

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
**DECLARATION OF VANESSA
BARSANTI IN SUPPORT OF LCR 37
JOINT SUBMISSION REGARDING
PLAINTIFFS’ RFP NO. 44**

NOTE ON MOTION CALENDAR:
APRIL 10, 2020

1 I, Vanessa Barsanti, swear under penalty of perjury under the laws of the United States to
2 the following:

3 1. I am counsel of record for Plaintiffs in this action, am over the age of 18, and am
4 competent to be a witness. I make this declaration in support of LCR 37 Joint Submission
5 Regarding Plaintiffs' RFP No. 44 based on facts within my personal knowledge.

6 2. Attached hereto as Exhibit 1 is a March 6-20, 2020 email chain between counsel for
7 Plaintiffs, Vanessa Barsanti, and counsel for the Government, Andrew Carmichael.

8 3. As reflected in Exhibit 1, on March 18, 2020, the Parties met and conferred with
9 regards to a number of Requests for Production, including Request No. 44. The parties were
10 unable to reach an agreement with respect to Request No. 44.

11 4. During the parties' March 18, 2020 meet and confer, in response to Plaintiffs'
12 questions regarding the Government's alleged burden in identifying responsive documents,
13 Counsel for the Government stated that only around 100 service members would fall within the
14 scope of Request No. 44.

15
16 I declare under the penalty of perjury that the foregoing is true and correct.

17
18 DATED: April 10, 2020

/s/ Vanessa Barsanti

Vanessa Barsanti

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.

s/Rachel Horvitz
Rachel Horvitz, WSBA No. 52987
rachel@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

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EXHIBIT 1

Malloy, Emily N.

From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>
Sent: Friday, March 20, 2020 10:14 AM
To: Barsanti, Vanessa; Stallings-Ala'ilima, Chalia (ATG); Norway, Robert M. (CIV); Enlow, Courtney D. (CIV); Powers, James R. (CIV); Gerardi, Michael J. (CIV)
Cc: Skurnik, Matthew (CIV); *prenn@lambdalegal.org; *tborelli@lambdalegal.org; *Rachel@newmanlaw.com; Siegfried, Daniel I.; *colleen.melody@atg.wa.gov; *jason@newmanlaw.com; Rosenberg, Michael E.; Heinz, Jordan M.; Means, Miranda; Ikard, Sam
Subject: [EXT] RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Vanessa,

Thank you for putting this together. I made a few changes to some of the summaries as to the Government's positions below (in red).

Best regards,

Drew

Drew Carmichael
Trial Attorney | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Sent: Thursday, March 19, 2020 2:54 PM
To: Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Gerardi, Michael J. (CIV) <mgerardi@CIV.USDOJ.GOV>
Cc: Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Means, Miranda <miranda.means@kirkland.com>; Ikard, Sam <sam.ikard@kirkland.com>
Subject: RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Counsel,

Thank you for the discussion yesterday. The following reflects our understanding of what was discussed during the meet and confer. Ahead of the April 2 teleconference, the parties have agreed to exchange initial drafts of the joint status report by Thursday, March 26. In addition, the parties discussed the following:

- **Status Update on RFPs 20, 43, and 54:** The Government stated that it has initiated searches and has started to collect documents responsive to each of these requests. The Government plans to try and produce documents

before the teleconference on April 2. Plaintiffs have asked that productions be made when on a rolling basis as documents are reviewed and ready for production.

- **Five Prioritized RFPs:** The Government generally objected to moving forward on these RFPs because it is the Government's position that Plaintiffs have already identified five prioritized RFPs since the last court conference and these are the second set. Plaintiffs disagree with this understanding of the and believe the Government should move forward on these requests. With regard to specific requests:
 - RFP No. 16: It is the Government's position that this request entirely overlaps with 54 and whatever has been produced in response to 54 should encompass 16 as well. Documents are already being collected in response to 54, according to the Government.
 - RFP No. 19: Plaintiffs clarified that they are seeking documents regarding any service member diagnosed with gender dysphoria who has been discharged for any reason. The Government's position is that this request is too burdensome, but agreed to determine whether it could easily narrow the relevant population of individuals by searching servicemembers diagnosed with gender dysphoria and exclude those on active duty.

In addition to this request being burdensome the Government also contends that this request is well outside of the scope of the lawsuit which is a facial challenge to the Department's 2018 policy and does not challenge individual discharges of any service member. It is also irrelevant to the lawsuit as any materials that would be uncovered in this search were not considered in the formation of the Mattis policy. The Government agreed to provide additional information on the burden of collecting such records.

