

Honorable Marsha J. Pechman

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

RYAN KARNOSKI et al.,  
*Plaintiffs,*  
v.  
DONALD J. TRUMP et al.,  
*Defendants.*

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

LCR 37 EXPEDITED JOINT  
DISCOVERY MOTION TO  
COMPEL DEFENDANTS TO SEEK  
AND PRODUCE INFORMATION  
REASONABLY AVAILABLE AND  
WITHIN THEIR CONTROL

STATE OF WASHINGTON,  
*Plaintiff-Intervenor,*  
v.  
DONALD TRUMP et al.,  
*Defendants.*

NOTE ON MOTION CALENDAR:  
April 13, 2020

**I. WASHINGTON’S INTRODUCTORY STATEMENT**

Plaintiff-Intervenor Washington State moves for an order compelling Defendants United States Departments of Defense and Homeland Security (Defendants) to search for and produce information responsive to Washington’s discovery requests.

On July 5, 2019, Washington issued 18 interrogatories and 21 requests for production (RFPs) to Defendants. Declaration of Chalia Stallings-Ala’ilima in Support of Washington’s Motion to Compel (Stallings-Ala’ilima Decl.) ¶ 2, Ex. A (Washington’s interrogatories and Defendants’ responses); ¶ 3, Ex. B (Washington’s RFPs and Defendants’ responses). These

1 requests had a specific Washington focus, asking for information and documents that would  
2 establish the number of transgender Washingtonians who have been affected by the military's  
3 policies with respect to open service by transgender members, both leading up to and following  
4 Defendants' current ban on open service (the Ban). *Id.* In addition to establishing the impact of  
5 the Ban on Washingtonians, several of Washington's requests are squarely relevant to Defendants'  
6 asserted defenses related to cost, deployability, lethality, unit cohesion, and their request for military  
7 deference. *Id.* ¶ 3, Ex. A at 7-10, ¶ 4, Ex. B at 9-12. There can be no dispute that the information  
8 sought by Washington is within Defendants' custody and control.

9 In response to Washington's interrogatories, Defendants asserted a number of objections  
10 and then provided limited information to 12 of them. Stallings-Ala'ilima Decl. ¶ 2, Ex. A. For six  
11 of the interrogatories, Defendants stood on their objections and provided no responsive information.  
12 *Id.* at 24-37. In response to Washington's RFPs, Defendants identified documents responsive to ten  
13 of Washington's requests, producing a total of 36 documents.<sup>1</sup> *Id.* ¶ 3, Ex. B at 15-40, ¶ 4, Ex. C.  
14 For the remaining 11 RFPs, Defendants objected and identified no documents. *Id.*

15 Washington repeatedly notified Defendants that it believes the responses and production are  
16 deficient. Stallings-Ala'ilima Decl. ¶ 5. Over the past eight months, despite Defendants' claims of  
17 some willingness to "consider" and "look into" conducting searches and producing information and  
18 records responsive to Washington-specific discovery, including from the custodians and databases  
19 where Washington's requested information would be kept, Defendants have failed to take any  
20 meaningful steps to search for or provide information responsive to Washington's discovery  
21 requests. *Id.*; *see also* ECF No. 450-2 at 4. Indeed, during the half-dozen meet and confers held  
22 between the parties over the past three months, Washington has consistently queried Defendants on  
23 the status of their responses to Washington's discovery, but Defendants have declined to commit to  
24 contact custodians with Washington-specific information or conduct searches of existing databases.

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26 <sup>1</sup> Seven of those 36 documents were withheld in their entirety as privileged, Stallings-Ala'ilima Decl. ¶ 4, but those assertions of privilege are not the subject of the instant motion.

1 Stallings-Ala'ilima Decl. ¶ 5. Defendants have likewise declined to provide any timeframe by  
2 which they will even decide whether to collect and review information responsive to Washington's  
3 requests. *Id.* Washington is left with no choice but to seek this Court's intervention.

4 Washington has attempted to avoid the need for motions practice. Per the Court's direction  
5 on November 19, 2019, Washington has coordinated with Private Plaintiffs to sort outstanding  
6 requests for production in order of priority. *See* ECF No. 394 at 6; ECF No. 398 at 2 n.3; ECF No.  
7 408 at 1 n.1. Specifically, Washington has sought to streamline the process by identifying its state-  
8 specific requests that substantially overlap with Private Plaintiffs' prioritized requests and  
9 requesting Defendants include Washington's overlapping requests in their review and identification  
10 of responsive records. ECF No. 398 at 2 n.3; Stallings-Ala'ilima Decl. ¶ 4, Ex. C. But Washington  
11 has received no supplemental discovery responses from Defendants as a result of this coordination.  
12 *Id.* Instead, Defendants concede that they relied exclusively on searches conducted prior to July  
13 2019 in responding to Washington's requests, and have not even begun any search in response to  
14 Washington's specific requests. *Id.* ¶ 5; ECF No. 398 at 2 n.2 (Defendants do not dispute that they  
15 neither isolated their "searches by geographic location (i.e. within Washington State or based on  
16 service members that are residents of Washington State)" nor "searched formal complaint databases  
17 for records responsive" to Washington's related discovery requests).<sup>2</sup> It is improper for Defendants  
18 to rely exclusively on searches conducted prior to the issuance of Washington's discovery, at  
19 least where the pre-July 2019 searches did not identify or produce known, responsive  
20 information and documents. Rather, in responding to Washington's requests, Defendants must  
21 affirmatively query and conduct a search for responsive records from reasonably available  
22 custodians and data sources.

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<sup>2</sup> In response to Private Plaintiffs' RFP 20, which Washington agreed to prioritize, Defendants have recently confirmed their willingness to conduct a search for records related to transgender individuals located in Washington who applied for military service from January 1, 2018, to the present. Washington looks forward to receiving those records, but that search will cover, at most, a portion of Washington's information and document requests and will not resolve this dispute.

1 For three of Washington’s RFPs, Defendants have promised to produce responsive  
2 documents, but have simply not done so in the more than eight months since Washington issued  
3 its requests. Stallings-Ala’ilima Decl. ¶ 3, Ex. B at 32-35 (RFPs 14, 15, 17); ¶ 4. In response to  
4 a fourth RFP, Defendants responded only regarding the National Guard, but not any other  
5 Service branch operating in Washington. *Id.* at 38-39 (RFP 20). Defendants’ excuse for their  
6 failure to respond to another 13 of Washington’s requests is that they do not centrally “track”  
7 the information requested, or “have not identified” responsive documents within the set of  
8 documents they previously collected in response to discovery requests propounded by other  
9 plaintiffs in this case or related cases—searches that all pre-dated Washington’s requests. *Id.* ¶  
10 2, Ex. A at 25-31, 33-34 (interrogatories 9-14, 16); ¶ 3, Ex. B at 26-31, 34-37 (RFPs 8-9, 11, 13,  
11 16, 18). But Washington has reason to believe that branches of the services operating within  
12 Washington state do possess information relevant and responsive to Washington’s requests, and  
13 Defendants are required to search for it regardless of whether some centralized database already  
14 “tracks” it. For example, in discovery production for the related *Doe* case, Defendants produced  
15 a spreadsheet showing at least eight transgender service members stationed in Washington at  
16 Fort Lewis and Naval Base Kitsap. *See* Stallings-Ala’ilima Decl. ¶ 6, Ex. D. According to  
17 Defendants’ counsel, Defendants are aware of approximately 1,500 service members nationwide  
18 with a gender dysphoria diagnosis, although counsel has not specified how they know that or  
19 where that information is stored. *Id.* ¶ 5.

