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

**JOINT STATUS REPORT**



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In advance of the February 3, 2020 status hearing, the parties respectfully submit the following Joint Status Report.

**PLAINTIFFS' STATEMENT**[1]

On December 10, 2019, this Court heard argument on Plaintiffs' first five prioritized document requests: RFP Nos. 15, 29, 33, 36, and 44. On December 18, 2019, the Court issued a written opinion memorializing its holdings at the hearing. (Dkt. No. 401.) The Court found that the parties had "few disputes" regarding RFP Nos. 15, 33, 36, and 44, and ordered the Government to produce documents responsive to RFP No. 29. The parties are at an impasse regarding the Government's compliance with the Court's Order regarding RFP Nos. 15 and 29.[2] Plaintiffs also provide an update on the next five prioritized RFPs, a dispute regarding the Government's responses to Plaintiffs' interrogatories, disputes regarding documents improperly withheld as non-responsive and documents sent to third parties, and a proposed revision to the case schedule.

**A. Request for Production No. 29**

The Court first determined over two months ago (back on November 19, 2019) that the "deliberative process privilege does not apply to documents that were used or considered in the development of the Mattis Plan." (Dkt. No. 394 at 4.) Plaintiffs accordingly requested that the Government produce all documents responsive to RFP No. 29 because, consistent with that November 19, 2019 order, RFP No. 29 requested documents "that were used or considered in the development of the Mattis Plan." The Government declined to produce any additional documents beyond what it had already produced in other litigation. Plaintiffs then put this issue before the Court *again* as part of the December 10, 2019 status conference, which led the Court to unequivocally order the Government to produce ***"[a]ll documents responsive to Request for Production No. 29***." (Dkt. No. 401 at 7 (emphasis added).) The Court analyzed RFP No. 29 and

[1] Plaintiff-Intervenor State of Washington continues to coordinate discovery with Private Plaintiffs pursuant to the Court's directions and agrees with Plaintiffs' Statement herein.

[2] Contrary to their representations, the Government also has not produced all documents responsive to RFP 36. The Government identified two Equal Opportunity complaints, but it has not produced the attachments to those complaints, including the "detailed complaint" referenced in a summary document the Government did produce. Plaintiffs brought this to the Government's attention on January 28, 2020, but do not yet know whether this was inadvertent or if the Government is withholding documents responsive to RFP 36 (and on what basis).



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the applicable *Warner* factors in a granular fashion, and specifically ordered the Government to produce documents responsive to RFP No. 29.

The parties conferred on December 20, 2019 regarding the Government's plan for complying with the Court's Order. During that conference, the parties discussed how the Government could identify those documents responsive to RFP No. 29 given the breadth with which the Government has invoked the deliberative process privilege. Plaintiffs offered the Government suggestions, and the Government took those suggestions under advisement. The Government gave no indication that it saw the Court's December 18 Order as ambiguous or that it otherwise would not comply.

The parties next conferred on January 10, 2020, and the Government ***for the first time*** asserted that the Court's December 18 Order was unclear as to RFP No. 29 and, as a result, it would not comply with the Order. Plaintiffs thereafter emailed the Court on January 16, 2020, to request a telephonic hearing under Local Civil Rule 7(i) in order for the Court to resolve the Government's purported confusion. The Court set a telephonic hearing for January 30 in response to Plaintiffs' email. The parties conferred again on January 17, 2020, and rather than claiming the December 18 Order was unclear, the Government stated its intention to request the Court (1) reconsider its December 18 Order based on a recent hearing in the related *Doe* litigation, and (2) stay the Government's compliance with the December 18 Order. Defendants further stated that if the December 18 Order is not reconsidered, they are likely to file a mandamus petition with the Ninth Circuit Court of Appeals. Finally, on January 24, 2020—over a full month after the Court had unambiguously ordered production of "[a]ll documents responsive to Request for Production No. 29"—Defendants filed a "Motion for Clarification and Motion for Stay" (Dkt. No. 405). In light of the Government's motion and the need for Plaintiffs to fully respond to the arguments and evidence therein, Plaintiffs contacted the Court on January 27 asking for the January 30 teleconference to be cancelled.

In the meantime, the Government has not produced *any* additional documents responsive to RFP No. 29. The Government states that it plans to produce by January 31 "a small number of documents" from one former official "who was the only Panel member who did not vote on the


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policy." (Dkt. No. 405 at 5.) That is all. The Government continues to withhold, by its own admission, "more than 22,000 deliberative documents" responsive to RFP No. 29. (*Id.* at 6.) This includes all materials—including communications—from the Panel's working groups and all post-Panel materials related to the creation of the Report and Recommendation. The Court has unambiguously ordered the Government to produce these materials. Instead, the Government attempts to shield from any further production documents responsive to this RFP by seeking "clarification" and/or a stay.

The Government's feigned confusion is just another attempt to delay producing the documents central to core issues in the case. The Government has *repeatedly* pursued meritless motions that purportedly seek "clarification" of perfectly clear orders. (*See, e.g.*, Dkt. No. 106 (Defendants' Motion for Clarification and, if Necessary, a Partial Stay of Preliminary Injunction Pending Appeal) (Dec. 15, 2017); Dkt. No. 121 at 3 (Order Denying Motion for Clarification and Partial Stay of Preliminary Injunction Pending Appeal) (motion for clarification is "without merit") (Dec. 29, 2017); Dkt. No. 205 (Defendants' Motion for Clarification and, if Necessary, for Reconsideration") (Mar. 19, 2018); Dkt. No. 210 at 2 (Order Denying Motion for Clarification and Reconsideration: "The Court expects Defendants to comply with its Order.") (Mar. 20, 2018).) There is no ambiguity in the December 18 Order and no conceivable need for clarification.

This Court's decisions regarding RFP No. 29 are unambiguous and correct. Defendants cannot use deliberate process privilege to shield these documents. This Court has properly balanced the *Warner* factors, and has painstakingly complied with the Ninth Circuit's procedural suggestions.[3] But now that the Government has filed a written motion that crystalizes its

[3] The Ninth Circuit stated that "in balancing the Warner factors, the district court should consider classes of documents separately when appropriate," and that "[i]f Defendants persuasively argue that a more granular analysis would be proper, the district court should undertake it." *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019). The Court diligently followed the Ninth Circuit's suggested approach through an exhaustive, step-by-step process. When Plaintiffs first renewed their motion to compel and divided their requests into nine categories (see Dkt. No. 364), the Court determined that the Government "failed to respond . . . in a manner that would allow the Court to assess [their] privilege claims . . . or conduct [a] 'granular analysis.'" (Dkt. No. 394 at 6.) Yet, despite the Government having the burden to "persuasively argue that a more granular analysis would be proper," *see Karnoski*, 926 F.3d at 1206, even then the Court did not grant Plaintiffs' motion to compel. Instead, the Court ordered the parties to proceed on an RFP by RFP basis, as provided by Plaintiffs in order of priority. (*See* Dkt. No. 394.) Plaintiffs selected RFP No. 29 as their first priority (*see* Dkt. No. 398), and the Court then conducted an exhaustive



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objections regarding RFP No. 29 and have indicated its intention to again seek appellate relief, Plaintiffs respectfully request to brief the motion in full.

**B. Request for Production No. 15**

RFP No. 15 requests documents related to the transgender military service policy promulgated under Secretary of Defense Ash Carter, including documents related to the Working Group that developed the policy (the "Carter Working Group"). At the December 10 hearing, Plaintiffs agreed to first review the final report from Carter Working Group that the Government agreed to produce on December 20, and the Court permitted Plaintiffs to re-raise this RFP should the production of additional documents be warranted. (December 10, 2019 Hr'g Tr. at 33–35.) Since the Government produced the final report from the Carter Working Group, it has subsequently put the integrity of the Carter Working Group process at issue in discovery. For example, the Government questioned one of Plaintiffs' expert witnesses, General Margaret Wilmoth, for nearly a full day on January 22 regarding her experience serving as a member of the Carter Working Group. The questions the Government posed were clearly designed to impugn the integrity of the work conducted by the Carter Working Group with lines of examination focused on the Carter Working Group's presumptions based on Secretary Carter's memo and any concerns that the group was mandated to reach a preordained outcome.

The Government took the same tack and asked similar questions at the deposition of Plaintiffs' expert and former Acting Under Secretary of Defense Brad Carson on January 28, 2020. (Plaintiffs will provide the Court with relevant excerpts of the Wilmoth and Carson deposition transcripts if requested.) The Government has also cherry-picked email communications among members of the Carter Working Group that it had previously withheld on the basis of the deliberative process privilege, ***and selectively "waived" the privilege so the Government's lawyers could use the documents against Plaintiffs' expert witnesses***. (*See* Dkt. No. 381-8, USDOE00238554_0001–02 (internal Carter Working Group email communication).)

status conference to discuss Defendants' objections in granular detail, including what documents were at issue and what objections were made. Only then did the Court grant Plaintiffs' motion to compel responses to RFP No. 29.



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Having put the integrity of the Carter Working Group at issue, and selectively "waived" the privilege as to Carter Working Group documents that are advantageous to the Government, equity demands that *all* documents responsive to RFP No. 15 be produced in order for Plaintiffs to respond to the Government's arguments—particularly because Plaintiffs have already shown the privilege should be overcome for these documents. The Government should not be allowed to assert the deliberative process privilege broadly across thousands of relevant documents, and then selectively decide to "waive" the privilege for documents that benefit the Government.

To be clear, Plaintiffs are not arguing the Court should order production because the Government has committed subject-matter waiver over all Carter Working Group documents. The Government misconstrues Plaintiffs' position in that regard. Rather, by selectively waiving privilege on some Carter Working Group documents, the Government has amplified both the relevance and Plaintiffs' need for the other withheld documents, making it all the more clear that Plaintiffs overcome the privilege under the *Warner* balancing test. Given these changed circumstances, the small set of Carter Working Group documents the Government produced are no longer sufficient, and the Court should order it to produce all documents responsive to RFP No. 15.

**C. Plaintiffs' Next Five Prioritized Requests for Production**

On December 10, 2019, Plaintiffs' gave Defendants a list of their next five prioritized RFPs:[4]

1. **RFP No. 13:** All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

2. **RFP No. 26:** Documents sufficient to show the total annual amount spent and average, actual, or estimated annual per person cost of hormone therapy provided to service members for each of fiscal years 2015, 2016, and 2017, and for the year to date of fiscal year 2018, including without limitation hormone therapy for the treatment of hypogonadism, hypothyroidism, hyperthyroidism, prostate cancer, breast cancer, growth hormone deficiency,

[4] As with the first set of prioritized Plaintiffs' RFPs, Plaintiff-Intervenor identified for Defendants its discovery requests that Washington understands to substantially overlap with Private Plaintiffs' second set of prioritized RFPs.


