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

DEFENDANTS' RESPONSES TO QUESTIONS FROM THE COURT

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Defendants herein provide responses to the Court's nine questions, issued May 4, 2020.

Question 1. In the December 13, 2019 letter, Plaintiffs identified 487 individual third parties. Has the government produced all third-party communications to plaintiffs, other than the 70 documents involving RAND and the DOD, the 63 documents involving Kennell and the DOD, and the six email chain documents attached as Exhibit 6 to the Carmichael Declaration (Dkt. No. 462), which have been submitted for *in camera review*?

Answer: Yes. To the best of Defendants' knowledge, all third-party communications other than those that have been submitted to the Court *in camera* have been produced to Plaintiffs.

Question 2. Based on the PrivWithhold page numbers at the bottom right of each document page of each Kennell documents submitted for *in camera* review, it appears that privilege pages 30-108 were not included. However, there are RAND documents that bear a PrivWithhold page number of 30-108. Can you confirm that the gap in the PrivWithhold page number sequence in the Kennell production were submitted to the Court as part of the RAND document production? If not, have these missing pages been produced to plaintiffs?

Answer: Defendants confirm that the gap in the PrivWithhold page number sequence in the Kennell production was submitted to the Court as part of the RAND *in camera* production. The jump in PrivWithhold numbers occurred because Defendants' document review platform applied Bates numbers to the RAND and Kennell documents in a single running sequence, and undersigned counsel then manually separated the documents into separate groups of RAND documents and Kennell documents for filing.

Question 3. Some of the Kennell documents submitted for *in camera* review are entitled Task Order with a number. What are Task Order documents? Who did they go to? Were they used in both the RAND and the Mattis policy developments? How were they used? Did all Task Order documents become part of the final report to the Panel of Experts?

Answer: A "task order contract" is a type of contract for services in which the contract "does not procure or specify a firm quantity of services," but rather "provides for the issuance of orders for the performance of tasks during the period of the contract." 10 U.S.C. § 2304d. Congress has granted the Department of Defense ("DoD") the authority to enter into task order

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contacts, *see* 10 U.S.C. § 2304a, and DoD has entered into such a contract with Kennell and Associates.

Each "task order" assigned to Kennell under its contract with DoD is assigned a "task order number" for tracking purposes. Many of the documents in the Kennell *in camera* submission consist of memoranda authored by Kennell in response to particular "tasks orders" from the Department of Defense. In the subject line of these memoranda, Kennell lists the "task order number" to which the memoranda correspond. *See* PrivWithold 1, 120, 196, 201, 223, 256, 286, 315, 353, 548, 553, 575, 608. Defendants understand the Court's use of the phrase "Task Order documents" to refer to these memoranda.

The Kennell memoranda in the *in camera* submission were solicited by senior DoD policy officials within DoD's Office of the Assistant Secretary of Defense for Health Affairs, including Dr. Terry Adirim, Principal Deputy Assistant Secretary of Defense for Health Affairs, and Dr. Andrew Finley, Health Services Policy and Oversight Program Director, as well as by senior policy officials within the Defense Health Agency, including Dr. Paul Doan, Chief, Specialty Care Support. These memoranda contain Kennell's independent advice and analysis on the healthcare and cost components of DoD policies related to transgender service members and service members with gender dysphoria. Specifically, they were used to advise DoD officials on the development and implementation of the Carter policy, through work done by smaller medical groups supporting DoD decisionmakers and/or directly in briefings to senior leadership. For example, PrivWithold 120 is a Kennell memorandum containing analysis of the estimated cost of providing comprehensive health insurance coverage for transition treatment, and was used by DoD officials as part of the development of the Carter policy.

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The Kennell memoranda in the *in camera* production did not directly relate to the Mattis policy, and did not become part of any final report to or from the Panel of Experts. However, there are other materials in the Kennell *in camera* submission, such as briefing presentations, that were related to the development of the Mattis policy, *see, e.g.*, PrivWithold 153.

Question 4. Plaintiffs, if you have the final RAND reports, what is the relevance of the earlier drafts? Defendants, if the RAND documents are public, what damage to the deliberative process privilege can come about if drafts reflecting editorial changes are produced?

