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

LCR 37 JOINT SUBMISSION REGARDING PLAINTIFFS' RFP NO. 44

NOTE ON MOTION CALENDAR: APRIL 10, 2020

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PLAINTIFFS' OPENING STATEMENT

Plaintiffs are the moving party for this submission. Pursuant to Federal Rules of Civil Procedure 26 and 34, and Local Rule 37, Plaintiffs request an order compelling the production of documents responsive to their Request for Production No. 44. The parties have met and conferred in good faith in an attempt to resolve this dispute without Court action, but have not made progress and are currently at an impasse. Thus, this dispute is ripe for resolution by the Court. Plaintiffs respectfully request that the Court grant Plaintiffs' motion in full.

A. Procedural History

On March 3, 2020, the Government served supplemental written objections and responses to Plaintiffs' first 15 Prioritized Requests for Production (the "Prioritized Requests"), pursuant to the Court's oral ruling on February 3, 2020 that the Government amend its written discovery responses and remove boilerplate objections. (*See* 2/3/2020 Hr'g Tr., Dkt. No. 410, at 57:8–17.) On March 6, 2020, Plaintiffs wrote to the Government identifying deficiencies in the Government's amended responses. (Declaration of Vanessa Barsanti ("Barsanti Decl.") ¶ 2; Ex. 1.) The parties conducted a meet and confer on March 18, 2020 in an attempt to resolve the deficiencies in the Government's responses. (*Id.* ¶ 3; Ex. 1.) Despite these efforts, the Government continues to refuse to produce documents responsive to Request No. 44. Thus, the parties are at an impasse with regard to this request and Plaintiffs have no choice but to bring this matter before the Court.

In particular, the Government will not search for or produce documents sufficient to show whether transgender service members have been rendered non-deployable due to gender dysphoria or transition-related medical care and the details regarding that non-deployability decision (RFP No. 44). As detailed below, these documents are relevant to Plaintiffs' claims and the Government's defenses, and the Government has not demonstrated a sufficient basis to withhold or refuse to search for these documents. Plaintiffs thus respectfully request that the Court compel the Government to search for and produce documents responsive to Request No. 44.

B. Legal Standard

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. FED. R. CIV. P. 26(b)(1). The concept of relevance "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Olberg v. Allstate Ins. Co.*, No. C18-0573-JCC, 2019 WL 6033699, at *2 (W.D. Wash. Nov. 14, 2019) (citation omitted). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Brown v. Warner*, No. C09-1546RSM, 2015 WL 630926, at *1 (W.D. Wash. Feb. 12, 2015) (citation omitted); *see also McEuen v. Riverview Bancorp, Inc.*, No. C12-5997 RJB, 2013 WL 12095581, at *2 (W.D. Wash. Oct. 1, 2013) (where discovery sought appears relevant, resisting party has the burden of demonstrating "lack of relevance").

DEFENDANTS' OPENING STATEMENT

Defendants have produced all of the documents responsive to RFP No. 44 that were considered by the Panel of Experts during their deliberations regarding the policy at issue in this litigation. Under the law of the case as articulated by the Ninth Circuit, as well as binding principles of military deference stated by the Supreme Court, those are the only documents responsive to RFP No. 44 that are relevant to the parties' claims and defenses. Accordingly, additional documents responsive to RFP No. 44 are outside the scope of discovery under Federal Rule of Civil Procedure 26. If that were not enough, production of the information sought by RFP No. 44 is not proportional to the needs of the case: the individualized information sought by this RFP is irrelevant even on the terms of Plaintiffs' argument and locating this information will require a burdensome process of consulting with numerous combatant commands and the military services. Plaintiffs' motion should be denied.

PLAINTIFFS' REQUEST NO. 44

A. Text and Response to Plaintiffs' Request No. 44

Request No. 44: Documents sufficient to show, for each service branch since June 30, 2016, the name, rank, and service unit of each transgender service member rendered non-deployable on account of gender dysphoria or transition-

> related medical care, and the duration of and specific reason(s) for such non-deployability.