- RFP No. 23: The Government stated that there were documents being withheld on deliberative process privilege grounds, but otherwise documents have been produced.
- RFP Nos. 27 and 28: For both 27 and 28, the Government contends that these overlap with RFP No. 29, which is the subject of the mandamus petition. Plaintiffs disagree with this understanding of RFP Nos. 27 and 28 and assert that the Government should collect and produce documents responsive to these requests.

The Government has already collected and produced non-privileged documents responsive to these RFPs. Privileged documents responsive to these RFPs have been previously identified on privilege logs provided to the Plaintiffs and since these documents overlap entirely with the documents responsive to RFP No. 29 they have already been prepared for production without redactions or withholdings for DPP pending the outcome of the Government's mandamus petition. The Government maintains privileges over these documents. With regard to documents withheld pursuant to DPP, the Government maintains that Plaintiffs' need for deliberative materials in these categories does not overcome the chilling effect on frank and open Government deliberations on military policy.

- **March 6 Email re Government's Responses to RFPs:**
 - RFP No. 13: The Government confirmed that all non-privileged documents have been produced and it is not withholding any documents.
 - RFP No. 26: The Government did not read this request to be broken out by condition, but Plaintiffs clarified that was their understanding. ~~The Government will consult with the DoD to determine how to locate this information.~~

The Government will consult with DoD to determine if there is a location or office in DoD where documents containing the costs of hormone treatment broken out by condition are likely to exist.

- RFP No. 44: The Government objects and will not produce documents on the grounds that the request is burdensome, irrelevant, and seek PII. Plaintiffs disagree and contend that these are highly relevant documents.
- RFP Nos. 65, 66, 68: The Government confirmed that it had produced documents responsive to these requests and was not withholding any responsive documents.
- **March 12 Email re Government's Responses to RFPs**: Overall, the Government clarified that it is not withholding documents on the basis of the general objection regarding the administrative record.
 - RFP Nos. 73, 74: Plaintiffs contend that these requests seek documents from hybrid experts/fact witnesses. ~~The Government states that it will only produce documents relied upon by these witnesses in forming their expert opinions.~~

The Governments' hybrid fact / expert witnesses are being offered to rebut misstatements by Plaintiffs' putative experts regarding medical deployment standards (and the military's capabilities with respect to treating medical conditions in the deployed environment), medical accessions standards, and medical retention standards. These doctors did not have any input in the formation of the Mattis policy and will only be offered by Defendants if the Court allows testimony of Plaintiffs' putative experts over Defendants' objections. Accordingly, individual treatment records from these doctors are disproportionate to the needs of the case, beyond the scope of the lawsuit, and burdensome to obtain and the Government will not search for or provide them.

- RFP Nos. 75, 77, 82: The Government has confirmed that documents responsive to the requests have been produced and no documents are being withheld.
- RFP No. 80: ~~The Government stated that it has produced documents responsive to this request that were presented to the Panel of Experts. Plaintiffs have asked for all communications, regardless of whether they were presented to the Panel of Experts.~~

The Government has produced all responsive non-privileged documents in its collection, which sought to identify documents even remotely connected to the formation of the Department's policies on military service by transgender individuals or individuals with gender dysphoria from June 30, 2016 to March 23, 2018. In total the Government collected documents from 156 different custodians. The Government objects that any further search for public comments provided to any of its roughly two million other employees (who were not among the 156 custodians the Government previously identified as having some level of input in the policymaking process) would be disproportionate, overly burdensome, irrelevant, and outside the scope of the lawsuit.

- RFP No. 83: The Government has stated that there is no way to search for this data and they are still unsure what is being asked for. Plaintiffs said they would consider.
- **Encrypted Documents**: The Government stated that they would follow up to recent email from Vanessa and clarify this.
- **Government's Requests to Plaintiffs**: Plaintiffs clarified that if they will update the materials considered lists in the expert reports if there's anything new to add. If the Government has identified a specific document referenced in the report that they are not sure about, they are welcome to call it to Plaintiffs' attention.