Answer: Disclosure of non-final versions of the RAND Report, *e.g.* PrivWithhold 59, 723, 765, 1012, would have a direct negative effect on the Department of Defense's future deliberations. "[D]raft documents" are at the core of the deliberative process privilege because they reflect "the editorial and policy judgment of the decisionmakers." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1122 (9th Cir. 1988) (citation omitted). By comparing earlier, confidential drafts of a document with the final, public version, one can uncover suggestions that were rejected, proposals that were not adopted, information later determined to be misleading, language thought to convey the wrong point, and other information that reflects "the personal opinions of the writer rather than the policy of the agency." *Id.* at 1118–19 (citation omitted). Disclosure of such information might "inaccurately reflect or prematurely disclose the views of the agency," and make it "impossible to have any frank discussions of legal or policy matters." *Id.* at 1117, 1119 (citation omitted). At the same time, "maintaining the confidentiality of the give-and-take that occurs among agency members in the formulation of policy"—including the confidentiality of draft analysis and recommendations—"encourages frank and open discussions of ideas, and, hence, improves the decisionmaking process." *Id.* at 1117. For these reasons, courts routinely hold that "draft documents, by their very nature, are typically predecisional and deliberative." *Agility Public Warehousing Co. v. DoD*, 110 F.

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Supp. 3d 215, 221 (D.D.C. 2015) (citation omitted).

Disclosure of drafts of the RAND Report would hamper DoD's future ability to engage in fulsome and candid deliberations with agency consultants. *See* Easton Decl. ¶ 24, Dkt. 461. The DoD decision-making apparatus relies on open and frank conversations between DoD officials and nongovernment consultants to address the many difficult and complicated decisions faced by the agency. *Id.* These consultants play an integral role because they may have particular expertise, or may be able to consider a problem from a fresh perspective. Indeed, DoD has relied on the RAND Corporation for such assistance for decades. If drafts of the RAND report were to be disclosed in litigation, even pursuant to a protective order, it would cause consultants like RAND to be less willing to engage in full and frank discussions and lend their candid views. If personnel from RAND or any other DoD consultants knew that their preliminary ideas, impressions, and opinions would be subject to scrutiny in court, they may hesitate to provide their true positions on recommendations or potential courses of action out of concern for such disclosure. This is especially true when the ideas or opinions at issue relate to high-profile questions such as military service by transgender individuals and individuals with gender dysphoria.

By the same token, DoD officials themselves would be less likely to provide consultants with the necessary information and advice to enable them to do their jobs if DoD officials knew that their own candid views and advice may be disclosed in draft materials prepared by consultants. *See id.* Likewise, consultants in such circumstances may be less likely to agree to work with DoD in the first place, for fear that their candid and non-final views would be subject to scrutiny in court. Consider, for instance, the next time that DoD attempts to retain a consultant to assist with policy development on a prominent or potentially controversial issue. If the consultant is aware that RAND's draft policy proposals were previously disclosed in

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court and dissected by litigants, he or she may simply decline the project at the outset. This would have an immediate negative effect on DoD's ability to form policy, and may even expose the nation to more overall risk. In sum, disclosure of drafts of the RAND report would degrade DoD's decision-making process, and should not occur.

Question 5. Defendants, it appears that RAND and the DoD may have expected the reports and briefings to be made public. (See, e.g., PrivWithhold 1106.) In addition, some documents bear a Library of Congress number and at least one PrivWithhold document was available for purchase at the price of $22.50 off the RAND website. Isn't this a recognition that these documents were going to be made available to the public even prior to the formal adoption of the policy? If it was understood that the main documents were going to be made available to the public, how can any of the RAND documents and drafts be considered so sensitive that disclosure would harm the Government's need for free and frank policy discussions?

Answer: RAND's briefing presentations to the Department of Defense, *e.g.* PrivWithhold 638, 685, 813, 977, 1107, 1143, 1170, 1210, 1227, were not expected or intended to be made public. Although PrivWithhold 1106 indicates that a RAND briefing presentation "may go to a broader audience," Defendants understand that language to refer to a broader audience within DoD, not a broader audience of the public. Likewise, non-final drafts of the RAND report, *e.g.* PrivWithhold 59, 723, 765, 1012, were not expected or intended to be made public.

However, upon further review, Defendants has identified a group of documents in the *in camera* submission that are public and therefore are not privileged and should not have been included with the submission. Specifically, Defendants identified two copies of the final version of the RAND Report (which bears a Library of Congress number and states that it is available for purchase for $22.50 on RAND's website), *see* PrivWithhold 865, 1245, three copies of a fact sheet for the final report, *see* PrivWithhold 674, 863, 1357, and one copy of a brief concerning the report, *see* PrivWithhold 1202. Although these documents were inadvertently included in the *in camera* submission, their inclusion did not prejudice Plaintiffs,

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as each of these documents had previously been produced to Plaintiffs. *See, e.g.*, USDOE00111405 (Final RAND Report); USDOE 00095727 (Fact Sheet); USDOE00086280 (Brief).

