The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

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

PLAINTIFFS' RESPONSE TO THE COURT'S QUESTIONS IN ITS JUNE 24, 2020 ORDER

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In the Court's June 24, 2020 Order concerning its ongoing, *in camera* review of a random sample of documents withheld by Defendants on grounds of deliberative process privilege (Dkt. No. 536), the Court posed several questions to the parties to aid in its review. Plaintiffs respond to those questions as follows.

A. "Deliberative Document" Markings.

The Court noted that a number of the 350 documents submitted for *in camera* review are stamped with "Draft Deliberative Document" or "Draft/Working Papers/Pre-Decisional/For Official Use," and asked for Plaintiffs' views on these markings.

Plaintiffs are unable to discern any obvious relationship between these markings and a determination that the documents so labeled are subject to the deliberative process privilege. Indeed, Defendants have produced a number of documents with these stamps without ever having placed them on a privilege log, suggesting that even they do not believe the fact that a document bears one of these stamps means it is, in fact, privileged. (*E.g.*, Ex. 18, RR_USDOE00254880 ("Health Data for Service Members with Gender Dysphoria," dated November 1, 2017, reporting facts and data not subject to the privilege); Ex. 19, USDOE00290829 (PowerPoint dated November 7, 2017 reporting data); Ex. 20, USDOE00000614 ("Additional Administrative Data" presentation, dated November 20, 2017).)[1] For good reason. For example, many of the documents with these markings concern the implementation of existing policy, not deliberations about new policy. (*E.g.*, Ex. 1, USDOE00003309 (post-decisional "Transgender Senior Implementation Group Meeting" PowerPoint, dated July 14, 2017, posing Q&As regarding the implementation of the Carter policy).) Some of these implementation-related documents appear to be drafts, but again, are clearly post-decisional and not deliberative. (*E.g.*, Ex. 2, USDOE00024823 (draft DoD handbook on "Transgender Service Implementation," dated September 16, 2016); Ex. 3, USDOE00025255 (same, dated September 21, 2016).)

Other documents marked "Draft Deliberative Document" are agendas for Panel meetings and/or documents considered by the Panel. (*E.g.*, Ex. 4, USDOE00003196 (agenda for

[1] True and correct copies of each of these documents are attached hereto as Exhibits 1 to 21.

November 28, 2017 meeting of the Medical Personnel Executive Steering Committee); Ex. 5, USDOE00063981 (Panel agenda for November 9, 2017 with Navy Bates stamp); Ex. 6, USDOE00096332 (Panel agenda for December 22, 2017 with Army Bates stamp); Ex. 21, USDOE00002691 ("Health Data for Service Members with Gender Dysphoria" PowerPoint, dated November 2, 2017, with Air Force Bates stamp).) The *Doe* court has ruled that such documents are not privileged in a ruling Defendants have not challenged and have since touted in opposing production of the remaining 30,000 or so documents Defendants have withheld on grounds of deliberative process privilege. (*See, e.g.*, Pet. for Mandamus, No. 20-70365, Dkt. No. 1, at 21 (claiming "the disclosure of those documents [considered by the Panel] radically alters Plaintiffs' purported need for yet more privileged discovery"); Reply in Support of Pet. for Mandamus, No. 20-70365, Dkt. No. 18, at 1 (claiming "the government has produced every deliberative document sent from, received by, generated by, presented to, or considered by the Panel of Experts that formulated the now-challenged Mattis policy").)

In short, the fact that a document is stamped "Draft Deliberative Document" or "Draft/Working Papers/Pre-Decisional for Official Use" does not mean the document is privileged, or even that Defendants claim it is privileged.

B. Policy Timeline.

The Court also set forth in its Order a policy timeline derived from the Ninth Circuit's decision (Dkt. No. 536 at 4–6), and directed the parties "to provide any necessary supplemental information regarding this timeline" (*id.* at 6). Plaintiffs agree that this timeline accurately sets forth the key dates with respect to the adoption and implementation of the President's Ban and the "Mattis policy" that were established by the documents available to Plaintiffs (mostly from public sources) at the time of Defendants' May 2018 appeal from the Court's denial of their motion to dissolve the preliminary injunction and Defendants' August 2018 petition for mandamus. However, since that time, Defendants have produced documents that establish the following additional key events and dates.

