

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 2, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action No. 17-cv-1597 (CKK)
v.)	
)	
MARK T. ESPER, in his official capacity as Secretary of Defense, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**PARTIES’ JOINT STATUS REPORT IN RESPONSE
TO SEPTEMBER 13, 2019 OPINION AND ORDER**

In the September 13, 2019 Memorandum Opinion and Order (Dkt. 237, the “Opinion and Order”), this Court concluded, *inter alia*, that “Defendants may not assert the deliberative process privilege over documents that were used or considered in the Panel of Experts for the Transgender Policy Review’s (the “Panel”) development of the Mattis Plan[.]” *Id.* at 2. The Court acknowledged “that this conclusion will likely still require the Court to determine whether or not certain individual documents fall into this subcategory of documents which is not protected by the deliberative process privilege.” *Id.* The Court further concluded that “the parties need to conduct additional negotiations to determine whether or not Plaintiffs’ narrowed requests for the raw data, personnel files, and field reports supporting the statistical summaries and conclusions of the Mattis Report remain overly burdensome.” *Id.* Accordingly, the Court ordered the parties to meet and confer, directing them to focus on “Plaintiffs’ request for data underlying Defendants’ summary statistics and conclusions,” in light of the Court’s “overarching guidance on the breadth and scope of discovery relevant to this lawsuit.” *Id.* at 2, 25. The Court further ordered the parties to file a joint status report by October 25, 2019, “indicating how they intend to proceed given the findings

and conclusions” in the Opinion and Order, including “whether or not additional briefing on discovery issues is necessary.” *Id.* at 3, 26.

The parties met and conferred telephonically on September 27, 2019, October 8, 2019, and October 22, 2019. At the outset, Defendants preserve their objection for purposes of appeal to the Court’s finding that they may not assert the deliberative process privilege over these documents, but will produce these materials in response to the Opinion and Order at this time.

In response to the Opinion and Order, Defendants have agreed to produce an unredacted version of the Administrative Record and unredacted meeting minutes of the Panel (which contain a record of the deliberations of the Panel members)¹ by November 1, 2019. Defendants have also agreed to produce by November 22, 2019, a majority of the documents included on the five *Vaughn* indices produced to Plaintiffs in May 2019 that are documents and communications to or from voting members of the Panel dated from September 14, 2017 to March 23, 2018, previously withheld pursuant to the deliberative process privilege and that were used or considered in the development of the Mattis Plan.²

Defendants will continue to withhold from production documents on the *Vaughn* indices that pertain to “other events” that Defendants believe are not encompassed by the Opinion and Order. *Id.* at 11. As examples of “other events,” Defendants have identified at least two categories of documents which Defendants maintain were inadvertently included on the *Vaughn* indices: (i) documents pertaining to the implementation of the Court’s preliminary injunction, *see* Order of October 30, 2017, Dkt. 60, and (ii) deliberations pertaining to individual service members

¹ Defendants reserve their rights to preserve certain redactions of personally identifiable information (“PII”) in these documents.

² Defendants reserve their rights to preserve certain redactions of PII and any redactions made on the basis of other privileges in these documents (i.e., attorney-client privilege or attorney work product protection).

unrelated to the Panel or the development of the Mattis Plan. Defendants plan to identify on the *Vaughn* indices which documents they believe fall into an “other events” category and provide a list of those documents to Plaintiffs by November 22, 2019. If Plaintiffs disagree with any of Defendants’ designations, the parties will meet and confer before raising any such disputes to the Court.