In addition, Defendants have identified in the *in camera* submission two versions of RAND's briefing presentations over which Defendants have previously voluntarily waived the deliberative process privilege. *See* PrivWithold 813, 1210. Again, Plaintiffs were not prejudiced by the inadvertent inclusion of these documents, as Defendants previously produced them to Plaintiffs, marking them as confidential under the protective order. *See* USDOE00075512; USDOE00075325. Although Defendants have voluntarily waived privilege over these two versions of the briefing presentations, Defendants have properly maintained the deliberative process privilege over the other versions of RAND's presentations in the *in camera* submission. *See* PrivWithhold 638, 685, 977, 1107, 1143, 1170, 1227; *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) ("[R]release of a document only waives [executive] privileges for the document or information specifically released, and not for related materials."); *accord Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700 (9th Cir. 1989).

The inadvertent inclusion in the *in camera* submission of the above public documents and documents over which Defendants have voluntarily waived privilege likely resulted from making that submission on a short timeline. *See* Dkt. 454 (ordering Government to review list of third parties, determine scope of *in camera* submission, gather evidence to support consultant corollary, make *in camera* submission, and make additional production to Plaintiffs, all in ten days).

Regarding the final version of the RAND Report, that document was published on the same day that the Carter policy went into effect, June 30, 2016. *See* DTM 16-005, "Military Service of Transgender Service Members" (June 30, 2016), Dkt. 21-8. Defendants thus

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disagree that the Report itself was intended to be made public prior to the formal adoption of the Carter policy.

Notwithstanding the fact that the final RAND Report was eventually made public, the non-final drafts of that report, as well as RAND's briefing presentations, were confidential and reflect analysis, opinions, recommendations, and language that does not necessarily match what is in the final report. To permit Plaintiffs to compare "the findings, projections, and recommendations" of the draft report and unproduced versions of the presentations to the final report would reveal RAND's "editorial and policy judgment[s]." *Nat'l Wildlife*, 861 F.2d at 1122. For the reasons explained above (*supra*, response to Question 4), this would have a direct negative effect on DoD's ability to engage in fulsome and candid deliberations with agency consultants.

Question 6. If this is the case, and if the Task Orders included in the Kennell documents predated the date of the formal adoption of the Carter policy, what harm could extend to the DoD if the earlier Task Orders were released to plaintiffs? For those Kennell Task Force Order document prepared that postdate by days, or two weeks, or one month of the actual release of the Carter policy but clearly relate to the Carter policy, what harm could extend to the DoD if these were released, given their association with the Carter policy?

Answer: As noted above, Defendants understand the "Task Order" documents to refer to the confidential memoranda submitted by Kennell in response to specific requests for advice or analysis by DoD. With respect to the Kennell memoranda that predates the June 30, 2016 release date of the Carter policy, *see, e.g.*, PrivWithold 120, 608, those documents contain analysis of the estimated cost of providing comprehensive health insurance coverage for transition treatment, as part of the development of the Carter policy. Disclosure of these confidential documents would have a chilling effect on DoD's future decision-making process. *See* Easton Decl. ¶ 24, Dkt. 461. Consultants like Kennell would hesitate before lending their full and frank advice on high profile policy matters if they knew that their opinions,

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recommendations, and analysis would be disclosed in court. And DoD itself would be chilled from soliciting consultant advice on a difficult and potentially controversial topic, knowing that whatever advice they receive may later be subject to scrutiny from litigants. *See id.* This would have the effect of discouraging DoD from utilizing consultants in the first place, leading the agency to miss out on particular expertise and analysis.

With respect to the Kennell memoranda that post-date the June 30, 2016 release date of the Carter policy, *see, e.g.*, PrivWithold 196, 201, 223, their release too would be to the detriment of DoD's decision-making process. These memoranda contain analysis of the estimated cost of providing medical services to treat gender dysphoria consistent with draft language of a "Policy Manual" implementing the Carter policy. Deliberations over how to implement the details of a policy are squarely protected by the deliberative process privilege. *See, e.g.*, *Bloche v. DoD*, 279 F. Supp. 3d 68, 83 (D.D.C. 2017) (finding DoD's discussion of "how [a] current policy is implemented" to be predecisional and deliberative"). The memoranda in question also reflect earlier analysis performed prior to the adoption of the Carter policy, which likewise is privileged. *See, e.g.*, PrivWithold 196 ("The basis of our cost estimate is the modeling work we did . . . on June 9, 2016"); *Judicial Watch, Inc. v. DHS*, 841 F. Supp. 2d 142, 163 (D.D.C. 2012) (documents post-dating a decision are protected where "they recount or reflect pre-decisional deliberations"). Disclosure of the Kennell memoranda post-dating June 30, 2016 would chill DoD's decision-making process to the same extent as disclosure of the earlier memoranda. Knowing that their analysis and opinions about how to implement the details of a policy might be disclosed in a lawsuit would discourage DoD consultants from conveying their full and frank advice to the agency. This is particularly true when the topic at issue is one that is both sensitive and high-profile, as it is in this case. The chilling effect of disclosure in such circumstances is starkly felt by those asked to convey