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menopause, osteoporosis, and transgender hormone therapy.

3. **RFP No. 43:** Documents sufficient to show the number, identity, service branch and military unit, theatre, and circumstances of any transgender service member evacuated from theatres of deployment due to medical and/or mental health reasons since June 30, 2016, including the nature of the medical or mental health reason and the circumstances that led to the decision to evacuate.

4. **RFP No. 54:** All documents reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive the disqualifying condition of gender dysphoria, including without limitation documents reflecting criteria that will inform decisions upon those waiver requests, documents reflecting the date of and grounds for each such request, documents showing whether each request was granted or denied and the basis for such decision, and documents showing whether those decisions were made upon the subject individual's attempted accession into, or instead retention by, the military.

5. **RFP No. 65:** All documents reflecting or relating to "the Department's own data and experience obtained since the Carter policy took effect" that is referenced at page 18 of the Report.

For all five RFPs, the Government claims it is "not aware" of any documents that are (a) responsive to Plaintiffs' next five RFPs and (b) currently being withheld under the deliberative process privilege. *Infra* at _. There are several problems with this response.

First, the Government inexplicably limited the scope of relevant information to documents "sent to, presented to, or received by" the Panel of Experts. Plaintiffs' requests did not contain any such limitation, nor is that the only information that is relevant to the parties' claims or defenses. Indeed, it is just as important—and just as relevant—that Plaintiffs discover what information and data the Government knew but was *not* sent to, presented to, or received by the Panel. The Court cannot appropriately subject the Mattis Plan to heightened scrutiny without knowing whether the Panel's decision-making process was preordained by the selective inclusion of certain information and the exclusion of countervailing information. Nor is it



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appropriate to force Plaintiffs, when challenging the Panel's decision-making process and result, to rely exclusively on the cherry-picked information the Government chose to feed the Panel.

Second, the Government cabins their assurance that all responsive documents have been produced to their initial collection—which occurred *before* Plaintiffs even served several of these requests—without providing any clarity about whether they conducted additional searches or collections to identify any additional documents responsive to these requests. For instance, the Government admitted during one of the parties' recent meet-and-confers that they did not even conduct any searches or attempt to locate or collect documents responsive to RFP No. 54 regarding waiver applications. Thus, the Government's blanket (and misleading) assertion that no documents are being withheld on the basis of deliberative process privilege elides Plaintiffs' more fundamental concern that the Government has not even attempted to satisfy their basic discovery obligation to search for and collect responsive documents.

Third, the Government's statements about these RFPs underscore the core problem that prompted this entire dispute in the first place: the Government has improperly asserted boilerplate deliberative process privilege objections in their written responses to every single one of Plaintiffs' RFPs, regardless of whether they are actually withholding documents on that basis. At a minimum, the Government has now confirmed that it is not withholding any documents responsive to RFP Nos. 13 and 26 on the basis of the deliberative process privilege, even though its written objections—which Plaintiffs have repeatedly asked them to amend—say the exact opposite. The Government's improper privilege claims continue to prejudice Plaintiffs' ability to accurately discern "whether any responsive materials are being withheld on the basis" of the deliberative process privilege. Fed. R. Civ. P. 34(b)(2)(C). It was only by putting the Government's claims to the test on a request-by-request basis—at the Court's insistence—that the Government finally admitted several of its objections were baseless to begin with.

Yet the Government is still trying to capitalize on its improper and dilatory discovery tactics by asking the Court to foreclose Plaintiffs from challenging the Government's privilege assertions for any additional RFPs. The Court should not penalize Plaintiffs for having been forced into a game of go fish. To the extent the Court has concerns about how many additional


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rounds of RFP review are required, the appropriate next step would be to order the Government to review all written responses to Plaintiffs' RFPs and withdraw any deliberative process privilege claim where no responsive documents have been withheld. This would allow Plaintiffs to assess how many remaining RFPs are subject to actual privilege claims and prioritize only those requests that will not waste the Court's and the parties' time.

**D. The Government's Failure to Supplement Certain Interrogatories**

On January 6, 2020, following this Court's December 18 Order overruling the Government's deliberative process privilege objection to certain categories of documents, Plaintiffs wrote the Government and requested that the Government supplement the following two interrogatories on which the Government had objected entirely on the basis of the deliberative process privilege:

- Interrogatory No. 16: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of Secretary James Mattis's February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals.
- Interrogatory No. 17: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons.

Additionally, Interrogatories Nos. 18 & 19 ask that the Government "describe in detail" information, advice, or opinions provided by persons attending meetings of the purported "Panel of Experts" and "Transgender Service Policy Working Group." The Government has not fully responded to these interrogatories. The Government's response to Interrogatory No. 18 provides some names of attendees of meetings at the "Panel of Experts" and "Retention and Nondeployability Working Group," but does not describe in detail or otherwise indicate what information or opinion these attendees provided. The Government's response also does not make clear whether these lists of names include all attendees or all attendees that provided information to the panel. To give one example, the "medical experts" apparently attending October 26, 2017


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meeting are not identified by name, even though they appear to have provided information significant to at least two meetings of the panel. Similarly, although the Government notes that the "Medical Personnel Executive Steering Committee," "Retention and Nondeployable Work Group" and "Transgender Personnel Policy Work Group" provided input to the panel and subsequently provide lists of names for these groups in response to either Interrogatory Nos. 18 or 19, the Government has not provided any "detail" about what input any members of these groups provided. (*See* Dkt. No. 375, 8/30/19 Defendants' Objections & Responses to Plaintiffs' Second Set of Interrogatories.)

The Government never responded to Plaintiffs' January 6 letter identifying these deficiencies. In light of the Court's holding that the deliberative process privilege does not apply to documents related to the creation of the 2018 Mattis Memorandum and documents relating to the development of the Mattis Plan, the Government should supplement these interrogatories immediately.

**E. Documents Improperly Withheld by the Government as Non-Responsive**

On October 4, 2019, Plaintiffs requested the production of nearly 15,000 documents withheld from the Government's productions on the basis of "non-responsiveness." Each of these documents is part of a family of documents that are otherwise responsive, though many of the responsive documents are being withheld on the basis of deliberative process privilege. The law is clear that parties must produce ***all*** non-privileged documents in a family when it determines that any one member of the family is responsive. *See, e.g., Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, No. 08 Civ. 7508(SAS), 2011 WL 3738979, at *5 (S.D.N.Y. Aug. 18, 2011) (finding that "if something was attached to a relevant e-mail, it is likely also relevant to the context of the communication," and that production of a parent e-mail without its corresponding child attachment, or vice versa, does not satisfy the requirements of Fed. R. Civ. P. 34(b)(2)(E)(i)), *adopted without objection*, 2011 WL 3734236 (S.D.N.Y. Aug. 24, 2011). The Government informed Plaintiffs that the withheld non-responsive documents are largely made up of: (1) read receipts and delivery notifications related to responsive e-mails; and (2) discussions regarding the medical treatment of service members for gender dysphoria. Neither category is


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non-responsive. The Government agreed to provide more information regarding a random sampling of 50 of the "non-responsive" documents, and Plaintiffs' review of that information confirms that the documents are responsive and should be produced. (*See* Ex. 1, 1/17/20 Government Comments on Non-Responsive Sampling.)

The Government tries to improperly sever the relevance of read receipts and delivery notifications from their parent communication and contends that because plaintiffs have not requested the notifications specifically in an RFP that plaintiffs are not entitled to their production. Because the receipts and notifications directly relate to the substance of a responsive communication and can show whether an intended recipient of an email received the communication if disputed they are clearly responsive. Their relevance cannot be separated from the main communication. The Government contends, without any support, that production of these documents would somehow be burdensome. Given that they have already identified the documents at issue, the only burden would be the cost of bates stamping and exporting the production, the burden of which is *de minimis* and certainly does not outweigh the benefit to plaintiffs of having proof of the receipt of relevant communications. As to the the medical treatment records being withheld, the Government attempts to paint the picture that these documents are solely related to the individualized treatment of service members with gender dysphoria and have nothing to do with the Ban. But a closer look at the families of these documents quickly dispels this notion. The majority of these documents are attachments to communications that have been withheld on the basis of deliberative process privilege. Meaning that the Government has admitted the communication is responsive and contend it is reflective of the internal processes related to the Ban. Further, many of the senders and recipients of these documents had direct roles in the formation of the Ban. For example, Panel members Mr. Anthony Kurta, General James McConville, and Admiral William Moran are listed as senders and recipients of many of the withheld communications. (*See* Ex. 2, 1/24/20 Barsanti Ltr. to Powers.)

Given the clear relevance of these documents, Plaintiffs have again requested their production and are awaiting the Government's response.



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**F. Government Communications with Third Parties**

On October 7, 2019, Plaintiffs requested the production of all communications involving third parties that the Government is withholding on deliberative process privilege grounds. As the court in *In re Subpoena of Center for Military Readiness* recently found when applying the Ninth Circuit's discussion of the deliberative process privilege in *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), the deliberative process privilege does ***not*** apply to DoD's communications with third parties. *See In re Subpoena of Ctr. for Military Readiness*, No. MC 18-51013, 2019 WL 4733602, at *9 (E.D. Mich. Sept. 28, 2019) (holding that the magistrate judge "correctly concluded the deliberative process privilege does not apply" with respect to the third party communications at issue); *see also In re Subpoena of Ctr. for Military Readiness*, No. MC 18-51013, 2018 WL 6722247, at *10 (E.D. Mich. Nov. 6, 2018) ("Since [the Center for Military Readiness] is a private organization, documents reflecting communication between it and the government do not enjoy an executive or deliberative process privilege."). Plaintiffs assessed the Government's privilege logs and identified in their production request a number of persons likely to be third parties based on non-governmental e-mail domains (*e.g.* hks.harvard.edu, unc.edu, gmail.com, aol.com) or for whom no e-mail address was provided in the log entry and thus no party determination could be made. (*See* Ex. 3, 12/13/19 Barsanti Ltr. to Carmichael.) For example, in this entry from the Government's privilege log for DoD Production No. 14 associated with the document bates labeled USDOE00208639, which has been withheld on attorney client privilege, work product, and deliberative process privilege grounds, Plaintiffs are unable to tell whether James Linear is associated with the Government, as the log provides no information is provided about his employer, such as a domain or military rank:

| AUTHOR | Putative AUTHOR | RECIPIENT(S) | Putative RECIPIENT(S) |
|---|---|---|---|
| James Linear | Microsoft Outlook /O=SD/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MICROSOFTEXCHANGE329E71EC88AE4615BBC36AB6CE41109E> - on behalf of - Bushman, William CIV SD /O=SD/OU=EXCHANGE ADMINISTRATIVE GROUP | | DeMartino, Tony SES SD <Tony.DeMartino@sd.mil> |

The Government's refusal to provide further information about the individuals Plaintiffs have identified as suspected third parties improperly shifts their burden to show that the


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documents they are withholding are, in fact, privileged. *See* Fed. R. Civ. P. 26(b)(5)(A)(i–ii) (requiring a party who withholds discoverable information due to privilege to "expressly make the claim; and describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim"); *see also Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 & 545 (W.D. Wash. 2000) ("The initial burden of establishing the applicability of the [deliberative process] privilege is on the government. . . . NMFS has failed to carry its burden of proof."). That the Government cannot identify documents in their collection applicable to the individuals Plaintiffs identified as potential third parties is all the more concerning and calls into question the accuracy of the Government's privilege logs. As Plaintiffs previously informed the Government, the individuals and emails Plaintiffs identified were taken *directly* from the Government's logs. To the extent the Government is having difficulty identifying the communications associated with these individuals, they can simply refer to their own logs.

