

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

State of Washington,

Plaintiff-Intervener,

v.

DONALD J. TRUMP, in his official
capacity as President of the United States, *et
al.*,

Defendants.

CASE NO. 2:17-CV-01297-MJP

WESTERN DISTRICT OF
WASHINGTON

CASE NO. 1:18-mc-00674

**DECLARATION OF VANESSA
BARSANTI IN SUPPORT OF
PLAINTIFFS' MOTION TO COMPEL
DISCOVERY FROM DR. PAUL R.
MCHUGH, M.D.**

I, Vanessa Barsanti, swear under penalty of perjury under the laws of the United States to the following:

1. I am counsel of record for Plaintiffs in the main action pending in the Western District of Washington from which this dispute arises, I am over age 18, and competent to be a witness. I am making this Declaration based on facts within my own personal knowledge. I provide this Declaration in support of Plaintiffs' Motion to Compel Compliance with Discovery from Dr. Paul R. McHugh, M.D.

2. Plaintiffs issued a subpoena *duces tecum* (the "Subpoena") dated August 22, 2018 to Dr. McHugh to produce all documents and communications from June 16, 2015 through the present between Dr. McHugh and President Trump, the Executive Office of the President, the Trump Campaign, Vice President Pence, the Office of the Vice President, or the Department of

Defense, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general. The Subpoena is attached hereto as Exhibit A.

3. As a part of its discovery efforts, Plaintiffs served Defendants with requests for production of documents, including requests for communications Defendants had regarding transgender military service and the Ban. For example, Plaintiffs' Request for Production No. 1 requests "[a]ll Documents and Communications related to the Policy," and Plaintiffs' Request for Production No. 7 requests "[a]ll Documents and Communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare."

4. As part of its document productions, Defendants produced an email chain Bates-stamped USDOE00206512 between Dr. McHugh and Mr. William Bushman from the Office of the Secretary of Defense dated February 5, 2018 through February 14, 2018. Defendants' discovery responses indicate that Bushman attended meetings of the "Panel of Experts" charged with evaluating and implementing the Ban. USDOE00206512 is attached hereto as Exhibit B.

5. In response to Plaintiffs' discovery requests, Defendants have broadly invoked the presidential communications privilege and the deliberative process privilege to withhold responsive documents from production. Plaintiffs have challenged Defendants' privilege claims, and the parties are engaged in an ongoing discovery dispute that is currently before the Ninth Circuit.

6. Based on the information currently available to Plaintiffs from the Government's privilege logs, it is evident that the Government is withholding communications with Dr. McHugh on the grounds of deliberative process privilege. The Department of Defense's Privilege Log for

Production 14 indicates that Defendants are withholding six “[e]mail[s] involving transgender research” between Dr. McHugh and Mr. Bushman dated February 5, 2018 through February 13, 2018 on the basis of “deliberative process privilege.” The Department of Defense’s Privilege Log does not invoke executive privilege for the withheld documents and does not indicate any direct communications between Dr. McHugh and President Trump. The withheld documents are Bates-stamped USDOE00206875, USDOE00206903, USDOE00206909, USDOE00207030, USDOE00207812, and USDOE00207814.

7. Dr. McHugh has objected to the Subpoena and refused to produce any responsive documents on the grounds that the requested materials are “privileged as either attorney work product” or “privileged, at least as a communication with the President bearing upon his (the President’s) Executive responsibilities.” Exhibit C, July 19, 2018 email from Dr. McHugh’s counsel.

8. Dr. McHugh has refused to provide a privilege log or any details regarding his privilege claims. *See* Exhibit D, August 22, 2018 email from Dr. McHugh’s counsel. Dr. McHugh’s counsel has refused to engage in a telephonic meet and confer regarding Dr. McHugh’s privilege claims.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: October 3, 2018



Vanessa Barsanti

CERTIFICATE OF SERVICE

I hereby certify that, on October 3, 2018, a copy of the document above was served by email and U.S. Mail on the following counsel:

Dr. Paul R. McHugh, M.D.
c/o Gerard Bradley
Professor of Law, University of Notre Dame
3156 Eck Hall of Law
Notre Dame, IN 46556 USA
Gerard.V.Bradley.16@nd.edu

Andrew E. Carmichael
Trial Attorney
United States Department of Justice
Civil Division Federal Programs Branch
Tel. 202.514.4336
Andrew.e.carmichael@usdoj.gov

La Rond Baker
Assistant Attorney General
Wing Luke Civil Rights Unit
Office of the Washington Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Tel. 206.516.2999
Fax 206.464.6451
larondb@atg.wa.gov

s/ Robert S. Ryland
Robert S. Ryland

Exhibit A

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

Honorable Marsha J. Pechman

NOTICE OF SUBPOENA

PLEASE TAKE NOTICE that pursuant to Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs, by their attorneys, Kirkland & Ellis LLP, will serve, on or after August 22, 2018, a subpoena on Dr. Paul R. McHugh, in the form attached hereto, for the production of documents at Veritext Legal Solutions, Court Reporting Service Center, 36 S. Charles St., Suite 2002, Baltimore, Maryland 21201.