In response to this Request, the Government narrowly limited the documents it would produce:

> Specific Objections: Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Moreover, Defendants object to this request, on the grounds that even if such information did exist, it is overbroad, unduly burdensome, and disproportionate to the needs of the case because it seeks medical records and sensitive privacy data from both current and former service members. This information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy.
>
> Response: Subject to and without waiving the above objections, Defendants have 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.

B. Plaintiffs' Argument

Despite its obligation under the Federal Rules to produce all non-privileged, relevant documents responsive to Plaintiffs' requests, the Government is improperly withholding or refusing to search for and collect relevant documents without a sufficient basis.

As an initial matter, the Government's response does not cogently state whether the Government is withholding responsive materials or the Government's basis for doing so. Instead, the Government merely states that certain documents, namely, data presented to the Panel of Experts, have already been produced. But Request No. 44 is not limited to data that was presented before the Panel of Experts. Plaintiffs sought to clarify the Government's response during the parties' meet and confer, and the Government made clear that it does not intend to produce any documents outside of what was considered by the Panel of Experts. As this Court

has ruled previously, relevancy stretches beyond documents considered by the Panel of Experts, and thus the Government is not entitled to limit its productions in this manner. *See, e.g.*, 2/3/2020 Hr'g Tr., Dkt. 410, at 12:24–13:8 (requiring the production of data not presented to the Panel of Experts); Dkt. No. 235 at 2 (this Court found "there is no reason for discovery to be confined to the administrative record," where "Plaintiffs and Washington do not challenge the policy under the APA, but instead raise direct constitutional claims.").

The Government further objected that the request is irrelevant, unduly burdensome, or would result in the production of documents containing personal identifiable information ("PII"). Each of these objections is unavailing. ***First***, the documents sought in Request No. 44 are relevant to the parties' claims and defenses, and thus ably meet the standard for relevance set forth in Rule 26. Documents identifying those service members rendered non-deployable due to a gender dysphoria diagnosis or transition-related medical care are relevant to the Government's asserted justification for the transgender service military ban (the "Ban"). The Government's arguments rest on the assertion that a diagnosis of gender dysphoria renders a service member non-deployable and thus negatively impacts readiness. (*See* Feb. 2018, Department of Defense Report and Recommendations, Dkt. 224-2, at 32–41.) How this purported justification plays out in reality—the *actual* impact of a diagnosis of gender dysphoria on deployability—goes directly to whether these justifications are credible reasons for instituting the Ban, as opposed to *post hoc* rationalizations intended to legitimize a policy rooted in animus.

Second, the Government contends that Request No. 44 is overly broad and unduly burdensome. In terms of breadth, the request is narrowly tailored to "[d]ocuments sufficient to show" specific categories of information that are, as noted above, relevant to the parties' claims and defenses. The Government has not articulated how this request, which seeks only specific information limited to a subset of service members with gender dysphoria, is unduly burdensome. During its meet and confer with Plaintiffs, the Government asserted that only around 100 service members would even fall within the scope of Request No. 44. (Barsanti Decl. ¶ 4.) Given the relevance and narrowly circumscribed request, the Court should compel production here. *See Melendez v. Gulf Vessel Mgmt., Inc.*, No. C09-1100 MJP, 2010 WL

2650572, at *2 (W.D. Wash. July 1, 2010) (Pechman, J.) (compelling discovery into the identities of medical providers for 10 years where the information was relevant to the parties' claims or defenses); *see also Partner Weekly, LLC v. Viable Mktg. Corp.*, No. 2:09-cv-2120-PMP-VCF, 2014 WL 1577486, at *2 (D. Nev. Apr. 17, 2014) (requiring that party resisting discovery allege "specific facts" or "sufficient detail" about the nature and extent of any purported burden). Moreover, Plaintiffs are amenable to the Government responding to this request as if it were an interrogatory, and listing the required information as opposed to producing documents sufficient to show the information.

Third, the Government asserts that it cannot produce documents responsive to this request, even redacted documents, because such documents could include medical records that contain PII, such as service members' names and other identifying information. While Plaintiffs' request requires only documents *sufficient to show* information about non-deployability and does not specifically seek medical records, to the extent the Government chooses to produce medical records to fulfill this request, it can can designate these documents at an appropriate level of confidentiality under the protective order in place in this matter. To date, it has failed to articulate a reason why the protective order, which it agreed to, is insufficient to maintain the confidentiality of the information within these records. In light of these protections, the Government's refusal to produce documents because they might contain PII is improper.