20 Washington certifies that it has met and conferred with counsel for Defendants in an effort  
21 to resolve this dispute without Court action. *See* Stallings-Ala’ilima Decl. ¶ 1. Since those efforts  
22 have been unsuccessful, Washington asks the Court to compel Defendants’ search and production  
23 of the information and records responsive to Washington’s discovery requests identified below.  
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**II. DEFENDANTS’ INTRODUCTORY STATEMENT<sup>3</sup>**

Less than a month after the Ninth Circuit made clear 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,” *Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019) (emphasis added), Washington served numerous interrogatories and requests for production (“RFPs”) seeking information that “had a specific Washington focus.” But Washington-specific information was never considered by the Panel of Experts in forming the Mattis Plan, and nothing in the record on this worldwide policy suggests that the military’s decision-makers considered its impact on any particular state.

Washington nonetheless offers a conclusory statement that such discovery is “squarely relevant” to “establish the number of transgender Washingtonians who have been affected by the military’s policies” and to establish those policies’ impact on “Washingtonians” but they offer no explanation as to why establishing the exact number of Washingtonians impacted by the military’s policy or the impacts on Washington state in particular would in any way affect the resolution of this litigation or be material to any issue in this case. The absence of such an explanation is particularly striking when Washington itself believes that it has enough to establish “‘standing’ to challenge” the military policy at issue. *See* Dkt. 187 (quoting the Court’s prior ruling, Dkt. 103 at 11–12, and arguing that Defendants should not be permitted to further explore Washington’s standing because the Court previously decided the issue). More importantly, Washington cites to no case where a court has ever considered the impact of a policy governing the United States Armed Forces on a particular state. The irrelevance of Washington’s discovery requests is reason alone to deny Washington’s motion to compel.

Despite the fact that the information Washington seeks is plainly irrelevant to the Court’s consideration of the constitutionality of the Mattis Plan, Defendants performed reasonable

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<sup>3</sup> The expedited procedures of Local Rule 37(a)(2) for resolving discovery disputes are only available upon “agreement” of the parties. Defendants have not given their consent to the expedited procedures and reiterate their objection to Washington’s use of Local Rule 37(a)(2) without their consent.

1 searches and provided responsive information and documents for the vast majority of  
 2 Washington's requests. For many of its requests, such as Washington's request for training  
 3 materials (RFP 20), Defendants searched for and produced responsive documents long before  
 4 Washington served its requests. Washington's insistence that Defendants perform new searches  
 5 for these documents simply reflects a lack of diligence on the part of Washington to review the  
 6 documents that have already been produced. For others, such as RFPs 14, 15, and 17, contrary to  
 7 Washington's representation, Defendants performed new searches in response to Washington's  
 8 discovery requests and either have produced or will shortly produce responsive documents. For  
 9 the remaining discovery requests, Defendants explained in their objections that the Department  
 10 of Defense ("DoD") does not compile the information in the manner Washington requested.  
 11 However, given the breadth of Defendants' searches, *see* Easton Decl. ¶¶ 5–11, Dkt. 371-1, any  
 12 material pertaining to Washington service members that reasonably related to the formation of  
 13 DoD's policies on military service by transgender individuals and individuals with gender  
 14 dysphoria would have been collected and produced to Washington. Accordingly, Defendants  
 15 have complied with their discovery obligations under the Federal Rules of Civil Procedure.  
 16 Washington's motion should be denied.

### 17 III. DISCOVERY REQUESTS AT ISSUE<sup>4</sup>

18 Washington's discovery requests and Defendants' responses at issue in this motion are:

19 **INTERROGATORY NO. 9:** Identify the number of transgender Washington  
 20 service members—including Washington residents stationed or deployed outside  
 of Washington State—for each year during the relevant period.

21 **Specific Objections:** Defendants object on the grounds that this interrogatory is  
 22 overbroad, unduly burdensome, and disproportionate to the needs of the case. As  
 23 explained above, neither Plaintiff-Intervenor, Plaintiff-Intervenor's witnesses,  
 24 nor the Court may undertake an independent evaluation of military data, as  
 Plaintiff-Intervenor proposes to do through these discovery requests. *See* Dkt. 388  
 at 45 ("[T]he district court may not substitute its 'own evaluation of evidence for  
 a reasonable evaluation' by the military." (quoting *Rostker*, 453 U.S. at 68)).<sup>5</sup>

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 26 <sup>4</sup> The relevant period is January 1, 2014, to the present.

<sup>5</sup> Defendants assert this paragraph as identical "Specific Objections" to all interrogatories.

1 Moreover, Department of Defense policy prohibits discrimination on the basis of  
2 gender identity and seeks to protect the privacy of all Service members. Thus,  
3 DoD does not track service members or applicants by gender identity and has no  
4 means of searching for the requested information as it pertains to “transgender  
5 Washington service members.” Accordingly, this request is overbroad, unduly  
6 burdensome, and disproportionate to the needs of the case.

7 **Response:** Defendants stand on the foregoing objection.

8 **REQUEST FOR PRODUCTION NO. 9:** Please produce all documents that are  
9 referenced in, support, or that form the basis of Your answer to Interrogatory 9.

10 **Specific Objections:** Defendants object to this request to the extent that it seeks  
11 (a) attorney work product; (b) communications or information protected by the  
12 attorney-client privilege; (c) communications or information protected by the  
13 deliberative process privilege; (d) material the disclosure of which would violate  
14 legitimate privacy interests and expectations of persons not party to this litigation;  
15 or (e) communications or information protected by the presidential  
16 communications privilege. Without waiver of the objections, a privilege log will  
17 be provided by the government, which describes the privileged documents that  
18 have been withheld and the basis for privilege at issue for those documents.

19 Defendants further object on the grounds that this request is overbroad, unduly  
20 burdensome, and disproportionate to the needs of the case. As explained above,  
21 neither Plaintiff-Intervenor, Plaintiff-Intervenor’s witnesses, nor the Court may  
22 undertake an independent evaluation of military data, as Plaintiff-Intervenor  
23 proposes to do through these discovery requests. See Dkt. 388 at 45 (“[T]he  
24 district court may not substitute its ‘own evaluation of evidence for a reasonable  
25 evaluation’ by the military.” (quoting *Rostker*, 453 U.S. at 68)).<sup>6</sup>

26 **Response:** Defendants have identified no material responsive to Plaintiff-  
Intervenor’s request.

**INTERROGATORY NO. 12:** For each military installation in Washington  
State, identify all persons during the relevant period who have responded or been  
assigned to respond to complaints, including problems with unit cohesion, arising  
from—in part or in whole—the transgender status or a diagnosis of gender  
dysphoria of any Washington service member, including Washington residents  
stationed or deployed outside of Washington State. Include in your response: the  
factual information You believe each person possesses and the person’s title or  
rank.

**Specific Objections:** . . . Moreover, Defendants object to the use of the term  
“complaint” as it is overboard, unduly burdensome, vague, ambiguous, and

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<sup>6</sup> Defendants assert identical “Specific Objections” to every RFP.

1 undefined. Specifically, the Department of Defense is an organization consisting  
2 of over two million employees stationed throughout the world and the  
3 Department does not centrally track “complaints” or responses to “complaints,”  
and does not specifically assign employees to respond to “complaints” of this  
nature.

4 **Response:** Defendants stand on the foregoing objections.

5 **REQUEST FOR PRODUCTION NO. 12:** Please produce all documents that  
6 are referenced in, support, or that form the basis of Your answer to Interrogatory  
12.

7 **Response:** Defendants have identified no material responsive to Plaintiff-  
8 Intervenor’s request.

9 **REQUEST FOR PRODUCTION NO. 14:** Please produce all documents that  
10 are referenced in, support, or that form the basis of Your answer to Interrogatory  
11 14.

12 **Response:** Subject to and without waiving the above general and specific  
13 objections and subject to applicable privileges, Defendants will produce materials  
responsive to Plaintiff-Intervenor’s request.

14 **REQUEST FOR PRODUCTION NO. 15:** Please produce all documents that  
15 are referenced in, support, or that form the basis of Your answer to Interrogatory  
16 15.