Dated: August 22, 2018

/s/ Vanessa Barsanti

KIRKLAND & ELLIS LLP

James F. Hurst, P.C. (admitted pro hac vice)

Stephen Patton (admitted pro hac vice)

Jordan M. Heinz (admitted pro hac vice)

Scott Lerner (admitted pro hac vice)

Vanessa Barsanti (admitted pro hac vice)

Daniel I. Siegfried (admitted pro hac vice)

300 North LaSalle

Chicago, IL 60654

NEWMAN DU WORS LLP

Derek A. Newman, WSBA #26967

Jason B. Sykes, WSBA #44369

2101 Fourth Ave., Ste. 1500

Seattle, WA 98121

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INC.**

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730 Peachtree Street NE, Ste. 640

Atlanta, GA 30308

OUTSERVE-SLDN, INC.

Peter Perkowski (admitted pro hac vice)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on August 22, 2018, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants and Intervenor-Plaintiff:

Andrew E. Carmichael
United States Department of Justice
Civil Division, Federal Programs Branch
Andrew.E.Carmichael@usdoj.gov

La Rond Baker
Assistant Attorney General
Office of the Washington Attorney General
LaRondB@atg.wa.gov

s/ Vanessa Barsanti _____

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)
Plaintiff)
v.) Civil Action No.
_____)
Defendant)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

Place: Date and Time:

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place: Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: _____

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) _____, who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

SCHEDULE A

The document requests below are served subject to all instructions and definitions set forth in Rules 26, 34, and 45 of the Federal Rules of Civil Procedure, as well as to the instructions and definitions set forth below.

INSTRUCTIONS

1. Any responsive document in electronic form shall be produced in electronic form, including, without limitation, originals and all copies of email; output resulting from the use of any software program, including word processing documents, spreadsheets, database files, charts, graphs, and outlines; image files in any format; PDF files; and all other electronic files or file fragments, regardless of the media on which they are stored and regardless whether the data resides in an active file, deleted file, or file fragments.

2. All documents electronically produced shall be provided in a file format that can be read by a computer configured to process ADOBE ACROBAT®, Microsoft Word®, or Microsoft Excel® formatted files, when possible. Should a document not be capable of being produced in one of these file formats (or in a standard image format), identify the software application, including the version number and trade name, that can be used to open such document.

3. Produce all documents in the order in which they appear in your files. Documents that, in their original condition, are stapled, clipped, or otherwise fastened together shall be produced in this same condition.

4. Produce all documents within your possession, custody, or control including all documents in the possession, custody, or control of any employee, agent, representative, consultant, attorney, accountant, advisors, or other persons directly or indirectly connected with

you or subject to your control, any government department, agency or any other government subdivision.

5. If any responsive document has been lost, destroyed, removed from, or is no longer in your possession, custody, or control for any reason, please identify the document, its last known location, and the circumstances surrounding its loss, destruction, or removal.

6. If you contend that any responsive document is protected from disclosure pursuant to any privilege or work-product doctrine, including but not limited to attorney work product, deliberative process privilege, and/or executive privilege, please submit a privilege log specifically setting forth for each document (i) the privilege being asserted, (ii) any factual or legal basis for its assertion, and (iii) the date and title of the document, its subject matter generally, its author(s) and recipient(s), and its Bates number(s), if any. Please provide individual privilege log entries for each responsive document for which you are asserting privilege.

7. If no documents responsive to a particular request exist, or if such documents exist but are not in your possession, custody, or control, then your response to that request shall so state.

8. Pursuant to the Federal Rules of Civil Procedure, these requests are continuing and you must revise or supplement your responses and production whenever new or additional responsive information becomes known.

DEFINITIONS

1. The “Relevant Period” shall mean June 16, 2015 through the present.
2. “Transgender” shall mean a person whose gender identity differs from the sex they were assigned at birth.

3. “President Trump” and the “President” means Donald J. Trump, the President of the United States and also refers to Donald J. Trump before his inauguration to that office and any persons engaged directly or indirectly by or under the control of Donald J. Trump.

