

1 of relevant data and information pertaining to transgender Service members.” (See Dkt. No. 226
2 at 9-10; Dkt. No. 224, Ex. 2 at 19.) The Panel received its information from several working
3 groups that gathered and sorted information before passing it along to the Panel. (Dkt. No. 402,
4 December 10, 2019 Hr’g Tr. (“Hr’g Tr.”) at 23:1-8; Dkt. No. 375 at 12, 18.)

5 On July 27, 2018 this Court granted Plaintiffs’ Motion to Compel Discovery Withheld
6 Under the Deliberative Process Privilege. (Dkt. No. 245; Dkt. No. 299.) Defendants appealed,
7 and on June 14, 2019 the Ninth Circuit issued a writ of mandamus, vacating this Court’s Order.
8 Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019). The Ninth Circuit found that the
9 record was insufficient to evaluate Defendants’ privilege assertions and suggested that on
10 remand this Court should “consider classes of documents separately when appropriate” and, “[i]f
11 Defendants persuasively argue that a more granular analysis would be proper, [the Court] should
12 undertake it.” Id.

13 On August 22, 2019, Plaintiffs filed a renewed Motion to Compel Documents Withheld
14 Under the Deliberative Process Privilege (Dkt. No. 364). Noting that Defendants asserted the
15 privilege as the sole basis for withholding or redacting 35,000 responsive documents, (Dkt. No.
16 394 at 3) and produced documents by creating and searching lists of terms and custodians,
17 without responding to individual Requests for Production, (Dkt. No. 381, Ex. 1, Declaration of
18 Robert E. Easton (“Easton Decl.”), ¶ 5), the Court found that Defendants’ production did not
19 permit Plaintiffs or the Court to assess Defendants’ privilege claims in the “granular” fashion
20 mandated by the Ninth Circuit. (Dkt. No. 394 at 6-7.) The Court therefore ordered Defendants
21 to begin producing documents responsive to Plaintiffs’ Requests for Production and the Parties
22 to periodically appear before the Court to review Defendants’ deliberative process privilege
23 assertions, in groupings of five Requests for Production at a time. (Id. at 6.)

1 On December 18, 2019 the Court issued an Order Granting Plaintiffs' Motion to Compel
2 Documents Withheld Under the Deliberative Process Privilege pursuant to Plaintiffs' Requests
3 for Production Nos. 15, 29, 33, 36, and 44. (Dkt. No. 401.) Relevant here, the Court ordered
4 Defendants to produce:

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

10 (Id. at 7.) Further, during the December 10, 2019 Status Conference, the Court directed
11 Defendants to "supply [Plaintiffs] with the working group names, who's on the working group,
12 the dialogue in e-mail or any other communication within those working groups, and the data
13 that they produced. And the communications between those people on each working group."
14 (Hr'g Tr. at 22:1-3.) Defendants now request clarification of the first part of the Court's Order
15 and seek a stay of any part of the Order that requires Defendants to produce more than the
16 "documents of Members of the Panel of Experts." (Dkt. No. 405 at 7, 11.)

17 Discussion

18 A. Motion for Clarification

19 Defendants ask the Court to clarify whether the first part of its December 19, 2019 Order
20 requires Defendants to produce "communications solely between non-Panel members and other
21 non-Panel members, or other documents non-Panel members never shared with Panel members."
22 (Dkt. No. 405 at 7.) It does.

23 As stated in the Order, Defendants are required to produce "the names, communications,
24 and deliberative documents of non-voting members of the Panel." (Dkt. No. 401 at 7.) This

1 includes the communications of members of the working groups and the data reviewed by these
2 groups, discussed at length during the December 10, 2019 Status Conference, where the Court
3 ordered Defendants to “supply the dialogue in e-mail or any other communication within those
4 working groups, and the data that they produced.”¹ (Hr’g Tr. at 22:1-3.) This also includes
5 responsive communications among members of the services.² (Dkt. No. 412, Feb. 3, 2020 Hr’g
6 Tr. at 17:22-18:15.)