17 **Response:** Subject to and without waiving the above general and specific  
18 objections and subject to applicable privileges, Defendants will produce materials  
responsive to Plaintiff-Intervenor’s request.

19 **INTERROGATORY NO. 16:** Identify each instance during the relevant period  
20 where “cross-sex hormone therapy or sex reassignment surgery” has rendered any  
21 Washington service member—including Washington residents stationed or  
22 deployed outside of Washington State—non-deployable for more than one year.

23 **Specific Objections:** . . . This interrogatory is also overbroad, unduly  
24 burdensome, and disproportionate to the needs of the case because the  
25 Department of Defense does not track the number of service members deemed  
26 non-deployable based on “cross-sex hormone therapy or sex reassignment  
surgery.” To determine the number of Washington service members who have  
been deemed non-deployable based on cross-sex hormone therapy or sex

1 reassignment surgery would require an arduous manual review of thousands of  
2 personnel decisions and records dispersed at hundreds of distinct locations.

3 **Response:** Defendants stand on the foregoing objections.

4 **REQUEST FOR PRODUCTION NO. 16:** Please produce all documents that  
5 are referenced in, support, or that form the basis of Your answer to Interrogatory  
6 16.

7 **Response:** Defendants have identified no material responsive to Plaintiff-  
8 Intervenor’s request.

9 **REQUEST FOR PRODUCTION NO. 17:** Please produce all documents that  
10 are referenced in, support, or that form the basis of Your answer to Interrogatory  
11 17.

12 **Response:** Subject to and without waiving the above general and specific  
13 objections and subject to applicable privileges, Defendants will produce materials  
14 responsive to Plaintiff-Intervenor’s request.

15 **REQUEST FOR PRODUCTION NO. 20:** Please produce all training materials  
16 distributed at any point during the relevant time period to the Washington  
17 National Guard or used to train Washington service members regarding military  
18 service by transgender individuals.

19 **Specific Objections:** . . . Defendants further object to this request as overbroad,  
20 unduly burdensome, and disproportionate to the needs of the case because it seeks  
21 materials in the possession of Plaintiff-Intervenor the State of Washington,  
22 because the Washington National Guard is the federally recognized militia of the  
23 State of Washington and a subcomponent of the Washington Military  
24 Department, which is a State agency. *See Panetta*, 2012 WL 2952101 at \*1.

25 **Response:** Information responsive to this request is already in the possession of  
26 Plaintiff-Intervenor. Accordingly, Defendants stand on their objections to this  
request.

IV. WASHINGTON’S ARGUMENT

A. **Defendants Are Required to Conduct Reasonable Searches and Produce Complete Responses to Washington’s Discovery Requests**

Washington may obtain discovery regarding information that is (1) nonprivileged, (2)

1 relevant to Washington’s claims or Defendants’ defenses, and (3) proportional to the needs of  
2 the case, with consideration of the issues at stake and the information’s importance in resolving  
3 them, the amount in controversy, the parties’ access to the information, and whether the burden  
4 to Defendants outweighs the information’s benefit. Fed. R. Civ. P. 26(b)(1). The discovery  
5 sought by Washington is relevant to the issues of Defendants’ process and intent, whether  
6 reasoned decision-making occurred, and whether the Ban significantly furthers important  
7 government interests. As the Ninth Circuit has already recognized in this case, the Defendants’  
8 discriminatory classification based on gender is subject to heightened scrutiny, requiring review  
9 of their purported justifications to ensure they are “‘exceedingly persuasive’ . . . ‘genuine, not  
10 hypothesized or invented *post hoc* in response to litigation, and . . . not rel[iant] on overbroad  
11 generalizations.’” *Karnoski v. Trump*, 926 F.3d 1180, 1199-200 (9th Cir. 2019) (citing *United*  
12 *States v. Virginia*, 518 U.S. 515, 532-33 (1996)). And as this Court correctly recognized during  
13 the February 3, 2020, Status Conference, discovery of Defendants’ data and decisionmaking is  
14 necessary to the heightened scrutiny inquiry and therefore appropriate. *See* Feb. 3, 2020 Hr’g Tr.  
15 at 9:24-10:1, 39:24-40:7; *accord* ECF No. 413 at 4, ECF No. 455 at 4-5, ECF No. 457 at 3-4;  
16 *Karnoski*, 926 F.3d at 1206 (the discovery withheld by Defendants under the deliberative process  
17 privilege was “primarily, if not exclusively, under Defendants’ control”); *Doe v. Esper*, No.  
18 1:17-cv-01597-CKK (D.D.C. Sept. 13, 2019), ECF No. 237 at 2 (“Additional discovery is  
19 needed to determine if the [Ban] is the product of considered military decision-making that  
20 reasonably and evenhandedly regulates the matter at issue.”).

21 Under Rule 33, Defendants have an obligation to locate and provide information  
22 responsive to Washington’s interrogatories. Fed. R. Civ. P. 33(b)(1)(B), (3); *United States v.*  
23 *Kordel*, 397 U.S. 1, 8 (1970) (“service of the interrogatories obliged the [Defendant] to ‘appoint  
24 an agent who could . . . furnish such requested information as was available to the [Defendant]’”)  
25 (quoting *United States v. 3963 Bottles*, 265 F.2d 332, 336 (7th Cir. 1959)). If Defendants cannot  
26 produce complete responses, they must at a minimum “say why and set forth the efforts [they]

1 used to obtain the information.” *Milner v. Nat’l Sch. of Health Tech.*, 73 F.R.D. 628, 631 (E.D.  
2 Pa. 1977); *see also White v. Relay Res.*, No. C19-0284-JCC, 2020 WL 758114, at \*3 (W.D.  
3 Wash. Feb. 14, 2020) (“a reasonable effort to respond must be made”) (citing *Thomas v. Cate*,  
4 715 F. Supp. 2d 1012, 1032 (E.D. Cal. 2010) (“Rule 33 imposes a duty on the responding party  
5 to secure all information available to it.”)). Defendants have not complied with that duty here,  
6 instead admitting to having made no such efforts in response to many of Washington’s  
7 interrogatories. Stallings-Ala’ilima Decl., ¶¶ 2, 5; Ex. A at 12-37.

8 Rule 34 imposes similar, but separate, duties on Defendants. In particular, in order to  
9 respond, Defendants must take reasonable steps to identify proper custodians, conduct a search,  
10 gather documents, and produce the responsive records. Fed. R. Civ. P. 34(b)(2)(C); *LVB-Ogden*  
11 *Mktg. v. Bingham*, No. 2:18-cv-00243-TSZ, 2019 WL 142031, at \*4 (W.D. Wash. Jan. 9, 2019)  
12 (“Defendants have an independent obligation to conduct a reasonable search for responsive  
13 documents and either produce the documents located or provide a verification that after having  
14 conducted a search, no such documents could be located.”); *see also* Feb. 03, 2020 Hr’g Tr. at  
15 60:17-20 (“[I]n order to be responsive to the requests, [Defendants are] going to have to look at  
16 not just what they gathered, but where they might find documents that might be responsive.”);  
17 *City of Seattle v. Prof’l Basketball Club, LLC*, No. 2:07-cv-01620-MJP, 2008 WL 539809, at \*1  
18 (W.D. Wash. Feb. 25, 2008) (“[c]ontrol is defined as the legal right to obtain documents upon  
19 demand”) (quoting *United States v. Int’l Union of Petroleum & Indus. Workers*, 870 F.2d 1450,  
20 1452 (9th Cir. 1989)). A party “is under an affirmative duty to seek information reasonably  
21 available to [it] from [its] employees.” *City of Seattle*, 2008 WL 539809, at \*1 (citing *Gray v.*  
22 *Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992)). Even with an overbreadth objection,  
23 Defendants must respond to any part of the request that is outside the scope of the objection.  
24 Fed. R. Civ. P. 34(b)(2)(C) advisory committee’s note to 2015 amendment. As with the  
25 interrogatories, Defendants recognize no duty to search or identify Washington-responsive  
26 documents.

