

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**CONSENT MOTION FOR
CLARIFICATION OR
RECONSIDERATION**

NOTED FOR CONSIDERATION:
March 13, 2020

1 On March 4, 2020, the Court entered an order directing Defendants, among other things,
2 to “produce, by March 14, 2020, all documents previously withheld from families of responsive
3 documents and for which the Government produced a ‘Withheld for Non-responsiveness’
4 slipsheet.” Dkt. 455 at 2. Defendants are complying with the Court’s order. By March 14, 2020,
5 Defendants anticipate producing to Plaintiffs thousands of documents previously withheld as
6 non-responsive. *See* Ex. A, Declaration of Robert Easton ¶ 7.

7 As Defendants have noted, a large proportion of these documents are non-substantive,
8 such as journal reports automatically generated by Microsoft Outlook. *See* Dkt. 449 at 9. Some
9 are also medical documents. *Id.* at 11. However, during the course of preparing these non-
10 responsive family documents for production, Defendants have discovered that a small subset of
11 the documents are subject to privilege. These privileged documents—which include attorney-
12 client communications, attorney work product, pre-decisional Government deliberations, and
13 advice to the President or his senior advisors—were generally not previously withheld for
14 privilege. Easton Decl. ¶ 6. Instead, because the documents were coded as non-responsive, they
15 were withheld on that basis. *Id.*

16 Defendants respectfully request that the Court clarify that its March 4, 2020 order does
17 not require Defendants to produce non-responsive family documents that are subject to the
18 attorney-client, work product, deliberative process, or presidential communications privileges.¹
19 Such documents understandably were not addressed in the Court’s order. And now that
20 Defendants have discovered that these documents are privileged, the Court should clarify that its
21 order does not require them to be produced at this time. Instead, the Court should make clear
22 that Defendants are required to produce only the *non-privileged* non-responsive family
23 documents, of which there are thousands. In the event that the Court’s order properly is read to
24 compel disclosure of even *privileged* documents, Defendants request that the Court reconsider
25 its order.

26 ¹ For non-responsive family documents potentially subject to the presidential
27 communications privilege, disclosure at this stage would be particularly problematic in light of
28 separation-of-powers concerns. *See Karnoski v. Trump*, 926 F.3d 1180, 1205 (9th Cir. 2019).

1 For each non-responsive family document that is subject to privilege, Defendants will
2 produce to Plaintiffs, by Friday, March 20, 2020, privilege logs explaining the privilege basis
3 and justification for the withholding.

4 Defendants have consulted with counsel for Plaintiffs and the State of Washington, and
5 both Plaintiffs and the State consent to this motion.

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7 Dated: March 13, 2020

Respectfully submitted,

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Assistant Attorney General

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11 ALEXANDER K. HAAS
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**IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

No. 17-cv-01297 (MJP)

**DECLARATION OF ROBERT E.
EASTON IN SUPPORT OF
DEFENDANTS' MOTION FOR
CLARIFICATION OR
RECONSIDERATION IN THE
ALTERNATIVE**

DECLARATION OF ROBERT E. EASTON

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as Director, Office of Litigation Counsel, in the Department of Defense (“DoD”) Office of General Counsel (“OGC”). I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior DoD leaders, and coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria.

3. I submit this declaration in support of Defendants' Motion for Clarification of the Court's March 4, 2020 Order regarding documents withheld by the Government as non-responsive or in the alternative for reconsideration of that Order. Dkt. 455. I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

4. The Court's Order requires the Department of Defense to "produce, by March 14, 2020 all documents previously withheld from families of responsive documents and for which the Government produced a 'Withheld for Non-responsiveness' slipsheet." *Id.* at 2.

5. As explained in detail in a previous declaration,¹ DoD conducted a thorough and in-depth search and collection of files and documents potentially relevant to the claims and defenses in response to this and the three other lawsuits challenging DoD's policies regarding military service by transgender individuals and individuals with gender dysphoria. This process involved identifying custodians likely to have relevant information and working with them and DoD information technology personnel to gather these records. Once the responsive information was gathered, both through digital collections at the server level and with supplemental self-collections, the records were sent to Department of Justice ("DOJ") attorneys for processing in their eDiscovery software, Relativity. This information was then organized within Relativity as it was collected and as it would appear in the ordinary course of business—by DoD or Military

¹ Decl. of Robert E. Easton Submitted in Support of Notice of Filing Documents for *In Camera* Review (Aug. 29, 2019), Dkt. 371-1.

Service component and custodian. After the data were de-duplicated and batched, DoD's responsiveness and privilege review began.

6. Reviewers were trained on the review process, responsiveness, privilege, and how to code documents in Relativity. They were further informed that responsiveness and privilege determinations should be made in succession while reviewing a document and should be completed before moving to the next document unless there were questions. Privilege determinations were made only after a document was determined to be responsive. When a document was determined to be non-responsive, it was marked accordingly and no privilege determination was made.

7. In response to the Court's Order of March 4, 2020, attorneys from my office and DOJ identified approximately 10,878 documents previously withheld from families of responsive documents and for which the Government produced a "Withheld for Non-responsiveness" slipsheet. Of those documents, approximately 10,552 are not privileged and will be released in full pursuant to the Court's Order. In addition, attorneys have identified approximately 61 documents that are properly subject to the attorney-client privilege or attorney work product doctrine and approximately five documents subject to the presidential communications privilege. Further, attorneys have identified approximately 260 documents containing deliberations on matters wholly unrelated to the Department's current or previous policies on transgender service members and service members diagnosed with gender dysphoria. For example, some documents marked as non-responsive contain deliberations on the Department's Military Accessions Vital to National Interest Program ("MAVNI"), a program whereby the Secretary of Defense authorizes the Military Services to recruit certain non-citizens whose skills are considered to be important to national security. These documents are properly

subject to the deliberative process privilege. In all instances where DoD now claims a privilege over a particular document or portion of a document previously marked as non-responsive, the claim of privilege will be expressly made on a privilege log that Defendants will produce to Plaintiffs by March 20, 2020.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 13th day of March 2020, in Arlington, VA.

A handwritten signature in black ink, appearing to read "Robert Easton", written over a horizontal line.

ROBERT E. EASTON
Director, Office of Litigation Counsel

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

Plaintiffs,

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DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**[PROPOSED] ORDER GRANTING
DEFENDANTS' CONSENT MOTION
FOR CLARIFICATION OR
RECONSIDERATION**

For the reasons set forth in Defendants' Consent Motion for Clarification or Reconsideration, and upon a finding of good cause shown, it is hereby

ORDERED that Defendants' Motion is **GRANTED**, and that Defendants are not required to produce privileged documents in response to the Court's order of March 4, 2020, ECF No. 455.

DATED this ____ day of _____, 2020

The Honorable Marsha J. Pechman
United States District Judge

1 Presented by:

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