

Warner factor: Army_10001348.0001; Army_10011024.0002; Army_10035295.;
Army_10038659; Army_10039832; Army_10030442; Army_10030447; Army_10030923;
Army_10002510; Army_10019791.0001; Army_10019795.0001; and
Army_10019799.0001.

A. Army_10001348.0001

3. As previously stated in my September 4, 2020, declaration to this Court, Army_10001348.0001 is an information paper drafted by an Army subject matter expert, Colonel Mary Krueger, dated January 29, 2018, that updated the Under Secretary of the Army on the Army's recommendations regarding the development of the Department of Defense's ("DoD") accessions policy. This document was generated prior to the finalization of the DoD's policy, contains Army recommendations and views on the DoD's policy, and reflects discussions between the Army regarding those recommendations.¹

4. There is foreseeable harm in the release of Army_10001348.0001. This document discusses a request by the Under Secretary of Defense for Personnel and Readiness that the Army identify issues and policy concerns with respect to the policy on the service of transgender personnel, as well as the Army's responses to those requests. In response, the Army raised particularly sensitive concerns regarding personal privacy, as well as the retention of information about, and the provision of health care for, transgender soldiers. Release of such information would harm future efforts to improve policy, which require

¹ See Paragraph 6 of the Declaration of Colonel (COL) Jaqueline L. Emanuel, September 4, 2020 (the "Emanuel Declaration"). Dkt. 598-3.

candid assessments of policies’ perceived deficiencies and a willingness to discuss sensitive issues. Army personnel would be less likely to offer their uninhibited opinions, generally, and in particular to the DoD, if they expected that their opinions would be a potential item of discovery against the Army or the DoD in litigation. Diminished communication between the DoD and the Army would impair the ability of both the DoD and the Army to create and improve policies—especially those concerning sensitive issues—and execute their missions. Further, the release of the information in these documents will cause harm despite the existence of a protective order because the candid assessments of Army personnel could still be used against them, the Army, and the DoD in proceedings in this litigation. If the information in these documents were released, Army personnel would be less willing to provide their open and candid feedback in the development of future policy; this would, in turn, impair the Army’s policy-making and decision-making processes.

B. Army_10011024.0002; Army_10035295; Army_10038659; and Army_10039832

5. As previously stated, Army_10011024.0002, Army_10035295, Army_10038659, and Army_10039832 are identical information papers that reflect the Army’s deliberations regarding its policy for the management of transgender Reserve Officer Training Corps (“ROTC”) cadets. These documents contain Army views and analysis of the then-current Army policy on the management of transgender ROTC cadets as well as recommendations

to address specific aspects of that policy, and precede any changes to this policy.²

6. There is foreseeable harm in the release of these documents. These documents candidly identify, critique, and propose solutions to perceived challenges arising from the Army's then-current policy on transgender ROTC cadets, which, in the opinion of the author, rendered it more difficult for the Army to fulfill its ROTC mission. The release of these documents, which promoted a change in policy, would reduce the willingness of Army personnel to offer their uninhibited opinions, discuss policies' perceived deficiencies, and offer solutions. Indeed, Army personnel would be less willing to share such opinions if they were subject to external scrutiny and could be used in litigation against the Army. The Army, as a result, would be less likely to learn of potential problems or how to improve its policies. Especially with respect to the Army's ROTC policy, which must balance the interests of the Army, current and prospective cadets, and educational institutions, it is essential that information generated by those with first-hand knowledge of the ROTC program and its challenges be freely and openly communicated. Additionally, as discussed, despite a protective order, the release of these documents will harm the Army's ability to develop future policy because Army personnel will be concerned that their thoughts and impressions will be used against them, the Army, or the DoD in this litigation, and therefore less willing or likely to share their complete and candid opinions.

C. Army_10030442; Army_10030447; and Army_10030923

² See Paragraph 7 of the Emanuel Declaration. Dkt. 598-3.

7. Army_10030442, Army_10030447, and Army_10030923 are e-mails that reflect deliberations between DoD and Army personnel in drafting DoD's Report and Recommendations on Military Service by Transgender Persons ("DoD's Report"). In each of these emails, a Ryan Newman, a senior attorney at the DoD, was soliciting comments, edits, and suggestions on a working draft of the DoD's Report on behalf of the Office of the Secretary of Defense ("OSD") and the Office of the Under Secretary of Defense for Personnel and Readiness ("OUSD (P&R)") from Colonel Mary Krueger, a senior Army doctor with extensive experience working on issues involving military service by transgender individuals and individuals diagnosed with or having a history of gender dysphoria under the Carter policy. These email deliberations were generated prior to the finalization of the DoD Report and the DoD policy and reflect the non-final thoughts and opinions on both the draft DoD Report and the policy concerning military service by transgender persons and persons diagnosed with or having a history of gender dysphoria.³

8. There is foreseeable harm in the release of these documents, which contain the candid thoughts, impressions, edits, and suggestions of a senior ranking Army officer and senior DoD attorney. The information in these documents pertain to a sensitive and politicized topic and demonstrate the extent of Mr. Newman's and Colonel Krueger's participation in the formulation of the DoD policy, including non-final views, edits, and opinions attributable to Mr. Newman and Colonel Krueger. Both Army_10030442 and

³ See Paragraph 11 of the Emanuel Declaration, Dkt. 598-3; *see also* Paragraph 11 of the Declaration of Platte B. Moring, III, September 4, 2020, Dkt. 598-1.