1     **B. Defendants Have Failed to Produce Information in Their Control**

2           Defendants claim to have “no material responsive” to Washington’s interrogatory 9 and  
3 RFP 9 related to the number of transgender Washington service members. Stallings-Ala’ilima  
4 Decl. ¶ 2, Ex. A at 25-26; ¶ 3, Ex. B at 27-28. But Defendants do appear to possess and control  
5 this information. *See id.* ¶ 6, Ex. D.

6           Defendants assert the same lack of tracking as their basis for not producing information  
7 in response to interrogatory and RFP 16. *Id.* ¶ 2, Ex. A at 33-34; ¶ 3, Ex. B at 34-35. Interrogatory  
8 and RFP 16 ask for information and records of non-deployability assessments related to cross-  
9 sex hormone therapy or sex reassignment. *Id.* ¶ 2, Ex. A at 33-34; ¶ 3, Ex. B at 34-35. But  
10 Defendants cannot know for certain that they do not have this information if they have not asked  
11 custodians who would be able to tell them. For example, as of December 2, 2016, the Air Force’s  
12 tracking measures included “Formal Medical Transition Plans” and “Formal requests for DEERS  
13 (MilPDS) gender change.” *Id.* ¶ 7, Ex. E. These measures included the Regular Air Force, Air  
14 Force Reserves, and the Air National Guard. *Id.* These commands operate within Washington  
15 State, yet Defendants claim their own data is somehow unavailable to them.

16           Likewise, in response to interrogatory and RFP 12, Defendants assert that they have “no  
17 material responsive” regarding complaints or responses to complaints arising from a Washington  
18 service member’s transgender status or diagnosis of gender dysphoria because they do not  
19 “centrally track” that information and do not “specifically assign employees to respond to  
20 ‘complaints’ of this nature.” *Id.* ¶ 2, Ex. A at 28-29; ¶ 3, Ex. B at 30-31. But Defendants’ Panel  
21 of Experts considered and included one commander’s report of “dueling equal opportunity  
22 complaints” related to a transgender service member within their February 2018 Report and  
23 Recommendations on Military Service by Transgender Persons. *See* ECF No. 224-2 at 39.  
24 Washington needs to know whether any such complaints have occurred here, and with what  
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1 outcome.<sup>7</sup> Yet glaringly absent from Defendants’ efforts to seek existing information are any  
 2 human resources custodians for the Services operating within Washington State. *See* ECF No.  
 3 398 at 2 n.3 (Washington’s “understanding from Defendants is that [they] did not isolate [their]  
 4 searches by geographic location . . . and that Defendants have not searched formal complaint  
 5 databases for records responses to [RFP 12]. Defendants have not yet taken a position as to  
 6 whether they will agree to conduct those searches.”).

7 Next, Defendants failed to respond to Washington’s RFP 20. Although Defendants  
 8 provided a partial response that training materials distributed to the Washington National Guard  
 9 are “already in the possession” of Washington, they omit any responsive production of training  
 10 materials from the Army, Air Force, Navy, Marine Corps, or Coast Guard “used to train  
 11 Washington service members regarding military service by transgender individuals.” Stallings-  
 12 Ala’ilima Decl. ¶ 3, Ex. B at 38-39. RFP 20 is not limited to training materials for the Washington  
 13 National Guard, and Defendants’ incomplete answer omitting five entire military branches must  
 14 be treated as a total failure to respond for purposes of this motion. Fed. R. Civ. P. 37(a)(4).  
 15 Defendants should be compelled to respond, in full, to Washington’s RFP 20.

16 Finally, with respect to RFPs 14, 15, and 17, Defendants have simply failed to identify  
 17 or produce any documents, despite their promise to do so. *See* Stallings-Ala’ilima Decl. ¶ 3, Ex.  
 18 B at 32-35. An unexplained delay of more than eight months justifies an order compelling timely  
 19 production. *Gilson v. Evergreen at Talbot Road LLC*, No. 2:04-cv-002126-JCC, 2005 WL  
 20 3841864, at \*2 (W.D. Wash. Nov. 1, 2005) (“the burden is on the responding party to justify its  
 21 objections or failure to provide complete answers to the interrogatories or requests for  
 22 production”); *see also Burlington N. & Santa Fe Ry. v. U.S. Dist. Court for Dist. of Mont.*, 408  
 23 F.3d 1142, 1149 (9th Cir. 2005) (holding “a district court should make a case-by-case

24 \_\_\_\_\_  
 25 <sup>7</sup> In response to interrogatories and RFPs 11 and 13, Defendants produce no information or documents showing that  
 26 any Washington service member has been discharged or deemed not deployable due to transgender status or  
 diagnosis of gender dysphoria. Washington understands Defendants’ responses to constitute a binding  
 representation that no such evidence exists and Defendants will not seek to introduce it at trial. *Id.* ¶2, Ex. A at 27-  
 31; ¶ 3, Ex. B at 29-32.

1 determination” regarding “Rule 34’s 30-day time limit” and recognizing a party’s five month  
2 delay in producing a privilege log would have been a sufficient basis for the district court’s ruling  
3 that the party had waived its privilege). Indeed, with the possible exception of aggregate data  
4 available on Defendants’ public-facing website, Washington understands Defendants to have  
5 totally foregone any search efforts specific to its requests.

6 Defendants have articulated no burden to searching for the information subject to  
7 Washington’s requests from reasonable custodians such as human resources officials, command  
8 leadership of the Services operating in Washington State, or the relevant military medical  
9 providers that Defendants rely upon to evaluate exemptions and in-Service transitions under the  
10 Ban. *See Stallings-Ala’ilima Decl.* ¶ 8, Ex. F at 9. Therefore, Washington asks the Court to  
11 compel Defendants to affirmatively seek responsive information for Washington’s discovery  
12 requests from appropriate custodians for their Washington-based Service branches, produce  
13 discovery responses, and, for any branches that truly have no responsive materials, submit sworn  
14 verifications describing Defendants’ searches and the negative outcomes of each.

## 15 V. DEFENDANTS’ RESPONSE

### 16 A. All of the Information Washington Seeks is Entirely Irrelevant to This Court’s 17 Review of the Mattis Plan.

18 In response to the hundreds of discovery requests served in the four related cases, the  
19 Department of Defense and the Military Services conducted an expansive search, collection, and  
20 production of files and documents potentially relevant to the claims and defenses in the four  
21 cases. *Easton Decl.* ¶ 5, Dkt. 371-1; *Carmichael Decl.* ¶¶ 2–4, Ex. 1–3. In addition to the tens  
22 of thousands of documents produced to Washington as a result of these searches, Defendants  
23 have also produced to Washington all of the deliberative materials considered by the Panel of  
24 Experts in formulating the Mattis Plan.

25 Despite the production of the Panel’s deliberations and tens of thousands of documents,  
26 Washington nevertheless contends it needs additional information specific to the State of

1 Washington that the Panel never considered in order to challenge the constitutionality of the  
2 Mattis Plan. The Mattis Plan, however, is a worldwide policy governing the military. In the  
3 record of its development, there is no indication that the military proceeded by collecting data  
4 on each individual State because national military policies are not formulated on a state-by-state  
5 basis. Washington has no explanation for how Washington-specific information could be  
6 relevant to any of the issues in this case. In any event, Defendants have produced materials and  
7 information responsive to Washington’s interrogatories and requests for production that were  
8 considered by the Panel of Experts in making its recommendation. Under the law of this case  
9 and binding Supreme Court precedent, that is the only information even arguably relevant to  
10 Washington’s claims. Accordingly, Washington’s motion to compel should be denied.

