

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

Case No. 2:17-cv-01297-MJP

**PLAINTIFFS’ RESPONSE TO THE
COURT’S FEBRUARY 7, 2020 ORDER**

1 In response to the Court’s direction on the record during the February 3, 2020 Status
2 Conference for Plaintiffs to respond to the Court’s February 7, 2020 Order (2/3/2020 Hr’g Tr.,
3 Dkt. No. 412, at 23:11–15), Plaintiffs now respectfully submit the following evidence in support
4 of Plaintiffs’ Motion to Compel the Government to produce documents responsive to Plaintiffs’
5 Request for Production Nos. 15 and 29. Plaintiffs have discussed the substance of these
6 documents during recent status conferences and submissions to the Court, and now submit all of
7 the documents to ensure the record is complete for the benefit of the District Court and Ninth
8 Circuit panel reviewing the Government’s recent mandamus petition and stay request. Plaintiffs
9 submit this evidence to further demonstrate the relevance of three categories of documents:

10 (1) documents related to the deliberations of and decision by the Carter Working Group (Request
11 for Production No. 15); (2) communications among and data/documents generated by the
12 working groups supporting the so-called “Panel of Experts” (the “Panel”) (Request for
13 Production No. 29); and (3) drafts, communications, and documents created or relied upon in
14 drafting the February 2018 Department of Defense Report and Recommendations (*id.*). (*See* Dkt.
15 No. 364 at 3 (noting that the Court must consider the relevance of the information requested
16 under the factors enumerated in *FTC v. Warner Communications Inc.*, 742 F.2d 1156 (9th Cir.
17 1984)).)

18 **A. Carter Working Group**

19 1. At the December 10, 2019 Status Conference, the Government represented its ability
20 to produce the same categories of documents relating to the Carter Working Group as it had
21 produced regarding the Ban. (*See* 12/10/2019 Hr’g Tr., Dkt. No. 402, at 34:2–16.) Counsel for
22 Plaintiffs agreed to first review the final report that the Government agreed to produce on
23 December 20, and the Court permitted Plaintiffs to re-raise whether the full production is
24 required. (*Id.* at 35:10–13.)

25 2. At the February 3, 2020 Status Conference, counsel for Plaintiffs explained that the
26 Government put the integrity of the Carter Working Group process at issue by questioning two
27 of Plaintiffs’ expert witnesses at length about their involvement in and the processes utilized by
28 the Carter Working Group. (2/3/2020 Hr’g Tr., Dkt. No. 412, at 27:14–21; *see also* Joint Status

1 Report, Dkt. No. 408 at 5.) In support of Plaintiffs’ argument that documents requested in
2 Request for Production No. 15 are relevant, Plaintiffs provide the Court with excerpts from the
3 two expert depositions at issue.

4 a. An excerpt from the January 28, 2020 deposition of Brad Carson, the Acting
5 Under Secretary of Defense for Personnel and Readiness from April 2, 2015 to
6 April 8, 2016. Mr. Carson led the Carter Working Group. (February 25, 2020
7 Declaration of Jordan M. Heinz (“Heinz Decl.”), ¶ 2, Exhibit 1.)

8 b. An excerpt from the January 22, 2020 deposition of Margaret Wilmoth, former
9 Deputy Surgeon General for Mobilization, Readiness and Army Reserve Affairs
10 in the Office of the Surgeon General of the United States Army. General Wilmoth
11 was a member of the Carter Working Group. (*Id.* at ¶ 3, Exhibit 2.)

12 3. Plaintiffs also attach Wilmoth Dep. Ex. 16, USDOE00238554_0001, a document the
13 Government marked as an exhibit at the deposition of General Wilmoth. (*Id.* at ¶ 4, Exhibit 3.)
14 The document is an October 16, 2015 email between General Wilmoth and other members of the
15 Carter Working Group, which the Government previously withheld on the basis of the
16 Deliberative Process Privilege. The Government decided to selectively produce the document to
17 Plaintiffs in September 2019 over its prior privilege assertion, and then cross examined General
18 Wilmoth regarding its contents. (*See Id.* at ¶ 3, Exhibit 2 at 212:22–218:25.) Immediately after
19 the Government’s questioning on the document concluded, counsel for Plaintiffs requested on
20 the record that the Government produce all other communications between members of the
21 Carter Working Group as a matter of fairness, but counsel for the Government refused to respond
22 to the request. (*See id.* at 252:16–253:20; *see also* Joint Status Report, Dkt. No. 408 at 18–19.)
23 The Government continues to withhold other communications between members of the Carter
24 Working Group.