The attempt to place the onus on Plaintiffs also ignores that the Government has already done the work by undertaking a review of the list, but has refused to share its assessment with Plaintiffs about who is or is not a third party, and instead demanded that Plaintiffs identify *specific entries* on the Government's voluminous privilege logs, despite the fact that it is the Government (not Plaintiffs) who must support its privilege claims.

The Government's stonewalling and attempt to shift the burden to Plaintiffs is inappropriate.

**G. Case Schedule**

More than two months have now passed since the Court ordered the Government to produce the "documents that were used or considered in the development of the Mattis Plan." (Dkt. No. 394 at 4.) The Government continues to withhold from Plaintiffs thousands of responsive documents. In the meantime, Plaintiffs followed the Court's instructions at the December 10 status hearing and informed Defendants of Government witnesses they wish to depose. The close of fact discovery is currently just a few weeks away, on February 18, 2020. At


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the December 10 hearing, the Court indicated that the case schedule would be reassessed at the next status hearing. (Dkt. No. 402, ("December 10, 2019 Hearing") at 43.) Given the Government's continued delay, Plaintiffs respectfully submit they have no choice but to request a modest extension of the fact discovery deadline, to April 30, 2020.

**DEFENDANTS' STATEMENT**

**A. Defendants Productions to Date**

On June 14, 2019, more than seven months ago, the Ninth Circuit issued its judgment on the Government's appeal. *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019). That judgment definitively established the standard for review in the district court.

> In short, the district court must apply appropriate military deference to its evaluation of the 2018 Policy. *See Witt*, 527 F.3d at 821. On the current record, a presumption of deference is owed, because the 2018 Policy appears to have been the product of independent military judgment. In applying intermediate scrutiny on remand, the district court may not substitute its 'own evaluation of evidence for a reasonable evaluation' by the military. *Rostker*, 453 U.S. at 68. Of course, 'deference does not mean abdication.' *Witt*, 527 F.3d at 821 (quoting *Rostker*, 453 U.S. at 70). Defendants bear the burden of establishing that they reasonably determined the policy 'significantly furthers' the government's important interests, and that is not a trivial burden.

*Id* at 1202.

Defendants have produced tens of thousands of documents from the Department of Defense ("DoD") and the Military Service Branches that show how it arrived at its conclusions on the 2018 Policy. In addition, on November 19, 2020, this Court ordered disclosure of deliberative documents "used or considered in the Panel of Experts for the Transgender Policy Review's (the 'Panel') development of the Mattis Plan," adopting the ruling of the district court in the related *Doe* litigation. (*See* Dkt. No. 394 ("November 19, 2019 Order") at 6, (citing *Doe 2 v. Esper*, No. 17-cv-1597 (CKK), 2019 WL 4394842, at *5–10 (D.D.C.).) In response to those orders, Defendants have produced or agreed to produce[5] over 1,000 documents, including (i) an unredacted version of the Administrative Record; (ii) unredacted meeting minutes of the Panel of

[5] As noted below, Defendants have produced the deliberative materials of the voting members of the Panel, and anticipate producing the deliberative materials of the single non-voting member of the Panel, former Under Secretary of Defense for Personnel and Readiness Robert Wilkie, by January 31, 2020.


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Experts; (iii) all documents, testimony, and data reviewed by members of the Panel along with the deliberations on those materials; and (iv) all deliberative documents and communications related to the work of the Panel that were sent, received, or presented to members of the Panel during the decision-making process, regardless of whether that document or communication was authored, sent, or received by a person who was *not* a member.[6] Accordingly, Defendants have produced or agreed to produce each and every "input" to the Panel and the Panel's deliberations and communications regarding that input. What Defendants have not agreed to produce, however, are communications solely between non-Panel members and other non-Panel members, or other documents non-Panel members never shared with Panel members. In other words, what Plaintiffs seek to put at issue are documents that have no bearing on whether the Department of Defense "reasonably determined the policy 'significantly furthers'" the government's important interests" because those documents were not considered by the Department's decision-makers. *Karnoski v. Trump*, 926 F.3d at 1202.

Now, almost two years after Plaintiffs argued that "nearly six months" was sufficient time for Defendants to complete their own discovery, *see* Pls.' Reply to Defs.' Rule 56(d) response, (Dkt. No. 185 at 4), Plaintiffs' seek to prolong discovery further so they can test an entirely new and unsupported theory—that nefarious actors, whom they decline to name, were selecting documents the Panel was permitted or not permitted to consider in an attempt to influence their decision. Plaintiffs' have not pointed to a single piece of evidence supporting this theory and the *Doe* court rejected a similar fishing expedition into documents and communications that were never even considered by the Panel of Experts. This Court similarly should reject Plaintiffs' efforts.

**B. Motion for Clarification and Stay**

Following the hearing on December 10, 2019, this Court issued an order directing Defendants to produce additional materials previously withheld pursuant to the deliberative

[6] DoD 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, Dkt. 405-2.



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process privilege. (Dkt. No. 401 ("December 18, 2019 Order").) In its Order, the Court first explains that the parties primarily dispute

> [T]wo categories of documents responsive to Request for Production No. 29: (1) the work and communications of non-voting members of the Panel and (2) drafts created by officials in the Office of the Under Secretary of Defense, who were tasked with writing the Report and Recommendations after the Panel concluded its work.

(December 18, 2019 Order at 5.) As to those two categories of documents, the Court concluded that Plaintiffs had overcome the deliberative process privilege. The Court then directed Defendants to produce:

> 1) All documents responsive to Request for Production No. 29, including the names, communications, and deliberative documents of non-voting members of the Panel; and
>
> 2) Drafts, communications, and documents created or relied upon by officials in the Undersecretary of Defense's Office in drafting the Report and Recommendations.

(*Id.* at 7.) After meeting and conferring, the parties have determined that they hold conflicting interpretations of Part 1 of that order. Defendants interpret Part 1 to compel disclosure only of documents pertaining to "non-voting members of the Panel," in accord with the Court's analysis of that category in its Order. Defendants currently are processing for production the documents and communications of the single non-voting member of the Panel of Experts, former Under Secretary of Defense for Personnel and Readiness Robert Wilkie. Defendants anticipate producing Mr. Wilkie's materials by January 31, 2020.

Plaintiffs, in contrast, have interpreted the Order as broadly disposing of all documents "relating or referring" to the DoD's Report and Recommendation—implausibly encompassing over 22,000 deliberative documents from dozens of DoD employees who were not Panel members. (*See* Decl. of Robert E. Easton ¶ 10, Dkt. No. 405-2.) This interpretation both would cause significant tension with the Ninth Circuit's guidance and could be 20 times greater than the scope of the *Doe* ruling upon which the Court relied.

In light of the parties' conflicting interpretations, Defendants have moved for clarification



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of the Court's order, and for a limited stay. (*See* Defs.' Mot. for Clarification and Stay in re Dkt. 401, Dkt. No. 405.) Although Plaintiffs mischaracterize the motion as based on "feigned confusion" and "just another attempt to delay," Defendants respectfully refer the Court to the motion itself for an explanation of why clarification and a limited stay are warranted.[7]

**C. Teleconference in *Doe v. Esper***

Recently, the court in the related case *Doe v. Esper* held a telephonic hearing during which court stated that its own discovery order related to the deliberative process privilege did not require Defendants to produce deliberative documents never received by or presented to any member of the Panel of Experts, nor did it require production of drafts or communications of individuals involved in drafting the February 2018 Report and Recommendation. (*Doe* Hr'g Tr. 20:1–5; 28:8–9, Dkt. No. 405-3.) Defendants submit that the *Doe* court's interpretation of its prior order is relevant to the issues raised herein because this Court repeatedly has relied on the *Doe* order. (*See, e.g.*, December 18, 2019 Order at 3; *see also* November 19, 2019 Order at 4.) In addition, the *Doe* order counsels that Defendants are entitled to the relief they request in their motion clarification and a limited stay. (*See* Dkt. No. 405.)

**D. RFP Nos. 15, 33, 36, and 44**

The Court's recent discovery order primarily addressed Plaintiffs' Request for Production (RFP) No. 29, which is the subject of Defendants' motion for clarification and a limited stay. However, the Court's order also addressed Plaintiffs' RFP Nos. 15, 33, 36, and 44. Defendants respectfully provide the following update on discovery related to those RFPs:

**RFP No. 33**: With regard to RFP No. 33, which requested "any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the March 23, 2018, Memorandum," the Court stated that the RFP would be encompassed within Defendants' response to RFP No. 29. (December 18, 2019 Order at 7.) Defendants have now produced all alternatives, modifications, or refinements to the current policy that were considered

[7] Defendants recently became aware of an inadvertent error in their motion for clarification and a limited stay and the attached declaration of Robert Easton. Specifically, Defendants incorrectly stated that their productions pursuant to the Doe order occurred on October 31, November 22, and December 19, 2019. In fact, these productions occurred on November 1, November 22, and December 20, 2019. Defendants anticipate filing an appropriate correction shortly.