- The Panel initially met from October 13 through December 13, 2017, and issued its "Final Report and Recommendations" on December 13, 2017. (Ex. 7.) Pursuant to

Secretary Mattis' September 14, 2017 "Terms of Reference" memorandum creating the Panel and ordering the "implementation" of the President's directives in his August 25, 2017 Presidential Memorandum, the Panel's Final Report was provided to the Vice Chief of the Joint Chiefs of Staff ("VCJCS"), Paul Selva, and the Deputy Secretary of Defense ("DSD"), Patrick Shanahan. (Ex. 8.) Selva and Shanahan were the officials charged by Secretary Mattis to lead the DoD "in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in" the President's August 25, 2017 Memorandum. (*Id.* at 1.)

- The Panel presented its Final Report and Recommendations to General Selva and Deputy Secretary Shanahan at a meeting on December 15, 2017. [redacted]
- The Panel then reconvened three more times in late December 2017 and early January 2018, [redacted]. Defendants have represented there are no documents reflecting what occurred at these meetings. (*See* Ex. 10 at 1.)
- The Panel's final meeting occurred on January 11, 2018. On that date, the Undersecretary of Defense for Personnel and Readiness ("USDP&R"), Robert Wilkie, sent a one-and-one-half page memorandum to Secretary Mattis purporting to report on the Panel's recommendations. (Ex. 11.) The memorandum repeated the *same* recommendations the Panel made a month earlier to General Selva and Mr. Shanahan, [redacted]. (*Compare* Ex. 11 at 1 *with* Ex. 7 at 4.)

C. Dates that the Carter and Mattis Policies Were Adopted.

The Court also requested that the parties provide "their positions on the dates that the Carter policy and Mattis policy should be considered adopted." (Dkt. No. 536 at 6.)

1. The Carter Policy

As the Court has previously ruled, the deliberative process privilege does not apply to documents prepared after the adoption of the relevant policy.[2] Accordingly, communications that merely implement or announce a decision already made are post-decisional and not privileged. (*Id.*)

In the case of the Carter policy, Secretary of Defense Carter formally announced and ordered the implementation of the policy on June 30, 2016 with the issuance of DTM-16-005. (Ex. 12.) Therefore, any communications after June 30, 2016 are necessarily post-decisional as to the Carter policy and not protected by the deliberative process privilege.

However, the June 30, 2016 DTM ordering the Carter policy into effect is, itself, likely post-decisional, as the Government most likely came to a final decision concerning the policy prior to issuing the formal public announcement and order. Plaintiffs do not yet have access to the documents necessary to pinpoint the date on which the military adopted the Carter policy. But USDP&R Brad Carson, whom Secretary Carter tasked with chairing the Carter Working Group, has stated that "the Working Group had concluded that transgender personnel should be permitted to serve openly in the military" by the time he concluded his service as USDP&R, on April 8, 2016. (Ex. 13, Carson Expert Report at 12.) Thus, deliberations over the content of the Carter policy ceased, and Secretary Carson adopted the Working Group's recommendations, at some point between April 8, 2016 and June 30, 2016.

As for when deliberations over the Carter policy began, that date appears to be July 13, 2015, when Secretary Carter announced the military would begin studying the implications of

[2] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151–52 (1975) (explaining the privilege applies "prior to the time the decision is made" and "communications made after the decision and designed to explain it … are not" privileged); *Lahr v. NTSB*, 569 F.3d 964, 981 (9th Cir. 2009) (noting "we have rejected the argument that a continuing process of agency self-examination is enough to render a document 'predecisional'"; "[t]he documents must be prepared to assist an agency decision-maker in arriving at a future particular decision") (internal quotations and citation omitted); *Fishermen's Finest, Inc. v. Gutierrez*, 2008 WL 2782909, at *2 (W.D. Wash. July 15, 2008) (Pechman, J.) ("A document that was prepared to support a decision already made is not predecisional.").

allowing transgender individuals to serve. (Ex. 14.) Two weeks later, on July 28, 2015, Secretary Carter ordered the creation of a working group "to formulate policy options for the DoD regarding the military service of transgender Service members." (Ex. 15.) Documents dated on or prior to July 13, 2015, therefore, are unlikely to reflect deliberations over the Carter policy, since the process to formulate that policy had not yet begun. *See Karnoski v. Trump*, 926 F.3d 1180, 1203 (9th Cir. 2019) (explaining the deliberative process privilege only protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated").

