

The 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.

No. 2:17-cv-1297-MJP

**DECLARATION OF ANDREW E.
CARMICHAEL SUBMITTED IN
SUPPORT OF JOINT STIPULATION
TO EXTEND DEFENDANTS' TIME
TO RESPOND TO COURT'S ORDER
CONCERNING WASHINGTON'S
INTERROGATORY NOS. 9 AND 16
AND REQUESTS FOR PRODUCTION
NOS. 9 AND 16 (DKT. 486)**

DECLARATION OF ANDREW E. CARMICHAEL SUBMITTED IN SUPPORT OF JOINT STIPULATION TO EXTEND DEFENDANTS' TIME TO RESPOND TO COURT'S ORDER CONCERNING WASHINGTON'S INTERROGATORY NOS. 9 AND 16 AND REQUESTS FOR PRODUCTION NOS. 9 AND 16 (DKT. 486)

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
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1 I, Andrew E. Carmichael, swear under penalty of perjury under the laws of the United
2 States to the following:

3 1. I am a Trial Attorney at the United States Department of Justice and counsel of
4 record for Defendants in this action. I submit this declaration in support of Joint Stipulation to
5 Extend Defendants' Time to Respond to Court's Order Concerning Washington's Interrogatory
6 Nos. 9 and 16 and Requests for Production Nos. 9 and 16 (Dkt. 486). I base this declaration on
7 my personal knowledge, as well as on information acquired by me or made available to me in
8 the course of performing my official duties.

9 2. Attached to this declaration as Exhibit 1 is a true and correct copy of the
10 declaration of Lieutenant Colonel Jennifer L. Stangle of the U.S. Air Force. Lieutenant
11 Colonel Stangle serves as the Chief of Medical Retention Standards, Air Force Personnel
12 Center.

13 3. Attached to this declaration as Exhibit 2 is a true and correct copy of the
14 declaration of Brian Judge of the U.S. Coast Guard. Mr. Judge serves as the Chief of the Office
15 of Claims and Litigation, U.S. Coast Guard.

16
17 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is
18 true and correct.

19
20 EXECUTED this 6th day of May, 2020.

21 /s/ Andrew E. Carmichael
22 Andrew E. Carmichael
23 Trial Attorney
24 United States Department of Justice
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Counsel for Defendants

Exhibit 1 to Carmichael Declaration

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

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 2:17-cv-1297-MJP

**DECLARATION OF
LIEUTENANT COLONEL
JENNIFER A. STANGLE IN
SUPPORT OF REQUEST FOR
EXTENSION OF TIME TO
RESPOND TO WASHINGTON'S
INTERROGATORY NO. 16 AND RFP
NO. 16**

I, Jennifer A. Stangle, declare as follows:

1. I am a Lieutenant Colonel (Lt Col) in the U.S. Air Force currently assigned as the Chief of Medical Retention Standards, Air Force Personnel Center (AFPC), at Joint Base San Antonio, Texas. I have been a licensed practicing physician for 13 years and have served in the Air Force for 16 years. I have been in my current position since June 2017. My duties include implementing Department of the Air Force policies on medical retention, evaluating medical records of Airmen to determine whether the Airmen are within medical retention standards, re-assigning patients away from their work duties to the Airman Medical Transition Units, and being the subject-matter expert on medical standards. Those duties include reviewing the cases of Airmen who may be unfit for continued military service due to a medical condition; some of those cases relate to gender dysphoria. In my capacity as Chief, I manage a team of four other

medical providers performing these same duties. The team consists of two physicians and two physician assistants. As a senior officer in the Air Force Medical Service, I regularly receive updates on medical operations across the Air Force, including the response to the Coronavirus Disease 2019 (COVID-19) pandemic.

