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10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

12 LOG CABIN REPUBLICANS, a non-  
 13 profit corporation,

14 Plaintiff,

15 v.

16 UNITED STATES OF AMERICA and  
 17 ROBERT M. GATES, SECRETARY  
 18 OF DEFENSE, in his official capacity,

19 Defendants.

Case No. CV 04-8425 VAP (Ex)

**JOINT STIPULATION RE  
 PLAINTIFF'S MOTION TO  
 COMPEL PRODUCTION OF  
 DOCUMENTS**

Date: March 15, 2010  
 Time: 10:00 a.m.  
 Courtroom: 2

Discovery Cutoff: Mar. 15, 2010  
 Pretrial Conference: June 7, 2010  
 Trial: June 14, 2010

**DISCOVERY MATTER**

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1. Civil Trial Scheduling Order July 24, 2009 (Dkt. 92)
2. Reporter’s Transcript of Proceedings July 6, 2009
3. Reporter’s Transcript of Proceedings November 16, 2009

1 Pursuant to Fed. R. Civ. P. 37(a) and Local Rule 37-2.1, the parties hereby  
2 submit the following joint stipulation regarding Plaintiff Log Cabin Republicans'  
3 Motion to Compel Defendant United States of America and Robert M. Gates,  
4 Secretary of Defense ("Defendants") to produce documents responsive to Plaintiff's  
5 First Set of Requests to Produce Documents, Nos. 2, 4, 32, 33, 34, 38, 39, 40, 43,  
6 44, 45, 46, 47, 54, 55, 56, and 58 ("Document Requests").

7 The parties met and conferred on November 18, 2009, but were unable to  
8 resolve their disagreements. As noted below, Defendants disagree that Plaintiff has  
9 satisfied its obligations under Local Rule 37-1.

10 **I.**

11 **INTRODUCTORY STATEMENTS**

12  
13 **A. PLAINTIFF'S INTRODUCTORY STATEMENT**

14 This case challenges the constitutionality of the federal statute and  
15 Department of Defense regulations collectively known as Don't Ask, Don't Tell  
16 (the "Policy").

17 In June 2009, this Court entered its Order Denying in Part and Granting in  
18 Part Defendants' Motion to Dismiss. Dkt. No. 83. The Court thereafter set a  
19 scheduling conference to identify the scope and timing of discovery. In the parties'  
20 joint Rule 26(f) statement made in preparation for the scheduling conference,  
21 Plaintiff described several topics on which it would seek discovery:

- 22 • Discharge of service members under the Policy;
- 23 • The frequency with which the Policy has been applied or enforced during  
24 peacetime as compared to periods of war;
- 25 • Instances in which members of the U.S. military have served and fought  
26 side by side with forces from other nations that allow lesbian and gay  
27 personnel to serve openly;
- 28 • The disproportionate impact of the Policy on women in the U.S. military;

- 1           • Instances in which members of the U.S. military have worked closely
- 2           with personnel from the U.S. Central Intelligence Agency, National
- 3           Security Agency, Federal Bureau of Investigation, and other entities
- 4           which prohibit discrimination on the basis of sexual orientation;
- 5           • The formulation of, advocacy for, or enactment of the Policy.

6           At the scheduling conference, the Court stated that it was “inclined to think  
7           that the topics that the plaintiff has set forth in terms of discovery, in terms of areas  
8           in which it wants to do discovery, seem appropriate.” Transcript of Proceedings,  
9           July 6, 2009, p. 6, lines 13-15 (attached to this Stipulation as Appendix 2). The  
10          Court then ruled, over Defendants’ objection, that “Plaintiff is entitled to conduct  
11          discovery in this case to develop the basis for its facial challenge.” Dkt. No. 91  
12          (July 24, 2009 Minute Order Denying Defendants’ Request Regarding Discovery)  
13          (In Chambers).

14          On September 15, 2009, Plaintiff propounded on Defendants its First Set of  
15          Requests for Production of Documents. These requests tracked the topics that  
16          Plaintiff had set forth in the scheduling conference statement.

17          Defendants served no response whatsoever to the requests by the October 20  
18          deadline, and did not request any extension of time to respond. Instead, Defendants  
19          filed a motion under 28 U.S.C. § 1292(b) for leave to file an interlocutory appeal of  
20          the Court’s June 9, 2009 order on the motion to dismiss, coupled with a request for  
21          stay of discovery. Defendants’ motion was heard on November 16, 2009 and  
22          thereafter denied on November 24, 2009. At the hearing, the Court gave short shrift  
23          to Defendant’s specious position that their mere filing of a request for stay of  
24          discovery was sufficient to preserve objections to the discovery. Transcript of  
25          Proceedings, November 16, 2009, p. 5, line 3 – p. 7, line 1 (attached to this  
26          Stipulation as Appendix 3).