Army_10030447 are email chains entitled “Re: Interim Review: DRAFT REPORT 15 FEB 1700 readiness edits.docx (UNCLASSIFIED)” and reflect Mr. Newman’s solicitation of input (along with that input and back and forth deliberations regarding that input) on the draft DoD Report from Colonel Krueger. Army_10030923 contains an additional recommendation from Colonel Krueger again offered to Mr. Newman, pertaining to the DoD’s proposed policy based on her experience implementing the DoD’s prior policy regarding transgender military service and service with individuals with gender dysphoria. The release of these documents would deter senior officials—often possessing the most experience and greatest subject matter expertise—from participating in open discussions concerning sensitive issues. Although it is in connection to such issues that the DoD and the Army most rely on the candid assessments of their experts, Army experts would be less willing to fully share their opinions if their deliberative, editorial processes were subject to external scrutiny, could be used against the Army in litigation, or possibly against them, hindering their professional aspirations due to their close association with a controversial DoD policy. Further, the release of these documents would deter senior ranking Army officers from providing their full and frank assessments to the DoD, degrading communication between the Army and DoD. And release of such communications would deter senior DoD officials from seeking the full and frank assessments of Service experts due to fear that early drafts of their non-final work product would be released before the author had the opportunity to finish editing language and had obtained approval from superiors within the Department. Direct, unguarded communication between the Army and the DoD is critical. The DoD needs Service input to improve its policies, processes, and achieve its

mission; for the same reasons, the Army must be able to provide its unvarnished input to the DoD. Reluctance of its personnel to communicate freely and openly, both internally and to the DoD, would degrade the Army's decision-making process writ large. Additionally, as discussed, despite a protective order, the release of these documents will harm the Army's ability to develop future policy because Army personnel will be concerned that their thoughts and impressions will be used against them, the Army, or the DoD in this litigation, and therefore less willing or likely to share their complete and candid opinions.

D. Army_10002510; Army_10019791.0001; Army_10019795.0001; and Army_10019799.0001.

9. Army_10002510, Army_10019791.0001, Army_10019795.0001, and Army_10019799.0001, as Mr. Easton explained in his October 30, 2020 declaration to this Court, are Army PowerPoint slides presenting concerns and opinions raised by General Mark A. Milley in connection to the decision whether to delay the accession of transgender individuals into military service.⁴ General Milley has been the Chairman of the Joint Chiefs of Staff since October 1, 2019. In that capacity, General Milley serves as the nation's highest ranking military officer, as well as the principal military advisor to the President, the Secretary of Defense, and the National Security Council. In his previous role, General Milley served as the Chief of Staff of the Army. As the Chief of Staff of the Army, General Milley was the highest ranking Army officer whose responsibilities included both serving as a member of the Joint Chiefs of Staff and as the Army's military

⁴ See Paragraph 12 of the declaration of Robert Easton, October 30, 2020. Dkt. 632-1.

service chief.

10. There is foreseeable harm in the release of these documents, which reflect General Milley's candid opinions provided in response to the request of the Secretary of Defense. These concerns, which these documents reveal in detail, relate to several topics, including the recruitment of, and medical care for, transgender applicants. If these documents are released, these concerns—and the thought processes underlying them—will be directly attributed to General Milley. This would deter the most senior Army officers—those possessing the greatest subject matter expertise in Army policy and processes, and most capable of shaping, and accessing information necessary to refine, Army policy—from engaging in the type of uninhibited conversations required to make or change policy. The highest ranking Army officers would be less willing to express their full and candid opinions (especially) with respect to sensitive and controversial policies if their thoughts were used against the Army or the DoD in litigation, or, as discussed above, against them personally, affecting their current career and professional aspirations. Release of these documents, for the same reason, would deter open communication between the Army and the DoD. As discussed above, open, direct, and uninhibited communication between Army and DoD leaders is imperative. Additionally, as discussed, despite a protective order, the release of these documents will harm the Army's ability to develop future policy because Army personnel will be concerned that their thoughts and impressions will be used against them, the Army, or the DoD in this litigation, and therefore less willing or likely to share their complete and candid opinions.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of December 2020.

JACQUELINE L. EMANUEL
Colonel, Judge Advocate
U.S. Army