2. In the exercise of my official duties, I am aware that a lawsuit has been instituted in the above-captioned case and of the Court's "Order on LCR 37 Joint Discovery Motion to Compel Defendants to Seek and Produce Information Reasonably Available and Within Their Control," ECF No. 486. I understand the Order requires, among other items, the Department of Defense to identify "the number of transgender Washington service members" (Interrogatory No. 9) and "each instance" where "cross-sex hormone therapy or sex reassignment surgery has rendered any Washington service member ... non-deployable for more than one year" (Interrogatory No. 16) from January 1, 2014, to the present. LCR 37 Motion at 6, 8, ECF No. 482. I further understand that the Order requires the production of documents that are "referenced in, support, or that form the basis of" the responses to Interrogatory Nos. 9 and 16. *Id.* at 7, 9 (Requests for Production (RFPs) Nos. 9 and 16).

3. The information in this declaration is based on my personal knowledge and upon my personal review of information made available to me in my official capacity. From my official duties, I understand the process by which the Air Force may retrieve information concerning the medical status and deployability of transgender Airmen.

4. No single record maintained by the Air Force would be fully responsive to the Court's Order, and the Air Force does not maintain any type of database containing all the information required by the Court's Order. To comply with the Order, the Air Force will conduct a review of existing records to compile the requested information.

5. Compiling the response first requires that I be provided a list of all Air Force members diagnosed with gender dysphoria since January 1, 2014 who were either stationed in Washington or are registered with a Home of Record in Washington during the same time period (*i.e.*, information responsive to Washington Interrogatory No. 9). In connection with the Air Force's efforts to respond to Plaintiffs' Request for Production No. 44, *see* Order, ECF No. 485, Colonel (Col) Mary C. Goetter, Transgender Policy & Program Manager, Air Force Surgeon General, has produced a list of 373 Airmen evaluated since June 30, 2016. Among her duties, Col Goetter oversees policy for the Medical Multidisciplinary Team (MMDT). The list was produced from the records of the MMDT, identifying all Airmen evaluated by the MMDT. The MMDT is a centrally located medical team at Joint Base San Antonio, Texas, comprised of a case manager, a mental health provider, an endocrinologist and/or a surgeon knowledgeable in transgender medical care. By Air Force policy, local providers must have the MMDT confirm every diagnosis of gender dysphoria; local providers then coordinate with the MMDT to develop a treatment plan whenever a diagnosis indicates that gender transition is medically necessary. In addition to searching the records of the MMDT, Mr. Gregory A. Lutter, Analysis & Assessments Division, Air Force Medical Readiness Agency, has searched the Military Health System Management and Reporting Tool (MHS MART) to produce a list of 493 Airmen diagnosed with gender dysphoria from 2015 to present, with some from 2014. This list contains 339 redundancies with the MMDT list and 154 Airmen not on the MMDT list. Mr. Lutter is continuing to run his search to complete the list of Airmen diagnosed in 2014. That search is expected to run for several more days. After he completes that search, I will have a list of all Airmen diagnosed with gender dysphoria since 2014 (*i.e.*, a full response from the Air Force to Washington's Interrogatory No. 9). Meanwhile, Technical Sergeant Ritalynn D. Moss,

Noncommissioned Officer in Charge of Military Records, AFPC, has been reviewing records to identify when these members were, if at all, assigned in the state of Washington, and whether they have a Home of Record in Washington. AFPC is reviewing the records as the lists become available to them. So far, AFPC reviewed 296 Airmen and identified 27 Washington members.

6. I was informed about the previous service data request that was presented to the Panel of Experts on military service by transgender individuals in 2017. That service data request covered the time period from September 1, 2016 to August 31, 2017. The Air Force took about two weeks, with a team of about five providers working an estimated 150 provider-hours, to compile this information for the Panel. The Court's Order covers a wider period. The population of Airmen with treatment plans has more than doubled. And conducting this review only for Washington service members requires the Air Force to first obtain a list of Washington service members who have been diagnosed with gender dysphoria, which, as described above in paragraph 5, requires several steps. Furthermore, records for those early cases progressed in complexity as they continued along the transition process. The Air Force continues to improve and expand its care and treatment as the medical providers gain more expertise. Accordingly, any review conducted now will take significantly longer than it did for the prior Panel of Experts request.

7. Compiling the response to the Court's Order now requires medical providers to review many medical records individually. Transgender Airmen are not coded as simply medically non-deployable or deployable. Airmen may present a temporary or permanent condition which is recorded in a profile.