Defendants also agree to conduct a search for and produce documents responsive to all of the specific data requested by Plaintiffs, other than individual service member medical records and personnel records. The parties continue to dispute the scope of documents that must be produced relating to the development of the Mattis Plan, and whether Defendants must produce individual service member medical and personnel files. The parties’ respective positions on these two issues follow.³

PLAINTIFFS’ POSITION

As this Court held, Defendants cannot assert the deliberative process privilege to shield documents that were used or considered: (i) by the Panel of Experts or (ii) in the development of the Mattis Plan. *See* Dkt. 237 at 11, 16, 20-21. Defendants narrowly read the Opinion and Order, seeking to limit its scope to communications among members of the Panel rather than documents from and communications among individuals whose work related to the Panel or the development of the Mattis Plan. Defendants request additional briefing to further parse the categories of documents to be produced and continue to delay the progress of this litigation. Plaintiffs respectfully submit that the Court’s guidance is clear, and that the Court can provide any further necessary guidance to the parties in response to this submission without the need for further

³ To the extent the Court would find it helpful, the parties respectfully request oral argument on these issues pursuant to Local Civil Rule 7(f) or a teleconference with the Court as contemplated by Your Honor’s Individual Rule 8 (Dkt. 5).

briefing. Accordingly, Plaintiffs seek a reasonable schedule for completing fact discovery so that this matter can be decided on the merits, as set forth below.

I. Documents Used or Considered in the Development of the Mattis Plan

Defendants agree that an unredacted version of the Administrative Record (which was originally produced in heavily redacted form) must be produced pursuant to the Opinion and Order. Defendants also agree that documents used or considered in the development of the Mattis Plan that were included on the *Vaughn* indices produced to Plaintiffs in May 2019 must be produced.⁴ In the course of meeting and conferring, Defendants invited Plaintiffs to propose document custodians—other than members of the Panel—whose communications fall within the scope of the Opinion and Order. Based on unredacted documents produced to date, Plaintiffs identified 41 individuals who attended Panel meetings, presented to the Panel, prepared material for the Panel’s review, or otherwise worked on what ultimately became the Mattis Report. Those individuals are:

*Adirim, Terry	*Arendt, Christopher	*Barna, Stephanie	*Brown, Gary
Burke, Robert	*Bushman, William	Clardy, Herman	Clifford, James C.
Crandle, Darse	Davis, Lisa	Davis, Gary	*DeMartino, Tony
*Findley, Andrew	Friedman, Andrew C.	Gainey, Andrew	*Gearhart, Lee
Georgemiller, Randy J.	Gleishmann, Rachel	Grosso, Gina	*Hebert, Lernes
Hiller Lauby, Melissa D.	Hoffmann, Matt	Kelly, Bill	Kremer, Kyle
Krueger, Mary	*Mattis, James	*Miller, Stephanie	Mulcahy, Patricia
Narvaez-Woods, Dorothy	Nelson, Michael	Nowell, John	Overbeek-Wager, Erika
Rincon-Zahm, Christina M.	Rocco, Michael	Saner, Jennifer J.	Selva, Paul J.
Sitterly, Dan	Soper, Martha	*Sweeney, Kevin	Wellman, Aaron
*Work, Robert			

Plaintiffs note that as reflected in the Declaration of Robert E. Easton dated August 29,

⁴ As noted on pages 2-3 *supra*, Defendants take the position that at least two categories of documents regarding “other events” listed on the *Vaughn* indices do not fall within the scope of the Opinion and Order. Plaintiffs reserve their rights to seek relief from the Court with respect to these documents when Defendants specifically identify them.

2019, filed in the related *Karnoski* litigation, Defendants have already collected and reviewed 13 of these custodians' documents (indicated with asterisks above), whom Defendants characterize as "key individuals." No. 17-cv-01297 (W.D. Wash.) Dkt. 371-1, at 3-4 (Attached hereto as Exhibit A). Defendants do not object to producing these documents on the grounds of undue burden. And Defendants have offered no reason why these documents are not relevant and proportional to Plaintiffs' claims, stating that Defendants believe only documents of "decision makers" should be produced. Accordingly, Plaintiffs respectfully request that the Court order that these 13 custodians' documents,⁵ previously withheld on the basis of the deliberative process privilege, be produced.⁶

II. Data Underlying Defendants' Summary Statistics and Conclusions

Plaintiffs seek discovery into Defendants' proffered justifications for the Mattis Plan, on issues concerning transgender service including the impact on military readiness, medical costs, and unit cohesion. The Court ruled that it requires access to this evidence to determine whether the Mattis Plan "reasonably and evenhandedly regulates the service and accession of transgender military personnel." Dkt. 237 at 22 (citing *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986)).

