

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 J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' MOTION TO SEAL**

NOTE ON MOTION CALENDAR:  
September 18, 2020

1 Pursuant to Local Civil Rule 5(g), Defendants, through undersigned counsel, hereby  
2 respectfully move the Court for an order permitting them to file under seal Exhibits A and B to  
3 Defendants' Motion to Stay Discovery Pending Disposition of Mandamus Petitions (the  
4 "Motion"), both of which contain information that is designated confidential under the protective  
5 order in this case.

6 Pursuant to Rule 5(g)(2), Defendants have filed Exhibits A and B after or  
7 contemporaneously with this motion under seal, and respectfully request that the Court, in its  
8 discretion, allow the Exhibits to remain as filed.

9 Defendants certify that, pursuant to Rule 5(g)(3), Andrew E. Carmichael, counsel for  
10 Defendants, conferred via email with Jordan Heinz, counsel for Plaintiffs, and Chalia Stallings-  
11 Ala'ilima, counsel for Plaintiff-Intervenor State of Washington, on September 10, 2020.  
12 Counsel for Plaintiffs and Plaintiff-Intervenor confirmed that they consent to Defendants' request  
13 to file the exhibits under seal.

### 14 **ARGUMENT**

15 Defendants seek to file Exhibits A and B under seal in accordance with LCR 5(g)(3) and  
16 the Stipulated Uniform Protective Order and Cross-Use Agreement, ECF No. 183, because the  
17 documents were designated "CONFIDENTIAL" by Defendants and produced through the  
18 discovery process. That Protective Order permits parties to designate Discovery Material as  
19 confidential where it contains "personal, proprietary, or sensitive information not generally  
20 disclosed to the public." ECF No. 183 ¶ 2. As the party designating Exhibit A and B as  
21 confidential, Defendants bear the burden of satisfying Local Rule 5(g)(3)(B) in support of  
22 sealing.

23 The proponent of sealing a document attached to a "discovery motion unrelated to the  
24 merits of a case" need only show that there is "good cause" to do so. *Ctr. for Auto Safety v.*  
25 *Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016). That standard comes from Rule of  
26 Civil Procedure 26(c), which permits the issuance of protective orders for good cause "to protect  
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1 a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.*  
2 (quoting Fed. R. Civ. P. 26(c)). “When a court grants a protective order for information produced  
3 during discovery, it already has determined that ‘good cause’ exists to protect this information  
4 from being disclosed to the public by balancing the needs for discovery against the need for  
5 confidentiality.” *Phillips ex rel. Ests. of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th  
6 Cir. 2002). “Therefore, when a party attaches a sealed discovery document to a nondispositive  
7 motion, the usual presumption of the public’s right of access is rebutted . . . .” *Id.*

8           There is good cause for sealing Exhibit A. Exhibit A contains the Department of  
9 Defense’s (“DoD”) response to Plaintiffs’ Interrogatories No. 18, which, as interpreted by the  
10 Court, required Defendants to “provide information describing in detail, for each attendee and  
11 person supporting the Panel [of Experts] . . . the information or input provided by that person.”  
12 ECF No. 458 (March 5 Order) at 2. The response contains the results of the Government’s  
13 interviews of 27 high ranking DoD officials including eight at the General/Admiral level and the  
14 current Under Secretary of Defense (P&R), including the current Chief of Staff of the Army,  
15 General McConville, who is the operational head and service chief of the U.S. Army and a  
16 member of the Joint Chiefs of Staff. Exhibit A also includes the input of numerous career and  
17 lower-level DoD employees and service members and reflects their participation in the  
18 development of the challenged military policy. Further, Exhibit A contains the names of the  
19 transgender service members and commanders of those service members who spoke to the Panel  
20 and the information they provided. In light of the high profile and controversial nature of these  
21 issues and proceedings, there is good cause to prevent disclosure of this information, which may  
22 cause these persons “annoyance, embarrassment, oppression, or undue burden.” Fed. R. Civ. P.  
23 26(c). There is also little public interest in the information that would remain under seal,  
24 particularly in light of the fact that this information is not at issue in Defendants’ Motion.

25           There is also good cause for sealing Exhibit B. Exhibit B contains Defendants’ response  
26 to Plaintiffs Intervenor’s Interrogatories Nos. 9 and 12, which, as interpreted by the Court,  
27 required Defendants to provide information regarding individual non-party State of Washington  
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1 transgender service members. *See* ECF No. 486 (April 20 Order). This response contains private  
2 information pertaining to individual service members who are listed in DoD databases as being  
3 diagnosed with the medical condition gender dysphoria as well as information obtained from  
4 interviews with each of their 125 commanders about whether they were aware of any complaints  
5 or unit cohesion issues regarding those service members. Exhibit B identifies the commanders  
6 by name and, where there were complaints, describes those complaints in detail. In light of the  
7 high profile and controversial nature of these issues and proceedings, there is good cause to  
8 prevent disclosure of this information, which may cause these persons “annoyance,  
9 embarrassment, oppression, or undue burden.” Fed. R. Civ. P. 26(c). There is also little public  
10 interest in the information that would remain under seal, particularly in light of the fact that this  
11 information is not at issue in Defendants’ Motion.

12 Defendants do not believe, however, that any of the information related to these two  
13 exhibits that is actually contained in their Motion needs to be filed under seal, and Defendants  
14 are therefore filing their Motion without any redactions. This “less restrictive alternative” to  
15 complete sealing, LCR 5(g)(3)(B), protects the legitimate interests of these non-party service  
16 members and DoD employees and officials, while permitting public disclosure to the fullest  
17 extent possible.

### 19 CONCLUSION

20 For all of the foregoing reasons, Defendants respectfully request that the Court grant their  
21 Motion to Seal and permit them to file Exhibits A and B to Defendants’ Motion to Stay Discovery  
22 Pending Appeal of the Court’s September 2, 2020 Order under seal.

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24 Dated: September 10, 2020

Respectfully submitted,

25 DAVID M. MORRELL  
26 Deputy Assistant Attorney General

27 ALEXANDER K. HAAS  
28 Branch Director

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ANTHONY J. COPPOLINO  
Deputy Director

*/s/ Andrew E. Carmichael*  
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*Counsel for Defendants*

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT  
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RYAN KARNOSKI, et al.,

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DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**[PROPOSED] ORDER GRANTING  
DEFENDANTS' MOTION TO SEAL**

Upon Review of Defendants' Motion to Seal, and having considered the Motion and finding that good cause has been shown, it is HEREBY ORDERED that:

1. Defendants' Motion to Seal is hereby GRANTED, and
2. Exhibits A and B to Defendants' Motion to Stay Discovery Pending Disposition of Mandamus Petitions shall remain FILED UNDER SEAL.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2020

\_\_\_\_\_  
The Honorable Marsha J. Pechman  
United States District Court Judge