27          On November 18, 2009, Plaintiff’s and Defendants’ counsel met and  
28          conferred regarding Defendants’ failure to respond to the requests in an attempt to

1 reach an overall resolution of the requests for production. Plaintiff was willing to  
2 negotiate such a resolution despite Defendants' having failed to serve any responses  
3 and thereby having waived any objections. The parties were unable to reach such  
4 an overall resolution, though Plaintiff did agree in principle to limit the scope of  
5 certain requests if a total resolution could be achieved.

6 On January 12, 2010, 84 days after the deadline for responses to the First  
7 Request for Production of Documents, Defendants finally served responses and  
8 purported objections. The responses and objections repudiated in part even the  
9 proposed limitations that had been discussed and tentatively agreed at the meet and  
10 confer. The production so far has been limited in both relevance and scope, and is  
11 generally limited to statistical information regarding former servicemembers  
12 discharged pursuant to the Policy.<sup>1</sup>

13 This motion to compel covers 17 of the 79 requests that Plaintiff served.  
14 Defendants' objections or claims of privilege fall into one or more of the following  
15 types:

- 16 1) complete refusal to provide discovery;
- 17 2) limited production of requested documents based on the so-called  
18 "deliberative process" privilege;
- 19 3) limited production of requested documents based on a refusal to  
20 produce documents outside the possession of the Department of  
21 Defense;
- 22 4) limited production of requested documents based on belated assertion  
23 of the attorney-client or work product privileges.

24 Because Defendants failed to serve any timely responses whatsoever, and did  
25 not request or obtain an extension of the response date, each of these objections has  
26

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27 <sup>1</sup> Of the roughly 7,000 pages of documents the Government produced, virtually  
28 none are substantive documents of the type requested.

1 been waived. Moreover, the boilerplate objections of “overbreadth” and “undue  
2 burden” asserted in their untimely responses and objections to Plaintiff’s document  
3 request lack specifics and are insufficient to excuse their failure to comply with the  
4 discovery process.

5 Furthermore, as discussed below, Defendants’ objections based on the so-  
6 called “deliberative process” privilege fail, because the privilege does not apply to  
7 post-decisional or non-deliberative or factual communications, and must be invoked  
8 by the agency head.

9 Finally, Defendants’ unilateral limitation of discovery to documents located  
10 within the Department of Defense is unsupported by law. Defendants should be  
11 ordered to provide all responsive documents within the custody of the United States  
12 government, regardless where within the Executive Branch such documents may  
13 happen to reside.

14 **B. DEFENDANTS’ INTRODUCTORY STATEMENT**

15 On November 18, 2009, counsel for the parties met to discuss Plaintiff’s  
16 First Set of Document Requests. This meeting occurred after the Government  
17 lodged objections to the type of discovery contemplated by Plaintiff, both at the  
18 Rule 26(f) conference in this case and in other filings. In an attempt to reach a  
19 mutual accommodation regarding the requests, counsel for the parties went  
20 through each of Plaintiff’s seventy-nine requests and reached agreements on the  
21 vast majority of them. On January 12, 2009, the Government produced over  
22 7,000 pages of responsive documents, and accompanied that production with  
23 objections and responses to Plaintiff’s requests, a privilege log, and a letter. In  
24 the letter, the Government noted that the parties had successfully resolved a  
25 number of discovery issues and invited Plaintiff’s counsel to call about any issues  
26 that remained after the production in the hope that those issues too could be  
27 resolved.

28



1 But Plaintiff's counsel did not call about any remaining discovery issues.  
2 Instead, on February 13, Plaintiff's Counsel sent an email to Government counsel  
3 stating that Plaintiff would be filing a motion to compel the production of  
4 documents and attaching Plaintiff's portion of the required Joint Stipulation.  
5 Plaintiff's motion to compel is premature and violates both the spirit and letter of  
6 Local Rule 37-1. Plaintiff has broken the document requests at issue into four  
7 categories. As pertains to the requests in Category II, Plaintiff argues that  
8 Defendants have improperly asserted the deliberative process privilege over  
9 responsive documents. If Plaintiff's counsel had conferred with Government  
10 counsel before proceeding with this motion, however, they would have learned  
11 that the Government is only withholding one subset of documents on deliberative  
12 process grounds that would be responsive to the ten requests in Category II. A  
13 call from Plaintiff's counsel would have allowed the parties to significantly  
14 narrow, if not eliminate, the contested issue related to the Category II requests.