Accordingly, Plaintiffs seek medical records of service members who have been diagnosed with gender dysphoria since the announcement of the Carter open service policy on June 30, 2016. Plaintiffs seek these documents in order to distinguish between medical or mental health visits that

⁵ Plaintiffs will review the unredacted Administrative Record once it is produced and then continue to meet and confer with Defendants with respect to the remaining 28 proposed custodians. Plaintiffs reserve their rights to seek relief from the Court with respect to these custodians' documents.

⁶ By letter dated September 20, 2019, Defendants sought to claw back 29 documents on the basis of privilege, including deliberative process privilege. Defendants have represented that they are re-evaluating that claw-back notice and will advise Plaintiffs by November 22, 2019, which of the identified documents they still seek to claw back.

were administratively required and those that reflect genuine mental health concerns. Plaintiffs request these documents in order to rebut Defendants' assertion that transgender service members are less mentally stable.⁷ Plaintiffs also seek the personnel records of these service members, to show that transgender service members do not have a higher rate of nondeployability than do other service members, and to rebut Defendants' argument that transgender service members disrupt unit cohesion.⁸ As the population of service members diagnosed with gender dysphoria since June 2016 is discrete (approximately 1500 individuals), Plaintiffs respectfully submit that the burden of collecting and producing these documents is proportional to the needs of the case. And, as this Court has noted, Defendants' concerns for service member privacy⁹ can be addressed by redaction or heightened confidentiality designation. Dkt. 237 at 21-22. Plaintiffs offered to accept these documents with a heightened confidentiality designation to eliminate the burden on Defendants of performing redactions of PII.

Plaintiffs have also identified to Defendants specific documents or assertions for which Plaintiffs seek the underlying data. Defendants have agreed to search for and produce documents in each of the categories Plaintiffs have identified except for the personnel files and medical and mental health records of individual service members diagnosed with gender dysphoria. To the extent Defendants conclude that any of this data has already been produced, Plaintiffs respectfully request that Defendants identify it by Bates range. Because of the lack of metadata produced by Defendants, which is the currently the subject of ongoing meet and confers between the parties,

⁷ Plaintiffs also seek these medical records to rebut Defendants' contentions that transgender service members who receive treatment for their gender dysphoria have higher rates of suicide and suicidal ideation.

⁸ Defendants have represented that personnel files are unlikely to reflect a complete record of deployments, and may not reflect limited duty status or other potential bases for non-deployability.

⁹ Defendants have represented that, by way of example, individual service member social security numbers appear on every page of military medical files.

Plaintiffs are unable to search Defendants' productions by document custodian or isolate documents based on how they were saved in the ordinary course of business. Accordingly, Plaintiffs reserve the right to raise the issues of Defendants' data and metadata production to the Court if the parties are unable to resolve it through the meet and confer process.

III. Plaintiffs' Proposed Schedule

Plaintiffs propose the following schedule:

- December 20, 2019: Defendants complete document production
- March 6, 2020: Parties complete fact depositions
- March 20, 2020: Parties file any discovery motions
- March 27, 2020: Parties exchange affirmative expert reports
- April 24, 2020: Parties exchange rebuttal expert reports
- May 14, 2020: Parties complete expert depositions
- May 15, 2020: Fact discovery ends
- June 5, 2020: Parties file dispositive motions
- August 7, 2020: Parties file motions in limine
- October 5, 2020: Trial