8. A profile is an assessment of an Airman's ability to participate in military activities. A profile may set out specific restrictions on exercise or work duties and may render a member

non-deployable. Profiles can range in duration from a number of days to more than a year to permanent. Profile systems are different between the military branches; the purpose, information contained, and time needed to review are not comparable between systems. Differentiating the Air Force from the other service branches, our medical system is additionally focused on aerospace medicine, including the evaluation and treatment of aircrew.

9. For many cases, a simple database query will not accurately match all deployment-limiting profiles with diagnoses of gender dysphoria or gender transition. Air Force medical records are coded in accordance with international standards, but the coding alone does not always present a full picture of a patient's ongoing treatment, the purposes, or whether multiple co-morbid conditions are present. In some cases, a profile may not indicate whether a treatment or condition is connected to gender dysphoria and gender transition. Furthermore, transgender Airmen may have profiles rendering them non-deployable for conditions and treatment unrelated to gender dysphoria or for a related co-morbid condition such as depression. Treatment not unique to gender transition may be provided as part of a gender transition treatment plan. Treatments that are commonly associated with gender dysphoria may also be applied to unrelated conditions. Even if profiles are coded for gender dysphoria or gender transition, those codes must be verified. To associate a profile with gender dysphoria or gender transition treatment, a medical provider must review the previous notes, diagnoses, and treatment for contextual clues. Some records may be complex with multiple years of profiles.

10. Conducting the review requires remotely retrieving the medical records. Due to current self-isolation precautions in response to the COVID-19 pandemic, medical providers not performing direct patient care are performing their duties by telework. Accessing the voluminous medical records will take significant time from latency in the Virtual Private Network (VPN).

The VPN is the only means of remote access to medical records on the Armed Forces Health Longitudinal Technology Application (AHLTA) and the Aeromedical Services Information Management System (ASIMS), away from a medical facility terminal. ASIMS contains more detailed information, such as diagnoses, than what is printed on the paper copy of the profiles that are provided to Airmen and commanders on Air Force Form 469, Duty Limiting Condition Report. The AF Form 469 is used to describe physical limitations and recommend duty restrictions to commanders. Medical providers ordinarily do not have access to the data coded in ASIMS because they rely on other medical records to provide patient care. I access ASIMS in carrying out my ordinary duties. The Air Force-wide telework posture to mitigate the spread of infection is resulting in unforeseen demands which strain the VPN. Due to the severe network congestion, the time needed to review has increased significantly from the minimum one hour per case. Providers could avoid this network congestion by retrieving the information from an on-site terminal, but this could put the medical providers at increased risk of transmitting or contracting COVID-19.

11. I have already begun review of the records of the known Washington service members. At this time, we do not know the number of Washington service members diagnosed with gender dysphoria, but I have identified 27 so far and estimate there may be up to 40 based on the rate so far. I am accommodating this review alongside my team's ordinary full-time duties and any emergency responses.

12. Despite best efforts, the Air Force will be unable to provide a full response to the Court's Order by the deadline of May 8, 2020. The Air Force has already taken steps to comply with the order, including, as described above in paragraph 5, identifying most of the Washington Airmen who have been diagnosed with gender dysphoria. My team is in the best position to respond to

the Court's Order because of our expertise in reviewing profiles and our access to ASIMS. Other providers have only limited access to or are unfamiliar with ASIMS. My team will be able to devote some resources to conduct the Court-ordered review during the pandemic. However, my team must have sufficient time to process cases for the current patient population and respond to the Air Force's readiness needs during the COVID-19 pandemic. Critically, I cannot know whose records to review until the Airmen are identified as Washington Airmen. I must rely on Mr. Lutter completing his search and then AFPC reviewing records for assignment history and Home of Record. Based on the projected dates that my team will receive the remaining lists, and owing to my team's other responsibilities, I expect to need no more than 28 additional days to complete the review of the records of Washington service members who have been diagnosed with gender dysphoria. Finally, while I do not currently anticipate the need for any further extension, if circumstances related to the COVID-19 pandemic change, the Air Force may need additional time to comply with the Court's Order.

