

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

NICHOLAS HARRISON, *et al.*,

Plaintiffs,

v.

MARK ESPER, Secretary of Defense, *et al.*,

Defendants.

No. 1:18-cv-641 (LMB/IDD)

RICHARD ROE, *et al.*,

Plaintiffs,

v.

MARK ESPER, Secretary of Defense, *et al.*,

Defendants.

No. 1:18-cv-1565 (LMB/IDD)

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO FILE
UNDER SEAL CERTAIN SUMMARY-JUDGMENT REPLY FILINGS**

Pursuant to Local Civil Rule 5, Defendants move to seal the unredacted versions of certain summary-judgment reply filings: Exhibits 64 and 65, as well as Defendants' summary-judgment reply brief. In support of this motion, Defendants state as follows:

1. Exhibit 64 is a January 12, 2016 Department of the Army Memorandum, on the subject of "Request for a Medical Opinion," in connection with an individual service member.
2. Exhibit 65 is a form titled Preventive Medicine Counseling Record, in connection with an individual service member.
3. These exhibits (as well as portions of the unredacted version of Defendants' summary-judgment reply brief) contain one or more of the following: (1) confidential medical

information of HIV-positive service members, and (2) confidential personal information related to Plaintiff Harrison.

4. Under established Fourth Circuit precedent, there are three requirements for sealing court filings: (1) public notice of the request to seal with an opportunity to object; (2) consideration of less drastic alternatives; and (3) a statement of specific findings supporting a decision to seal and rejecting alternatives to seal. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000).

5. Defendants have complied with the first *Ashcraft* factor because Defendants are filing concurrently with their motion to seal a Notice of Sealed Filing, this public memorandum, and a Proposed Order to seal the materials pursuant to Local Civil Rule 5. Should anyone object to this motion (including non-parties to the litigation), he or she may raise objections with the Court.

6. Second, this is the least drastic alternative available in compliance with the second *Ashcraft* factor. The specified filings contain information that is not suitable for public release, including confidential personal and medical information of Plaintiffs and others. Although Defendants request that the unredacted versions of the specified filings be sealed, Defendants are also concurrently filing redacted versions on the public docket, where appropriate, to ensure compliance with the second *Ashcraft* factor. Defendants have endeavored to redact these filings as lightly as possible without revealing any information that is inappropriate for public release.

7. Third, Defendants' request to seal is supported by existing Fourth Circuit precedent, as well as the Court's July 19, 2018 Order, *Harrison* ECF 31, August 17, 2018 Order, *Harrison* ECF 49, January 18, 2019 Order, *Roe* ECF 42, January 28, 2019 Order, *Roe* ECF 59, February 8, 2019 Order, *Roe* ECF 69, March 1, 2019 Order, *Roe* ECF 84, April 8, 2019 Order, *Roe* ECF 110, July 22, 2019 Order, *Harrison* ECF 231, May 8, 2020 Order, *Roe* ECF 272, June 4, 2020 Order, *Roe* ECF 289, and July 6, 2020 Order, *Roe* ECF No. 299—all of which granted very similar requests.

8. In particular, the Court has granted motions to seal similar information with respect to Plaintiff Harrison, and individuals other than the plaintiffs. *See, e.g.,* Order, *Harrison* ECF 231; Order, *Roe* ECF 289.

9. Accordingly, Defendants respectfully request that the Court enter an order sealing the specified filings.

10. Defendants' understanding is that Plaintiffs do not oppose the relief requested in this motion.¹

¹ Defendants are also filing Exhibit 29 on the *Harrison* docket. Defendants inadvertently failed to file Exhibit 29 with the other sealed filings supporting Defendants' opening brief on the *Harrison* docket (though it was properly filed on the *Roe* docket). Plaintiffs do not oppose this additional filing.

DATE: July 20, 2020

Respectfully submitted,

G. ZACHARY TERWILLIGER
United States Attorney

/s/

DENNIS C. BARGHAAN, JR.
Deputy Chief, Civil Division
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3891
Fax: (703) 299-3983
dennis.barghaan@usdoj.gov

ETHAN P. DAVIS
Acting Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

JOSHUA C. ABBUHL
KERI L. BERMAN
REBECCA CUTRI-KOHART
STEPHEN M. PEZZI
Trial Attorneys
U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-0265
Facsimile: (202) 616-8460
rebecca.cutri-kohart@usdoj.gov

Counsel for the Government