DEFENDANTS' POSITION

I. Defendants' Deliberative Documents

As an initial matter, the scope of the documents Defendants have agreed to produce pursuant to the Court's order is broader than Plaintiffs describe. Defendants have agreed to produce deliberative documents to, from, or presented to voting Panel members in relation to the development of the Mattis plan. Defendants do not intend to limit this production just to communications "among" Panel members, and the forthcoming production will specifically

include all the documents actually considered by the Panel in development of the Mattis plan. However, because the Court specifically found that “Defendants may not assert the deliberative process privilege over documents that were used or considered in the Panel of Experts for Transgender Policy Review’s (the ‘Panel’) development of the Mattis Plan[,],” *see* Dkt. 237 at 2; *see also id.* at 7, 12, 13, 15, Defendants believe that the Court, at least at this time, did not intend to extend its ruling to the deliberative documents of non-Panel members—documents that were not even on Defendants’ *Vaughn* indices or the subject of Plaintiffs’ motion to compel—that were never seen or considered by the Panel.

Plaintiffs originally requested that Defendants expand their forthcoming production beyond the documents on the *Vaughn* indices that were the subject of Plaintiffs’ motion to compel, Dkt. 216, to 41 additional individuals, some of whom played such minor and peripheral roles in the development of the Mattis Plan that they were not even identified by DoD as custodians. Plaintiffs have now narrowed their request to 13 additional individuals, all of whom DoD identified as custodians. However, these individuals still had varying levels of participation with the Panel, and none were voting members of the Panel (although the list does include Secretary Mattis, who was the ultimate decision-maker). For example, only one individual on Plaintiffs’ list was present at the Panel’s final two meetings, where the majority of deliberations took place.

Plaintiffs incorrectly assert that the only consideration for determining whether to add the deliberative documents of these 13 individuals should be the burden on Defendants. In fact, further consideration of the deliberative process privilege would still be required for these materials. Here, Plaintiffs are asking the Court to overrule Defendants’ assertion of the deliberative process privilege as to deliberative documents to and from these 13 additional DoD custodians. This would require the Court to conduct a similar balancing of Plaintiffs’ need for these materials with the

military's countervailing interests in maintaining full and frank discussions regarding contemplated policies and decisions in the future. *See* Dkt. 237 at 17-20. However, these additional deliberative documents, which would not have been seen by voting members of the Panel, are significantly less relevant than documents regarding deliberations and communications of the Panel itself. The deliberative materials to and from the 13 additional individuals Plaintiffs have identified and voting Panel members will already be produced in the November 22, 2019 production, because a voting Panel member would have been either be a recipient or sender of such material. Accordingly, the only additional documents encompassed by Plaintiffs' request are deliberative materials to or from a non-voting attendee of Panel meetings and individuals who were *not* voting members of the Panel. Therefore, the same balancing cannot be applied to the deliberations of these 13 individuals as to the deliberations of Panel members. Further, the balancing test would not be the same among all 13 custodians based on their varying degrees of involvement with the Panel.

Defendants agree that rather than submit briefs to the Court on the meaning of its own Order, the parties would benefit from a telephone conference with the Court for guidance on this issue before Defendants evaluate Plaintiffs' new list of 13 additional individuals.

II. Plaintiffs' Request for Approximately 1500 Medical and Personnel Records from Non-Party Service Members

Plaintiffs seek to compel the production of mental health records and personnel records from approximately 1500 non-party military service members diagnosed with gender dysphoria. Defendants propose further briefing on this topic and suggest the following schedule:

Plaintiffs' motion to compel due by November 15, 2019;

Defendants' opposition due by December 6, 2019;

Plaintiffs' reply due by December 20, 2019.

The Court previously suggested that “[b]efore the Court enters any Order on whether or not the discovery of such information should be permitted, the Court requires additional information pertaining to the burdensomeness of such discovery.” Dkt 237 at 25. Defendants request the opportunity to present the Court with further information regarding the burdens of obtaining approximately 1500 non-party service member medical records from Military Treatment Facilities throughout the world and approximately 1500 military personnel files. *See, e.g.*, Decl. of Terry Adirim, Ex. 5, Dkt. 218-5, ¶ 10; *see also St. John v. Napolitano*, 274 F.R.D. 12, 15-17 (D.D.C. 2011) (noting that before ordering the release of medical records both the burden of producing such records and the harm to privacy interests from disclosure of such records should be weighed against the relevance of the records to the litigation).