Best,

Vanessa Barsanti

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vanessa.barsanti@kirkland.com

From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>
Sent: Monday, March 16, 2020 10:56 AM
To: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>
Cc: Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Means, Miranda <miranda.means@kirkland.com>; Ikard, Sam <sam.ikard@kirkland.com>
Subject: [EXT] RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Can we schedule the call for 2pm ET on Wednesday? That time works a little better for us here. Also happy to have the call later in the afternoon.

Best regards,

Drew

Drew Carmichael
Trial Attorney | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>
Sent: Monday, March 16, 2020 12:57 PM
To: Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Gerardi, Michael J. (CIV) <mgerardi@CIV.USDOJ.GOV>
Cc: Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Means, Miranda <miranda.means@kirkland.com>; Ikard, Sam <sam.ikard@kirkland.com>
Subject: RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Following up on this. Can you please let me know if 12:30 ET on Wed. works?

Vanessa Barsanti

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vanessa.barsanti@kirkland.com

From: Barsanti, Vanessa

Sent: Friday, March 13, 2020 5:40 PM

To: 'Carmichael, Andrew E. (CIV)' <Andrew.E.Carmichael@usdoj.gov>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>

Cc: Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Means, Miranda <miranda.means@kirkland.com>; Ikard, Sam <sam.ikard@kirkland.com>

Subject: RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

How about 12:30 ET? We are also flexible after that time if later works better. Just let me know so we can hold the time and send out an invite.

Thanks,

Vanessa Barsanti

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From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Sent: Friday, March 13, 2020 12:49 PM

To: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>

Cc: Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Means, Miranda <miranda.means@kirkland.com>; Ikard, Sam <sam.ikard@kirkland.com>

Subject: [EXT] RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Vanessa,

We are not available on Monday. Are you available on Wednesday?

Best regards,

Drew

Drew Carmichael
Trial Attorney | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>

Sent: Thursday, March 12, 2020 5:12 PM

To: Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Gerardi, Michael J. (CIV) <mgerardi@CIV.USDOJ.GOV>

Cc: Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Means, Miranda <miranda.means@kirkland.com>; Ikard, Sam <sam.ikard@kirkland.com>

Subject: RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Counsel,

We have reviewed the Government's March 9, 2020 objections and responses to Plaintiffs' fourth set of requests for production. We have several concerns regarding the Government's response, some of which are similar to the issues that arose in the Government's last set of responses, which we flagged on March 6. In particular, we ask that you clarify the Government's position with regards to the following requests:

- **RFP Nos. 73 & 74** - RFP Nos. 73 and 74 ask for all documents relating to transgender military service and transgender related medical care in the possession, custody, or control of the Lt. Col. Kevin Cron, Col. Christopher D. Meyering, or Col. Steven E. Pflanz. The Government objects to both of these requests on the grounds that they seek documents not relied upon by these witnesses in forming their expert opinions. But these witnesses are not just experts—they are also fact witnesses and were disclosed as such. These requests are thus proper and seek documents that are relevant to Plaintiffs' claims. The Government does not have a sufficient basis to withhold or refuse to search for documents responsive to this request. Please confirm by Monday, March 16, that all documents responsive to the request, including documents not relied upon by these witnesses in their expert capacity, will be produced by Friday, March 20, and that these witnesses have been added as custodians. In addition, please identify the documents these expert witnesses relied on in forming their opinions.
- **RFP No. 75 & 77** - In response to RFP Nos. 75 and 77, the Government objects to the extent that the requests call for documents other than those provided to the DoD decision-makers or considered by those decision-makers in the formation of the DoD's 2018 policy. In response to these requests, the Government states that it has produced all data "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." The intent and basis for the Government's transgender service policy is central to this litigation. Data supporting statistics, charts, presentations, or incidents that the Government itself described or referenced in the Report, Mattis Memorandum, or December 2017 Report and Recommendations, as requested by RFP No. 75, regardless of whether they were shown to the Panel of Experts, are thus clearly relevant and need to be produced. As are documents and communications reflecting data relating to presentations produced as part of the Administrative Record, as requested by RFP No. 77. The Government has not articulated a sufficient basis for limiting its production solely to data that was presented to the Panel of Experts. Please confirm whether the Government is withholding responsive documents and data not presented to the Panel of Experts. If the Government is withholding such documents, please confirm by Monday, March 16, that all documents will be produced by March 20.
- **RFP Nos. 80 & 81** - In response to RFP Nos. 80 and 81, the Government responds that "to the extent documents responsive to Plaintiffs' request were before the Panel of Experts and military decision-makers, they were

previously produced.” These requests seek communications sent by members of the public to the DoD or any officers regarding the military service of transgender persons and all communications in response, as well as the data underlying those communications. It is not clear what the Government means when it says that these communications would have been produced if they were “before the Panel of Experts and military decision-makers.” Again, the intent and reasoning behind the policy is a central issue in this litigation and communications with the public on transgender military service goes directly to that issue, even if such communications or data were not explicitly “before” the Panel of Experts. Please confirm whether the Government is withholding responsive communications and if so, please confirm by Monday, March 16, that all documents will be produced by March 20.