25 **B. “Panel of Experts” Working Groups**

26 4. In support of Plaintiffs’ argument regarding the relevancy of the so-called “Panel of
27 Experts” working group documents, Plaintiffs referenced a working group presentation during
28 the December 10, 2019 Status Hearing. (12/10/2019 Hr’g. Tr., Dkt. No. 402, at 15:17–16:11.)

1 This document appears to be from the [REDACTED] of the Transgender Personnel Policy
 2 Working Group, which was one of five military working groups that considered the policy for
 3 transgender military service.¹ The Government initially withheld this document pursuant to the
 4 Deliberative Process Privilege, but elected to produce the document in November 2019 over its
 5 privilege objection. Notably, this presentation noted as an [REDACTED] that the [REDACTED]
 6 [REDACTED] (Heinz Decl. ¶ 5, Exhibit 4 at
 7 USDOE00273734_0013), and indeed, [REDACTED]
 8 [REDACTED] (*id.* at 0014). This document is plainly relevant to Plaintiffs’
 9 theory that the Panel was constrained by President Trump’s [REDACTED] announced in
 10 his July 2017 tweets and did not meaningfully consider open service as an option, and is
 11 indicative of the relevancy of other working group documents.

12 5. Additional documents show that the working groups felt constrained by the
 13 President’s expressed policy directives, and further demonstrate the relevance of working group
 14 documents:

- 15 a. On November 1, 2017, [REDACTED] provided a joint update to [REDACTED]
 16 and others regarding the Medical Personnel Executive Steering Committee
 17 (“MEDPERS”) and the Transgender Personnel Policy Work Group. (*Id.* at ¶ 6,
 18 Exhibit 5.) Regarding the MEDPERS meeting, Labrutta stated that, [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED] (*Id.*) Plaintiffs must be
 22 able to discover whether the working groups were only allowed to provide certain
 23 data to the Panel and what those data decisions ultimately entailed. Regarding the
 24 Transgender Personnel Policy Work Group meeting, [REDACTED] stated the group
 25 considered whether there should be a [REDACTED]
 26 [REDACTED]

27 ¹ The other working groups included the Senior Implementation Group, the Transgender Action Officer Working
 28 Group, the Accession Medical Standards Working Group, the Medical Personnel Executive Steering Committee,
 and the Medical Personnel Executive Steering Committee Accession Modernization Working Group. (*See*
 Defendants’ Responses to Plaintiffs’ Second Set of Interrogatories, Dkt. No. 375, at No. 19.)

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[REDACTED] (*Id.* at 0002.) [REDACTED]

explained that the primary argument

[REDACTED] (*id.*),

indicating that the working groups and the Panel believed that their role was to implement the President’s policy directives as soon as possible.

b. Indeed, on December 11, 2017, [REDACTED] provided an update regarding a later meeting of the Transgender Personnel Policy Working Group in which it was decided that [REDACTED]

[REDACTED] (*Id.* at ¶ 7, Exhibit 6.)

[REDACTED] (*Id.* (emphasis added).)

6. Plaintiffs also attach an email thread dated October 19, 2017, in which Panel member [REDACTED] expressed concern to [REDACTED] that the Panel meeting minutes did not accurately reflect the Panel’s discussions. (*Id.* at ¶ 8, Exhibit 7.)

[REDACTED] provided [REDACTED]
[REDACTED]
[REDACTED]:

[REDACTED]

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 (*Id.* at 0002 (emphasis added).) [REDACTED] later explains that [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED] (*Id.* at 0001.) That the minutes lack objectivity underscores

8 Plaintiffs’ need for underlying working group data and communications, and whether or not that

9 data or those communications reached members of the Panel.

10 **C. February 2018 Department of Defense Report & Recommendations**

11 7. The following timeline and documents support Plaintiffs’ arguments regarding the

12 relevance of documents relating to “[d]rafts, communications, and documents created or relied

13 upon by officials in the Undersecretary of Defense’s Office in drafting the Report and

14 Recommendations.” (12/18/2019 Order, Dkt. No. 401, at 7.)

15 8. On September 14, 2017, Secretary Mattis issued a memorandum establishing the so-

16 called “Panel of Experts.” The Panel was to be chaired by the Under Secretary of Defense for

17 Personnel and Readiness, who would report the Panel’s progress to the Deputy Secretary of

18 Defense (“DSD”) and the Vice Chair of the Joint Chiefs of Staff (“VCJCS”) every 30 days.

19 (Heinz Decl. ¶ 9, Exhibit 8 at USDOE00003063–64.)