15 In addition to being premature and in violation of the Local Rules, many of  
16 the requests that form the basis for Plaintiff's motion concern documents that are  
17 well outside the bounds of appropriate discovery. The requests in Category I  
18 seek "drafts" of the statute and implementing regulations and have been  
19 propounded for the exclusive purpose of probing whether the statute was enacted  
20 and implemented with an animus toward gay and lesbian service members. Both  
21 Supreme Court and Ninth Circuit precedent prohibits attempts to probe the  
22 motivations of Congress and the Executive in passing statutes and promulgating  
23 regulations. Indeed, the Ninth Circuit has addressed this issue in connection with  
24 DADT and found that two operational bases- privacy and the need to address sexual  
25 tension-negate any claim of prejudice or animus.

26 As to the Category III requests, Plaintiff challenges the Government's  
27 refusal to conduct a government-wide search for responsive documents beyond the  
28 agency charged with administering the statute, the Department of Defense (the



1 “DOD”). At its core, Plaintiff’s facial challenge to the statute and implementing  
2 regulations is a suit against the DOD, and not any other arm or instrumentality of  
3 the Government. The Government’s search is thus entirely reasonable, and one  
4 that should be upheld by the Court.

5 Lastly, as to the Category IV requests, the documents Plaintiff seeks are  
6 protected as attorney work-product. The requests in this category are also overly  
7 broad and unduly burdensome. Responding to Document Requests No. 39 and 40,  
8 for example, would require searching the folders of every attorney at the DOD,  
9 Department of Justice, and the federal government at large. Even if this type of  
10 search is possible, it is highly impractical and is unlikely to yield relevant,  
11 discoverable documents.

12 The discovery issues in Plaintiff’s motion to compel should have been resolved  
13 or at least narrowed by the parties before this motion was filed. As it stands,  
14 Plaintiff’s motion to compel is premature, violates the Local Rules, and is  
15 contrary to controlling Supreme Court and Ninth Circuit law. Accordingly, the  
16 Government respectfully requests that Plaintiff’s motion to compel be denied.

17 **II.**

18 **THE REQUESTS, THE RESPONSES, AND THE PARTIES’ ARGUMENTS**

19 For the Court’s convenience and ease of reference, the Requests for  
20 Production of Documents at issue in this motion are grouped in the following four  
21 categories:

- 22 • Category I: Requests to which Defendants responded they “will not  
23 produce responsive documents” [Requests Nos. 2, 4];
- 24 • Category II: Requests to which Defendants “object ... to the extent [they]  
25 call[. . .] for drafts, which are inherently deliberative and thus privilege”  
26 (i.e., Defendants are withholding otherwise responsive documents based  
27 on the deliberative process privilege) [Requests Nos. 32, 33, 34, 43, 44,  
28 45, 47, 54, 55];

- 1 • Category III: Requests as to which Defendants “object ... to the extent  
2 [they] call for documents that are not in the possession of the Department  
3 of Defense” [Requests Nos. 56, 58];
- 4 • Category IV: Requests as to which Defendants object based on their  
5 contention the requests “inappropriately call[. . .] for the production of  
6 documents subject to the attorney-client privilege and attorney work-  
7 product doctrine.” [Requests Nos. 38, 39, 40].

8  
9 **A. CATEGORY I: DEFENDANTS’ REFUSAL TO PRODUCE ANY**  
10 **DOCUMENTS [REQUESTS NO. 2, 4]**

11  
12 DOCUMENT REQUEST NO. 2:

13 All drafts of the Policy.

14 RESPONSE TO DOCUMENT REQUEST NO. 2:

15 Defendants object to this request, as it is currently drafted, as overly broad  
16 and unduly burdensome. Accordingly, the parties have met and conferred and  
17 Plaintiff has agreed to limit its requests to drafts housed at the Pentagon.

18 Defendants object to this request, even in its narrowed form, because  
19 requesting “drafts of the Policy” calls for discovery of deliberative documents,  
20 which are subject to privilege. In addition, the request is not reasonably calculated  
21 to lead to the discovery of admissible evidence relating to Plaintiff’s facial  
22 challenge to the Policy. To the extent that Plaintiff requests the production of bills  
23 considered by Congress, they are publically available.