Plaintiffs respectfully request that the Court order the Government to conduct a reasonable search and produce documents responsive to Request No. 44, or order the Government to provide the requested information as an interrogatory response.

C. Defendants' Argument

Defendants have produced documents sufficient to show the number of service members in each military service with a diagnosis of gender dysphoria that were on limited or restricted duty status, for the period September 1, 2016 to August 31, 2017. AR3024, AR3027. Those documents also demonstrate the average number of days each transitioning service member was in such status, as well as the range of days in the data set that service members were in limited or restricted duty status. *Id.*

The foregoing data represents the information responsive to this request for production that was considered by the Panel of Experts in making its recommendation. Under the law of this case and binding Supreme Court precedent, that is the only information relevant to the parties' claims and defenses. Accordingly, Plaintiffs' motion to compel should be denied.

The Court's role in this case is not to "substitute its 'own evaluation of evidence for a reasonable evaluation' by the military," but to test whether the decision the military made, in light of the evidence that it actually considered, is justifiable. *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)). Accordingly, the Ninth Circuit was clear in previously granting the writ of mandamus that "the 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." *Id.* at 1207 (emphasis added). A request for information that no decision maker ever considered is squarely contrary to those rulings.

Moreover, the Ninth Circuit's statement of the standard to be applied in this case is consistent with the Supreme Court's repeated rejection of the use of evidence that military decision-makers could not have considered. *See Winter v. NRDC*, 555 U.S. 7, 24 (2008) (making clear that "great deference" is owed to "the professional judgment of military authorities"); *Goldman v. Weinberger*, 475 U.S. 508, 509 (1986) (describing expert witness testimony as "quite beside the point"); *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (concluding district court had "palpably exceeded its authority" in relying on deposition testimony); *see also Doe 2 v. Shanahan*, 917 F.3d 694, 736–37 (D.C. Cir. 2019) (Williams, J., concurring) ("[I]t does not appear that the Supreme Court considered any evidence uncovered by those trial courts' explorations to be necessary—or even pertinent—to its disposition of" the *Rostker* and *Goldman* cases). Plaintiffs' insistence on extra-record discovery would essentially create a new record and invite the Court to make its own determination of the appropriate policy on the basis of data the Panel never gathered and did not consider in reaching its conclusions.

Plaintiffs' contention that they nonetheless need to determine how the readiness concerns identified by the Panel of Experts have played out since the Panel made its recommendation

blinkers Supreme Court precedent. For instance, in *Goldman*, the Supreme Court majority did not even acknowledge evidence developed in the district court that the plaintiff "had worn a yarmulke on base for years," in violation of Air Force policy, "without any adverse effect on his performance, any disruption of operations at the base, or any complaints from other personnel." 475 U.S. at 526 (Blackmun, J., dissenting). The Constitution places the responsibility for evaluating the ongoing viability of policies such as the Mattis Plan on the "[t]rained professionals" in the military, "subject to the day-to-day control of the responsible civilian authorities." *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973) (rejecting court of appeals' suggestion to district court to "survey certain materials not then in the record of the case" on remand). And "[i]t would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed requisite technical competence to do so." *Id.*

Plaintiffs ignore all of this case law, despite the fact that it binds this Court's disposition of this litigation. Instead, Plaintiffs simply assert their need for additional information to probe the validity of the military's decision. Although Plaintiffs' argument fails to take account of binding military deference principles, it should be noted that limiting discovery to items the Panel reviewed and considered should not hinder Plaintiffs in challenging the Mattis Plan. Plaintiffs are free to argue that evidence the Panel considered does not support the conclusions it reached, that the Panel misstated or misrepresented evidence, that the Panel ignored relevant factors, and that, as a result, the military did not meet its burden to show that it "reasonably determined [its] policy 'significantly furthers' the government's important interests." *Karnoski*, 926 F.3d at 1202. But what they cannot do is require Defendants to go back and gather all of the evidence that Plaintiffs believe should have been considered, but was not, in order to assess the Mattis Plan against a set of facts that were never considered by the individuals who made the decision. That would essentially substitute one decision-making process, conducted by the military, for another, supervised by this Court. Regardless of what the rule may be in garden-variety civil litigation, that is not an approach permitted in litigation challenging military policies.

