

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case 1:17-cv-02459-GLR

Hon. A. David Copperthite

**DEFENDANTS' NOTICE OF PRODUCTION OF DOCUMENTS AND
NOTICE OF SUPPLEMENTAL AUTHORITY CONCERNING PLAINTIFFS'
PENDING MOTION TO COMPEL DELIBERATIVE MATERIALS**

Defendants respectfully provide notice that on November 1, November 22, December 20, 2019, and January 31, 2020, in response to the order in the related case *Doe 2 v. Esper*, No. 17-cv-1597-CKK (D.D.C.), Dkt. 237,¹ Defendants produced to Plaintiffs here: (1) an unredacted version of the Administrative Record; (2) unredacted meeting minutes of the Panel of Experts; (3) documents, testimony, and data reviewed by members of the Panel along with the deliberations on those materials; and (4) communications to or from members of the Panel dated from September 14, 2017 (the date of the Interim Guidance creating the Panel of Experts) to March 23, 2018 (the date of the Presidential Memorandum), pertaining to the development of the Department of Defense's policy on military service by transgender individuals and individuals with gender dysphoria, that were previously withheld pursuant to the deliberative process privilege.² Therefore,

¹ Defendants respectfully disagree with the *Doe* Court's decision to direct disclosure of the Panel's deliberative documents, maintain their right to challenge the decision in further proceedings, and have complied with the *Doe* order. The Department of Defense continues to withhold certain materials on the basis of other privileges or because they contain personally identifying information. See Decl. of Robert E. Easton ¶ 4, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. Jan. 24, 2020), Dkt. 405-2.

² Defendants produced deliberative documents from the non-voting member of the Panel on January 31, 2020, in response to an order issued by the court in the related case *Karnoski v. Trump*, No. 17-cv-1297.

Defendants have now produced the documents from Category 2 of Plaintiffs' pending Motion to Compel, Dkt. 177, and supplemental brief, Dkt. 271, that are even arguably relevant to the District Court's evaluation of the Department of Defense's policy.

In addition, Defendants respectfully provide notice that on January 14, 2020, the *Doe* Court denied the plaintiffs' request for two types of deliberative materials that Plaintiffs seek in this case: (1) deliberative materials that were prepared during the time the Panel of Experts were meeting but were never presented or shown to Panel members; and (2) deliberative materials that post-dated the end of the work of the Panel of Experts. *See* Tr. of Telephone Conference, *Doe 2 v. Esper*, at 7:13–16 (D.D.C. Jan. 14, 2020), Dkt. 293-5 (seeking deliberative “documents or communications that were done that related or were created after the panel’s work that were used in the preparation of the final report”); *id.* at 14:12–15:3 (seeking “not only [deliberative] document[s] that w[ere] literally provided to a voting member of the panel, but also documents and communications that were created in the furtherance of the panel’s work and in the drafting of the Mattis plan”); *id.* at 22:23–25 (“Plaintiffs are asking for any other documents that were prepared or considered either for the briefings or that went into the final report or recommendation.”). The *Doe* Court’s decision supports Defendants’ arguments regarding the scope of the *Doe* Order and Defendants’ arguments concerning the relevance of deliberative materials that were never seen by the Panel of Experts. Although Plaintiffs argued in their Supplemental Brief that the *Doe* Court “affirmed the relevance of documents within [Plaintiffs’ Category 2] in ordering the production of the larger category of ‘documents which were used or considered in the development of the Mattis Plan,’” such as materials from the working groups supporting the Panel, Pls.’ Supp. Br. 12–13, Dkt. 271 (quoting *Doe 2 v. Esper*, No. 17-cv-1597, 2019 WL 4394842, at *10 (D.D.C. Sept. 13, 2019)), the *Doe* Court found that the plaintiffs were not “entitled to anything beyond” materials provided to Panel members because those deliberative documents and communications “wouldn’t be included in their

considerations,” Tr. 20:1–13. The *Doe* Court also declined to order Defendants to produce deliberative materials post-dating the Panel of Experts, such as drafts of the Department of Defense’s Report and Recommendation. *Id.* at 28:3–9 (“I’m not sure that getting a series of different drafts or what they want to highlight or not highlight is going to go anywhere in terms of what their presentation is, as long as it didn’t change from what originally was presented from the panel of experts and the briefings. At least at this point, I’m not going to do anything more in terms of ordering something.”). Finally, the *Doe* Court noted that by seeking deliberative materials that were not provided to the Panel, the plaintiffs appeared to be “fishing around.” *Id.* at 20:4–5. This Court should likewise conclude that Plaintiffs are not entitled to any additional deliberative materials.

A copy of the transcript from the *Doe* hearing is filed on the docket as an exhibit to Defendant’s Opposition to Plaintiffs’ Motion for Leave to Serve Additional Discovery at Dkt. 293-5.

Finally, Defendants respectfully provide notice that in the related case *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), the district court ordered the Department of Defense to produce, among other things, all deliberative documents from September 14, 2017 (the date the Panel was established) to February 22, 2018 (the date of the Mattis Memorandum and accompanying Report).³

³ Specifically, the *Karnoski* Court ordered production of all deliberative documents responsive to the plaintiffs’ request for production number 29, which requested as follows:

All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the “Report and Recommendations”), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any

See Order, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. Feb. 7, 2020), Dkt. 413. On February 11, 2020, the Government filed a petition for a writ of mandamus and motion for a stay of compliance with the district court’s order pending consideration of the petition with the Ninth Circuit Court of Appeals. *See* Petition for Writ of Mandamus and Emergency Motion for Stay Pending Consideration of the Petition, *In re Trump*, No. 20-70365 (9th Cir. Feb. 11, 2020), Dkt. 1. On February 12, 2020, the Ninth Circuit granted the Government’s request for an administrative stay for an indefinite duration. *See* Order, *In re Trump*, No. 20-70365 (9th Cir. Feb. 12, 2020), Dkt. 3. The Ninth Circuit then found that the Government’s “petition for a writ of mandamus raises issues that warrant an answer” and has directed the plaintiffs in that case to file a response to the petition and request for a stay pending review. *See* Order, *In re Trump*, No. 20-70365 (9th Cir. Feb. 13, 2020), Dkt. 4.

Dated: February 14, 2020

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meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.

See Karnoski v. Trump, No. 17-cv-1297 (W.D. Wash.), Dkt. 269-2.

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