

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J. TRUMP, et al.,  
  
Defendants.

No. 2:17-cv-1297-MJP  
  
**DECLARATION OF ANDREW E.  
CARMICHAEL**

1 I, Andrew E. Carmichael, swear under penalty of perjury under the laws of the United  
2 States to the following:

3 1. I am a Trial Attorney at the United States Department of Justice and counsel of  
4 record for Defendants in this action. I submit this declaration in support of Defendants' Response  
5 to Plaintiffs' Motion to Compel Further Discovery Responses (ECF 358).

6 2. Attached to this declaration as Exhibit A is a true and correct copy of the  
7 declaration of Robert Easton, Director of the Office of Litigation Counsel.

8 3. Attached to this declaration as Exhibit B is a true and correct copy of  
9 Defendants' revised objections to Plaintiffs' First Set of Interrogatories to Secretary Esper and the  
10 Department of Defense served on Plaintiffs on August 29, 2019.

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

13 Dated: August 29, 2019

Respectfully submitted,

14 JOSEPH H. HUNT  
15 Assistant Attorney General

16 JAMES M. BURNHAM  
17 Deputy Assistant Attorney General

18 ALEXANDER K. HAAS  
19 Branch Director

20 ANTHONY J. COPPOLINO  
21 Deputy Director

22 /s/ Andrew E. Carmichael  
23 ANDREW E. CARMICHAEL  
24 JAMES R. POWERS  
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*Counsel for Defendants*

# Exhibit A

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

No. 17-cv-01297 (MJP)

**DECLARATION OF ROBERT E.  
EASTON IN SUPPORT OF  
DEFENDANTS' RESPONSE TO  
PLAINTIFFS' MOTION TO  
COMPEL (ECF 358)**

**DECLARATION OF ROBERT E. EASTON**

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as Director, Office of Litigation Counsel, in the Department of Defense ("DoD") Office of General Counsel ("OGC"). I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior DoD leaders, and coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the March 12, 2019 DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria.

3. I submit this declaration in support of Defendants' Response to Plaintiffs' Motion to Compel (ECF No. 358). I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

#### **DoD Search and Review Process**

4. In their motion, Plaintiffs seek to compel Defendants to "(1) provide individualized objections to each request rather than the boiler-plate objections that were initially provided, and (2) identify whether any documents are being withheld pursuant to an individualized objection and, if so, sufficiently identify the documents withheld pursuant to that objection."

5. In response to this and the three other lawsuits challenging DoD's policies regarding military service by transgender individuals and individuals with gender dysphoria, DoD conducted an expansive search, collection, and production of files and documents potentially relevant to the claims and defenses in the four cases. DoD's search and review efforts were focused on material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria.

6. DoD began this process by identifying the key individuals who were involved in this policy making process going back to former Secretary of Defense Ashton Carter's announcement. DoD OGC identified and searched the accounts of the following key personnel:<sup>1</sup>

<b>Exec. Sec. Officials</b>	<b>Title</b>
Bushman, William	Special Assistant to the Secretary of Defense
Walsh, Laurel	Special Assistant to the Chief of Staff
Verga, Peter	Special Assistant to Secretary of Defense
Faller, Craig	Senior Military Assistant to the Secretary of Defense
Carter, Ashton	25th Secretary of Defense
Work, Robert	Deputy Secretary of Defense
Mattis, James	26th Secretary of Defense
Mohler, Hallock	Executive Secretary
Sweeney, Kevin	Chief of Staff to the Secretary of Defense
DeMartino, Tony	Chief of Staff to the Deputy Secretary of Defense
<b>DoD P-R</b>	
Kurta, Anthony	Under Secretary of Defense for Personnel and Readiness
Barna, Stephanie	Acting Assistant Secretary of Defense for Manpower and Readiness
Hebert, Lernes	Acting Deputy Assistant Secretary of Defense for Military Personnel Policy and Principal Director
Miller, Stephanie	Director, Accessions Policy
Gearhart, Lee COL	Assistant Director, Reserve Accessions
Brown, Gary LTC	Assistant Director, Reserve and Medical Manpower
Adirim, Terry Dr.	Principal Deputy Assistant Secretary of Defense for Health Affairs
Findley, Andrew Dr.	Program Manager - Quality, Graduate Medical Education, and Medical Accession and Retention Incentives
Chan, Edmund	Health Affairs - Health Services Policy and Oversight
Ribeiro, Elizabeth	Contractor Employee Supporting the Office of Health Services Policy and Oversight
Arendt, Christopher	Director, Accessions Policy
<b>DoD OGC</b>	

<sup>1</sup> In addition to the DoD officials listed in the table *infra*, other individuals involved in the development of the DoD transgender policy were identified in our Response to Plaintiff's Second Set of Interrogatories Nos. 18 and 19, filed under seal on August 21, 2019 (ECF No. 363).