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by the Panel of Experts, the Deputy Secretary of Defense, the Vice Chairman of the Joint Chiefs of Staff, and former Secretary of Defense Mattis. Accordingly, the only documents potentially responsive to RFP No. 33 that might still be in dispute are any alternatives, modifications, or refinements that were never presented to or considered by the Panel of Experts or DoD decision makers. Defendants submit that resolution of the issues raised in the motion for clarification and stay will resolve any deliberative process privilege dispute as to any such remaining materials.

**RFP No. 36:** Regarding RFP No. 36, which seeks all "complaints arising from or attributed to open service by transgender service members, accessions by transgender individuals, or the Carter Policy," the Court stated that Defendants "will either produce the complaints or inform the Plaintiffs that there are no remaining complaints to produce." (*Id.*) In accord with the Court's instruction, Defendants produced the two Equal Opportunity complaints referenced in DoD's Report and Recommendation.[8] Defendants are not aware of any other complaints or documents reflecting, referring, or relating to such complaints within Defendants' collection that Defendants are withholding on the basis of the deliberative process privilege.

**RFP Nos. 15 and 44:** Regarding RFP No. 15 and 44, the Court stated that Defendants' responses to these requests "will be included in their upcoming production on December 20, 2019." (*Id.*)

RFP No. 44 related to information on servicemembers rendered non-deployable as a result of gender dysphoria or transition-related medical care. Defendants have now produced all deployability data that was presented to the Panel of Experts, as well as the underlying deployability data utilized by the Military Services to formulate the data presented to the Panel of Experts.

RFP No. 15 covered materials related to the Carter policy. Defendants have now produced the most relevant deliberative materials from the development of the Carter policy, including multiple sets of briefing slides used by the RAND Corporation to present the findings of their study on transgender service; internal DoD slide presentations and documents containing

[8] On January 28, 2020, Plaintiffs raised with Defendants certain issues regarding purported attachments to the Equal Opportunity complaints. See Note 2, supra. Defendants are looking into this issue.


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potential courses of action with respect to transgender service for DoD's consideration; and an internal draft report explaining the work and deliberations of the Carter policy working group.

Nonetheless, Plaintiffs assert that Defendants have categorically waived the deliberative process privilege as to all documents related to the Carter policy because they have produced certain documents responsive to RFP No. 15. But the subject matter waiver concept has no applicability to the deliberative process privilege. *See Agility Public Warehousing Co. K.S.C. v. Dep't of Defense*, 110 F. Supp. 3d 215, 222 n.4 (D.D.C. 2015) (holding "there is no authority for applying the broad, subject-matter waiver rule to [the deliberative process] privilege; indeed, the cases suggest that the rule does *not* apply in this context.") Instead, "courts have said that release of a document only waives [executive] privileges for the document or information specifically released, and not for related materials." *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997); *cf. Mobil Oil Corp. v. U.S. EPA*, 879 F.2d 698, 700 (9th Cir. 1989) (disclosure of certain documents does not waive Government's ability to assert FOIA exemption 5—which covers documents protected by the deliberative process privilege—as to "related documents"). Plaintiffs cite no authority at all in support of their waiver argument.

Even if this Court were to consider Plaintiffs' waiver argument—despite the clear authority to the contrary—that argument falls well short. A number of the individuals designated by Plaintiffs as expert witnesses have offered reports setting forth numerous factual assertions about the deliberative process underlying the Carter Policy. For example, Plaintiffs' expert Dr. Margaret Wilmoth states an extensive narrative concerning the Working Group convened to study the issues leading to the Carter Policy. (Ex. 4, Wilmoth Expert Report at 5–8.) She also testifies that her opinions about certain issues are supported by evidence obtained as a member of the Working Group. (*Id.* at 10, 11.) It is thus *Plaintiffs* that have attempted to put the deliberative process underlying the Carter Policy at issue, through expert witnesses that have purported to offer information that should otherwise be subject to the deliberative process privilege, a privilege belonging to the Government. Moreover, in some instances, Plaintiffs' designated expert witnesses have made inaccurate or misleading statements in their reports regarding the Carter Policy deliberative process. Defendants do not waive the deliberative process privilege


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over thousands of Carter policy deliberative documents simply by introducing documents that impeach inaccurate or misleading assertions by Plaintiffs' experts. Plaintiffs' position should be rejected. *See In re Sealed Case*, 121 F.3d at 741 ("This limited approach to waiver in the executive privilege context is designed to ensure that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.").

**E. Plaintiffs' Next Five RFPs**

Following the December 10, 2019 hearing, Plaintiffs provided Defendants with five additional RFPs. As set forth below, in general—and at least with respect to documents sent to, presented to, or received by, the voting members of the Panel of Experts[9]—Defendants are not aware of any such documents in their collection that are responsive to any of the five additional RFPs and that Defendants currently are withholding on the basis of the deliberative process privilege.

> **RFP 13:** All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

The DoD memorandum implementing the current DoD policy concerning transgender servicemembers and servicemembers with gender dysphoria is "Directive Type Memorandum (DTM) 19-004." That memorandum is publicly available on DoD's website and has been filed on the docket. (*See* Dkt. No. 405-7.) In addition, Defendants have produced to Plaintiffs the Military Service Branches' official implementation guidance for the current policy. Defendants are not aware of any other documents in their collection that are responsive to RFP No. 13 and that Defendants are withholding on the basis of the deliberative process privilege.

> **RFP 26:** Documents sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members for each of fiscal years 2015, 2016, and 2017, and for the year to date of fiscal year 2018, including without limitation hormone therapy for the treatment of hypogonadism, hypothyroidism, hyperthyroidism, prostate cancer, breast cancer, growth hormone deficiency, menopause, osteoporosis, and transgender hormone therapy.

[9] As noted, Defendants anticipate producing the documents of the single non-voting member of the Panel by January 31, 2020.



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Defendants have already produced all data, including cost data, that was presented to the Panel of Experts, as well as the underlying data utilized by the Military Services to formulate the data presented to the Panel of Experts. In addition, cost data responsive to RFP No. 26 is publicly available at https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Health-Care-Program-Evaluation/Annual-Evaluation-of-the-TRICARE-Program. Plaintiffs therefore possess "[d]ocuments sufficient to show" what RFP No. 26 seeks.

> **RFP 43:** Documents sufficient to show the number, identity, service branch and military unit, theatre, and circumstances of any transgender service member evacuated from theatres of deployment due to medical and/or mental health reasons since June 30, 2016, including the nature of the medical or mental health reason and the circumstances that led to the decision to evacuate.

Defendants have already produced all documents sent to, presented to, or received by, the voting members of the Panel of Experts,[10] including any documents referencing servicemember evacuations from theater. It is possible that Defendants' collection included documents or communications relating to evacuations from theatre that were never sent to, presented to, or received by the Panel of Experts. But such documents, should they exist, would fall within the scope of RFP No 29, which is the subject of the Court's prior order and Defendants' pending motion for clarification. Thus, resolution of that motion should resolve the deliberative process dispute over any such documents, should they exist within Defendants' collection. In any event, Defendants are not aware of any documents in their collection that were sent to, presented to, or received by the Panel of Experts that are responsive to RFP No. 43 and that Defendants are withholding on the basis of the deliberative process privilege.

> **RFP 54:** All documents reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive the disqualifying condition of gender dysphoria, including without limitation documents reflecting criteria that will inform decisions upon those waiver requests, documents reflecting the date of and grounds for each such request, documents showing whether each request was granted or denied and the basis for such decision, and documents showing whether those decisions were made upon the subject individual's attempted accession into, or instead retention by, the military.

[10] As explained above, Defendants anticipate producing the documents of the single non-voting member of the Panel by January 31, 2020.



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Defendants are not aware of any documents in their collection that are responsive to RFP No. 54 and that Defendants are withholding on the basis of the deliberative process privilege.

> **RFP 65:** All documents reflecting or relating to "the Department's own data and experience obtained since the Carter policy took effect" that is referenced at page 18 of the Report.

Defendants have already produced all data that was presented to the Panel of Experts, as well as the underlying data utilized by the Military Services to formulate the data presented the Panel of Experts. It is possible that Defendants' collection included communications "reflecting or relating to" the reference at page 18 of the Report and Recommendation to DoD's data or experience under the Carter policy but that were never sent to, presented to, or received by the Panel of Experts. But such documents, should they exist, would fall within the scope of RFP No. 29, which is the subject of the Court's prior order and Defendants' pending motion for clarification and stay. Thus, resolution of that motion should resolve the deliberative process dispute over any such documents, should they exist within Defendants' collection. In any event, Defendants are not aware of any documents in their collection that were sent to, presented to, or received by the Panel of Experts that are responsive to RFP No. 65 and that Defendants are withholding on the basis of the deliberative process privilege.

**F. Additional RFPs**

Defendants submit that Plaintiffs should not be permitted to identify any additional RFPs for the Court's consideration. The fact that Plaintiffs' latest five RFPs have led to identification of few, if any, additional documents in dispute underscores the diminishing returns of identifying further RFPs for consideration. Simply put, the entire deliberative process privilege dispute between the parties has been put before the Court.

Plaintiffs make two incorrect assertions in an effort to stave off what should be the oncoming end of this long-running deliberative process dispute. First, Plaintiffs accuse the Government of interposing improper privilege objections to RFPs and "admitting" they have done so. This is incorrect, as Plaintiffs are well aware. Last August, Plaintiffs moved to compel further discovery responses and objections. (Dkt. No. 358.) They raised *precisely the same*



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*argument* they state here, namely that Defendants have not adequately supported their privilege objections. Defendants explained in their response brief that they did not conduct their document review in this case by reference to the 68 requests for production served by Plaintiffs (or the total of 218 requests for production served across the four cases challenging the policy at issue). (Dkt. No. 370 at 2.) Instead, they have reviewed and produced documents as they were kept in the ordinary course of business. (*Id.*) Where Defendants have asserted privileges, they have done so on a document-by-document basis on privilege logs. (*Id.* at 3.)

This approach to discovery is fully consistent with the Federal Rules of Civil Procedure and relevant authorities. (*See id.* at 5–6, 10–11.) Prior to receiving a ruling on that point, though, Plaintiffs elected to withdraw their motion. (Dkt. No. 382.) The Court should reject Plaintiffs' belated attempt to obtain relief on a motion they abandoned months ago.

Second, Plaintiffs accuse Defendants of failing to adequately collect documents in response to their RFPs. To the contrary, Defendants have conducted an extraordinarily broad document collection pursuant to these cases. And Plaintiffs have received a thorough explanation—by search terms and custodians—of that collection. Plaintiffs are also well aware of Defendants' arguments for why further searches would be disproportionate to the needs of the case and would yield wholly irrelevant information in this military case. *See, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019) ("[T]he reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision.").