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

EXECUTED on this 4th day of May, 2020.

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Jennifer A. Stangle, Lt Col, USAF
Chief, Medical Retention Standards
Air Force Personnel Center

Exhibit 2 to Carmichael Declaration

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

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

**Civil Action No. 17-CV-1297
(MJP)**

DECLARATION OF BRIAN JUDGE

I, Brian Judge, do hereby state and declare as follows:

1. I am Chief of the Office of Claims and Litigation, United States Coast Guard (USCG). I am employed by the United States Coast Guard within the Department of Homeland Security, in Washington, D.C. I have been employed by the U.S. Coast Guard as a civilian for over six years as the Chief of the Office of Claims and Litigation within the Office of the Judge Advocate General. I also served on active duty in the Coast Guard for over 24 years. My office provides litigation support to Department of Justice attorneys defending the United States in civil litigation, including in the above captioned case. I make this declaration based on my personal knowledge or based on facts that I have learned in the course of performing my Coast Guard duties. I submit this declaration in support of the defendants' motion to for an extension to produce documents pursuant to this Court's order dated April 20, 2020 (ECF No. 486).

2. On April 20, 2020, this Court granted Washington's Motion to Compel responses to certain written discovery requests, including Washington's Interrogatory (ROG) No. 16, and its complementary Request for Production (RFP) No. 16. These two discovery requests seek information about "each instance ... where 'cross-sex hormone therapy or sex reassignment surgery' has rendered any Washington service member—including Washington residents stationed or deployed outside of Washington State—non-deployable for more than one year." (ECF No. 482). Attorneys within my office conferred with agency counsel from the Department of Defense (DOD) to determine an appropriate course of action to respond to this production order.

3. While the U.S. Coast Guard is considered an armed force (*see* 10 U.S.C. § 101(4)), the Service falls under the Department of Homeland Security, not one of the Nation's Military Departments (*see* 10 U.S.C. § 101(8)). From a policy perspective, the Coast Guard is aligned with DOD and the other Services on a macro-level. However, on a micro-level, there are some idiosyncrasies about the Coast Guard, which as discussed below, will impact the Service's ability to produce the information contemplated in the Court's April 20, 2020, Order.

4. The Coast Guard has taken substantial steps to comply with the Court's Order. To compile the information necessary to respond to ROG/RFP 16, attorneys from my office sent a data query to the Coast Guard's Central Coordination Cell (SCCC), a team of Coast Guard experts on transgender policy. In response, personnel at the SCCC compiled a list of Coast Guard service members who the Service knows were diagnosed with gender dysphoria. This list comprised all the individuals who had submitted a Gender Transition Request. Attorneys from my office then directed SCCC personnel to

review the personal information of each member on the list to determine whether they: (a) had a Washington home of record; (b) claimed Washington as their state of residence for federal tax purposes; or (c) were attached to a duty station in Washington during the relevant period. This information is contained in a human resources database that the Coast Guard utilizes called Direct Access. Based on this review, we identified six service members diagnosed with gender dysphoria who (a) had a Washington home of record; (b) claimed Washington as their state of residence for federal tax purposes; or (c) were attached to a duty station in Washington during the relevant period.

5. The next step will be to determine whether any of these six individuals were determined to be “non-deployable” on account of “cross-sex hormone therapy or sex reassignment surgery.” The issue with this language is that in the Coast Guard, suitability for deployment is based in part on a member’s “medical readiness and deployment health.” *See* Chapter 6.A, Coast Guard Medical Manual, COMDTINST 6000.1F.¹ In other words, if a member has a medical condition that limits their ability to fully participate in a mission, the member’s Primary Care Manager (PCM) would place the member in a Not Fit for Full Duty (NFFD) status. By downgrading a service member’s medical status from Fit for Full Duty (FFD) to NFFD, by policy, the individual is no longer medically ready for deployment; however, there will be no documentation in the medical record formally stating the member is non-deployable.

