

The Honorable Marsha J. Pechman

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**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, et al.,

Defendants.

No. 2:17-cv-1297-MJP
JOINT STATUS REPORT

1 In advance of the hearing scheduled for December 10, 2019, the parties respectfully provide
2 the following joint status report to update the Court on the status of discovery related to the
3 deliberative process privilege.

4 CURRENT STATUS

5 First, on November 1, and 22, 2019, in response to the order in the related case *Doe 2 v.*
6 *Esper*, No. 17-cv-1597-CKK (D.D.C.), Dkt. 237, Defendants produced to Plaintiffs here: i) an
7 unredacted version of the Administrative Record; ii) unredacted meeting minutes of the Panel of
8 Experts; iii) documents, testimony, and data reviewed by voting members of the Panel along with
9 the deliberations on those materials; and iv) communications to or from voting members of the
10 Panel dated from September 14, 2017 to March 23, 2018, pertaining to the development of the
11 Department of Defense's policy on military service by transgender individuals and individuals with
12 gender dysphoria, that were previously withheld pursuant to the deliberative process privilege.¹ A
13 total of 791 documents were produced in the most recent November 22, 2019 production, and
14 Defendants contend this production entirely satisfies the portion of this Court's November 19 order
15 (Dkt. 394) adopting the reasoning in the *Doe* Court's September 13, 2019 order.

16 Second, in accord with the Court's order of November 19, 2019, Defendants, on November
17 15 and 26, 2019, provided Plaintiffs with the remaining custodians and search terms used to perform
18 document collections from the Department of Defense and the Military Services in this case. As a
19 result, Plaintiffs have now received the complete list of the 156 custodians as well as the collections
20 and search methodology employed by the Department of Defense and the Military Services in
21 response to discovery requests in this and the related three cases.

22 Third, as ordered by the Court, Plaintiffs, on November 29, 2019, provided Defendants with
23 a list of five Requests for Production ("RFP"), sorted by order of priority, for which Plaintiffs seek
24 to compel deliberative materials. Those RFPs are:

- 25 **1. RFP No. 29:** All Documents or Communications relating or referring to the February
26 2018 Department of Defense Report and Recommendations on Military Service by
27 Transgender Persons (the "Report and Recommendations"), including without

28 ¹ The Air Force recently supplemented its production as to two custodians. The additional materials
as to these two custodians are currently being processed for production to Plaintiffs.

1 limitation: (a) all documents received, reviewed, or considered by the Department of
2 Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any
3 other group or committee within the Department of Defense that reviewed or
4 considered transgender issues; (b) all Communications to, from, or copying the
5 Department of Defense, Panel of Experts, Transgender Service Policy Working Group,
6 and/or any other group or committee within the Department of Defense that reviewed
7 or considered transgender issues; (c) all Documents reflecting, containing, or setting
8 forth any information or data received, reviewed, or considered by the Department of
9 Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any
10 other group or committee within the Department of Defense that reviewed or
11 considered transgender issues; (d) all Documents relating, reflecting, or referring to
12 matters discussed at any meeting of the Panel of Experts, Transgender Service Policy
13 Working Group, and/or any other group or committee within the Department of
14 Defense that reviewed or considered transgender issues; (e) all drafts of the Report and
15 Recommendations.

- 16
- 17 **2. RFP No. 36:** All documents reflecting, referring, or relating to any complaints arising
18 from or attributed to open service by transgender service members, accessions by
19 transgender individuals, or the Carter Policy.
- 20 **3. RFP No. 33:** All Documents or Communications reflecting, referring, or relating to any
21 policies that were considered as alternatives, modifications, or refinements to the policies
22 set forth in the March 23, 2018, Memorandum.
- 23 **4. RFP No. 44:** Documents sufficient to show, for each service branch since June 30, 2016,
24 the name, rank, and service unit of each transgender service member rendered non-
25 deployable on account of gender dysphoria or transition-related medical care, and the
26 duration of and specific reason(s) for such non-deployability.
- 27 **5. RFP No. 15:** All documents or communications relating to Secretary of Defense Ash
28 Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender
military service and related healthcare.

Fourth, for RFP Nos. 29, 36, 33, and 15, Plaintiffs also provided Defendants with lists of
additional search terms that Plaintiffs request Defendants apply to their current document
collections.²

Fifth, the parties have met and conferred, and their positions with respect to each RFP are
set forth below.³

² For RFP No. 36, Plaintiffs also requested that Defendants search additional custodians.