- **RFP No. 82** - In response to Request No. 82, the Government states that it has produced certain documents responsive to the request. It’s not clear from the response, however, whether the Government is withholding documents or on what basis documents are being withheld. Please confirm that all non-privileged documents responsive to this request have been produced. If not, please produce these documents immediately.
- **RFP No. 83** - The Government makes numerous objections to this request on the basis of vagueness and ambiguity. For clarity, Plaintiffs are not seeking individual medical records, but rather documents sufficient to show average annual cost overall. The Government’s reference to the annual TRICARE report is insufficient, and its refusal to produce any documents at all in response to this request is not supported. The annual TRICARE report to which the Government directs plaintiffs does not provide a breakdown by medical condition and does not provide any data on disqualifying versus non-disqualifying conditions. In light of the information provided by the Government, Plaintiffs clarify that they request documents sufficient to show the annual average per capita cost for the Department of Defense to treat any medical condition considered by the Medical and Physical Evaluation Boards that did not result in a determination that a service member was unfit for service.

Further, as Plaintiffs have addressed with the Government previously, the Government’s general objection that the Court’s review is limited to the administrative record is contrary to rulings by the District Court and the Ninth Circuit. The District Court has explained that “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.” ECF No. 235 at 2. The Ninth Circuit similarly ruled that Plaintiffs could adduce and present new evidence, and directed the District Court to consider further discovery and Plaintiffs’ motions to compel documents DoD has withheld under claims of privilege. *See Karnoski v. Trump*, 926 F.3d 1180, 1203, 1206-07 (9th Cir. 2019). The Ninth Circuit’s opinion thus provides no basis for limiting review of Plaintiffs’ constitutional claims to an administrative record. Please confirm the Government is not withholding documents on this basis.

Lastly, Plaintiffs have received no response from the Government to their March 6 note regarding the prioritized RFPs and related request to meet and confer. Please indicate if you are available to discuss both these and the prioritized RFPs on Monday, March 16 at or after 3 ET.

Vanessa Barsanti

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From: Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>

Sent: Friday, March 6, 2020 5:36 PM

To: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>

Cc: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>;

*prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Means, Miranda <miranda.means@kirkland.com>; Ikard, Sam <sam.ikard@kirkland.com>

Subject: [EXT] RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Hello,

The Washington RFPs identified as substantially overlapping with the next 5 prioritized RFPs are:

Prioritized RFPs	
Private Plaintiffs' RFP No. 16	Washington RFP No. 17
Private Plaintiffs' RFP No. 19	Washington RFP No. 11
Private Plaintiffs' RFP No. 23	
Private Plaintiffs' RFP No. 27	Washington RFP No. 18
Private Plaintiffs' RFP No. 28	Washington RFP No. 18

As part of the parties' coordination efforts, Washington requests that Defendants include these comparable Washington requests in your review and identification of documents responsive to the prioritized RFPs. Again, please notify us if you disagree that these Washington RFPs fall within your production of records for the prioritized RFPs.

Thank you,
Chalia

Chalia Stallings-Ala'ilima Assistant Attorney General
Wing Luke Civil Rights Division Office of the WA Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104
Phone: 206-326-5480 Fax: 206-464-6451



[Chat Now](#)

*"The state of the Union is chaotic. ...
But there is hope out there. And there is a role for you to play."*

- Yamiche Alcindor, King County Bar Association 2019 Rev. Dr. MLK Jr. Luncheon

WARNING: The material contained herein may be subject to the attorney/client, common interest or work product privilege. It is intended only for the review and use of the above-named person(s). If you are not the intended recipient, any distribution, dissemination or copying is strictly prohibited. If you received this message in error, please notify the sender and delete/destroy the message.

