffs’ motion to compel documents and information withheld on the basis of deliberative process privilege, as well as leave to file under seal and *ex parte* hard copies of the eight email chains at issue. In support of this motion, Defendants state:

1. Exhibit C is a position paper prepared by the Air Force Directorate of Military Force Management Policy dated September 22, 2017, concerning how airmen with asymptomatic HIV should be evaluated in the Air Force Disability Evaluation System. This document was produced in this case on the Court’s order and pursuant to the Court’s protective order because it discloses the Air Forces’ internal deliberations.

2. Exhibit D is a position paper prepared by the Air Force Personnel Center dated November 13, 2017, concerning how airmen with asymptomatic HIV should be evaluated in the Air

Force Disability Evaluation System. This document was produced in this case on the Court's order and pursuant to the Court's protective order because it discloses the Air Forces' internal deliberations.

3. Exhibit E is a position paper prepared by the Air Force Medical Operations Agency dated November 13, 2017, concerning how airmen with asymptomatic HIV should be evaluated in the Air Force Disability Evaluation System. This document was produced in this case on the Court's order and pursuant to the Court's protective order because it discloses the Air Forces' internal deliberations.

4. 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.

5. US00040378\_0001-US00040378\_0003 and US00040414\_0001-US00040414\_0003 both are three-page email chains that contain redactions in an email that Major General LaBrutta directed his staff to prepare, containing 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.

6. US00040126-US00040128 is a three-page email chain that contains Major General LaBrutta's order to his staff to prepare a summary. The redacted information also 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.

7. US00040181-US00040182 is a two-page 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.

8. US00040238\_0001-US00040238\_0002 is a two-page email chain that contains a single redaction in an email 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.

9. US00040231\_0001-US00040231\_0002 is a two-page email chain that 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.

10. 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.

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 *Ashecraft* 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 *Ashecraft* factor.

Third, considering the information contained in these records, 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 records here contain the Air Force's internal policy discussions. 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 in these records 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”).

Furthermore, the submission of the unredacted versions of the eight email chains at issue in Plaintiffs' motion under seal and *ex parte* is appropriate to protect the deliberative process privilege while the Court resolves the discovery dispute in this matter. *See Ethyl Corp. v. EPA*, 25 F.3d 1241, 1249 (4th Cir. 1994) (noting that in camera review allows a producing party to "demonstrat[e] confidentiality without breaching the confidence" protected by the deliberative process privilege.

The parties have conferred, and counsel for Plaintiffs have authorized the undersigned to represent that Plaintiffs consent to the relief requested in this motion.

For these reasons, Defendants respectfully request the Court issue an order sealing Exhibits C, D, and E to Defendants' opposition to Plaintiffs' motion to compel documents and information withheld on the basis of deliberative process privilege, as well as granting leave to file under seal and *ex parte* hard copies of the eight email chains at issue.

DATE: July 17, 2019

Respectfully submitted,

G. ZACHARY TERWILLIGER  
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