7 The data collected and reviewed by the working groups is not deliberative and
8 understanding the decision-making regarding what information the working groups or anyone
9 within the services chose to withhold from the Panel is relevant to evaluating Defendants’
10 argument that the Panel’s decision was based on the “study of relevant data and information.”
11 (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Further, as noted by the Court during the
12 December Status Conference, (Hr’g Tr. at 23:16-17), the relevance of these documents
13 outweighs any deference owed to members of the working groups or services, who were not “the
14 most senior executive branch officials.” Karnoski, 926 F.3d at 1206. The Court therefore

16 ¹ The Parties are advised that any Order from the Court must be read in the context of the Court’s oral rulings during
17 the discovery conferences.

18 ² In the February 3, 2020 Status Conference, the Court provided Defendants with the following instruction:

19 The other thing I would say is that under the civil rules, a motion to compel is not necessary. It is a motion
20 to protect. If you’ve got documents out there that you believe are responsive but you’re still withholding,
21 you have the burden of bringing on the motion to protect. They don’t have to move to compel. So among
22 these thousands of documents, if you think that there is something out there that is responsive to this RFP,
23 you’ve got to put it in a log and you’ve got to defend why it is that the deliberative privilege still applies.
24 It’s not the other way around. You have the documents. You can see what’s there. They can’t.

And when you throw out ideas that maybe the services are offering up and saying this is the wrong data, of
course that’s responsive. If you think it’s deliberative, you have to apply the privilege.

So, let’s go back and talk again. I’m going to issue an order that covers – we’ve covered now the first two
categories, we’re going to get to the third. If you think there’s something else out there, because the order
says you have to respond, it’s your obligation to identify what it is, it’s not theirs. Okay?

(Dkt. No. 412, Feb. 3, 2020 Hr’g Tr. at 17:20-18:15.)

1 GRANTS Defendants' Motion to Clarify the first part of its Order³ regarding Request for
2 Production No. 29.

3 **B. Motion for Partial Stay**

4 The Government also moves the Court for a stay of its December 19, 2019 Order, which
5 required Defendants to produce all documents responsive to Request for Production No. 29.

6 (Dkt. No. 401 at 7; Dkt. No. 405 at 8-11.) Because Plaintiffs have overcome the deliberative
7 process privilege for these documents (see Section A, supra; Dkt. No. 401 at 5-7) and this

8 dispute has been pending for nearly two years (Dkt. No. 245), the Court will not issue a stay for
9 an unspecified amount of time while Defendants decide whether to appeal. (Dkt. No. 405 at 9.)

10 This is an ongoing process and until the process is complete it is wasteful to appeal one segment
11 at a time. Further, to the extent the Government's Motion is in fact a Motion for Reconsideration
12 of the Court's December Order (see Dkt. No. 405 at 9-11), the Local Rules provide that motions
13 for reconsideration must be filed "within fourteen days." LCR 7(h). The Government has
14 missed its deadline.

15 **Conclusion**

16 Accordingly, the Court GRANTS Defendants' Motion for Clarification. Defendants are
17 required to produce all documents responsive to Request for Production No. 29, this includes,
18 but is not limited to:

- 19 (1) All responsive working group communications, including communications that were
20 never seen or reviewed by the Panel;

21
22
23 _____
24 ³ Defendants have not requested that the Court clarify the second part of its Order regarding drafts from the
Undersecretary of Defense's Office and it declines to do so.

- 1 (2) all responsive data reviewed by members of the working groups or members of the
- 2 services, including data that was never seen or reviewed by the Panel; and
- 3 (3) all responsive communications among members of the services, regardless of whether
- 4 those communications were shared with the Panel.

5 Defendants are ORDERED to produce all documents responsive to Request for
6 Production No. 29, including those documents from the categories above, within seven (7) days
7 of the date of this Order. The Court DENIES Defendants' Motion for a Stay.

8 The clerk is ordered to provide copies of this order to all counsel.

9 Dated February 7, 2020.

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12 Marsha J. Pechman
13 United States District Judge
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