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analysis or opinions on such topics. The Kennell memoranda—both predating and postdating June 30, 2016—are a classic example of deliberative analysis the disclosure of which would harm with an agency's decision-making process.

Question 7. Two documents are specifically mentioned or referenced in the email chains attached to the Carmichael declaration (Dkt 462, Ex. 6 at pages 1, 4 (email chain dated 4/12/2018 (6:05 pm)); pages 1, 3 (email chain dated April 12, 2018 (5:43 pm)); pages 1, 2, 3 (email chain dated 04/12/2018 (5:04 pm)); pages 1, 2 (email chain date April 12, 2018 (4:13 pm)); pages 1, 2 (email chain dated April 11, 2018 (9:45 pm)); page 1 (email chain dated April 11, 2018 (1:54 pm))). Have these two documents been produced to plaintiffs? If not, why not? If they have not been produced, please identify the privilege log entry where privilege has been asserted.

Answer: Yes, the two documents referenced in the email chain have been produced to Plaintiffs. The documents are (1) the action memo from former Undersecretary of Defense for Personnel and Readiness (and current Secretary of Veteran's Affairs) Robert Wilkie, and (2) the dissenting opinion from Panel of Experts member Thomas Dee. The Wilkie action memo was produced as part of the administrative record, *see* Administrative_Record_003059, and the Dee dissenting opinion was produced in response to an order in the related case *Doe v. Esper*, *see* USDOE00081113_0001.

Question 8. Has the Easton Declaration (Dkt. No. 461) been produced to Plaintiffs? If not, why? Have the Carmichael Declaration (Dkt. No. 462) and attached exhibits (Id., Exs. 1-5) been produced to Plaintiffs? If not, why?

Answer: Defendants have not produced to Plaintiffs the Easton Declaration, Dkt. 461, the Carmichael Declaration, Dkt. 462, or the exhibits to those declarations. Defendants have not done so because the Court's March 4, 2020 order instructed Defendants to provide this "evidence" "*in camera*." Order 2, Dkt. 454. However, Defendants do not object to producing to Plaintiffs under the protective order either of the declarations or their exhibits, except for Exhibit 6 to the Carmichael Declaration, which contains privileged communications.

Question 9. It appears that some form of analysis was undertaken during preparation of the Mattis report on issues relating to deployability status. What is contained in the analysis that

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can be used to provide part of the information directed in the Court's April 15, 2020 Order (Dkt. No. 485)? What additional information would be required and why would it take 75 days to gather this information (see Dkt. No. 488 at 12), when the documents submitted for *in camera* review suggest that at least some of it may be available now?

Answer: The answers to this question differ by Military Service. Answers from each Military Service are set forth below:

***Army*.** During the preparation of Army data to the Panel of Experts, the Army reviewed the medical profiles ("profile") and, when necessary, medical documentation, of Soldiers who requested a gender marker change or a medical treatment plan, in order to assess their deployability status. A profile is a document that provides information to commanders concerning their Soldiers' duty limitations resulting from medical conditions. Profiles, however, contain limited information. Many descriptions of limiting conditions in a profile are not specific enough to allow for a conclusion that the condition is related to a diagnosis of gender dysphoria or related treatment. If a profile does not contain all the information necessary for a medical reviewer to assess a Soldier's deployability during a given time period for a specific diagnosis or treatment, the reviewer must examine the Soldier's medical file and consult providers' notes. For example, a profile for "post-surgery" may or may not be related to a surgery connected to transition, and in order to determine whether that is the case, the reviewer must consult the medical file and provider's notes.

The Army is presently conducting the same review of profiles and medical documentation as it conducted for the Panel of Experts and applying the same methodology. However, the present review is more burdensome, for two reasons.

