The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
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.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL DEFENDANTS TO ADEQUATELY RESPOND TO PLAINTIFFS' FIRST, SECOND, AND THIRD SETS OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND INTERROGATORIES

NOTE ON MOTION CALENDAR:
August 30, 2019

INTRODUCTION

A basic tenet of the Federal Rules of Civil Procedure is that a party must provide sufficiently detailed information in response to discovery requests, including whether and how the responding party's objections limit their responses to those requests, such that the propounding party can understand the nature of what is being withheld and determine whether and to what extent to negotiate those limitations before seeking the court's assistance. Plaintiffs' Motion to Compel seeks precisely that. Plaintiffs seek to compel only this specific information pertaining to Defendants' discovery objections and responses. Plaintiffs do not—as Defendants appear to misunderstand or misleadingly suggest—move on the adequacy of any one particular request's objection or response or cause Defendants to "invoke" any particular privilege at this time. Before the parties can narrow the disputes among themselves or bring any outstanding disputes before this Court, they first must be able to understand the other party's positions, and Defendants' current discovery responses fail to contain sufficient detail for Plaintiffs to meaningfully understand what information Defendants are withholding and on what basis. Complete discovery responses are all the more important given that Defendants have withheld on various grounds *over half* of the responsive documents in this case.

After Plaintiffs filed their Motion, Defendants served revised responses to Plaintiffs' First and Second Sets of Interrogatories and additional information pertaining to the limits of their search for responsive documents. (Dkt. Nos. 371, 371-1, 373; Barsanti Decl., Ex. 1.) These materials do not cure Defendants' discovery response deficiencies or render the dispute moot. Defendants must still be compelled to clearly and adequately respond to all of their discovery objections and responses, including their most recently revised responses, and provide additional information regarding the limits of their search so that the parties may meaningfully meet and confer regarding the sufficiency of these objections and responses moving forward.

ARGUMENT

A. Defendants continue to state boilerplate and undefined objections in response to Plaintiffs' discovery requests.

Defendants' objections to Plaintiffs' discovery requests remain inadequate. Given the widespread deficiencies in Defendants' responses, Plaintiffs have not endeavored to specifically

identify each and every particular deficient RFP or Interrogatory response in their Motion. Rather, Plaintiffs bring this Motion to compel proper responses to *all* of Plaintiffs' RFPs and Interrogatories to the DoD and President Trump because, on the whole, Defendants' objections are boilerplate in nature and/or insufficiently detailed for Plaintiffs to understand their nature and scope.[1] *See Athwal v. Nijjer*, No. C17-00740RSL, 2018 WL 1156233, at *6 (W.D. Wash. Mar. 5, 2018) (compelling defendant to "supplement all of its deficient discovery responses, whether or not they have been addressed by number").

The DoD's objections remain deficient for three reasons. First, the DoD's Privilege Objections are boilerplate despite the production of privilege logs, because they assert the same four to five privilege objections for every single request, even if the request implicates all five types of privileges, only certain privileges, or no privilege at all. (*See* Dkt. No. 358 at 7 (discussing RFP No. 21).) Asserting the same five objections verbatim to every request makes it impossible for Plaintiffs to understand why and to what extent a particular objection is implicated for a particular request, including why for some requests Defendants refuse to produce even a single document. (*See, e.g.*, Dkt. No. 359-4 at RFP Nos. 34 & 35.) The boilerplate nature of the DoD's objections persist even in the DoD's recently revised responses to Plaintiffs' First and Second Interrogatories. (*See* Dkt. No. 373; Barsanti Decl., Ex. 1.) For example, in response to Interrogatory No. 5 in which Plaintiffs request that Defendants state only the date on which President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military," Defendants objected "to the extent" that the request implicated four types of privileges without informing Plaintiffs which privileges are actually implicated. (Dkt. No. 373 at Interrogatory No. 5.)