³ Pursuant to the Court's directive to coordinate discovery, Plaintiff-Intervenor State of Washington
has: (1) agreed with Plaintiffs' first five prioritized RFPs; (2) identified for Defendants its discovery
requests that Washington understands to substantially overlap with Plaintiffs' prioritized RFPs; and

DEFENDANTS' POSITIONS**I. RFP Nos. 29 and 15.**

Defendants contend that RFP Nos. 29 and 15 are each far too broad to apply the balancing test set forth in *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156 (9th Cir. 1984). Together, RFP Nos. 29 and 15 encompass nearly every deliberative document still withheld in this case. By requesting all documents “relating” to the February 2018 Department of Defense Report and Recommendation, RFP No. 29 seeks essentially all deliberative documents from September 14, 2017 (the date the panel of experts was established) to March 23, 2018 (the date DoD’s current policy was publicly released). *See Mass. v. HHS*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) (A request for documents “relating to” a subject “is usually subject to criticism as overbroad since life, like law, is a seamless web, and all documents ‘relate’ to all others in some remote fashion.”). Similarly, by requesting all documents “relating” to the DTM containing the Carter policy, RFP No. 15 seeks essentially all deliberative documents from July 13, 2015 (the date that Secretary Carter announced a review of regulations pertaining to military service by transgender individuals) to June 30, 2017 (the date Secretary Mattis delayed the Carter accession policy). Based on preliminary searches using these date ranges, Defendants have identified approximately 15,000 documents responsive to each RFP—over 30,000 documents total—that are currently withheld pursuant to the deliberative process privilege.

Thus, in selecting RFP Nos. 29 and 15, Plaintiffs once again have selected categories that encompass thousands of documents and communications generated and transmitted by officials at varying levels in DoD, Department of Homeland Security, Army, Navy, Air Force, Coast Guard, Defense Health Agency, the National Guard Bureau, and the Office of the Chairman of the Joint

(3) participated in the parties’ meet and confers following the Court’s November 19, 2019, order. Defendants have not disagreed with Plaintiff-Intervenor that its identified RFPs should fall entirely within Defendants’ production of Plaintiffs’ first five prioritized RFPs. Plaintiff-Intervenor’s understanding from Defendants is that it did not isolate its searches by geographic location (i.e. within Washington State or based on service members that are residents of Washington State) and that Defendants have not searched formal complaint databases for records responsive to Plaintiff-Intervenor’s RFP No 12. Defendants have not yet taken a position as to whether they will agree to conduct those searches.

1 Chiefs of Staff, both uniformed and civilian, career employees and political appointees from two
2 administrations, across numerous ranks, positions, and areas of professional expertise over a period
3 of four years. *See* Dkt. 380 at 8; Dkt 381-1 ¶ 11. In doing so, Plaintiffs again seek to bypass the
4 Ninth Circuit’s decision and avoid the “granular” analysis it describes. *Karnoski v. Trump*, 926 F.3d
5 1180, 1206 (9th Cir. 2019).

6 Plaintiffs further contend that this Court already found that the deliberative process privilege
7 was overcome as to all documents responsive to RFP 29. However, this Court specifically adopted
8 the *Doe* Court’s ruling, which as this Court also noted ordered Defendants to “produce documents
9 from three of the categories Plaintiffs seek to compel in this case Panel Communications; Testimony,
10 Documents, and Data the Panel Received; and Panel Deliberations and Decisions.” (Dkt. No. 389
11 at 2 (citing Dkt. No. 364 at 7).) Defendants complied with that order with its November 1 and 22
12 productions except for a forthcoming supplementation from two Air Force custodians. Defendants
13 did not interpret this Court’s order as extending the *Doe* Court’s ruling to the deliberative documents
14 of non-Panel members—a subset of documents that were not even before that Court when it issued
15 its ruling, *see* Dkt. 389-1 at 7-9. An extension of the *Doe* Court’s order to all non-Panel members
16 would have required a separate *Warner* analysis based on the varying levels of seniority and
17 involvement between Panel members versus non-Panel members. *See Karnoski v. Trump*, 926 F.3d
18 1180, 1206 (9th Cir. 2019) (recognizing that officials’ seniority and their role in the decision making
19 process is an essential factor in the *Warner* balancing test).

20 Defendants have repeatedly suggested that Plaintiffs select narrower categories limited by
21 particular custodians, topics, and date ranges, but Plaintiffs continue to decline to do so. As
22 Defendants noted in the recent hearing before this Court, this method has resulted in the agreed
23 upon release of several categories of documents in the related *Doe* litigation without the need for
24 judicial intervention. Moreover, Defendants specifically arranged for an early production of meeting
25 minutes from the Panel (the November 1 production), which contain the names of non-Panel
26 members who attended each Panel meeting, to assist Plaintiffs in narrowing their requests. Further,
27 during the meet and confer with Plaintiffs, Defendants specifically identified, by name, non-Panel
28 members that were present during significant Panel deliberations. However, Plaintiffs continue to

1 insist on the deliberative process privilege being set aside *en masse* based on only on a date range
2 limitation.