Given the above, neither of the documents specifically referenced by the Court are subject to the deliberative process privilege. (Dkt. No. 536 at 6–7.) The December 8–10, 2014 email chain appears highly unlikely to be deliberative, given that it pre-dated by over six months the military's decision to begin the deliberations leading to the Carter policy. And the August 8, 2016 email chain (forwarded again on November 9, 2016) unquestionably post-dates the adoption of the Carter policy, which occurred no later than June 30, 2016, and is therefore not subject to the deliberative process privilege.

2. The Challenged Policy

Plaintiffs maintain that the Government adopted the challenged policy no later than August 25, 2017, when the President issued a memorandum that formalized his July 26, 2017 Tweets banning transgender military service and ordered the military to implement that policy. The Ninth Circuit, on an incomplete record, held that the Mattis policy represented "a *threshold* showing of a significant change in facts," but it also made clear that "Plaintiffs on remand may present additional evidence to support th[eir] theory" that the Mattis policy implements the President's directives. *Karnoski*, 926 F.3d at 1199, 1202 (emphasis added). The documents that Defendants have produced to date (largely pursuant to court order) only reconfirm Plaintiffs' view.[3]

[3] *E.g.*, Ex. 16 at 4, 11, 13 [redacted]; *accord* Ex. 17 at 2–3; Ex. 7 at 1 (Panel's Final Report, stating the Panel understood its charge was limited to

Regardless, Defendants' own theory of the case limits the span of the deliberative window to the three months from October 13, 2017 to January 11, 2018, when the Panel made its "final recommendations" and disbanded. Defendants claim that the Mattis policy is a new policy, independent from the President's orders requiring its creation, because it was supposedly developed by a panel of military experts.[4] Defendants' claim of military deference hinges on this factual assertion. (*See id.*; *see also, e.g.*, Defs.' Supp. Br. Opp. to SJ, Dkt. No. 226, at 9 (arguing "substantial deference should be given to decisions made by military authorities," and claiming the Mattis policy is owed that deference because it implemented the Panel's recommendations).) On Defendants' theory, then, it was the Panel that developed the Mattis policy, and the Panel finalized the content of the current policy by January 11, 2018, the date that it held its last meeting, issued its recommendations, and disbanded.

To the extent that any deliberations occurred over whether to formally adopt the Panel's January 11, 2018 recommendations, Defendants have represented that those deliberations ended within the month. According to Defendants, Secretary Mattis accepted the Panel's recommendations in their entirety following the Panel's briefing the Secretary "around January 11th" or "January 17th [2018]." (Dec. 10, 2019 Tr., Dkt. No. 402, at 27.) Whatever the exact date, Defendants are clear that Secretary Mattis "accepted the decision" of the Panel, *prior* to "ask[ing] for a report to be made by the Undersecretary of Defense's office." (*Id.* (referring to the DoD's February 2018 Report and Recommendations).) At a status conference on December 10, 2019, the Court clarified the sequencing of the final decision with counsel for Defendants, expressly asking whether "a decision [had] been made and all [the DoD's February 2018 Report] is doing is memorializing it[.]" (*Id.* at 28.) In response, Defendants stated unequivocally that "the final decision was made" prior to the development of the February 2018 DoD Report, and that

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recommending policy changes "pursuant to direction from the Commander in Chief dated August 25, 2017"); Ex. 11 at 1 (Jan. 11, 2018 report on Panel's recommendations from USDP&R to Secretary Mattis, stating that Panel's review was "in accordance with direction from the President on August 25, 2017" and attaching the August 25, 2017 memorandum).

[4] *E.g.*, Pet. for Mandamus, No. 20-70365, Dkt. No. 1, at 2 ("The Panel's recommendations were adopted in their entirety by then-Secretary of Defense James Mattis."); Reply in Support of Mandamus, No. 20-70365, Dkt. No. 18, at 1 (arguing "the Panel of Experts … formulated the now-challenged Mattis policy" and "the Panel's recommendations were adopted" and "implemented as the Mattis policy"); Defs.' Mot. to Dissolve PI, Dkt. No. 215, at 4–5 (similar); Defs.' Mot. for Protective Order, Dkt. No. 225, at 3 (similar).

the DoD Report merely wordsmithed an already-decided policy. (*See id.* (describing the "deliberations" going into the writing of the Report as deciding "how you're going to phrase a certain paragraph").) Accordingly, at the latest, Secretary Mattis had accepted the Panel's recommendations by late January. On Defendants' own theory and assertions, therefore, communications after January 11, 2018 (or, at the latest, late January 2018) are post-decisional, and fall outside the scope of the deliberative process privilege.

Respectfully submitted July 1, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on July 1, 2020.

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