4. The “Trump Campaign” means any entity registered with the Federal Electoral Commission and created with the purpose to promote the election of Donald J. Trump, Jr. as President of the United States, including but not limited to, Donald J. Trump for President, Inc., as well as the Republican National Committee and state and local Republican parties, and all officers and/or employees of and/or or all volunteers to any entity described in this paragraph.

5. “Vice President Pence” and the “Vice President” means Michael R. Pence, the Vice President of the United States and also refers to Michael R. Pence before his inauguration to that office and any persons engaged directly or indirectly by or under the control of Michael R. Pence.

6. The “Executive Office of the President” means the Executive Office of the President and all officers and employees thereof, including, but not limited to, the President’s Chief of Staff and his office, the Advisors, Senior Advisors, Chief Strategists, and Counselors to the President and their offices, the Assistant to the President for National Security Affairs (also known as the National Security Advisor) and his office, the White House Counsel and his office, and all officers and employees of the National Security Council.

7. The “Office of the Vice President” means the Office of the Vice President, including, without limitation, the Vice President’s Chief of Staff and his office, the Advisors, Assistants, and Deputy Assistants to the Vice President and their offices, and the National Security Advisor to the Vice President and her office.

8. The “Department of Defense” means the Department of Defense and all officers and employees thereof, including, but not limited to, the Secretary of Defense, the Deputy

Secretary of Defense, any Undersecretary of Defense, any Assistant Secretary of Defense, any Deputy Assistant Secretary of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, and all employees and officers of the Office of the Secretary of Defense, the Department of the Navy, the Department of the Army, and Department of the Air Force.

9. “Communication” shall mean any transmission of information by one or more persons to one or more persons by any means including, without limitation, telephone conversations, letters, telegrams, teletypes, telexes, telecopies, e-mail, text messages, computer linkups, written memoranda, and face-to-face conversations; “communication” includes all documents and electronically stored information (“ESI”) containing, summarizing, or memorializing any communication.

10. “Document” or “documents” shall have the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a) including ESI, and includes the original and any identical or nonidentical copy, regardless of origin or location, of any writing or record of any type or description, including but not limited to, all writings; records; contracts; agreements; communications (intra or inter-company); correspondence; memoranda; letters; facsimiles; electronic mail (e-mail); text messages; minutes, recordings, transcripts, and summaries of meetings, or recordings of meetings, speeches, presentations, conversations, or telephone calls (whether recorded in writing, mechanically, or electronically); handwritten and typewritten notes of any kind; statements; reports; voice recordings; desk calendars; diaries; logs; drafts; studies; analyses; schedules; forecasts; surveys; invoices; receipts; computer data; computer printouts; financial statements; balance sheets; statements of operations; audit reports; financial summaries; statements of lists of assets; work papers; pictures; photographs; drawings; computer cards; tapes; discs; printouts and records of all types; instruction manuals; policy manuals and statements;

books; pamphlets; and every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived.

11. “You” shall mean the Dr. Paul R. McHugh, individually and/or collectively, including any current and former employees, agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Dr. Paul R. McHugh.

DOCUMENT REQUESTS

1. All Documents and Communications from the Relevant Period between You and President Trump, the Executive Office of the President, the Trump Campaign, Vice President Pence, the Office of the Vice President, or the Department of Defense, concerning any of the following subjects: military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Exhibit B

From: Bushman, William CIV SD
Sent: Wednesday, February 14, 2018 2:57 PM
To: 'Paul McHugh'
Subject: RE: attachments

Thank you, sir. Really appreciate your assistance.

- Will

From: Paul McHugh [<mailto:pmchugh1@jhmi.edu>]
Sent: Tuesday, February 13, 2018 12:34 PM
To: Bushman, William CIV SD <William.Bushman@sd.mil>
Subject: RE: attachments

Mr. Bushman I've attached a copy of the study you wanted. Also I realize that I sited Tom Wise in Fairfield. I of course meant Fairfax Virginia. Sorry Paul McHugh

From: Bushman, William CIV SD [<mailto:William.Bushman@sd.mil>]
Sent: Monday, February 12, 2018 6:00 PM
To: Paul McHugh <pmchugh1@jhmi.edu>
Subject: RE: attachments

Thank you, sir. This is most helpful.

One additional question: do you have access to a copy of the following study?

- Mohammad Hassan Murad et al., "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes," *Clinical Endocrinology* 72 (2010): 214-231.

Thank you again for your help.