11 The Ninth Circuit was clear in previously granting the writ of mandamus that “the  
12 reasonableness of the 2018 Policy *must* be evaluated on the record supporting that decision and  
13 with the appropriate deference due to a proffered military decision.” *Karnoski*, 926 F.3d at 1207  
14 (emphasis added). This is because the Court’s role in this case is not to “substitute its ‘own  
15 evaluation of evidence for a reasonable evaluation’ by the military,” but to test whether the  
16 decision the military made, in light of the evidence that it actually considered, is justifiable and  
17 entitled to deference. *Id.* at 1202 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)). The  
18 Ninth Circuit’s statement of the standard to be applied in this case is consistent with the Supreme  
19 Court’s repeated rejection of the use of evidence that military decision-makers did not consider.  
20 *See Winter v. NRDC*, 555 U.S. 7, 24 (2008) (making clear that “great deference” is owed to “the  
21 professional judgment of military authorities”); *Goldman v. Weinberger*, 475 U.S. 508, 509  
22 (1986) (describing expert witness testimony as “quite beside the point”); *Rostker*, 453 U.S. at 81  
23 (concluding district court had “palpably exceeded its authority” in relying on deposition  
24 testimony); *see also Doe 2 v. Shanahan*, 917 F.3d 694, 736–37 (D.C. Cir. 2019) (Williams, J.,  
25 concurring) (“[I]t does not appear that the Supreme Court considered any evidence uncovered  
26 by those trial courts’ explorations to be necessary—or even pertinent—to its disposition of” the

1 | *Rostker* and *Goldman* cases.). Washington’s insistence on extra-record discovery would  
2 | essentially create a new record and invite the Court to make its own determination of the  
3 | appropriate policy on the basis of data the Panel never gathered and did not consider in reaching  
4 | its conclusions. This the Court cannot do.

5 | Washington’s contention that it nonetheless needs additional information concerning  
6 | what it deems Defendants’ “request for military deference” is directly contrary to binding  
7 | precedent. The principle of military deference is not a “request” by Defendants but is instead  
8 | mandated by the Supreme Court and the Ninth Circuit. *See Rostker*, 453 U.S. at 68; *Karnoski*,  
9 | 926 F.3d at 1202. In arguing that it needs more information concerning a so-called “request for  
10 | military deference,” Washington inexplicably ignores the Ninth Circuit’s direction that “the  
11 | district court *must* apply appropriate military deference to its evaluation of the 2018 Policy.”  
12 | *Karnoski*, 926 F.3d at 1202 (emphasis added). No discovery is needed to determine whether the  
13 | Court should apply principles of military deference in this case.

14 | Washington’s contention that it needs additional information concerning “cost,  
15 | deployability, lethality, [and] unit cohesion” fares no better. Defendants have produced all the  
16 | information on these subjects that the Panel considered, including its deliberations on these  
17 | topics. By explicitly seeking discovery beyond the scope of what the Panel considered, including  
18 | information that postdates the policy recommendations the Panel made, Washington is asking  
19 | this Court to substitute its own judgment for that of the military. As the Supreme Court has  
20 | found, this is not the proper role for a district court in a facial challenge to military policy. For  
21 | instance, in *Goldman*, the Supreme Court majority did not even acknowledge evidence  
22 | developed in the district court that the plaintiff “had worn a yarmulke on base for years,” in  
23 | violation of Air Force policy, “without any adverse effect on his performance, any disruption of  
24 | operations at the base, or any complaints from other personnel.” 475 U.S. at 526 (Blackmun, J.,  
25 | dissenting). The Constitution places the responsibility for evaluating the ongoing viability of  
26 | policies such as the Mattis Plan on the “[t]rained professionals” in the military, “subject to the

1 day-to-day control of the responsible civilian authorities.” *Gilligan v. Morgan*, 413 U.S. 1, 8  
2 (1973) (rejecting court of appeals’ suggestion to district court to “survey certain materials not  
3 then in the record of the case” on remand). And “[i]t would be inappropriate for a district judge  
4 to undertake this responsibility in the unlikely event that he possessed requisite technical  
5 competence to do so.” *Id.*

6 Washington ignores all of this case law, despite the fact that it binds this Court’s  
7 disposition of this litigation. Instead, Washington simply asserts its need for additional  
8 information to probe the validity of the military’s decision. But even setting aside Washington’s  
9 failure to take account of binding military deference principles, limiting discovery to items the  
10 Panel reviewed and considered should not hinder Washington in challenging the Mattis Plan.  
11 Washington is free to argue that the Panel should have considered the potential impacts of the  
12 policy it recommended on Washington state specifically, that evidence the Panel considered does  
13 not support the conclusions it reached, that the Panel misstated or misrepresented evidence, that  
14 the Panel ignored relevant factors, and that, as a result, the military did not meet its burden to  
15 show that it “reasonably determined [its] policy ‘significantly furthers’ the government’s  
16 important interests,” *Karnoski*, 926 F.3d at 1202. But what Washington cannot do is require  
17 Defendants to gather evidence that Washington believes should have been considered, but was  
18 not, in order to assess the Mattis Plan against a new set of facts that were never considered by  
19 decision-makers. That approach would substitute one decision-making process conducted by  
20 the military for another conducted by this Court. Regardless of what the rule may be in garden-  
21 variety civil litigation, that is not an approach permitted in litigation challenging military  
22 policies.

23 In sum, because Washington’s motion seeks state-specific information that the Panel *did*  
24 *not gather* and that the military *did not evaluate* in reaching its conclusion, it must be denied for  
25 this reason alone.  
26

1 Washington's claim that it needs discovery to "establish the number of transgender  
2 Washingtonians who have been affected by the military's policies" and to establish those  
3 policies' impact on "Washingtonians" is likewise baseless. Neither the number of transgender  
4 Washingtonians affected by the policy nor the impact of the policy on those particular individuals  
5 is relevant to the question before the Court—whether Defendants "reasonably determined" that the  
6 worldwide policy "'significantly furthers' the government's important interests." *Karnoski*, 926  
7 F.3d at 1202. And while Washington may have some say in the appointment of officers and the  
8 training of members of the Washington National Guard according to regulations prescribed by  
9 Congress, *see* 32 U.S.C. §§ 101–110, the Constitution reserves all authority to regulate the United  
10 States Armed Forces (including those individuals stationed on federal bases located within the state  
11 of Washington) to the Federal Government, *see* U.S. Const. art. I, § 8. Therefore, even assuming,  
12 *arguendo*, that a state can establish standing to challenge policies that pertain to its National Guard,  
13 which is in part controlled by a state and operates within state borders on state missions, a state  
14 cannot regulate personnel policies that apply to and are carried out in Federal military facilities  
15 within state borders (like Joint Base Lewis-McChord) or on the mere ground that some state  
16 residents serve in the Armed Forces. For this reason as well, any Washington state-specific  
17 discovery into the regulation of the United States Armed Forces is improper and irrelevant and  
18 Washington's motion to compel must be denied.<sup>8</sup>

19 **B. Defendants Complied with Their Discovery Obligations.**

20 Even though Washington seeks discovery that is plainly irrelevant to this case,  
21 Defendants nevertheless conducted reasonable searches for information and documents  
22 responsive to Washington's requests. Washington's insistence that Defendants did not  
23 adequately respond to its requests reflects only Washington's failure to review materials that  
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25 <sup>8</sup> As far as Washington seeks discovery into the Washington National Guard, that discovery is already in  
26 Washington's possession because the Washington National Guard is a joint federal and state entity. Defendants raised  
this point in their objections, and Washington does not contest it in its motion.

1 Defendants have produced and Washington’s refusal to recognize that Defendants do not track  
2 or compile the information in the manner Washington requested.