3 In any event, Plaintiffs should at least be required to review the approximately 6,000 pages
4 of deliberative material from the actual panel members that Defendants recently produced in
5 response to the *Doe* order, and articulate why there remains a need for additional deliberative
6 materials from more than 100 other Department of Defense and Military Services custodians, with
7 widely varying positions and involvement in the development of the policy, and why the need for
8 their deliberations overcomes the military's interests in full and frank communication about
9 policymaking.⁴ *Id.*

10 II. RFP Nos. 36, 33, and 44.

11 Defendants agree that RFP Nos. 36, 33, and 44 are sufficiently narrow for the Court to
12 conduct the *Warner* balancing test. RFP No. 36 encompasses documents relating to complaints
13 under the Carter policy. Defendants have agreed to produce to Plaintiffs the EO complaint that is
14 mentioned in the Department of Defense Report and Recommendation. In addition, Defendants
15 have agreed to apply search terms to their database to determine whether Defendants are currently
16 withholding any additional documents pursuant to the deliberative process privilege that are
17 responsive to RFP No. 36. Defendants will then meet and confer with Plaintiffs following these
18 searches to determine their respective positions on the continued withholding (or agreed release) of
19 any documents responsive to RFP No. 36 pursuant to the deliberative process privilege.

20 RFP No. 33 encompasses documents relating to any policies considered as alternatives,
21 modifications, or refinements to the Department of Defense's current policy. Defendants have
22 already produced to Plaintiffs, as part of the November 22, 2019 production, documents detailing
23 the different policy options, or "courses of action", presented to the Panel of Experts. Defendants
24 have also produced the briefing slides presented to Secretary Mattis that outlined the Panel's

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26 ⁴ As Plaintiffs note in their section of the JSR, they proposed to narrow their request pertaining to
27 RFP 15 to similar types of information used or considered in the formulation of the Carter Policy
28 as to what the Government recently produced in response to the *Doe* Order. The Government is
still considering this proposal and has already agreed to produce some of this information in the
form of the Carter Transgender Working Group summary and report.

1 recommendation. Notwithstanding these prior productions, Defendants have agreed to search their
2 database for additional documents (if any) withheld pursuant to the deliberative process privilege
3 that reflect any additional policy options or “courses of action” presented to Secretary Mattis.
4 Defendants will then meet and confer with Plaintiffs following these searches to determine their
5 respective positions on the continued withholding (or agreed release) of any documents responsive
6 to RFP No. 33 pursuant to the deliberative process privilege.

7 Finally, RFP No. 44 seeks documents reflecting information about service members
8 rendered non-deployable due to gender dysphoria or transition-related medical care. Defendants
9 have already produced to Plaintiffs data on the number of such servicemembers, including
10 information that was presented to the Panel of Experts. In addition, Defendants have agreed to
11 apply search terms to their database to determine whether Defendants are currently withholding any
12 additional documents pursuant to the deliberative process privilege that are responsive to RFP No.
13 44. Defendants will then meet and confer with Plaintiffs following these searches to determine their
14 respective positions on the continued withholding (or agreed release) of any documents responsive
15 to RFP No. 44 pursuant to the deliberative process privilege.

16 **III. Additional RFPs.**

17 While Defendants would not object to Plaintiffs swapping RFP Nos. 29 and 15 for more
18 narrow RFPs actually capable of analysis under the *Warner* factors, Defendants submit that Plaintiffs
19 should not be permitted to identify more than five RFPs in total for the Court’s consideration.
20 Defendants have already produced the deliberations of the Panel of Experts and have agreed to
21 produce the final report from the Carter Transgender Working Group (without the need for judicial
22 intervention), and Plaintiffs cannot show a need for further deliberative materials sufficient to
23 overcome the Government’s national security interests in non-disclosure. Discovery closes on
24 February 18, 2020, and further prolonging of this deliberative process privilege dispute is not
25 warranted.