Koffsky, Paul	Acting General Counsel and Senior Deputy General Counsel, Personnel and Health Policy
Casciotti, John	Senior Associate Deputy General Counsel
Gruber, David	Associate Deputy General Counsel
Easton, Robert	Director, Office of Litigation Counsel
Hatch, Richard	Associate Deputy General Counsel
Hecker, Karen	Associate Deputy General Counsel
Newman, Ryan	Deputy General Counsel, Legal Counsel

7. While the key custodian list was being finalized, DoD OGC attorneys simultaneously developed broad search terms and determined the relevant date range based on the assumption that DoD needed to gather and process all data not only potentially relevant to this case, but to any future cases and Freedom of Information Act requests on this topic. To that end, comprehensive search terms were selected to gather data from DoD Exchange servers on three different DoD networks. The search terms that were used were:

Term	Operator
transgend*	June 30, 2016 to March 23, 2018
"trans gender"	June 30, 2016 to March 23, 2018
gender /4 stab*	June 30, 2016 to March 23, 2018
"genital reconstruction" OR "gender transition" OR "gender marker" OR "gender transition plan"	June 30, 2016 to March 23, 2018
"gender dysphoria"	June 30, 2016 to March 23, 2018
"TG" /3 ("service member" OR "care" OR "working group" OR "individual")	June 30, 2016 to March 23, 2018
"transition surgery"	June 30, 2016 to March 23, 2018
("sex change" OR "sex-change") /3 surgery OR "sex change surgery"	June 30, 2016 to March 23, 2018
reassignment AND ("surgery" OR "procedure")	June 30, 2016 to March 23, 2018

"sex reassignment" /2 surgery OR "sex reassignment surgery"	June 30, 2016 to March 23, 2018
("cross sex" OR "cross-sex") AND ("hormone treatment" OR "hormone therapy")	June 30, 2016 to March 23, 2018
gender AND confirm* AND surgery	June 30, 2016 to March 23, 2018
"Join" OR SERV* /3 gender	June 30, 2016 to March 23, 2018
"vaginoplasty"	June 30, 2016 to March 23, 2018
"Penile amputation"	June 30, 2016 to March 23, 2018
Department of Defense Instruction OR DODI /2 "1300.28"	June 30, 2016 to March 23, 2018
("Directive Type Memo" OR "DTM") AND "16-005"	June 30, 2016 to March 23, 2018

8. The DoD search terms and the relevant date range were then transmitted by Microsoft Excel spreadsheet to DoD Information Technology ("IT") personnel to begin the digital search.

9. DoD IT personnel applied the designated search parameters while conducting digital searches as directed by DoD OGC attorneys. The only parameters applied were date range, search term(s), and custodian email address. No additional filters were applied by DoD IT at the server collection stage, and servers that contained service member medical records were not searched. Once the relevant native data were gathered by DoD IT personnel, the data collection was provided by CD to DoD OGC attorneys who then transferred it to DOJ attorneys for processing in their eDiscovery software, Relativity.

10. After DOJ processed this native data set, DoD was informed that there were more than 138,900 unique DoD documents based on the custodian list, search terms, and date range. Including the additional data gathered by the Military Services, who separately identified their own key custodians, more than 225,200 documents were collected. Documents were then

maintained and organized within the eDiscovery database as they were collected and as they would appear in the ordinary course of business—by DoD or Military Service component and custodian.

11. Supplemental self-collections were also executed with assistance from DoD OGC attorneys for select key custodians as a result of expedited discovery deadlines set in this case. Military Service attorneys directed similar self-collections from their key personnel. The decision to conduct supplemental self-collections was based on: the need to produce documents quickly, an understanding that a digital search by DoD IT personnel would take time to complete, and the fact that the identified key custodians were the relevant DoD policy makers for the Secretary Carter transgender policy. To that end, DoD OGC attorneys instructed Stephanie Miller, Anthony Kurta, Lernes Hebert, Dr. Terry Adirim, and Dr. Andrew Findley to create a folder on each of their desktops, copy all potentially relevant documents from organizational shared drives and Outlook accounts using search terms similar to those used for the digital search, and place any results in the newly created desktop folder. Once this was complete, the key custodians were instructed to send these folders to DoD OGC so that they could be transferred to DOJ for processing, review, and production. These additional self-collections were also maintained and organized within the eDiscovery database as they were collected—by DoD or Military Service component and custodian—and as they would appear in the ordinary course of business.

12. Once the data were uploaded to Relativity, duplicate documents were segregated from the corpus of documents for review. Thereafter, DOJ divided the remaining documents into batches of 250, and DoD OGC counsel for this case assigned a reviewer to each batch. No

documents were excluded from batching due to the possibility that a document contained privileged information.