3 With regard to RFP 20, contrary to Washington’s representation, Defendants produced  
4 numerous documents “used to train Washington service members regarding military service by  
5 transgender individuals” from the Department of Defense, Army, Navy, Air Force, and Coast  
6 Guard long before Washington served its RFPs in July 2019. Notably, Defendants produced the  
7 Department of Defense’s *Transgender Service in the U.S. Military: An Implementation*  
8 *Handbook*, which Plaintiffs filed on the docket in January 2018. *See* ECF No. 144-6. In addition,  
9 Defendants produced the Navy’s *Transgender and Gender Transition Commanding Officer’s*  
10 *Toolkit*, which the Navy issued to supplement DoD’s handbook. *See* Carmichael Decl. ¶ 5, Ex.  
11 4. Defendants also produced PowerPoint presentations given by the members of the DoD  
12 Transgender Education and Training Work Group (*see, e.g.*, Carmichael Decl. ¶¶ 6–8, Ex. 5–7),  
13 as well as presentations given by the Services (*see, e.g.*, Carmichael Decl. ¶¶ 9–12, 21–23, Ex.  
14 8–11, 20–22. And Defendants produced documents describing the training requirements (*see,*  
15 *e.g.*, Carmichael Decl. ¶¶ 13–14, Ex. 12–13), and documents showing completion of trainings  
16 by Service (*see* Carmichael Decl. ¶ 24, Ex. 23). Finally, Defendants produced the Services’  
17 policies that implemented the Carter policy. *See, e.g.*, Carmichael Decl. ¶ 15, Ex. 14.  
18 Accordingly, as stated in Defendants’ response to RFP 20, “[i]nformation responsive to this  
19 request is already in the possession of Plaintiff-Intervenor.”

20 Interrogatory and RFP 12 seek information and documents related to “complaints”  
21 “arising from” the “transgender status or a diagnosis of any Washington service member,”  
22 including Washington residents stationed or deployed outside of Washington State.” As an  
23 initial matter, Defendants have produced to Washington the EO complaint that is referenced in  
24 the DoD Report and Recommendation that accompanied the February 2018 Memorandum from  
25 Secretary Mattis. *See* Joint Status Report at 5, Dkt. 398. Washington seeks additional  
26 complaints—that the Panel never saw or considered—on the theory that “Washington needs to

1 know whether any such complaints have occurred here, and with what outcome.” But  
2 information that military decision-makers never considered is plainly irrelevant. *See Karnoski*,  
3 926 F.3d at 1207.

4 In any event, Defendants are not aware of additional information or documents  
5 responsive to Washington’s Interrogatory 12 or RFP 12. Washington insists on seeking  
6 information from “human resources custodians for the Services,” but the State simply  
7 misunderstands the military’s process for addressing issues related to transgender military  
8 service and has failed to review the materials already produced to it. Each Service created a  
9 Service Central Coordination Cell (“SCCC”) “to provide multi-disciplinary (e.g., medical, legal)  
10 advice and assistance to commanders with regard to service by transgender Service members  
11 and gender transition in the military.” *Transgender Service in the U.S. Military: An*  
12 *Implementation Handbook* at 12, 38, Dkt. 144-6. Commanders were encouraged to raise  
13 concerns about a variety of issues regarding transgender military service to their SCCC. *See*,  
14 *e.g., id.* at 29 (privacy concerns); *see also* Carmichael Decl. ¶ 5, Ex. 4 (encouraging Navy  
15 commanders to contact the SCCC with any issues). As Defendants informed Washington in  
16 November 2019, Defendants used broad search terms to search for responsive documents from  
17 custodians who were members of the Services’ SCCC. *See* Carmichael Decl. ¶¶ 2–4, Ex. 1–3.  
18 Accordingly, documents responsive to Washington’s RFP 12 would have been produced to  
19 Washington as a result of this search and collection. Defendants are not aware of additional  
20 information or documents responsive to Washington’s Interrogatory 12 or RFP 12.<sup>9</sup>

21 With regard to RFPs 14 and 15, it is not the case, as Washington claims, that Defendants  
22 have not produced any responsive documents. These RFPs sought documents “that are  
23

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24 <sup>9</sup> *See Hearing to Receive Testimony on the Department of Defense Budget Posture in Review of the Defense*  
25 *Authorization Request for Fiscal Year 2019 and the Future Years Defense Program: Hearing before the S. Comm.*  
26 *on Armed Servs.*, 115 Cong. 58:13–19 (Apr. 26, 2018) (“Senator Gillibrand: General Dunford, your fellow chiefs  
have told me that they are not aware of any instances of issues with unit cohesion, morale, and discipline as a  
result of open transgender service. Have you heard of any such incidents? General Dunford: Senator, thanks. I  
would not typically hear of individual cases of cohesion or discipline issues.”).

1 referenced in, support, or that form the basis of” Defendants’ responses to Washington’s  
2 Interrogatories 14 and 15. Interrogatories 14 and 15 sought the number of “sex reassignment  
3 surgeries” requested by Washington service members and the cost of “transgender-related health  
4 care services” provided to Washington service members. Subject to DoD’s objections, DoD  
5 provided responses to these two interrogatories using queries of its Health Affairs databases.<sup>10</sup>  
6 Because DoD generated responses using queries of electronic databases, the only documents that  
7 support DoD’s responses consist of an email chain and its attachment exchanged between DoD  
8 attorneys and a DoD doctor concerning the search parameters and results of the query. DoD  
9 produced slipsheets for these documents in November 2019. *See* Carmichael Decl. ¶ 16. As  
10 identified on its privilege log for Production 30, Defendants withheld these documents because  
11 they are protected from disclosure under the attorney-client privilege and the attorney work  
12 product doctrine. *See* Carmichael Decl. ¶ 16, Ex. 15. Accordingly, Defendants have searched  
13 for and have produced documents responsive to RFPs 14 and 15 and are not aware of additional  
14 responsive documents.

15 Washington also seeks state-specific information about non-deployability determinations  
16 (Interrogatory and RFP 16). Defendants have produced documents sufficient to show the number  
17 of service members in each military service with a diagnosis of gender dysphoria that were on  
18 limited or restricted duty status, including as a result of transition-related surgery, for the period  
19 September 1, 2016 to August 31, 2017. *See* Carmichael Decl. ¶ 17, Ex. 16. Those documents  
20 also demonstrate the average number of days each transitioning service member was in such  
21 status, as well as the range of days in the data set that service members were in limited or  
22 restricted duty status. *Id.* To the extent that service members from Washington were non-  
23 deployable, their information was included in these documents that Defendants already produced  
24 to Washington. Although these documents do not explicitly state the number of non-deployable  
25 individuals from Washington, the Department of Defense does not track non-deployability of

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26 <sup>10</sup> There is no dispute that Defendants provided adequate responses to these interrogatories.

1 service members on a state-by-state basis. Defendants are under no obligation to create documents  
 2 in response to discovery requests. *See Van v. Wal-Mart Stores, Inc.*, No. C 08-5296 PSG, 2011 WL  
 3 62499, at \*1 n.1 (N.D. Cal. Jan. 7, 2011) (“A party responding to a Rule 34 document request cannot  
 4 be compelled to prepare or create new documents.”); *Paramount Pictures Corp. v. Replay TV*, No.  
 5 CV01-9358FMC, 2002 WL 32151632, at \*2 (C.D. Cal. May 30, 2002) (same). And compiling this  
 6 information in the format Washington requests would require an arduous review of individual files.  
 7 The Department of Defense simply is not required to undertake the burden to create new documents  
 8 in response to this request, especially when there is no benefit to Washington in having information  
 9 the Panel never considered. *See In re Outlaw Labs., LP Litig.*, No. 18CV840 GPC (BGS), 2020  
 10 WL 1083403, at \*3 (S.D. Cal. Mar. 5, 2020) (“In deciding whether a request is unduly  
 11 burdensome, a court must balance the burden to the responding party against the benefit to the  
 12 party seeking the discovery.”).