6. To provide a meaningful response to the request, the Coast Guard will proceed as if the request had sought to “[i]dentify each instance ... where ‘cross-sex hormone therapy

¹ Publicly available https://media.defense.gov/2018/Jul/05/2001939216/-1/-1/0/CIM_6000_1F.PDF.

or sex reassignment surgery' has rendered any Washington service member—including Washington residents stationed or deployed outside of Washington State—[Not Fit For Fully Duty]" for more than one year." (ECF No. 482).

7. To determine whether, and for how long, a particular service member was placed in a NFFD status on account of cross-sex hormone therapy or sex reassignment surgery, attorneys from my office will need to coordinate the manual review of the medical records belonging to the six individuals referenced in Paragraph 4 above.

8. The Coast Guard uses a paper-based health care record for its service members. For each service member on active duty, locating a copy of their paper medical record is a straightforward task although those records are not maintained in a single centralized location. We have determined the current station for each of the six individuals, and are in the process of identifying which Coast Guard unit has physical possession of their individual medical record, as well as their individual PCM. Once we are able to determine the location of each individual's medical record, and identify their individual PCM, attorneys from my office will coordinate with each PCM to manually review each service member's medical record. It is worth pointing out that a PCM may not be co-located with the member's physical medical record; for example, a medical record may be kept at a member's duty station, while their PCM is assigned to a regional clinic, and the duty station and clinic are not geographically co-located. In such circumstances, the hard copy record will have to be delivered to the regional clinic. The PCM will produce a list of dates, if any, the service member was placed in a NFFD duty status on account of cross-sex hormone therapy or sex reassignment surgery. Once the review of a record is

complete, the PCM will submit a report with responsive information to staff attorneys in my office.

9. Attorneys from my office will then compile the information received from the PCMs into a single report to produce the final list of service members and associated information as outlined in the request.

10. As of the date of this declaration, the Coast Guard is operating in a constrained capacity due to the COVID-19 global pandemic. The significant hurdle facing the Coast Guard is that the Service will need to employ a group of Primary Care Managers and Coast Guard clinical staff to conduct the review of individual medical records. While the Coast Guard estimates it will only take three to four hours to complete the review of a single record, the problem is that all Coast Guard medical clinics and PCMs are inundated with the medical impacts of COVID-19 on the Coast Guard workforce.

11. The COVID-19 global pandemic has caused an increased need for healthcare capacity in the Coast Guard, as well as a need to flexibly allocate forces across the Service given the dynamic nature of the pandemic. At present, the Service is under strain to ensure its clinics and sickbays have medical surge capacity within existing Personnel Allowance Lists. Many Active Duty and Coast Guard Reserve personnel are already engaged in COVID-19 response and are unavailable to surge. Moreover, the Coast Guard does not have any Reserve Physician Assistants or Physicians who it can call onto active duty to assist with any surge operations. For reference, the Coast Guard Health, Safety, and Work-Life Service Center (HSWL SC) supports an average of 2,073 days of medical officer and 3,073 days of HS surge staffing requests each year. However, the current

demand for mission critical healthcare personnel is rapidly outpacing the ability of HSWL SC to fill those requests for surge medical staffing using traditional methods. The increased need for healthcare assets across the Service has significantly impacted HSWL operations and operational support throughout the service. Simply put, PCMs and clinic staff currently have no bandwidth to complete the record review in an expeditious manner and are already struggling to meet the demands placed upon them by COVID-19. The Coast Guard is currently preparing to pull 82 healthcare personnel from non-clinical billets to support surge staffing in clinics and sickbays in those regions most impacted by COVID-19. As such, the Coast Guard needs additional time to provide a response to ROG/RFP No. 16. This will provide our PCMs and clinic staff with the time they need to complete a reasonable and comprehensive review of each medical record to provide an accurate response to the ROG/RFP, without shifting scarce medical resources from our clinics and sickbays inundated with COVID-19 response duties.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.

Executed on this 4th day of May, 2020.



Brian Judge
Chief, Office of Claims and Litigation
Office of the Judge Advocate General
U.S. Coast Guard