Further, in addition to burden and relevancy arguments¹⁰ Defendants request to brief the Court on the application of the psychotherapist-patient privilege to the non-party service member medical records, as Plaintiffs specifically seek mental health records. Plaintiffs’ proposed use of these service member medical records is to “differentiate visits required administratively from visits that reflect actual mental health issues[.]” Pls.’ Reply, Dkt. 222 at 9, but this use would likely necessitate release of mental health communications subject to the psychotherapist-patient privilege.

The psychotherapist-patient privilege protects “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment,” *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996), from compelled production under Rule 501 of the Federal Rules of Evidence, “including from compelled production pursuant to pretrial discovery,” *In re Sealed*

¹⁰ As acknowledged by Plaintiffs, Defendants would explain in a potential brief why non-party military personnel files are unlikely to contain the information Plaintiffs seek regarding deployability and unit cohesion.

Case (Medical Records), 381 F.3d 1205, 1213 (D.C. Cir. 2004). This privilege is not subject to balancing due to the confidential nature of a patient and psychotherapist’s relationship. In order for the therapist to provide effective treatment, the patient must feel a sense of trust in order to speak candidly. *Jaffee*, 518 U.S. at 10. Because “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege,” *id.* at 17, the D.C. Circuit has “squarely rejected the position that a court should balance the need for relevant information in the particular case before it against the invasion of a patient’s privacy,” *Koch v. Cox*, 489 F.3d 384, 388-89 (D.C. Cir. 2007).

IV. Defendants Proposed Schedule

Defendants propose the following schedule:

- February 28, 2020: Discovery cut-off;
- April 10, 2020: Deadline to file for Summary Judgment.

Following the production of the Panel’s deliberative materials that Defendants have agreed to produce by November 22, 2019, Defendants believe that the parties can finally conclude the document production phase of discovery, which has already lasted for nearly two years. Defendants assert that an additional three months from that final document production is more than enough time to conduct the remaining fact depositions.

As to expert reports and depositions, the D.C. Circuit recently affirmed, in this case, that “when addressing constitutional challenges to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces...‘the tests and limitations to be applied may differ because of the military context[.]’” *Doe v. Shanahan*, 755 F. App’x 19, 24 (D.C. Cir. 2019) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981), and citing

Goldman v. Weinberger, 475 U.S. 503 (1986)). Further, both concurring opinions in *Doe* found that one way in which military cases differ from ordinary civil litigation is a prohibition on outside expert testimony. *Doe v. Shanahan*, 917 F.3d 694, 706 (D.C. Cir. 2019) (Wilkins, J., concurring) (“[T]he Court noted that it was improper for lower courts to consider plaintiff expert testimony that contradicted the military experts about whether the policies at issue were justified under the circumstances.”) (citing *Rostker*, 453 U.S. at 80–81; *Goldman*, 475 U.S. at 509–10); *id.* at 728 (Williams, J., concurring in result) (noting that the Supreme Court in “*Goldman* dismissed plaintiff’s ‘expert testimony’ as ‘quite beside the point,’ 475 U.S. at 509, and in *Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony,’ 453 U.S. at 81.”). Accordingly, there scheduling deadlines for expert reports and depositions are not necessary or proper. Moreover, Defendants assert that this case should be decided on summary judgment and thus it is unnecessary to set a trial date.

October 25, 2019

Respectfully Submitted,

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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:¹

Exec. Sec. Officials	Title
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
DoD P-R	
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
DoD OGC	

¹ 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 policies 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 29th day of August 2019, in Arlington, VA.



ROBERT E. EASTON
Director, Office of Litigation Counsel