13 Similarly, Washington seeks state-specific information about the number of transgender  
 14 individuals in the military (Interrogatory and RFP 9). Defendants have produced the survey that  
 15 was presented to the Panel of Experts that reflects service members’ self-reported data concerning  
 16 their gender identity, as well as the RAND Report, which provides an estimate of the number of  
 17 transgender individuals in the military. *See Carmichael Decl.* ¶¶ 18–19, Ex. 17–18. To the extent  
 18 that there are transgender service members from Washington, their information was included in  
 19 these documents that Defendants already produced to Washington. Although these documents do  
 20 not specifically provide the number of transgender individuals from Washington State, as  
 21 Defendants explained in their objections, DoD does not track such information.<sup>11</sup> Here, again,  
 22

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23 <sup>11</sup> Indeed, the fact that the Panel of Experts considered estimates of the number of transgender individuals in the  
 24 military and the RAND Corporation compiled estimates in its work supporting the formation of the Carter policy  
 25 is sufficient to show that DoD does not track such information. Washington refers to an Air Force document that  
 26 they claim shows that the Air Force is tracking such information. But this document is a draft slide of a larger  
 presentation from December 2016 that reflects only that the Air Force compiled information about the number of  
 service members with medical transition plans and gender marker changes in order to brief DoD leadership  
 regarding status of implementation of the Carter policy. The draft slide shows that the Air Force was  
 contemplating adding a data element to an Air Force-only personnel data system (“MilPDS”) that would allow the

1 Defendants are not required to create new documents in response to Washington's requests. And  
2 where the current production does not already answer Washington's questions, there will be  
3 significant burdens for Defendants to bear in responding. Those burdens should not be imposed on  
4 Defendants given how far removed Washington's state-specific requests are from the deliberations  
5 of the Panel.

6 Finally, with regard to RFP 17, as Defendants informed Plaintiffs and Washington on  
7 April 1, 2020, Defendants are preparing to produce responsive documents. *See* Carmichael Decl.  
8 ¶ 20, Ex. 19. Washington's RFP 17, like Plaintiffs' RFP 54, seeks waivers that have been granted  
9 under the Mattis Plan. Defendants have collected waiver request packets in response to both  
10 Plaintiffs' and Washington's RFPs. Because these packets include records generated by mental  
11 health providers that contain the providers' description of discussions with their patients and the  
12 providers' diagnostic decisions and impressions, Defendants informed Plaintiffs and  
13 Washington that this information will be redacted pursuant to the psychotherapist-patient  
14 privilege prior to production. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). Defendants  
15 anticipate completing the redactions and providing the waiver request packets to Washington in  
16 two productions, one on April 10 and the other on April 17.

17 Accordingly, it is simply not the case that Defendants have, as Washington claims, failed  
18 to search for documents specific to its requests. Because Defendants have fully complied with  
19 their discovery obligations under the Federal Rules of Civil Procedure, Washington's motion  
20 should be denied.

21  
22  
23 \_\_\_\_\_  
24 Air Force to track gender marker change requests. This data element was never added to MilPDS. In any event,  
nothing on the draft slide shows that DoD tracks service members or applicants by gender identity.

25 In addition, the most recent iteration of the National Defense Authorization Act does require DoD to  
26 prepare a report for Congress on waivers of gender dysphoria and retention of members of the armed forces  
diagnosed with gender dysphoria on or after April 12, 2019. National Defense Authorization Act for Fiscal Year  
2020 § 596, Pub. L. No. 116-92. The Department of Defense currently is in the process of determining how to  
collect the information required for this report.

## VI. WASHINGTON'S REPLY

1  
2 Defendants attempt to evade their discovery obligations by insisting that Washington be  
3 limited in discovery to evidence the Panel considered. *See supra* at 16, 17. This Court (and  
4 others) have repeatedly rejected that narrow view. *See* Feb. 3, 2020 Hr'g Tr. at 9:18-22 (“[I]t is  
5 just as important what you don’t produce to experts as what you do produce.”); ECF No. 235 at  
6 2 (“[T]here is no reason for discovery to be confined to the administrative record. Plaintiffs and  
7 Washington do not challenge the policy under the APA, but instead raise direct constitutional  
8 claims.”); Mem. Op., *Stone v. Trump*, No. 1:17-cv-02459-GLR, ECF No. 299 at 8 (D. Md.  
9 Apr. 9, 2020) (working group documents not produced or presented to the Panel are relevant).

10 Defendants also assert that Washington’s requests invite the Court to substitute its own  
11 evaluation of the evidence for the military’s, but the issue of the appropriate quantum of  
12 deference is a merits question that remains for trial. As the Ninth Circuit made clear, a  
13 “presumption of deference [was] owed” to the Mattis Policy based only “on the *current record*”  
14 at the preliminary injunction stage, leaving plaintiffs free on remand to seek and present  
15 “additional evidence” to rebut that presumption at trial. *Karnoski*, 926 F.3d at 1202 (emphasis  
16 added). Given the Ninth Circuit’s express nod to the likelihood that further evidence would  
17 develop on the question of deference, Washington’s discovery requests and motion are in no  
18 way remarkable. Washington simply asks that Defendants be ordered to *actually search for*  
19 information related to Washington’s transgender service members and Defendants’ claim that  
20 open service causes sufficient harm to “military readiness, lethality, deployability, [and]  
21 budgetary constraints,” to justify banning all transgender Washingtonians from service. *See*  
22 ECF No. 405-4 (reciting bases for the Panel’s conclusions).

23 Given its defined geographical boundaries, Washington limited its requests to  
24 information about its residents and interests. Instead of accepting that limit and inquiring of  
25 Washington-based custodians who would have responsive information, Defendants try to have  
26 it both ways, broadly claiming entitlement to military deference, *see supra* at 5-6, 14-23

1 (mentioning “deference” ten times in 12-pages), but refusing to search for information that  
 2 would test their claim to such deference. The Rules do not permit Defendants’ approach.  
 3 Defendants should be ordered to do a reasonable search for information responsive to  
 4 Washington’s requests, and, if no such information exists, to provide amended discovery  
 5 responses so stating. *See, e.g., Rogers v. Giurbino*, 288 F.R.D. 469, 485 (S.D. Cal. 2012) (“[a]  
 6 party must make a reasonable inquiry to determine whether responsive documents exist, and if  
 7 they do not, the ‘party should so state. . . .’”) (citation omitted); *Trotsky v. Travelers Indem. Co.*,  
 8 No. C11-2144-JCC, 2013 WL 12116153, at \*3 (W.D. Wash. May 8, 2013) (compelling  
 9 document production unless defendants submit “a sworn declaration” that “no such documents  
 10 exist”); *Columbia Mach., Inc. v. Besser Co.*, No. 3:10-cv-05667-RBL, 2011 WL 6217353, at \*2  
 11 (W.D. Wash. Dec. 14, 2011) (ordering defendant to produce documents or indicate “that after  
 12 diligent search no responsive documents exist”); *Jackson v. Woodford*, No. 05CV513 L(NLS),  
 13 2007 WL 2238363, at \*4 (S.D. Cal. Aug. 3, 2007) (defendants must conduct a “reasonable  
 14 search” and either “produce [responsive] documents” or “provide Plaintiff with a declaration”  
 15 stating no responsive documents exist).<sup>12</sup>

16 Turning to the specific requests, for interrogatory and RFP 9, Defendants first rely on  
 17 their faulty premise that only information considered by the Panel is relevant. *Supra* at 18, 23.  
 18 Two years ago, this Court ruled that evidence in this case is not properly confined in such a way.  
 19 ECF No. 235 at 2. Instead, Washington should be privy to the known number of transgender  
 20 Washingtonians in military service so that it may measure—for its claims as a plaintiff—whether  
 21 Defendants’ alleged injuries to military deployability, lethality, and unit cohesion are  
 22 “exceedingly persuasive.” *Karnoski*, 926 F.3d at 1200 (quoting *United States v. Virginia*, 518  
 23 U.S. 515, 532-33 (1996)); *see also Witt v. Dep’t of Air Force*, 526 F.3d 806, 819 (9th Cir. 2008)  
 24 (asking “whether a justification exists for the application of the policy *as applied to* [the

25 \_\_\_\_\_  
 26 <sup>12</sup> Alternatively, Washington invites Defendants’ stipulation that they will limit their evidence at trial on the issues  
 of lethality, deployability, unit cohesion, and budget constraints to the information they identified in this motion as  
 responsive to Washington’s discovery requests.