Best,
Will

William G. Bushman
Office of the Secretary of Defense
Office: 703.571.8935
Cell: 703.216.5782
NIPR: william.bushman@sd.mil
SIPR: william.bushman@sd.smil.mil
JWICS: william.bushman@sd.ic.gov

From: Paul McHugh [<mailto:pmchugh1@jhmi.edu>]
Sent: Monday, February 12, 2018 2:12 PM
To: Bushman, William CIV SD <William.Bushman@sd.mil>
Subject: RE: attachments

Mr. Bushman, You might contact Dr. Chester Schmidt here at Hokins and Dr. Thomas Wise at Fairfield. PM

From: Bushman, William CIV SD [<mailto:William.Bushman@sd.mil>]
Sent: Sunday, February 11, 2018 3:30 PM
To: Paul McHugh <pmchugh1@jhmi.edu>
Subject: RE: attachments

Dr. McHugh,

Thank you again for speaking to us and providing additional information. During our call, I believe you mentioned there were other individuals who could also serve as resources for our policy review. Do you know of any other persons we should consider reaching out to?

Thanks,
Will Bushman

William G. Bushman
Office of the Secretary of Defense
Office: 703.571.8935
Cell: 703.216.5782
NIPR: william.bushman@sd.mil
SIPR: william.bushman@sd.smil.mil
JWICS: william.bushman@sd.ic.gov

From: Paul McHugh [<mailto:pmchugh1@jhmi.edu>]
Sent: Monday, February 5, 2018 2:51 PM
To: Bushman, William CIV SD <William.Bushman@sd.mil>
Subject: attachments

Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis. I've attached them all here . Do tell me if they get through. Paul McHugh

Exhibit C

From: Paul McHugh <pmchugh1@jhmi.edu>
Sent: Thursday, July 19, 2018 12:45 PM
To: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Cc: Gerard Bradley <Gerard.V.Bradley.16@nd.edu>
Subject: RE: Karnoski v. Trump - Subpoena Duces Tecum

Ms Barsanti. On advice from counsel (Gerard Bradley Gerard.V.Bradley.16@nd.edu) I will not be complying with this subpoena
Yours sincerely Paul McHugh

From: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Sent: Wednesday, July 18, 2018 12:32 PM
To: Paul McHugh <pmchugh1@jhmi.edu>
Subject: Karnoski v. Trump - Subpoena Duces Tecum

Dr. McHugh,

My understanding is you were served with the attached subpoena on July 3rd. Forgive me if I have missed it, but I expected a response by 7/16 (the compliance date on the subpoena) and I have not seen anything. If you are represented by an attorney, please provide me with their contact information so that I may discuss this matter with them. If you are not represented by an attorney, could you please inform me whether you intend to respond to this subpoena?

Best,

Vanessa Barsanti

KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200

vanessa.barsanti@kirkland.com

The information contained in this communication is confidential, may be attorney-client privileged, may constitute inside information, and is intended only for the use of the addressee. It is the property of Kirkland & Ellis LLP or Kirkland & Ellis International LLP. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify us immediately by return email or by email to postmaster@kirkland.com, and destroy this communication and all copies thereof, including all attachments.

Exhibit D

From: Gerard Bradley
To: [Barsanti, Vanessa](#)
Subject: Re: Karnoski v. Trump - Subpoena Duces Tecum
Date: Wednesday, August 22, 2018 8:22:02 PM

Subpoena received and, yes, I have instructed Dr. McHugh to decline to comply on grounds of privilege.

Gerry Bradley

On Wed, Aug 22, 2018 at 5:30 PM, Barsanti, Vanessa <vanessa.barsanti@kirkland.com> wrote:

Mr. Bradley

Attached please find a subpoena to Dr. McHugh. We've simply updated the document production location. I presume Dr. McHugh maintains the same objections to this subpoena as the prior one, but can you please confirm?

Thank you,

Vanessa Barsanti

KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200

vanessa.barsanti@kirkland.com

From: Gerard Bradley <Gerard.V.Bradley.16@nd.edu>
Sent: Tuesday, August 21, 2018 7:13 PM
To: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Subject: Re: Karnoski v. Trump - Subpoena Duces Tecum

Yes that would be acceptable, Vanessa.

Gerry Bradley

On Tue, Aug 21, 2018 at 7:54 PM, Barsanti, Vanessa <vanessa.barsanti@kirkland.com> wrote:

Mr. Bradley,

Will you agree to accept email service on behalf of Dr. McHugh of another subpoena so that we may avoid bothering him with personal service?