First, Soldiers frequently are given several profiles for the same or different conditions, and each profile may limit a Soldier's ability to deploy for different durations. As Soldiers continue to serve, they are likely to receive more profiles and accumulate a greater number of

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medical records that might require review. Thus, although the previous analysis involved review of some of the same information (i.e. profiles and medical records), now, the medical reviewer must still review every Soldier's materials because Soldiers may have new profiles and corresponding medical documentation that did not exist when the previous analysis was conducted.

Second, since the initial review roughly three years ago, approximately one hundred more Soldiers have requested gender marker changes or medical treatment plans. Because there are now more profiles to review, more Soldiers with profiles, and more corresponding medical documentation that might require analysis, there is significant additional documentation that must be reviewed and analyzed to comply with the Court's Order.

The Army is willing to submit for *in camera* review anonymized profiles (or a sampling of anonymized profiles) that were generated during the timeframe covered by the previous analysis (particularly if this could be done in lieu of the more burdensome review it is currently conducting to comply with the Court's order). The process of anonymizing those profiles would likely take several days.

Air Force. Similar to the Army, the Air Force's original review for the Panel of Experts involved a review of Airmen profiles and medical documentation. And like the Army, the Air Force's current review is significantly larger in scope than the original review because it involves both more Airmen and more records. Whereas the original review covered a time frame of one year (September 1, 2016 to August 31, 2017), the current review covers a period of nearly four years (June 30, 2016 to present). Thus, there are now more patients to review and longer medical histories for each patient. The Air Force is currently reviewing the records of 478 Airmen who have been diagnosed with gender dysphoria between June 30, 2016 and the present. By contrast, 207 Airmen were diagnosed prior to the closing date of the review for the Panel of Experts. As

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a result, the patient population has more than doubled and the length of records has increased threefold since the original request.

Like with the Army, the profiles of all Airmen must be re-reviewed to provide current information, regardless of whether profiles of some of the same Airmen were reviewed in 2017, because patient records since then have grown in length, and many Airmen have acquired new profiles. In addition, the Air Force needs to devote a significant amount of time to reviewing medical records themselves to explain any ambiguities in the profiles. This is particularly true because the 2017 review did not require the same level of detailed reporting on the reasons and durations of each instance of a deployability restriction.

Similar to the Army, the Air Force is willing to submit for *in camera* review anonymized profiles (or a sampling of anonymized profiles) pulled from its Aeromedical Services Information Management System (ASIMS), the database which presents the required profile data and diagnosis codes (particularly if this could be done in lieu of the more burdensome review it is currently conducting to comply with the Court's order). The process of conducting this data pull and anonymizing those profiles would likely take several days.

Navy. Unlike the Army and Air Force, the Navy does not use profiles. Instead, the Navy performed its 2017 review using treatment plans that had been submitted to a transgender care team, and submitted data to the Panel of Experts on the number of such care plans and types of treatment included in the plans. The Navy also has a status called Limited Duty or "LIMDU", which is similar in some ways to profiles in the Army or Air Force. However, by policy, the Navy did not place members on LIMDU for transition-related care, so the data in that regard was limited. Instead, the Navy provided the Panel of Experts with data on the number of non-transition related LIMDUs for members with a care plan, and the average number of days on LIMDU.

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In order to conduct the current review, the Navy is not able to simply review treatment plans or limited LIMDU information, as it did for the Panel of Experts.[1] Those sources would not contain information on which members would have had limited deployability due to transition-related care, and for how long and what reasons. Thus, the Navy is now planning to review the medical records of every member diagnosed with gender dysphoria who developed a treatment plan over the relevant period. Accordingly, the Navy's current review is much more burdensome than the original review it conducted for the Panel of Experts. Performing this review during the current COVID-19 crisis is especially difficult and burdensome. *See* Gada Declaration, Dkt. 489-3.

For members not placed on LIMDU, but receiving transition-related care (which is most members receiving such care), the Navy could approximate the days of nondeployability by pulling data on the transition-related care provided to every member, and then applying the average recovery times presented to the Panel. This would be considerably faster and mirror the information presented to the Panel. It would not produce the precise days of nondeployability for any given member, however, because while the recommended recovery time may be 45 days for a given surgery, some members may recover in 40 days, and some may recover in 50. To determine how many days each member was actually non-deployable requires a provider to review entire medical records and identify periods where that reviewing provider would consider the member to have been nondeployable, even though the treating provider did not make such determinations.

[1] Since the original review, the Navy has placed 17 members on LIMDU for transition related care. However, this does not represent the full universe of Navy members receiving transition-related care.

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