20 9. The Panel was anticipated to meet between October 13, 2017 and

21 December 13, 2017. By the end of this period, the Panel had created its “Final Report and

22 Recommendations of the Transgender Panel.” (*Id.* at ¶ 10, Exhibit 9.)

23 10. On December 14, 2017, [REDACTED] sent his opinion dissenting to the “Final Report

24 and Recommendations of the Transgender Panel.” (*Id.* at ¶ 11, Exhibit 11.) [REDACTED] stated, [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 (*Id.*) Within the dissent itself, [REDACTED] stated that [REDACTED]

28 [REDACTED]

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[REDACTED]

(*Id.* at ¶ 12, Exhibit 11.)

[REDACTED]

(*Id.* at 0004.)

11. On December 15, 2017, the Panel briefed the Deputy Secretary of Defense (“DSD”) and the Vice Chair of the Joint Chiefs of Staff (“VCJCS”) regarding its report and recommendations. (*See Id.* at ¶ 13, Exhibit 12.) Following this briefing, [REDACTED] sent an email to [REDACTED], and [REDACTED] stating,

[REDACTED]

(*Id.*)

12. Following this briefing, the Panel apparently reconvened for three additional meetings: December 22, 2017 (*Id.* at ¶ 14, Exhibit 13); January 4, 2018 (*Id.* at ¶ 15, Exhibit 14);

1 and January 11, 2018 (*Id.* at ¶ 16, Exhibit 15). The Government has confirmed that *no* meeting
 2 minutes exist for the Panel’s December 13, 2017 meeting prior to briefing DSD and VCJCS (*Id.*
 3 at ¶ 17, Exhibit 16) or for the Panel’s final three meetings that occurred after this briefing on
 4 December 22, 2017; January 4, 2018; and January 11, 2018. (*Id.* at ¶ 18, Exhibit 17 (confirming
 5 “there were not meeting minutes for these 4 meetings”).)

6 13. The only document the Government has produced regarding what occurred during
 7 these final four undocumented Panel meetings is a two-page January 11, 2018 “Action Memo”
 8 from Robert Wilkie, Undersecretary of Defense for Personnel and Readiness, to Secretary Mattis
 9 with the subject “Recommendations by the Transgender Review Panel of Experts.” (*Id.* at ¶ 19,
 10 Exhibit 18.) Wilkie’s only attachments to the “Action Memo” are the two memoranda from
 11 Secretary Mattis on September 14, 2017 forming the Panel and President Trump’s August 25,
 12 2017 memorandum. Wilkie does not attach the December 2017 “Final Report and
 13 Recommendations of the Transgender Panel” that was rejected by the DSD and VCJCS on
 14 December 15, 2017, or any other information prepared by the Panel. Wilkie states that “we will
 15 develop a writing by which you would advise the President of your conclusions and
 16 recommendations in this matter.” (*Id.* at 3060.)

17 14. On January 29, 2018, more than two weeks after the Panel’s final undocumented
 18 meeting, retired Lieutenant General ██████████ emailed ██████████ to ██████████
 19 ██████████
 20 ██████████ (*Id.* at ¶ 20,
 21 Exhibit 19.) ██████████ (*Id.*) ██████████ instructed
 22 ██████████ of the Office of the Undersecretary of Defense to contact McHugh and
 23 Woodruff. (*See Id.* at ¶¶ 21–23, Exhibits 20–22.)

24 15. On February 2, 2018, ██████████ emailed ██████████, stating that he is ██████████
 25 ██████████ (*Id.* at ¶ 21,
 26 Exhibit 20.) On February 6, 2018, ██████████ indicated he and ██████████ spoke over the phone
 27 and provided a memorandum regarding ██████████ opinions ██████████
 28 ██████████. (*Id.* at ¶¶ 21–22, Exhibits 20–21.) At the end

1 of this memorandum, [REDACTED] admitted he is [REDACTED]
 2 [REDACTED]
 3 [REDACTED] (*Id.* at ¶ 22, Exhibit 21.) To
 4 Plaintiffs’ knowledge, [REDACTED] never presented to the Panel or provided information to the
 5 Panel, and only provided this information to the Office of the Undersecretary of Defense during
 6 this post-Panel period leading up to the February 2018 report at issue.