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PLAINTIFFS' POSITIONS

I. RFP No. 29.

Documents responsive to RFP No. 29 are within the scope of the Court's November 19, 2019 Order finding that "the deliberative process privilege does not apply to documents that were used or considered in the development of the Mattis Plan," including panel communications, testimony, documents, and data the panel received, and panel deliberations and decisions. *See* Dkt. 394 at 4. Based on the Court's order, on November 25, 2019, Plaintiffs requested that the government produce all documents responsive to RFP No. 29 (and four other RFPs) because RFP No. 29, consistent with the Court's order, requests documents "that were used or considered in the development of the Mattis Plan." The government responded that it viewed the materials called for by RFP No. 29 as beyond the scope of the Court's order and the *Doe* order, and declined to produce any additional documents beyond the documents already produced in the *Doe* litigation. The government, however, has taken an overly narrow view of the *Doe* order, for example limiting the scope of production to only voting members of the Panels—even though it is beyond dispute that others were involved. The government insists it has produced all documents called for under the *Doe* order, but its compliance remains in dispute. In any event, even taking the government's position at face value, the Court's adoption of the *Doe* court's reasoning applies with equal force to the documents responsive to RFP No. 29. The documents go to the heart of the deliberative process that the government cites as the basis of its claim that military deference is owed to the Ban, and the government does not explain why the analysis would be any different for RFP No. 29 than the documents it agrees are encompassed within the Court's order.

The government next claims RFP No. 29 is overbroad and calls for the production of all documents from September 2017 until the publication of the Mattis Memorandum in March 2018. But the text of the request is clear in its limitation, requesting documents leading up to the February 2018 report. There are separate requests that directly seek documents regarding the Mattis Memorandum such as RFP No. 33. Finally, the government points to more than 100 custodians to claim that Plaintiffs' request is overbroad. However, the government has refused to provide Plaintiffs with a proposed list of custodians identifying those most involved in the deliberative

1 process to allow Plaintiffs to further narrow its requests for withheld documents. The information
2 of who was most involved is uniquely in the government's possession. If the government wants
3 Plaintiffs to narrow their request to a subset of custodians, it should not be Plaintiffs' burden to
4 guess in the dark as to who are the most appropriate.

5 **II. RFP No. 15.**

6 The government's primary complaint about RFP No. 15 is overbreadth: the government
7 claims it is too broad to apply the *Warner* balancing test. Plaintiffs already proposed a means for
8 narrowing this request, however, asking the government to produce similar types of information
9 used or considered in the formulation of the Carter Policy as it is already obligated to produce for
10 the Ban, i.e. communications among the working group, documents shared with the working group,
11 testimony and data provided to the working group, and deliberations and decisions that resulted in
12 the Carter Policy. This information is relevant to understanding who was involved, what information
13 was considered, and the deliberations underlying a diametrically opposite policy decision on military
14 service by transgender individuals less than two years prior to the Panel's deliberations and policy
15 recommendations. Given that two courts, including this Court, have already applied the balancing
16 test to a similar set of documents, the government cannot credibly argue this universe is too broad
17 under *Warner*. Plaintiffs proposed this as a means of narrowing RFP No. 15 but the government has
18 not accepted this proposal.

19 **III. RFP Nos. 36, 33, and 44.**

20 Both RFP No. 36 and RFP No. 44 seek quintessentially factual information, meaning the
21 deliberative process privilege does not apply. While the government has agreed to search its database
22 of previously collected documents for these requests, the parties discussed that the government's
23 current collection is unlikely to contain all of the documents requested and additional collections and
24 review would likely need to be done to respond fully to these requests. The government agreed to
25 look into what further collection would entail, but has not yet agreed to actually perform the searches.
26 Furthermore, as to the government's agreement to perform searches in its current database of
27 collected documents, it has not yet done those searches, nor has it informed Plaintiffs what search
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1 terms it will apply. Given this, Plaintiffs do not know how many responsive documents are being
2 withheld based on the privilege at this time.

3 As to RFP No. 33, the government has taken an overly narrow view of the request to seek
4 only alternative “courses of action” rather than all deliberations about alternative policies. Like RFP
5 Nos. 36 and 44, the government has committed to running search terms within its current collection
6 for this request to identify the universe of responsive documents being withheld, but had not
7 disclosed those search terms yet.

8 **IV. Additional RFPs.**

9 The government treats the Court’s order to initially hear disputes on the first 5 RFPs in terms
10 of Plaintiffs’ prioritization as the beginning and end of the process to resolve its privilege claims.
11 That is not based on anything in the Court’s November 19 order, nor is it warranted under the facts.
12 Plaintiffs anticipate the Court’s ruling on these first 5 RFPs will help guide the parties’ disputes on
13 the remaining requests, potentially obviating the need for the Court’s intervention on requests that
14 are substantially similar in nature and where the Court concludes the privilege is either inapplicable
15 or otherwise overcome. However, given the government’s position on the process, it seems unlikely
16 the parties will be able to resolve any further disputes informally and without the Court’s
17 intervention. The government does not appear willing to withdraw any objection without a court
18 order, and Plaintiffs thus believe further discussion on the dispute process going forward is necessary
19 at the initial conference.

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22 Dated: December 6, 2019

Respectfully submitted,

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