13. The DoD document review was conducted by a team of DoD OGC staff. Prior to the review, DoD OGC counsel provided the team detailed instructions on the mechanics and criteria for the review. Reviewers received training on how to determine whether a document was responsive, to note whether the document was a “key” document because it contained information especially relevant to the claims or defenses at issue in this and the related litigation, to review the document for any applicable privileges and code the document appropriately, and finally to provide a description of the privileged information for the privilege log. The review team was also instructed to mark a document as “responsive” if the document was remotely related to DoD’s transgender policy, past or present, and further instructed to err on the side of finding responsiveness. In light of the 218 RFPs in this and the three related cases challenging DoD’s transgender policy, DoD did not further review and categorize documents as responsive to particular RFPs. Rather, documents were categorized and produced as they were maintained and collected in the ordinary course of business—by DoD or Military Service component and custodian. Efforts to reorganize the documents by RFPs in this and the related litigation would have added substantial burdens to DoD’s review efforts by requiring DoD attorneys to compare the content of each document reviewed to the list of the 218 RFPs across the four cases. This task would be further complicated by the fact that many responsive documents would be specifically responsive to numerous RFPs.

14. Beyond determining whether a document was responsive, as described above, DoD did not apply non-privilege objections to exclude reviewed documents from production.

15. The review team was also instructed on various privileges including the Deliberative Process Privilege, the Attorney-Client Privilege, Work Product privilege, and the Presidential Communications Privilege so that team members had a working knowledge of the applicable privileges they were likely to encounter as they reviewed the documents. They were further asked to code a document as “needs further review” if they were unsure about the content, had questions on whether a specific code was warranted, or encountered a document with a close privilege call so that an attorney could later locate and review the document to make the appropriate privilege determination. Finally, at the beginning of the review project DoD OGC hosted daily teleconferences among members of the review team to ensure uniformity across the review and to offer the team an opportunity to discuss any unique documents encountered as they worked through the batches.

16. Privilege determinations were generally made at the same time as responsiveness determinations. Reviewers would read an entire document and consider the content, the title, the author, the recipients, and the date of the document’s creation as they contemplated whether the document was privileged. If a document contained privileged material, it was appropriately coded in Relativity, and the reviewer moved on to the next document. These privilege determinations were made only after a document was determined to be responsive, and there were no custodians, documents, or batches that were excluded from review because they contained privileged information.

17. Once the documents were coded as privileged, DoD OGC notified DOJ, and DOJ created and provided DoD OGC privilege logs for several batches of documents. These logs were generated from Relativity by the eDiscovery software and sent to my office in Microsoft Excel format. They were created using a combination of metadata from a document and the

reviewer's coding in Relativity. The logs included the following metadata: author of the email or creator of the document, recipient of any email, date of creation or date the email was sent, title of the document, a privilege determination, and basis for the privilege determination. This information was provided for every document that DoD withheld as privileged in this case. Accordingly, Defendants have long since provided Plaintiffs with the "individualized [privilege] objections" and a description of the documents "being withheld pursuant" to those individualized privilege objections that they seek through this motion. *See* ECF 358 at 2.

18. While Plaintiffs' motion is unclear on this point, it appears that in addition to seeking the individualized privilege objections that Defendants have already provided, Plaintiffs seek to have Defendants reorganize its productions and privilege objections by Plaintiffs' RFPs. Unsurprisingly, neither DoD nor the Military Services organize their files by Plaintiffs' RFPs. Therefore, to reorganize Defendant's production and privilege objections from how those documents were kept in the ordinary course of business to conform to Plaintiffs' desired organizational scheme, DoD and the Military Services would need to re-review the more than 42,000 privileged documents and simultaneously consult with Plaintiffs' RFPs to identify and re-categorize the information per Plaintiffs' specific request. In addition, because DoD and the Military Services conducted separate reviews of their documents and have differing command structures, reorganizing the data according to Plaintiffs' requests would require a coordinated, months-long re-review to group the privileged documents according to each of Plaintiffs' 68 RFPs.

19. Moreover, Plaintiffs' proposed organizational scheme would be unwieldy and virtually unusable as documents from primary custodians involved in the development of these polices for nearly three years could be simultaneously categorized into more than a dozen of

Plaintiffs' 68 RFPs. If required to reorganize the database this way, not only would DoD be providing Plaintiffs with the same information they currently possess (organized in a manner inconsistent with how it was collected or kept in the ordinary course of business), but the new database would be unmanageable due to the large number of duplicate entries Plaintiffs' proposed organization would create.

20. Finally, Plaintiffs' proposed reorganization will net them no new information. DoD OGC privilege logs already include the metadata needed to locate when a document was sent, created, or received by any particular custodian. Given that there are three related cases, and 218 total RFPs across the four cases, if DoD OGC had to reorganize the entire production and the privilege logs six separate times to accommodate each Plaintiffs' (including the State Plaintiffs) organizational preferences, the entire project could take a year to accomplish and in each instance the final product would be less manageable than what DoD and the Military Services have already provided.

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

EXECUTED this 29<sup>th</sup> day of August 2019, in Arlington, VA.



ROBERT E. EASTON  
Director, Office of Litigation Counsel