Plaintiffs have never filed a motion to compel seeking additional collections and this dispute regarding the deliberative process privilege is not an appropriate occasion to raise that issue. The purpose of Plaintiffs' motion is to seek documents *withheld* as privileged, not to seek documents Defendants *never collected*.

**G. Defense Witnesses at Trial**

During the previous hearing on December 10, 2019, the Court referenced statements from counsel from a prior hearing on July 17, 2018 that, in any trial in this case, Defendants would submit, as their defense, the administrative record that supports the current policy, which



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includes DoD's Report and Recommendation. (*See* Dkt. No. 310 (" July 17, 2018 Hr'g Tr."), at 15:6–13 (Counsel for Defendants: "What the government would put on at trial is essentially the administrative record . . . accepting the hypothetical, or the reality, that this would go to trial, we would present that administrative record."); Dkt. No. 402 ("December 10, 2019 Hr'g Tr."), at 31:13–15 (the Court: "did the report, which is key, you told me that that's the only thing you're going to be introducing at trial, if that is the only thing that you've got on the table . . .").) Although Defendants maintain their position that this case is properly adjudicated on an administrative record, because the Court has rejected that position, Defendants respectfully notify the Court that, at any trial in this matter, Defendants plan to call witnesses to testify in their defense. Defendants have already served Plaintiffs with the necessary initial and expert disclosures and will provide pretrial disclosures concerning trial witnesses at the appropriate time under the Court's schedule.

**H. Purported Third Parties on Privilege Logs**

Plaintiffs also raise a matter that is currently the subject of meet and confer discussions between the parties—namely, the purported presence of third parties on Defendants' privilege logs. This issue is not ripe for the Court's consideration, nor have Plaintiffs presented an accurate portrayal of the parties' dispute to date. Plaintiffs are not entitled to any relief on this point.

To begin, the Court should not consider this issue in its current posture. Plaintiffs have not filed a motion to compel with regard to this dispute, nor have they adequately met and conferred with Defendants, as the narrative below demonstrates. This dispute is not ripe for consideration. In accord with LCR 37(a)(1) and this Court's motions procedures, the Court should reject Plaintiffs' *de facto* motion to compel.

In any event, Defendants have not "stonewalled" Plaintiffs regarding this issue and Plaintiffs are not entitled to any relief from the Court at this time. On December 13, 2019, Plaintiffs sent Defendants a list of approximately 500 names or email addresses that they claimed indicated the existence of communications involving third parties on Defendants' privilege logs. In response to Plaintiffs' letter, and after considerable review, Defendants agreed to withdraw their assertion of the deliberative process privilege as to communications with eight individuals


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to which they have determined the privilege was applied erroneously, and will produce any such documents shortly.

But after numerous hours spent reviewing Plaintiffs' list, Defendants' counsel concluded that Plaintiffs otherwise had made no serious effort to narrow or even crystallize the parties' dispute. (*See* Ex. 5, Letter from J. Powers to V. Barsanti, Jan. 17, 2020.) As the attached letter describes, Plaintiffs' list is littered with entries corresponding to persons that are obviously not third parties, such as Plaintiff Lindsey Muller (a member of the Armed Forces), former Deputy Secretary of Defense Robert Work, former Secretary of Homeland Security and DoD General Counsel Jeh Johnson, and numerous DoD contractors, such as principal author of the RAND report that supported the Carter Policy, Agnes Schaefer. (*Id.* at 2.) In other instances, Defendants have been unable to even identify a communication in their collection to which the identified individual was a party. (*Id.*) Nor have Plaintiffs stated whether they have updated their list in light of the hundreds of deliberative documents released as a result of the *Doe* order (Plaintiffs could not have done so at least as to the productions made on December 20, 2019). (*Id.*)

Defendants' letter also sets forth a reasonable path forward for resolving this dispute, namely identifying particular privilege log entries corresponding to documents that Plaintiffs believe are not privileged because they were shared with third parties. Indeed, the scope of the dispute could be substantially *reduced* by this approach. For example, at least 18 of the entries on Plaintiffs' list appear to correspond to *one* document, USDOE00255328, an email addressed to members of the U.S. Department of Health and Human Services Interdepartmental Serious Mental Illness Coordinating Committee. A discussion about such particular documents is likely to be far more productive than a context-free list of hundreds of names and email addresses. Indeed, for the first time, in this Joint Status Report, Plaintiffs identify a particular privilege log entry about which they seek additional information, a document authored by James Linear. Defendants would be happy to provide additional information about this document.

This is plainly the correct path forward because the applicability of the deliberative process privilege to third party communications is highly context dependent. Contrary to Plaintiffs' arguments, information generated by third parties may be protected by the privilege where it is


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solicited by the agency as part of its deliberative process. *See, e.g.*, *Public Citizen, Inc. v. Dep't of Justice*, 111 F.3d 168, 171 (D.C. Cir. 1997) ("If it is to effectively deliberate, an agency may need or want to enlist the help of outside experts skilled at unravelling the knotty complexities of problems outside their ken." (citation and alterations omitted)); *Ryan v. Dep't of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980) ("Such consultations [with outside consultants] are an integral part of [an agency's] deliberative process . . . .").

At any rate, this issue is not ripe for the Court's consideration, as the parties still are conferring and Plaintiffs have not filed a motion to compel.

**I. Defendants' Responses to Plaintiffs' Interrogatories 16–19**

Plaintiffs' concerns with Defendants' responses to Interrogatory Nos. 16–19 likewise are not ripe for consideration and should not be resolved until the issue is properly before the Court. In short, Plaintiffs have not moved to compel supplementation of these responses and the parties still are conferring over these issues. Moreover, because Defendants have responded to at least one of these interrogatories by pointing Plaintiffs to their document production, *see* Fed. R. Civ. P. 33(d), supplementation is intertwined with the issues surrounding the deliberative process privilege that Defendants have raised in their motion for clarification, (Dkt. No. 405). Subject to these considerations, Defendants note their position on these interrogatories as follows:

First, Defendants are in the process of supplementing their interrogatory responses to provide a list of individuals who reviewed, revised, or commented on any drafts of former Secretary Mattis's February 22, 2018 Memorandum for the President (Interrogatory No. 16) and the February 2018 Department of Defense Report and Recommendations (Interrogatory No. 17). Doing so should resolve any dispute over Defendants' responses to Interrogatory Nos. 16 and 17.

Defendants note that in their motion for clarification and a limited stay, they requested a stay of Part 2 of the Court's recent discovery order pending further proceedings regarding Defendants' response to Interrogatory No. 17. (*See* Motion for Clarification and Stay 10, Dkt. No. 405.) Now that Defendants have committed to providing the names of the individuals who reviewed, revised, or commented on any drafts of the February 2018 Department of Defense Report and Recommendations, Plaintiffs will be fully capable of exploring the possibility of


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outside influence in the drafting of the Report and have no need for actual drafts of the Report itself. This demonstrates why a stay of Part 2 of the Court's recent discovery order pertaining to drafts of the Report is warranted. (*See id.*)

Furthermore, with regard to Interrogatory 18, Defendants have already put Plaintiffs on notice that they have construed Interrogatory 18 as seeking a list of "the attendees of the formal meetings of the Panel of Experts," and not as seeking a list of every attendee who provided information to the Panel. (Dkt. No. 375, Defs.' Objs. & Resp. to Plaintiffs Second Set of Interrogatories, at 6 (served May 29, 2018).) Likewise, DoD's response to Interrogatory 19 explains which committees or working groups "considered the policy for military service of transgender persons," and provides the "identity of each person who attended formal meetings of a Department of Defense-established group or committee." (*Id.* at 10.) Defendants hope this resolves Plaintiffs' objection that "[t]he Government's response . . . does not make clear whether these lists of names include all attendees or all attendees that provided information to the panel."

In addition, the documents referenced by Defendants' Civil Rule 33(d) response to Interrogatory No. 18 already provide comprehensive detail regarding the deliberations of the members of the Panel of Experts, including the contributions of members of the various working groups. Defendants have already produced or agreed to produce all deliberative documents and communications related to the work of the Panel of Experts that were sent, received or presented to any member of the Panel during the decision-making process, including every document from a working group member that was sent or presented to the Panel or considered by the Panel. To the extent Plaintiffs are seeking to compel Defendants to recreate in the form of a "detailed" narrative description thousands of pages of meeting minutes, presentations, communications, deliberations, and recommendations that have already been produced in their original form, Defendants object that such a request is unduly burdensome and grossly disproportionate to the needs of this case.

In any event, Defendants' responses to Interrogatories 16–19 are not properly before the Court because the parties still are engaged in narrowing relevant disputes and Plaintiffs have not moved to compel supplementation.



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**J. Documents Withheld as Nonresponsive**

Plaintiffs' concerns over nonresponsive documents have no connection to deliberative process privilege issues, nor have Plaintiffs filed a motion to compel production of such documents. Thus, once again Plaintiffs attempt to leapfrog this Court's rules of procedure and raise an issue that is not the subject of a motion to compel and over which the parties still are conferring. The Court should not address Plaintiffs' premature arguments about nonresponsive documents at this time.

In any case, even if the Court were to address this dispute, Plaintiffs' assertions have no merit. The documents at issue were collected by Defendants, reviewed to determine responsiveness on an individual basis, and ultimately withheld from production as not responsive. Plaintiffs are second-guessing that review with respect to document families, asserting "[t]he law is clear that parties must produce all non-privileged documents in a family when it determines that any one member of the family responsive." But that statement of the law is not even supported by the case Plaintiffs cite, which recognized that "if an e-mail attaches three disparate items in one communication package, that does not mean that all three items relate to the same thing or would be equally relevant to a discovery request." *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.*, 2011 WL 3738979, at *5 (S.D.N.Y. Aug. 18, 2011) (noting that "produc[ing] any non-privileged attachment to an e-mail if the e-mail is determined to be relevant" is a "prevailing practice," but that there are no "ironclad standards" in this area).