Second, Defendants' cut-and-paste objections to Plaintiffs' requests on the basis of "All documents and communications," regardless of the text that follows, constitutes a quintessential

[1] Though outside the scope of the current Motion, Defendants seemingly attempt to argue that any discovery outside of Defendants' formulation of its "2018 Policy" is irrelevant. (*See* Dkt. No. 370 at 4.) This is not true. *See Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (suggesting, for example, that Plaintiffs may present evidence that the 2018 Policy was directed by the President); *id.* at 1204 (noting that "the litigation may require the district court to consider the basis of the President's initial decision," including "the President's Twitter Announcement and the 2017 Memorandum," as well as the 2018 Policy).

boilerplate objection. Every request beginning with "All documents and communications" is not "overbroad, unduly burdensome, and disproportionate to the needs of the case" and does not require Defendants "to search for and produce documents throughout the entirety of [the] DoD—a massive, two-million-member organization" (an explanation for the objection that ***was not*** provided in Defendants' discovery responses and only appears in Defendants' opposition brief) (Dkt. No. 370 at 7), because the remaining, substantive text of the request narrows its scope. (*See, e.g.*, Dkt. No. 359-2 at RFP No. 1 ("All Documents and Communications ***related to the Policy***.") (emphasis added).) An objection that is not tailored to the text of the specific request is boilerplate and must be revised.

Third, Defendants' other Nonprivileged Objections too are inadequate; for example, where Defendants object that a particular word is "vague" without explanation other than that it is "undefined." (*See, e.g.*, Dkt. No. 359-2 at RFP Nos. 7, 11, 17, 22, 23; *see also* Dkt. No. 359-6 at RFP No. 36 (objecting to the word "complaint" as "overb[roa]d, unduly burdensome, vague, ambiguous, and undefined" only on the purported basis that "the Department does not maintain a central repository of 'complaints'").) All of Defendants' objections must be revised for clarity and to explain *why* the objection is purportedly vague or overly broad or too burdensome.

With respect to President Trump, Defendants have pasted the same boilerplate Privilege Objections even where the request could not conceivably call for privileged information. Indeed, they have confirmed that he "will not produce privileged *or non-privileged* documents and information." (Dkt. No. 359-1 at 8 (emphasis added).) As just one example, RFP No. 11 requests, "All Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs." (Dkt. No. 359-1 at RFP No. 11.) It is difficult to see how all privileges are implicated in documents that simply reflect what third parties visited the White House, which may not even include the President or a close advisor, on a particular date.

Defendant Trump's (and in some cases, the DoD's) boilerplate assertion of the presidential communications privilege over every single discovery request regardless of the request's scope makes it impossible for Plaintiffs to limit the scope of this dispute before it reaches the Court.

Defendants must be compelled to identify, at the very least, which discovery requests they claim implicate the presidential communication privilege in order for Plaintiffs to be able to make their "preliminary showing of need" in the first instance. (Dkt. No. 370 at 5.) That does not compel Defendants to formally "invoke" any particular privilege, but to comply with the Rules. Otherwise, Plaintiffs' only option to resolve any disputes about these objections is to compel *generally* documents from *all* 68 RFPs served on President Trump and all RFPs under which the DoD has asserted executive privilege. This is not only unworkable, but judicially inefficient.

B. Defendants should be compelled to provide adequate information regarding how their objections have limited their discovery responses.

Defendants' assertion that "identify[ing] specific documents withheld pursuant to each RFP" would be too burdensome and would require "re-reviewing all responsive documents to categorize them as responsive to particular requests" entirely misunderstands Plaintiffs' request to this Court and the requirements of the Federal Rules. (*See* Dkt. No. 370 at 10.) Defendants may meet the Rule 34(b)(2) requirement to "state whether any responsive materials are being withheld on the basis of that objection" in one of two ways: (1) by providing a sufficiently detailed response to *each* discovery request that identifies how the objections asserted to that particular request have narrowed the parameters of Defendants' search for responsive documents or information,[2] or (2) by "stat[ing] the limits that have controlled the search for responsive and relevant materials." Fed. R. Civ. P. 34(b)(2)(C) advisory committee's note to 2015 amendment. Defendants have not satisfied either approach.