7 16. On or around February 5, 2018, after William Bushman contacted McHugh and the
 8 two spoke telephonically, McHugh sent Bushman an email (*Id.* at ¶ 24, Exhibit 23 (“I mentioned
 9 these several articles in our conversation”)), and attached four additional sources of data relating
 10 to transgender persons:

- 11 a. Paul R. McHugh, “Witches, multiple personalities, and other psychiatric
 12 artifacts,” *Nature Publishing Group, Nature Medicine*, Vol. 1, No. 2
 13 (February 1995). (*Id.* at ¶ 25, Exhibit 24.)
- 14 b. Hayes Directory, “Sex Reassignment Surgery for the Treatment of Gender
 15 Dysphoria” (May 15, 2014) (“Hayes Directory”). (*Id.* at ¶ 26, Exhibit 25.)
- 16 c. Paul W. Hruz, Lawrence S. Mayer & Paul R. McHugh, “Growing Pains Problems
 17 with Puberty Suppression in Treating Gender Dysphoria,” *The New Atlantis*
 18 (Spring 2017). (*Id.* at ¶ 27, Exhibit 26.)
- 19 d. Ceclilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas
 20 Langstrom & Mikael Landen, “Long-Term Follow-Up of Transsexual Persons
 21 Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PloS One*,
 22 Vol. 6, Issue 2, e16885 (Feb. 2011) (“Sweden Study”). (*Id.* at ¶ 28, Exhibit 27.)

23 17. On February 11, 2018, Bushman asked McHugh to name “other individuals who
 24 could also serve as resources for *our* policy review.” (*Id.* at ¶ 29, Exhibit 28 (emphasis added).)

25 18. On February 12, 2018, McHugh suggested Bushman speak with Dr. Chester Schmidt
 26 and Dr. Thomas Wise. (*Id.*) McHugh also provides an additional source of data relating to
 27 transgender persons:

- 28 a. Mohammad Hassan Murad et al., “Hormonal therapy and sex reassignment: a

1 systematic review and meta-analysis of quality of life and psychosocial
2 outcomes,” *Clinical Endocrinology* 72, 214–231 (2010) (“Murad Article”). (*Id.*)

3 19. On February 12, 2018, [REDACTED] informed [REDACTED] of the Office of General
4 Counsel of the Department of Defense that he would [REDACTED]
5 [REDACTED]. (*Id.* at ¶ 23, Exhibit 22.) Bushman also stated he could
6 [REDACTED]

7 [REDACTED] (*Id.*) To Plaintiffs’ knowledge, McHugh never presented to the Panel or provided
8 information to the Panel, and only provided this information to the Office of the Undersecretary
9 of Defense during this post-Panel period leading up to the February 2018 report at issue.

10 20. On February 22, 2018, Secretary Mattis issued the Memorandum for the President
11 and accompanying Department of Defense Report and Recommendations on Military Service by
12 Transgender Persons. (*Id.* at ¶ 30, Exhibit 29.) The actual author(s) of the Memorandum are
13 unknown, and the Report and Recommendations attached to the memo is undated, unsigned, and
14 anonymous. Note, however, that:

- 15 a. the Hayes Directory, provided by McHugh, is cited throughout the Report and
16 Recommendations (*id.* at USDOE00280465 n.26, USDOE00280475 nn.67 & 72,
17 USDOE00280478 n.88, USDOE00280479 n.89);
18 b. the Sweden Study, provided by McHugh, is cited throughout the Report and
19 Recommendations (*id.* at USDOE00280475 n.72, USDOE00280478 nn.85 & 87,
20 USDOE00280479 n.96); and
21 c. and the Murad Article, provided by McHugh, is cited in the Report and
22 Recommendations (*id.* at USDOE00280479 n.93).

23 21. The above record evidence demonstrates that the Panel’s work had concluded as of
24 January 11, 2018, and that the Office of the Undersecretary of Defense gathered additional
25 “evidence” while it (or someone else, as the author is unknown) drafted the February 2018
26 Report and Recommendations. This work is plainly relevant to Plaintiffs’ claims, particularly
27 since the Government has represented to this Court that it will *exclusively* rely on the Report and
28 Recommendations and accompanying Administrative Record to justify the Ban. (*See* 7/17/2018

1 Hr’g Tr., Dkt. No. 310, at 15:1–7 (Government counsel: “And here, we have a 44-page report
2 from the Secretary of Defense, Mattis, who has reached conclusions, supported by an extensive
3 administrative record. You asked the question, Your Honor, what would the government put on
4 at trial? What the government would put on at trial is essentially the administrative record.”).
5 Accordingly, all communications and documents related to the February 2018 Memorandum and
6 Report & Recommendations should be produced, in addition to drafts of those two documents.

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8 Respectfully submitted February 25, 2020.

9
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CERTIFICATE OF SERVICE

1 The undersigned certifies under penalty of perjury under the laws of the United States of
2 America and the laws of the State of Washington that all participants in the case are registered
3 CM/ECF users and that service of the foregoing documents will be accomplished by the
4 CM/ECF system on February 25, 2020.
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