Closer scrutiny is particularly warranted with respect to the primary categories of documents in this non-responsive set. "Read receipts" are sent automatically by certain e-mail clients to confirm an e-mail was opened by its recipient, and "Delivery Notifications" are automatic notifications sent by the email client that confirms delivery of the email message to the recipient's mailbox *See* Microsoft Office Support, "Add and Request Read Receipts and Delivery Notifications," https://support.office.com/en-us/article/Add-and-request-read-receipts-and-delivery-notifications-a34bf70a-4c2c-4461-b2a1-12e4a7a92141. Plaintiffs have not submitted a discovery request for "read receipts" or "delivery notifications," nor any other


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discovery request to which such receipts or notifications would be responsive. But even if "read receipts" or "delivery notifications" were responsive to a properly served request (they are not), producing thousands of such receipts or notifications would impose a substantial burden on Defendants while providing no meaningful benefit to Plaintiffs, and therefore would be disproportionate to the needs of this case. Plaintiffs also fail to articulate why communications between medical professionals regarding individualized treatment of a service member for gender dysphoria are responsive to their requests or relevant to this case, or why the information Defendants provided to Plaintiffs regarding their random sample of non-responsive documents did not dispel their concerns about responsiveness.

In all events, the Court should not order relief with respect to nonresponsive documents before Plaintiffs' have properly moved to compel such documents and Defendants have had an opportunity to present a full opposition with any necessary supporting evidence, including declarations. Indeed, Plaintiffs, in this Joint Status Report, do not even request relief on this issue, and state they are simply "awaiting the Government's response" to their most recent communication.

**K. Case Schedule**

Any delay in discovery in this case is of Plaintiffs' own making. After Defendants successfully obtained mandamus relief vacating an order to disclose *all deliberative documents*, *see Karnoski v. Trump*, 926 F.3d 1180, 1207–08 (9th Cir. 2019), Plaintiffs once again asked this Court to order disclosure of *all deliberative documents*, *see* Pls.' Mot. to Compel at 12, Dkt. 364. Then, when this Court instead ordered Plaintiffs to select particular RFPs as a mechanism to resolve the deliberative process privilege dispute, Plaintiffs selected as two of their choices RFP No. 15 (all documents and communications "relating" to the Carter policy) and RFP No. 29 (all documents and communications "referring or relating" to DoD's Report and Recommendations). Collectively, these RFPs encompassed, again, nearly every deliberative document still withheld in this case. Plaintiffs' persistently overbroad approach to discovery is the reason why, more than seven months after the Ninth Circuit granted the writ of mandamus, the deliberative process



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privilege is still in dispute and Defendants have had to seek a stay pending potentially *another* action in the Court of Appeals. (*See* Dkt. No. 405.)

In the meantime, although Plaintiffs finally have provided a list of individuals they wish to depose, they still have not sought to *schedule* a single deposition. This is despite the Court's statement at the December 10 hearing that if Plaintiffs are "not going to note depositions until after [they] get the documents, then we're kind of stuck," and the Court's direction that Plaintiffs "might as well get [their] dates set now" and that "if there are people you know that you want, then set them up." (December 10, 2019 Hr'g Tr. at 44–45:19–4.) Indeed, there is no reason why plaintiffs could not schedule depositions of individuals on their proposed list whose deliberative materials have already been released, *e.g.* head of the Panel of Experts Anthony Kurta or Panel member Thomas Dee. On the other hand, Defendants have conducted five depositions, have three other depositions scheduled and have attempted to schedule an additional two depositions with the Plaintiffs.

Due to the limited availability of several of Plaintiffs' expert witnesses, Defendants have had to schedule certain remaining depositions as late as the end of March. Accordingly, Defendants submit that, at this time, the February 18, 2020 discovery[11] deadline should be extended until March 31, 2020. In addition, depending on the outcome of Defendants' motion for Clarification and Stay, (Dkt. No. 405), Defendants potentially may need to seek an additional extension in light of the time required to process for production potentially tens of thousands of deliberative documents or to seek relief in the Court of Appeals.

Respectfully submitted, January 30, 2020

[11] Plaintiffs refer to the current February 18 deadline as the close of "fact discovery," but it is actually the close of all discovery. See Order 7, Dkt. 343 ("The discovery cutoff will be February 18, 2020").



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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 January 30, 2020.

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# EXHIBIT 1

**EXHIBIT A**

| Identifier | DocID | Email Sent Date | File Name | Email Subject | More information from DoD/Services |
|---|---|---|---|---|---|
| USDOE00077924 | Navy_00047404 | | PRESS RELEASE Transgender Service Members EMBARGOED UNTIL 1_30 PM.docx | | Press release from June 30, 2016, posted on www.defense.gov, announcing the Carter policy. |
| USDOE00079686 | Navy_00049166 | | TG Action Officer Work Group_25 July 17.docx | | Administrative informationfrom July 25, 2017 working group. Hours, lunch, restrooms, order of topics. |
| USDOE00083596 | DoD00005044 | | SECAF Action Memo to DSD - Accession of Transgender Applicants Into Military, dtd 31 May 2017.pdf | | Miscoded; but previously released as USDOE 129760 |
| USDOE00117632 | Army_10009527.0001 | 12/5/2016 | Transgender Tier 2 - Further Coordination | Transgender Tier 2 - Further Coordination | Email dated December 5, 2016. Email includes an attachment titled "HQDA EXORD 029-17-Tier Two Training.pptx." From the Chief, USASOC G-1 Military Personnel Division, to "USARMY Pentagon HQDA DCS G-1 Mailbox SCCC," with Paul Aswell copied. Requests information concerning processes surrounding requests for gender marker changes, including clarification on portions of the attached slide deck. |
| USDOE00118110 | Army_10009744.0001 | 1/12/2017 | Transgender question_ | Transgender question. | Email dated Jan 12, 2017 from an Army Psychiatric Mental Health Nurse Practitioner to the SCCC ("HQDA DCS G-1 Mailbox"). Email requests responses to questions concerning who is responsible for treating GD, when a trainee may begin the transition process, and the steps to follow when a trainee who meets the diagnostic criteria for GD cannot complete training due to a BH condition and is under 180 days |
| USDOE00118271 | Army_10009907.0001 | | Encl 1 TRADOC Transgender Training and Education Status TASK IN163341.docx | | Chart (with no content) titled "(Command) Tier 2 Transgender Training and Education Status," which tracks the number & percentage of trained individuals and projected training completion date |
| USDOE00119486 | Army_10010410.0001 | | LT Winter%27s DA FORM 4187 signed %28ETP-Gender Marker Change.pdf | | DD Form 4187 (Personnel Action), dated June 9, 2017, approved ETP to allow a soldier to comport to the requirements of the female gender prior to gender marker change. Also included is a separate memorandum--the soldier's treatment plan for transgender behavioral health / medical care. |

**EXHIBIT A**

| Identifier | DocID | Email Sent Date | File Name | Email Subject | More information from DoD/Services |
|---|---|---|---|---|---|
| USDOE00122053 | Army_10005693.0001 | 11/13/2017 | RE_ SPC Akbarian Gender Marker Change Request (UNCLASSIFIED) | RE: SPC Akbarian Gender Marker Change Request (UNCLASSIFIED) | Email chain that is communications to/from attorneys [concerning a soldier's request for gender marker change] |
| USDOE00125477 | Army_10010714.0001 | | Form 5_ETP_transgender service EXORD.pdf | | Partial / Incomplete routing slip to Army G-1 for Army Policy re: Gender Marker change (Army Directive 2016-35). Army Directive 2016-35 itself appears several times in the collection (i.e. USDOE00099965). |
| USDOE00131754 | DoD00012133 | | Transgender Service Member Information Paper LC final.pdf | | Not within date range; attachment created and predates work on the Carter policy |
| USDOE00143455 | Army_10002491.0083.0004 | | SSG Bigley's evidence of Name Change.pdf | | photcopy of passport |
| USDOE00143617 | Army_10002491.0157.0001 | | Memorandum for COL Garman regarding Gender Marker Change CPT Aaron Stehlik.pdf | | Partial / Incomplete routing slip to Army G-1 for Army Policy re: Gender Marker change (Army Directive 2016-35). Army Directive 2016-35 itself appears several times in the collection (i.e. USDOE00099965). |
| USDOE00144686 | Army_10010754.0001 | | Form 5_ETP_transgender service EXORD.pdf | | Partial / Incomplete routing slip to Army G-1 for Army Policy re: Gender Marker change (Army Directive 2016-35). Army Directive 2016-35 itself appears several times in the collection (i.e. USDOE00099965). |
| USDOE00151943 | Navy_00058366 | | FW_ TGCT_Endo.pptx; #4.pdf | FW: TGCT_Endo.pptx; #4 | May 11, 2017 Transgender care team email distributing powerpoint from endocrinologist presentation. |
| USDOE00153620 | Navy_00060043 | | SPEC_Transgender ADULT Template_OCT 2016.doc | | October, 2016 template for medical chronological record of care entry for patient self-referral for gender dysphoria. |
| USDOE00154286 | Navy_00060709 | | FW_ Transgender Care Update - Key Points(1).pdf | FW: Transgender Care Update - Key Points | Email forwarding updates on transgender care among Okinawa Hospital leadership. |
| USDOE00154811 | Navy_00061234 | | Transgender Pathway for Green Medical Providers_17_Oct_2016_MV.pptx | | October 17, 2016 Marine Corps flowchart on gender transision under the Carter policy. |
| USDOE00155758 | Navy_00062181 | | FW_ 16-Star TG Letter (DRAFT) - 20 Jun 17.pdf | | Jun 21, 2017 email regarding transgender accessions. |
| USDOE00158387 | Navy_00064810 | | 01_O'Reilly CV MAR 2017 TGCT.pdf | | March 2017 curriculum vitae for plastic surgeon. |
| USDOE00161149 | Navy_00067572 | | TG POC MTF TEMPLATE.xlsx | | August 11, 2016 template regarding data points for transgender point of contacts at military treatment facilities. |
| USDOE00161898 | Navy_00068321 | | Transgender Health_Conference Attendance Roster.docx | | August 30, 2016, incomplete draft attendance roster for medical conference. |
| USDOE00164379 | Navy_00070802 | | TG Care pathway NMCSD.pub | | February 16, 2017 Navy transition flowchart |