1 particular plaintiff]”) (emphasis added). And even if Washington *were* limited to discovery about  
2 issues the Panel directly considered, the Panel *did* appear to consider population numbers in  
3 developing the Ban. For example, the Panel concluded that “accommodating gender transition  
4 could . . . lead to disproportionate costs.” *See* ECF No. 224-2 at 7. Washington is entitled to test  
5 that “disproportionate cost” assumption.

6 Defendants next resist responding to interrogatory and RFP 9 because “there will be  
7 significant burdens” in doing so. *Supra* at 23. To be clear, Defendants do not claim that data on  
8 the number of known transgender service members does not exist—they concede it does, in, at  
9 minimum, the form of medical transition plans and gender marker changes that enabled the Air  
10 Force to compile in 2016 the same data that Washington seeks here, *supra* at 25 n.12. Instead,  
11 Defendants claim that they might have to collect it from multiple custodians, and that would be  
12 burdensome. Defendants have not, however, sought a protective order under Rule 26(c), even  
13 after this Court’s express reminder of their burden to bring a motion to protect information that  
14 they believe is responsive but too burdensome to produce. Feb. 3, 2020 Hr’g Tr. at 17:22-25.  
15 Under Rule 26(c), “the party seeking protection bears the burden of showing specific prejudice  
16 or harm will result if no protective order is granted . . . and must allege specific facts which  
17 indicate the nature and extent of the burden . . ., usually by affidavit or other reliable evidence[.]”  
18 *LVB-Ogden Mktg., LLC v. Bingham*, No. 2:18-cv-00243-TSZ, 2018 WL 6830319, at \*3  
19 (W.D. Wash. Dec. 28, 2018) (quotations omitted); *see also, Phillips ex rel. Estates of Byrd v.*  
20 *Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). Defendants make no such showing  
21 and provide no evidence regarding the number of search locations, human resources custodians,  
22 or any other data to support their general claim that a search in Washington is not feasible.<sup>13</sup>  
23 Because Defendants have not articulated any actual burden from complying, and because  
24 Washington has mitigated any burden to Defendants by reasonably limiting its request to

25 \_\_\_\_\_  
26 <sup>13</sup> In December 2019, after Defendants said that command unit searches for Washington-specific data was too burdensome, Washington invited them to collaborate in ways to narrow custodians or stage their collections. Stallings-Ala’ilima Decl. ¶ 4, Ex. C at 2-3. Defendants did not respond or propose any possible narrowing.

1 Washingtonians, Defendants should be ordered to respond to interrogatory and RFP 9.

2 For interrogatory and RFP 12, Defendants admit that information on complaints arising  
3 from a service member's transgender status would be held at the commander level. *Supra* at 20.  
4 Yet Defendants seek to limit their custodians to members of the SCCCs, which by their terms  
5 were an optional resource that commanders were encouraged to utilize, not a mandatory  
6 reporting structure that can be relied on for complete information. *Id.* The information that  
7 Defendants' commanders hold is relevant. As with interrogatory and RFP 9, Defendants do not  
8 articulate a burden with the required specificity to justify their position and. Defendants should  
9 be ordered to collect the information from the custodians who have it.

10 For RFPs 14 and 15, Defendants said they would produce records, but now claim that  
11 none exist. *Supra* at 20-21. At a minimum, Defendants should produce the "Health Affairs  
12 databases" records that provided their figures for interrogatories 14 and 15.

13 For interrogatory and RFP 16, again, Defendants' asserted lack of central tracking does  
14 not prove a lack of other means to access or produce responsive information. *See supra* at 21.  
15 Further, the Panel purported to rely on considerations of lethality and deployability in making  
16 its recommendations to Secretary Mattis. *See* ECF No. 224-2 at 2, 33. The data Defendants  
17 reference to claim they complied with their discovery obligations consists, in its entirety, of two  
18 slides presented to the Panel composed of eight data points. Carmichael Decl. ¶ 17, Ex. 16 at 11-  
19 12. If this is the extent of Defendants' evidence regarding non-deployability—not just for  
20 Washington service members who are transgender, but nationwide—then Washington invites a  
21 stipulation to that effect. But Defendants cannot continue to both (1) rely on impact to  
22 deployability as a justification for the Ban, while (2) refusing to provide the information that  
23 goes to the heart of that issue.

24 For RFP 17, Defendants agreed to produce responsive materials after Washington served  
25 its draft of this motion. *Supra* at 23. Washington has not seen Defendants' full production or  
26 redactions and therefore preserves its legal claims as to the discoverability of these records.

1 Finally, for RFP 20, Defendants identify no trainings post-dating the Mattis Policy or  
2 DTM 19-004. *See supra* at 19. Again, if Defendants’ position is that the training materials they  
3 identify in this motion constitute the universe of training materials used to train Washington  
4 service members on issues related to transgender accession or service, then Defendants should  
5 be ordered to amend their discovery responses accordingly.

6  
7 DATED this 13th day of April 2020.

8 Respectfully submitted,

9  
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Attorney General

JOSEPH H. HUNT  
Assistant Attorney General  
Civil Division

11  
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*Counsel for Defendants*

**CERTIFICATION**

I certify that the full response by the responding party has been included in this submission, and that prior to making this submission the parties conferred to attempt to resolve this discovery dispute in accordance with LCR 37(a).

Dated this 13th day of April 2020.

S/Chalia Stallings-Ala'ilima  
CHALIA STALLINGS-ALA'ILIMA, WSBA #40694

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 13th day of April 2020 in Seattle, Washington.



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Caitilin Hall  
Legal Assistant

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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 TRUMP et al.,

Defendants.

Case No: 2:17-cv-1297-MJP

[PROPOSED] ORDER  
GRANTING MOTION TO  
COMPEL DEFENDANTS TO  
SEEK AND PRODUCE  
INFORMATION REASONABLY  
AVAILABLE AND WITHIN  
THEIR CONTROL

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD TRUMP et al.,

Defendants.

This matter came before the Court on the LCR 37 Expedited Joint Discovery Motion to Compel Defendants to Search and Produce Information Reasonably Available and Within Their Control.

The Court has considered all legal authority, briefing, and argument submitted to the Court on this matter. Having considered the foregoing:

IT IS HEREBY ORDERED that the Motion to Compel Defendant to Search and Produce Information Reasonably Available and Within Their Control is GRANTED; and

[PROPOSED] ORDER GRANTING  
MOTION TO COMPEL DEFENDANTS  
TO SEEK AND PRODUCE  
INFORMATION REASONABLY  
AVAILABLE AND WITHIN THEIR  
CONTROL

1 IT IS FURTHER ORDERED that defendants shall, within twenty-one (21) days of the  
2 date of this order, search custodians with responsive information and produce the responsive  
3 information to Washington's discovery requests:

- 4 • Interrogatory and RFP 9
- 5 • Interrogatory and RFP 12
- 6 • RFP 14
- 7 • RFP 15
- 8 • Interrogatory and RFP 16
- 9 • RFP 17
- 10 • RFP 20

11 If no responsive information exists, Defendants shall, within thirty (30) days of this order,  
12 amend their discovery requests so stating or provide a sworn stipulation that they will limit  
13 their evidence at trial on the issues of lethality, deployability, unit cohesion, and budget  
14 constraints to the exhibits they submitted with this motion.

15  
16 DATED this \_\_\_\_ day of \_\_\_\_\_ 2020.

17  
18 The Honorable Marsha J. Pechman  
19 United States District Court Judge

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25 //  
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1 Presented by:

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3 Attorney General

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