Plaintiffs' request should also be denied because it is not proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs' request would require a burdensome process of

consulting with numerous combatant commands and the military services to obtain the specific information it seeks, such as the precise circumstances of each individual's non-deployability. And in any event, information about individual service members, such as their names and ranks, is irrelevant to this litigation, even judged against Plaintiffs' erroneous proposed standard of review. Plaintiffs' opening argument does not explain why they need to identify the particular individuals behind these numbers. The identity of these persons would, of course, demonstrate little about the military's readiness concerns. It would, instead, be a gratuitous invasion of privacy for dozens of service members that have not asked to be a part of this lawsuit. Plaintiffs' inadequate attempt to address these privacy concerns notwithstanding, such concerns, coupled with the patent irrelevance of the information and the burden of obtaining it, render Plaintiffs' request disproportionate to the needs of this case.

Plaintiffs' motion should be denied.

D. Plaintiffs' Reply

The Government attempts to relitigate an issue that has already been decided by this Court on multiple occasions; the Government cannot limit its production to documents considered by the Panel of Experts. (2/3/2020 Hr'g Tr., Dkt. 410, at 12:24–13:8 (requiring the production of data not presented to the Panel of Experts); 12/10/2019 Hr'g Tr., Dkt. 402, at 24:4–15, 36:6–20 (same); Dkt. No. 235 at 2 ("[T]here is no reason for discovery to be confined to the administrative record.").) Moreover, the Government's vague assertion that Request No. 44 is overly burdensome is also unavailing. An assertion of undue burden requires the provision of detailed evidence of the burden. *Partner Weekly*, 2014 WL 1577486, at *2 (requiring that party resisting discovery allege "specific facts" or "sufficient detail" about the nature and extent of any purported burden). The Government has not identified the specific burden imposed (i.e. how many documents exist, how many hours of review it anticipates, or even how many individuals are even at issue). Finally, while Plaintiffs continue to believe the protective order sufficiently addresses the Government's privacy concerns, Plaintiffs would accept documents redacted to conceal identifying information, as they have informed the Government already. Thus, Plaintiffs' motion should be granted.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move the Court pursuant to Federal Rules of Civil Procedure 26 and 34, and Local Rule 37, to issue an order compelling the Government to search for and produce documents responsive to Plaintiffs' Request No. 44. In the alternative to alleviate burden, Plaintiffs are amenable to receiving information responsive to Request No. 44 in the form of an interrogatory response rather than through document production. Plaintiffs respectfully request the Court order the Government to produce responsive documents or serve an interrogatory response within fourteen (14) days of the issuance of an order granting this Motion.

Respectfully submitted, April 10, 2020

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s/ Rachel Horvitz

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UNITED STATES DEPARTMENT OF JUSTICE

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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 April 10, 2020.

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The Honorable Marsha J. Pechman

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[PROPOSED] ORDER GRANTING LCR 37 JOINT SUBMISSION REGARDING PLAINTIFFS' RFP NO. 44

NOTE ON MOTION CALENDAR:
APRIL 10, 2020

This matter comes before the Court on the foregoing LCR 37 Joint Submission Regarding Plaintiffs' Request for Production No. 44 (the "Joint Submission"). The Court, having considered the parties' arguments and finding good cause therefore, GRANTS Plaintiffs' portion of the Joint Submission.

IT IS HEREBY ORDERED:

Within fourteen (14) days of the issuance of this Order, the Government must produce documents sufficient to show, for each service branch since June 30, 2016, information regarding each transgender service member rendered non-deployable on account of gender dysphoria or

transition-related medical care, and the duration of and specific reason(s) for such non-deployability; OR

Within fourteen (14) days of the issuance of this Order, the Government must serve an interrogatory response providing, for each service branch since June 30, 2016, information regarding each transgender service member rendered non-deployable on account of gender dysphoria or transition-related medical care, and the duration of and specific reason(s) for such non-deployability.

IT IS SO ORDERED

Dated this _____ day of _____, 2020.

_____
The Honorable Marsha J. Pechman
United States District Court Judge

Presented by:

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