From: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>

Sent: Friday, March 6, 2020 4:14 PM

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Subject: RE: Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Counsel,

We have reviewed the Government's March 3, 2020 supplemental objections and responses to Plaintiffs' 15 prioritized requests for production and have several concerns regarding the Government's responses. In particular, as we've detailed below, many of the responses are narrowly circumscribed, such that it appears that the Government is withholding responsive documents and improperly narrowing the requests. Thus, we ask that you clarify the Government's position with respect to the following requests:

- **RFP No. 13** - In the Government's first response to request No. 13, it agreed to "produce any non-privileged documents responsive to this RFP in [the Government's] possession, custody or control." In the supplemental response, without objection, the Government seems to narrow its response and states only that it has produced a DoD memorandum implementing the current DoD policy, as well as the Military Service Branch's official implementation guidance for the current policy. It is not clear from this response, however, whether the Government is withholding documents or on what basis documents are withheld. Please confirm that **all** non-privileged documents responsive to this request have been produced. If not, please produce them immediately.
- **RFP No. 26** - As above, in the Government's first response to request No. 26, it agreed to "produce any non-privileged documents responsive to this RFP in [the Government's] possession, custody or control." In its supplemental response, the Government narrows its response to state that it has produced only data "presented to the Panel of Experts," as well as "underlying data utilized by the Military Services to formulate the data presented to the Panel of Experts." The Government correctly construes this request as excluding individual medical and information. That said, this request is in no way limited to data presented to the Panel of Experts. It seeks documents sufficient to show the annual cost per person of hormone therapy, not just cost data that was presented to the Panel. Moreover, the link to which the Government refers is not an adequate response to this request. This links to an annual evaluation of the TRICARE program, which does not encompass all of the data sought by this request. In particular, this report does not specifically address the cost of hormone therapies or treatments, and is therefore not sufficient. Please confirm whether the Government is withholding documents and data not presented to the Panel of Experts. If the Government is withholding responsive documents, including documents sufficient to show the data requested even if not presented to the Panel of Experts, please produce them immediately.
- **RFP No. 44** - In the Government's first response to request No. 44, it agreed to "produce any non-privileged documents responsive to this RFP in [the Government's] possession, custody or control." In its supplemental response, however, the Government again states that it has produced all data "that was presented to the Panel of Experts," as well as underlying data used by the Military Services "to formulate data presented to the Panel of Experts." This request is not limited to data that was presented to the Panel of Experts. Please confirm that the Government is not withholding documents responsive to this request. If the Government is withholding responsive documents, including documents sufficient to show this data requested that were not presented to the Panel of Experts, please produce them immediately.

- **RFP Nos. 65, 66, 68** - In the supplemental responses, without any objection, the Government again states it has produced all data “considered by the Panel” (#65) or “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.” As noted with many of the other requests, these requests are in no way limited to data presented to the Panel of Experts or used to formulate data presented to the Panel of Experts. Please confirm that the Government is not withholding documents responsive to this request and that it has, in fact, produced all documents relating to this data. If the Government is withholding responsive documents, please produce them immediately.

Additionally, the Government has indicated that it will search for and produce additional documents in response to RFP Nos. 20, 43, and 54. Please indicate when the Government will be producing documents responsive to those requests.

Lastly, Plaintiffs and Plaintiff-Intervenor identify RFP Nos. 16, 19, 23, 27, and 28 as their next five prioritized RFPs, the text of which are copied below.

- **RFP No. 16** All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.
- **RFP No. 19** All Documents or Communications, between June 30, 2017 and the present, relating to discharge proceedings against any transgender service member serving in the U.S. military.
- **RFP No. 23** All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.
- **RFP No. 27** All Documents or Communications relating or referring to Secretary James Mattis’s February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals (the “February 22, 2018, Memorandum”), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the February 22, 2018, Memorandum; and (b) all drafts of the February 22, 2018, Memorandum.
- **RFP No. 28** All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the final draft of the February 22, 2018, Memorandum

Please let us know the Government’s availability to meet and confer the afternoon of Tuesday, March 10 to discuss these issues.

Thank you,

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Subject: [EXT] Karnoski: Supplemental Objs. & Resps. for Prioritized RFPs

Counsel,

Please see attached supplemental objections and responses to Plaintiffs' 15 prioritized requests for production of documents. As you know, for RFP Nos. 20, 43, and 54, Defendants intend to conduct supplemental searches. Accordingly, for those three RFPs, Defendants reserve the right to further supplement their privilege objections once those searches are complete.

Best,
Matt

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