Defendants now—for the first time, and only after Plaintiffs filed their Motion—provided information about how the DoD collected, searched for, and reviewed responsive documents. (*See* Dkt. No. 371-1.) This information confirms Plaintiffs' suspicion, as identified in their Motion at Dkt. No. 358 at 11–12, that Defendants' search terms were insufficient for targeting

[2] Defendants rarely comply with this obligation. *See, e.g.*, Dkt. No. 359-6 at RFP No. 38 ("Subject to and without waiving the above objections, Defendants will produce nonprivileged documents containing general treatment and cost data for current service members with a diagnosis of gender dysphoria and data regarding applicants for accession with a diagnosis of gender dysphoria through February 2019 that are responsive to this request and prepared at the request of the House Armed Service Committee in Defendants' possession, custody, or control.").

documents responsive to a number of RFPs, for example RFP Nos. 11 and 26, despite Defendants' initial responses that they "will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control."

Yet, Defendants' responses remain deficient where their search methodology is vague. For example, although Defendants purport to provide the full list of custodians from whom they collected responsive documents (Dkt. No. 371-1 ¶ 6), they include a footnote indicating that there may be "other individuals involved in the development of the DoD transgender policy" from whom Defendants may or may not have searched for responsive documents without clarifying whether they searched the files of these "other individuals" or not. (*Id.* at n.1.) As another example, in paragraph 11, Defendants state that certain custodians were instructed to search through their individual computers, files, and email accounts "using search terms ***similar to those used*** for the digital search" (*id.* ¶ 11 (emphasis added)), without stating with specificity the search terms used or the methods by which these custodians identified relevant information. Plaintiffs cannot meaningfully meet and confer without Defendants' full list of custodians, search terms, or other sufficiently specific information about Defendants' search methodology.

Additionally, Defendants have still not provided adequate responses from President Trump or produced ***any*** information about how President Trump searched for, collected, or reviewed responsive documents. Defendants' use of semantics to delay is apparent. Defendants state in their Opposition that because the President stated that he will not produce any documents, "it is plain that documents ***may*** have been withheld pursuant to objections." (Dkt. No. 370 at 9 (emphasis added).) This qualification is precisely the issue. Plaintiffs are unable to discern for each request whether documents have, in fact, been withheld. Plaintiffs have issued 68 RFPs on President Trump who, in response to every single RFP, has issued numerous objections before generally stating, "The President will not produce any documents responsive to this RFP." (*See* Dkt. Nos. 359-1, 359-3, 359-5.) Plaintiffs are left speculating if there are any responsive documents at all to a particular request. With respect to the presidential communications privilege, Defendants state that "virtually all" of the discovery directed to the President is subject to the privilege (*see, e.g.*, Dkt. No. 359-1 at 5), which indicates that *at least some* documents are

not subject to the privilege. Yet, President Trump has not yet produced a single document.

As discussed above, the purpose of this Motion is to compel clear, adequate discovery objections and responses to facilitate later meet and confer negotiations regarding the scope of the parties' discovery. At a minimum, Plaintiffs must know whether any documents and information are being withheld for each request in order to narrow the parties' disputes before the Court.

Finally, Defendants' responses are deficient where no response was provided at all. (*See, e.g.*, Dkt. No. 359-2 at RFP Nos. 5, 7, 14.)

C. Any alleged delay is the result of Defendants' own actions.

Defendants' argument that Plaintiffs have unreasonably delayed in raising discovery disputes before this Court, or that any delay is "highly prejudicial" to Defendants, is astonishing. (Dkt. No. 370 at 11–12.) As this Court is well aware, it is *Defendants* who have continually delayed the discovery process both formally, through numerous motions for reconsideration; motions to stay discovery; and mandamus petitions,[3] and informally, by providing inadequate objections and responses to Plaintiffs' discovery requests; by declining to remedy these deficiencies through the meet-and-confer process; and by forcing Plaintiffs to move to compel this information—only to provide some of the requested information after Plaintiffs filed their Motion. Any perceived burden on Defendants to cure deficiencies in their discovery responses and revise their document collection process is solely a result of Defendants' improper delay tactics and is certainly not due to any unreasonable delay by Plaintiffs.

CONCLUSION

For the reasons discussed in Plaintiffs' Motion and all other reasons discussed herein, the Court should issue an order compelling all Defendants to adequately respond to all three sets of Plaintiffs' RFPs and Interrogatories.

[3] *See, e.g.*, Dkt. Nos. 300–302, 312, 315.

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Respectfully submitted September 4, 2019.

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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 all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on September 4, 2019.

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