**EXHIBIT A**

| Identifier | DocID | Email Sent Date | File Name | Email Subject | More information from DoD/Services |
|---|---|---|---|---|---|
| USDOE00166402 | Navy_00072825 | | TRANSGENDER de-identified DHA Waiver.docx | | May 9, 2017 request from medical facility to perform gender transition surgery. |
| USDOE00167997 | Navy_00074420 | | Updated_Master_Quarterly_TGCT_Data_Call.xlsx | | December 19, 2017 blank spreadsheet for collecting TG data by service and medical region. |
| USDOE00168581 | Navy_00075004 | | Sex Reassignment Surgery Evaluation Criteria.pptx | | Powerpoint slides on the then-current criteria for requesting sex reassignment surgery. |
| USDOE00168585 | Navy_00075008 | | transgenderandgenderidentity.pdf | | Policy statement from the National Association of Social Workers, published in *Social Work Speaks* |
| USDOE00168780 | Navy_00075203 | | TG Patient Record Review Sheet.pdf | | Blank template patient record for transgender patients. |
| USDOE00168907 | Navy_00075330 | | trans search terms final.docx | | Surgeon General search terms for document collection |
| USDOE00169137 | Navy_00075560 | | Navy_MTF TG Care Capabilities.xlsx | | Blank checklist for TG care capabilities at various naval hospitals |
| USDOE00169138 | Navy_00075561 | | New TG Assessment Template.xlsx | | Blank spreadsheet for data on number of providers and their surgical privileges. |
| USDOE00170236 | Navy_00076659 | | Navy_MTF TG Care Capabilities.xlsx | | Blank checklist for TG care capabilities at various naval hospitals |
| USDOE00170284 | Navy_00076707 | | TG POC MTF TEMPLATE.xlsx | | August 19, 2016 template regarding data points for transgender point of contacts at military treatment facilities. |
| USDOE00170314 | Navy_00076737 | | TG POC MTF TEMPLATE.xlsx | | October 7, 2016 template regarding data points for transgender point of contacts at military treatment facilities. |
| USDOE00171348 | Navy_00077771 | | Brinkmeyer.Buchholz.Transgender Military Review.docx | | October 12, 2016 recommendations on medical care of transgender individuals in light of the Carter policy. |
| USDOE00172229 | Navy_00078652 | | TGCT Data TEMPLATE_NO PHI.xlsx | | November 3, 2016 template for collecting data on transgender individuals. |
| USDOE00173002 | Navy_00079425 | | TRANSGENDER (2).xlsx | | List of individuals with completion date of transgender web training. |
| USDOE00177580 | Navy_00084003 | | Patient Checklist for Transgender Care.pdf | | Marine checklist on steps to take when being treated for gender dysphoria, such as what waivers to seek. |
| USDOE00177619 | Navy_00084042 | | Physician Checklist for Transgender Care.pdf | | Marine checklist for physicians on steps to take/items to remember regarding transgender care plans. |
| USDOE00178621 | Navy_00085044 | 12/18/2017 | ATTACH003.eml | Appt For Transgender Marine | December 18, 2017 email regarding medical care of specific transgender individual. |
| USDOE00180085 | ATTACH004.eml | 3/17/2017 | ATTACH004.eml | RE: Dependent requesting Transgender surgery | Dependent requesting Transgender surgery |

**EXHIBIT A**

| Identifier | DocID | Email Sent Date | File Name | Email Subject | More information from DoD/Services |
|---|---|---|---|---|---|
| USDOE00180155 | Navy_00086578 | | Navy_MTF TG Care Capabilities.xlsx | | Blank checklist for TG care capabilities at various naval hospitals |
| USDOE00180187 | Navy_00086610 | | Navy_MTF TG Care Capabilities.xlsx | | Blank checklist for TG care capabilities at various naval hospitals |
| USDOE00180240 | Navy_00086663 | 3/1/2017 | ATTACH007.eml | FW: WebBased Transgender Training | List of members who have not completed required transgender web based training |
| USDOE00197075 | DoD00012094 | | Cigna coveragepositioncriteria_gender_reassignment_surgery.pdf | Cigna Coverage Policy 0266 | third party Cigna insurance coverage criteria for gender surgery |
| USDOE00238547 | Army_10030182 | 4/9/2018 | [Non-DoD Source] Canceled_ Transgender (TG) Care IPT Meeting | [Non-DoD Source] Canceled: Transgender (TG) Care IPT Meeting | Outlook calendar notification cancelling April 10, 2018 Transgender Care IPT Meeting |
| USDOE00239060 | DoD00005277 | 7/20/2015 | SAF MR TG Memo.pdf.htm | SAF MR TG Memo.pdf | Pre-dates work on Carter policy |
| USDOE00246906 | DoD00120476 | | MHS TG Workgroup Agenda 24 JAN 2018v5.doc | | attachment regarding Military TELEHEALTH not TG; TYPO in attachment title of TG instead of TH |
| USDOE00253403 | DoD00122617 | | How much does a hysterectomy cost.docx | | outside analysis of much a hysterectomy costs in the private sector |
| USDOE00253405 | DoD00122619 | | Hysterectomy Cost (2).docx | | outside analysis of much a hysterectomy costs in the private sector |
| USDOE00283105 | DoD00143338 | | ATT26410 | Transgender tweets by POTUS (UNCLASSIFIED) | Miscoded email from PA re: POTUS tweet on TG service; attaches screenshot of tweet; released in full with PII redcations via 143337 but deemed this duplicate document 143338 non responsive |

# EXHIBIT 2

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January 24, 2020

**By E-mail**

James R. Powers
United States Department of Justice
Civil Division, Federal Programs Branch
(202) 353-0543

Re: *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP

Dear Jim:

I write in response to your January 17 email providing more information regarding the sampling of 50 non-responsive slipsheets. The information provided by Defendants further validates Plaintiffs' concern—these documents have been improperly withheld.

As detailed in Plaintiffs' October 4, 2019 letter, even if a non-privileged family member of a responsive document is not responsive, because of its association with a responsive document it must be produced. Federal Rule of Evidence 106, colloquially the rule of completeness, requires it. As does Federal Rule of Civil Procedure 34, which mandates that documents be produced "as they are kept in the usual course of business."

Apart from clear law requiring the production of non-privileged non-responsive family members in an otherwise responsive family, these documents do not appear to be non-responsive at all. Per Drew's December 2 email, "the vast majority (I would estimate over 95%) of the documents with the extension .msg in the file name were Outlook delivery or read receipts." To the extent a witness denies reading or viewing a message, read receipts are relevant evidence relating to that contention. Defendants must produce these messages.

Drew's December 2 email also states that of the remainder of the documents, "the vast majority appear to be discussions between medical professionals regarding individualized treatment of a service member for gender dysphoria." Yet Defendants did not collect from medical professionals in relation to their individualized treatment. They collected from the Panel of Experts and those directly supporting the Panel. This is plainly evident with one look at the

metadata for these documents. For example, senders and recipients of the messages related to the withheld documents include Panel members such as Mr. Anthony Kurta, General James McConville, and Admiral William Moran. Colonel Mary Krueger, who testified in her deposition that she "supported the panel of experts" is amongst the senders and recipients. 04/17/18 Krueger Dep. Tr. at 57:16. As is Mr. Lernes Hebert, who provided a December 15, 2017 declaration in this matter stating that he was "responsible for overseeing the human resource policies impacting the sustainment of the all-volunteer-force for the Department of Defense…" and opined on the implementation of transgender accessions. Dkt. No. 107. The list goes on. Furthermore, the majority of these of withheld documents are attachments to communications withheld for deliberative process privilege ("DPP"). If these attachments were part of communications that Defendants assert are shielded by DPP because they reflect the internal processes related to the Ban then it is difficult to see how the attachments could be irrelevant. In light of the context in which these documents were sent and the individuals involved in the review of them, the only logical conclusion is that they were considered in connection with the formation of the Ban.

But one need not even infer from the metadata or privilege calls the relevance of the documents being withheld. The information provided by Defendants on the sampling of 50 reveals all too clearly that relevant records are being withheld. By way of example only, USDOE00151943 is an email attaching an endocrinology presentation regarding the treatment of transgender individuals. Defendants have consistently put the medical treatment of transgender service members at issue in this litigation—both with respect to cost and impact to readiness and lethality. The substance of an email conveying a military presentation regarding the medical treatment of transgender individuals is plainly relevant to both the claims and defenses in this litigation. USDOE00253403 and USDOE00253405 both contain information known to the military about the cost of a hysterectomy in the private sector and are part of communications that Defendants themselves describe on their privilege log as relating to "the formulation of the transgender policy." Similarly, USDOE197075 is a document detailing insurance policy coverage for transgender individuals and is part of a communication described by Defendants as including "deliberations regarding the formulation of the transgender policy" on their log. If this was considered as part of the formulation of the Ban then it is plainly relevant.

Plaintiffs first raised this issue 16 weeks ago. Defendants' delay tactics with respect to these documents can go on no longer. Please indicate by Wednesday, January 29 whether you will agree to produce these documents. Otherwise we will seek assistance from the Court.

Sincerely,

*/s/ Vanessa Barsanti*

Vanessa Barsanti

# EXHIBIT 3

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December 13, 2019

**By E-mail**

Andrew E. Carmichael
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20 Massachusetts Avenue, NW, Rm. 7218
Washington, D.C. 20530

Re: Document Productions of Communications with Third Parties in *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP

Dear Drew:

I write regarding the Department of Defense's ("DoD") refusal to produce communications with third parties that have been withheld for deliberative process privilege and/or attorney-client privilege, or even so much as identify whom on Defendants' privilege logs is *not* a third party. As detailed in my October 7 letter, no such privileges apply to the identified communications with third parties, and it is inappropriate to withhold responsive communications or documents shared with third parties.

The burden is on Defendants to support their privilege claims. However, in the spirit of cooperation, Plaintiffs have further assessed the initial list they provided of potential third parties and have reduced it significantly. Plaintiffs have narrowed the approximately 800 individuals previously identified as potential third parties associated with documents withheld for deliberative process privilege and/or attorney-client privilege and ask that, consistent with the parties' conversations during meet and confers, the DoD re-review the smaller subset of approximately 500 potential third parties identified in Exhibit A.

Though Plaintiffs reserve their right to challenge the withholding of documents for deliberative process privilege and/or attorney-client privilege that are not on Exhibit A, those included in the exhibit contain author or recipient metadata that indicate they were shared with an individual that Plaintiffs cannot confirm is employed by Defendants:

- Many entries in the exhibit show that documents are being withheld where the domain name information indicates that the email addresses belong to third parties. For example, there are domain names that belong to private universities, hospitals, corporations, etc.

- Similarly, approximately 50 privilege log entries contain popular, public email domains, such as Gmail.com, Hotmail.com, and Yahoo.com.

Please indicate by December 19 whether the DoD will consent to re-reviewing this limited subset of its documents withheld for deliberative process privilege and/or attorney-client privilege. We are available to meet and confer at your convenience.