Vanessa Barsanti | KIRKLAND & ELLIS LLP

300 North LaSalle Street | Chicago, IL 60654

Direct: [+1.312.862.2205](tel:+13128622205) |

Fax: [+1.312.862.2200](tel:+13128622200)

On Aug 21, 2018, at 10:41 AM, Gerard Bradley <Gerard.V.Bradley.16@nd.edu> wrote:

Dear Vanessa:

After considering the matter further in light of your last message, my judgment remains that any material in Dr. McHugh's possession which would be responsive to your subpoena is privileged, at least as a communication with the President bearing upon his (the President's) Executive responsibilities. Thus I am instructing my client to refuse to comply with the subpoena.

Gerry Bradley

On Fri, Aug 17, 2018 at 8:16 PM, Barsanti, Vanessa <vanessa.barsanti@kirkland.com> wrote:

Even if, for argument's sake, attorney work-product privilege applied to Dr. McHugh's relevant communications, it is Dr. McHugh's burden to show that the documents Plaintiffs have requested are privileged. *In re Denture Cream Prod. Liab. Litig.*, 292 F.R.D. 120, 123 (D.D.C. 2013). Federal Rule of Civil Procedure 45 requires that the person withholding subpoenaed information under a privilege claim "describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." Fed. R. Civ. P. 45(e)(2)(A)(ii). Plaintiffs cannot possibly assess Dr. McHugh's claim of attorney work-product privilege via the information you have provided below. It is not even

clear what privilege or protection Dr. McHugh is claiming at all in connection with any supposed “confidential advice to the President for purposes of policy-making.”

Will Dr. McHugh agree to provide a privilege log describing the nature of the withheld documents, as is required by the Rules? *See, e.g., Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95, 98 (D.D.C. 2012); *N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 307 (D.D.C. 2009).

Vanessa Barsanti

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vanessa.barsanti@kirkland.com

From: Gerard Bradley <Gerard.V.Bradley.16@nd.edu>
Sent: Friday, August 17, 2018 4:09 PM
To: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Subject: Re: FW: Karnoski v. Trump - Subpoena Duces Tecum

No, I do not have anything to add to my note of last evening, Vanessa.

GVB

On Fri, Aug 17, 2018 at 6:53 PM, Barsanti, Vanessa
<vanessa.barsanti@kirkland.com> wrote:

Thank you for your response. I would like to further understand your position on this. Are you available for a meet and confer on Wed.?

Vanessa Barsanti

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vanessa.barsanti@kirkland.com

From: Gerard Bradley <Gerard.V.Bradley.16@nd.edu>
Sent: Thursday, August 16, 2018 6:31 PM
To: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Cc: Paul McHugh <pmchugh1@jhmi.edu>
Subject: Re: FW: Karnoski v. Trump - Subpoena Duces Tecum

Dear Vanessa (if I may):

We returned from vacation night before last, and I have been playing catch-up-to-my-messages since. I apologize for not getting back to you before this.

I have indeed instructed Dr. McHugh not to comply with your subpoena in the Karnoski case. My judgment is that all the materials in his possession which you seek are privileged. They are privileged as either attorney-work product or as confidential advice to the President for purposes of policy-making -- or both.

Respectfully,

Gerry Bradley

On Thu, Aug 16, 2018 at 6:40 PM, Barsanti, Vanessa
<vanessa.barsanti@kirkland.com> wrote:

Mr. Bradley,

I am just writing to follow up on the voicemail I left you yesterday.
Are you available to discuss this subpoena tomorrow sometime?

Vanessa Barsanti

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vanessa.barsanti@kirkland.com

From: Paul McHugh <pmchugh1@jhmi.edu>
Sent: Thursday, July 19, 2018 12:45 PM
To: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Cc: Gerard Bradley <Gerard.V.Bradley.16@nd.edu>
Subject: RE: Karnoski v. Trump - Subpoena Duces Tecum

Ms Barsanti. On advice from counsel (Gerard Bradley
Gerard.V.Bradley.16@nd.edu) I will not be complying with this
subpoena Yours sincerely Paul McHugh

From: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Sent: Wednesday, July 18, 2018 12:32 PM
To: Paul McHugh <pmchugh1@jhmi.edu>
Subject: Karnoski v. Trump - Subpoena Duces Tecum

Dr. McHugh,

My understanding is you were served with the attached subpoena on July 3rd. Forgive me if I have missed it, but I expected a response by 7/16 (the compliance date on the subpoena) and I have not seen anything. If you are represented by an attorney, please provide me with their contact information so that I may discuss this matter with them. If you are not represented by an attorney, could you please inform me whether you intend to respond to this subpoena?

Best,

Vanessa Barsanti

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vanessa.barsanti@kirkland.com

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