Sincerely,

/s/ Vanessa Barsanti

Vanessa Barsanti

# Exhibit A

| |
|---|
| - on behalf of - Duffy M <rmujaahida@yahoo.com> |
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# EXHIBIT 4

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

| | |
|---|---|
| RYAN KARNOSKI, et al.,<br><br>*Plaintiffs*,<br><br>STATE OF WASHINGTON,<br><br>*Plaintiff-Intervenor*,<br><br>v.<br><br>DONALD J. TRUMP, in his official capacity as President of the United States, et al.,<br><br>*Defendants*. | Case No. 2:17-cv-01297-MJP |

**PLAINTIFFS' RULE 26(a)(2) EXPERT REPORT OF**
**MARGARET C. WILMOTH**

My name is Margaret C. Wilmoth. I have been retained by counsel for Plaintiffs as an expert in connection with the above-captioned litigation. The purpose of my engagement is for me to provide my expert opinion on whether transgender service members' health care needs will impose a burden on the military. I prepared this report to set forth the opinions I may express at trial and the basis for my opinions. The opinions expressed in this report are based on the information that I have reviewed to date. I reserve the right to revise and supplement it if any new information becomes available in the future.

A copy of my curriculum vitae, which includes my publications, is attached as Exhibit A. The materials I considered in forming my opinions are listed in Exhibit B or referenced in this report. I also relied on my professional experience and education, including my research and experience in military health care issues and my understanding of U.S. military personnel policies in reaching the

member medical care needs, the Military Health System is already providing the same or substantially similar services to other service members. There would be little, if any, additional burden on the Military Health System from the provision of the required medical services to transgender service members, nor would it have any adverse impact on military readiness.

## III. BACKGROUND

On July 28, 2015, Secretary of Defense Ashton Carter directed Brad Carson, Acting Undersecretary of Defense for Personnel and Readiness, to convene a "Working Group" to study the policy and readiness implications of allowing transgender persons to serve openly in the Armed Forces. The Working Group was asked to determine whether there were any objective, evidence-based impediments to permitting transgender people to serve openly and, if not, to develop an implementation plan for changing the policy to permit open service with the goal of maximizing military readiness.

When Secretary Carter directed the formation of the Working Group, I was serving as Deputy Surgeon General for Mobilization, Readiness, and Army Reserve Affairs. I was asked by the Surgeon General, United States Army to serve as that office's representative to the Working Group. Members of the Working Group were appointed based on the positions they held, not any policy predisposition. As one of approximately twenty-five members of the Working Group, I was able to provide the benefit of my medical expertise, my academic research, and my knowledge of the workings of the Military Health System and the Defense Health Agency. I participated in the Working Group's weekly meetings from its initial meeting in the summer of 2015 though the final meeting in late spring of 2016.

The Working Group addressed many topics, one of which was determining how the military could meet medical needs of transgender service members. With respect to that topic, our process involved three steps: (1) Understanding the medical needs of transgender service members;

(2) identifying whether and how those needs could be met within the Military Health System; and (3) developing policies and protocols to ensure transgender service members could serve openly and have their medical needs met. The Working Group focused on ensuring that transgender service members' medical needs would be treated in the same manner and under the same framework as the medical needs of other service members, unless that proved unworkable. The Working Group was free to conclude those needs could not be met under the existing framework and, indeed, had a duty to articulate any such concerns.

The first step for the members of the Working Group was to establish a baseline level of knowledge among all Working Group members about the medical needs of transgender service members. We educated ourselves by meeting with experts from the civilian sector so we could better understand what being transgender means. We wanted to understand the full range of medical and behavioral treatment that might be required for a transgender service member. We sought to understand how an individual might go through a transition process and what the medical components of that process might be. We spoke to internal medicine experts, psychologists, endocrinologists, and surgeons who educated the Working Group—based on a variety of medical and behavioral health perspectives—regarding all aspects of transgender care including mental health treatment, pharmaceutical treatment, and surgical treatment. The Working Group also conducted comprehensive reviews of the applicable medical and scientific literature. Several transgender service members currently serving in the military spoke to the Working Group and made themselves available for any questions the Working Group had about their experiences and needs.

Throughout this educational process, the Working Group developed a deep understanding of the medical needs of transgender service members. After we understood the universe of potential medical needs of transgender service members, we focused on how the Military Health System (MHS) could—within its current structure—meet those needs, including with respect to hormone

therapy, pharmaceutical care, gynecological care, behavioral health care, and surgical therapy. The Working Group used its analysis and the medical literature to calculate average cost figures for the "total package of care" for a transgender man and a transgender woman serving in the military.

Next, we turned our focus to developing a policy that would address the psychological and physical needs of transgender individuals and treat those individuals fairly while keeping medical readiness and deployability at the forefront. Developing the protocol was an iterative process involving multiple rounds of drafting, gathering input from the services, and redrafting.

The Working Group sought to identify and address all potential issues relating to service by openly transgender persons. We concluded that there were no barriers that, from any perspective, should prevent transgender service members from serving openly in the military. Open service by transgender service members would not impose any significant burdens on readiness, deployability, or unit cohesion. On deployability, for instance, the Working Group discussed that while some transgender service members might not be deployable for limited periods of time due to their treatment, this is not unusual, as it is common for service members to be non-deployable for periods of time due to medical conditions such as orthopedic injuries, obstructive sleep apnea, appendicitis, gall bladder disease, infectious disease, and myriad other conditions.

For those seeking to join the military, the Working Group recommended that the medical standards for accession into the Military Services by transgender persons be based upon the same standards applied to persons with other medical conditions, which seek to ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty. Based upon that standard, the Working Group recommended that the new accessions policy permit enlistment so long as an applicant with a history of gender dysphoria or of treatment for gender

dysphoria has completed all medical treatment associated with the applicant's medical condition and has been stable in the preferred gender for a sufficient period of time.

The Working Group's process for developing the protocol and recommendations was deliberative and thoughtful, involved significant amounts of research and education, and in the end resulted in a policy that all services supported. We were very proud to have developed a policy that treats transgender service members as the equal of their fellow service members, and as soldiers, sailors, Marines, cuttermen, and airmen first.

## IV. OPINIONS

The MHS already provides the medical care needs that transgender service members might require. It is my assessment, based on my participation in the Working Group, and my experience, education, and research in military health care issues, that for the vast majority of transgender service member medical care needs, the MHS is already providing the same or substantially similar services to other service members, and that there would be little, if any, additional burden on the MHS from the provision of the required medical services to transgender service members.

**Hormone Therapy**. The MHS already provides hormonal therapy to service members. Women—in particular, many menopausal women—frequently receive hormonal therapy, and men commonly require testosterone replacement. The MHS also provides hormone replacement therapy to treat service members with a wide variety of medical needs, including adrenal or pituitary deficiencies. Providing similar care for transgender individuals from a pharmaceutical perspective would not be a complicating issue or an additional burden, because the medications transgender service members take are identical to those already provided to non-transgender personnel. There is no administrative or other reason for the MHS to single out transgender people taking the same medication for different treatment.

# EXHIBIT 5

**U.S. Department of Justice**
Civil Division, Federal Program Branch

James R. Powers
Trial Attorney

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January 17, 2020

By Email

Vanessa Barsanti
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

*Counsel for Plaintiffs*

Re: Your Letter of December 13, 2019 in *Karnoski v. Trump*, No. 17-1297

Dear Vanessa,

I write in response to your letter of December 13, 2019, which purports to challenge DoD's withholding of "communications with third parties" under the deliberative process or attorney-client privileges. Your letter does not refer to any specific privilege log entries nor does it contain any details about particular documents to which you object to Defendants' invocation of privilege. Defendants have reviewed Exhibit A attached to your letter and determined that it does not raise any basis to provide further information at this time in light of Plaintiffs' continued lack of effort to narrow this dispute.

Your December 13 letter follows a similar letter sent October 7, 2019, which also attached an Exhibit A. That document contained approximately 800 entries purportedly "appear[ing] to represent communications with third parties." To the contrary, Exhibit A contained references to, for example, the current and most recent former Secretaries of Defense, two DOJ counsel of record in this case, and numerous attendees at meetings of the Panel of Experts, all of whom have been previously identified in Defendants' discovery responses. As we discussed in our November 4, 2019, letter in response, Defendants had no obligation to undertake a burdensome review of the hundreds of entries in Exhibit A where Plaintiffs made no serious effort to minimize the dispute by consulting, for example, Defendants' responses to Plaintiffs' interrogatories to determine whether the individuals they supposed are third parties are, in fact, employees or officials of the Department of Defense or Military Services.

Exhibit A attached to your December 13 letter does little to resolve this fundamental flaw. After numerous hours spent reviewing the entries contained in the approximately 500-line

spreadsheet, we have noted that it is littered with problematic entries, including the following issues:

- At least two references to Plaintiff Lindsey Muller, who you are well aware is a member of the Armed Forces.
- References to numerous senior executive officials, including former Deputy Secretary of Defense Robert Work, former Secretary of Homeland Security and DoD General Counsel Jeh Johnson, retired Army General Carter F. Ham, and DoD Deputy General Counsel Ryan Newman.
- Entries corresponding to numerous employees of the federal government whose email addresses indicate that fact.
- Numerous references to DoD contractors, such as the principal author of the RAND report, Agnes Schaefer.
- Numerous entries where we have been unable to identify any communication in the collection to which the individual named was sender or recipient, raising questions about the methodology employed by Plaintiffs in preparing Exhibit A. It is also unclear whether Plaintiffs have updated this list based on the hundreds of deliberative documents Defendants recently released in the *Doe* litigation.

All of these problems indicate that Plaintiffs have ignored their obligation to minimize the parties' discovery dispute. As stated in our prior letter of November 4, the only reasonable approach to this dispute is a discussion of particular privilege log entries corresponding to documents Plaintiffs believe have been improperly withheld because of the involvement of outside third parties. This approach is likely to substantially reduce the burdens of this dispute. For example, at least 18 of the entries in Exhibit A appear to correspond to USDOE00255328, an email addressed to members of the U.S. Department of Health and Human Services Interdepartmental Serious Mental Illness Coordinating Committee. Defendants are happy to discuss the applicability of privilege as to any particular document, such as USDOE00255328; they will not engage with a list of hundreds of names served without any context.

Based on our work reviewing Exhibit A, however, Defendants have determined they will withdraw their assertion of deliberative process privilege as to any communications to which the following individuals were a party, and will provide a supplemental production accordingly:

- Anna Pohl
- Lolita Baldor
- Michael P. Richter
- Elizabeth Kocienda
- Dan Lamothe
- Amy Wilson
- Mary Wilfert

- Chris Geidner

I look forward to hearing from you further on this matter.

Sincerely,
*/s/*
James R. Powers