24 Based on the specific and general objections set forth above, Defendants will  
25 not produce documents in responses to this request.

26 DOCUMENT REQUEST NO. 4:

27 All Documents referring or relating to the drafting of the DOD Directives  
28 1332.14, 1332.30, and 1304.26.

1 RESPONSE TO DOCUMENT REQUEST NO. 4:

2 Defendants object to this request, as it is currently drafted, as overly broad  
3 and unduly burdensome. Accordingly, the parties have met and conferred and  
4 Plaintiff has agreed to limit its request to drafts of the listed DOD regulations or  
5 documents relating to the process of drafting those regulations that are housed at the  
6 Pentagon.

7 Defendants object to this request, even in its narrowed form, because by  
8 requesting drafts and documents relating to the drafting process, the request calls  
9 for the discovery of deliberative documents, which are subject to privilege. In  
10 addition, the request is not reasonably calculated to lead to the discovery of  
11 admissible evidence relating to Plaintiff's facial challenge to the Policy.

12 Based on the specific and general objections set forth above, Defendants will  
13 not produce responsive documents to this request.

14 **PLAINTIFF'S ARGUMENT RE CATEGORY I:**

15 **1. Defendant's Objections Are Untimely and Are Therefore**  
16 **Waived**

17 Where a party fails to file timely objections to discovery requests, that failure  
18 constitutes a waiver of any objections which a party might have to the requests.  
19 Ramirez v. County of Los Angeles, 231 F.R.D. 407, 409 (C.D. Cal. 2005).  
20 Objections must be filed in the original discovery responses, not in other pleadings,  
21 motions, or proceedings. Id. at 410.

22 Here, Defendants failed to object, assert a privilege, or even respond to the  
23 First Request for Production of Documents by October 20, 2009, the deadline for a  
24 response under Fed. R. Civ. P. 34(b)(2)(A). In fact, their original response was not  
25 served until January 12, 2010, 84 days beyond the deadline. Therefore, all of  
26 Defendants' objections and assertions of privilege are waived for their failure to  
27 respond, object, or assert any privilege in a timely manner.

28

1           **2. General Objections for Discovery as Overly Broad,**  
2                           **Burdensome, or Oppressive, Will Not Alone Constitute a**  
3                           **Successful Objection.**

4           Defendants also state that the requests are “over broad” and “unduly  
5 burdensome.” Defendants do not describe in any further detail what the supposed  
6 burden entails.

7           Vague objections to the scope and burden of requests are insufficient to  
8 excuse a respondent’s non-compliance with the discovery process. Ramirez v.  
9 County of Los Angeles, 231 F.R.D. 407, 409, (C.D. Cal. 2005), citing Allianz Ins.  
10 Co. v. Surface Specialities, Inc., No. Civ.A.03-2470-CM-DJW, 2005 WL 44534, \*2  
11 (D. Kan. Jan. 7, 2005) (“The familiar litany of general objections, including overly  
12 broad, burdensome, or oppressive, will not alone constitute a successful objection  
13 to an interrogatory, nor will a general objection fulfill the objecting party’s burden  
14 to explain its objections.”). To the extent that Defendants base their objections on  
15 the burden of the requests, or limit discovery on that basis, their objections and  
16 limitations are insufficient to relieve them of the duty to produce even if the  
17 requests were overbroad, which they plainly are not. The Requests are narrowly  
18 tailored to call for specific documents or sets of documents, and should be  
19 compelled.

20           **3. The Deliberative Process Privilege Must Be Invoked By the**  
21                           **Agency Head, Which Was Not Done Here**

22           Plaintiff incorporates its arguments on this point as set forth in connection  
23 with Category II, at pp. 21 below.

24           **DEFENDANTS’ ARGUMENT RE CATEGORY I:**

25           **1. The Documents Plaintiff Seeks Are Protected by the**  
26                           **Deliberative Process Privilege**

27           In Document Requests No. 2 and 4, Plaintiff seeks “drafts of the policy” and  
28 “documents referring or relating to the drafting of the DOD Directives.” The

1 documents in this category are protected by the deliberative process privilege. The  
2 privilege exists to allow “agencies freely to explore possibilities, engage in internal  
3 debates, or play devil’s advocate without fear of public scrutiny” by protecting from  
4 discovery agency documents that are predecisional and deliberative. Lahr v.  
5 National Transp. Safety Bd., 569 F.3d 964, 979 (9th Cir. 2009) (quoting Assembly  
6 of Cal. v. U.S. Dep’t of Commerce, 968 F.2d 916, 920 (9th Cir.1992)). The Ninth  
7 Circuit recently reaffirmed what it means for a document to be both predecisional  
8 and deliberative and provided a telling list of the types of documents subject to the  
9 privilege:

10 A “predecisional” document is one prepared in order to  
11 assist an agency decision maker in arriving at his decision,  
12 and may include recommendations, *draft documents*,  
13 proposals, suggestions, and other subjective documents  
14 which reflect the personal opinions of the writer rather  
15 than the policy of the agency. A predecisional  
16 document is a part of the “deliberative process,” if the  
disclosure of the materials would expose an agency's  
decision making process in such a way as to  
discourage candid discussion within the agency and  
thereby undermine the agency's ability to perform its  
functions.

17 Lahr, 569 F.3d at 979 (quoting Assembly of Cal., 968 F.2d at 920) (emphasis  
18 added). Plaintiff’s document requests seek the very type of documents that the  
19 deliberative process privilege is meant to protect: drafts and other predecisional  
20 documents that reveal how the policy and implementing regulations were  
21 formulated. Because the documents Plaintiff seeks are protected by the  
22 deliberative process privilege, Plaintiff’s motion to compel should be denied.

23 Plaintiff makes the specious argument that documents created after the  
24 DADT statute was passed in 1993 are not protected by the deliberative process  
25 privilege because they are not predecisional. Yet Plaintiff’s argument ignores the  
26 fact that after Congress enacted the DADT statute, decisions about how the statute  
27 should be implemented were left to the DOD. Deliberative documents that were  
28

1 created during the formulation of the DOD's implementing regulations are clearly  
2 predecisional and protected by the deliberative process privilege.

3 Plaintiff also argues that DOD cannot assert the deliberative process  
4 privilege because it has not offered the declaration of an agency head. Before the  
5 Government is put to the time and effort of formally asserting privilege in this  
6 case, Plaintiff's demands must be adequately bolstered by a showing of  
7 relevance and good cause. See generally, Freeman v. Seligson, 405 F.2d 1326,  
8 133 8-39 (D.C. Cir. 1969). Plaintiff's failure to properly "meet and confer"  
9 regarding the documents pursuant to Local Rule 37-1 precludes any such showing  
10 here. To the extent Plaintiff moves forward and seeks to compel the production of  
11 such documents, the Government will supply an appropriate declaration in support  
12 of the privilege at that time.

13 **2 Plaintiff's Document Requests are Inappropriate Under**  
14 **Binding Supreme Court Case Law**

15 Plaintiff's purpose in seeking these documents is also improper. Plaintiff  
16 seeks these documents to probe the motivations of the political branches in  
17 enacting the statute and promulgating the directives and regulations implementing  
18 the statute. Well-established Supreme Court precedent squarely provides that  
19 inquiry into the subjective motives of members of Congress is a "hazardous  
20 matter" and that courts will not strike down an otherwise constitutional statute on the  
21 basis of an alleged illicit motive." United States v. O'Brien, 391 U.S. 367, 383-84  
22 (1968); Board of Educ. of the Westside Community Schools v. Mergens, 496  
23 U.S. 226, 249 (1990) (in evaluating constitutionality of statute, "what is relevant  
24 is the legislative purpose of the statute, not the possibly religious motives of the  
25 legislators who enacted the law") (emphasis in original); Las Vegas v. Foley, 747  
26 F.2d 1294, 1298 (9th Cir. 1984) (same). The same is true of attempts to probe the  
27 motivations of the Executive Branch. See e.g., Village of Arlington Heights v.  
28 Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977) ("judicial



1 inquiries into legislative or executive motivation represent a substantial intrusion  
2 into the workings of other branches of government"). In light of the controlling  
3 case law, discovery into such areas is per se improper.

4 This is particularly so here, where the Court has already ruled that Plaintiff's  
5 substantive due process challenge is governed by rational basis. At the Rule 26(f)  
6 conference, Plaintiff's counsel conceded that Plaintiff's burden is to "prove that  
7 there is no rational basis" for the policy. Rule 26(f) Conference, July 6, 2009, pg.  
8 11. Discovery concerning "whether there's a bad basis" is therefore outside the  
9 scope of appropriate discovery. See id. Indeed, the Ninth Circuit in Philips v.  
10 Perry, 106 F.3d 1420, 1429 (9th Cir. 1997), confronted the argument that the  
11 Government's justifications for the DADT policy-concerns about privacy and  
12 sexual tension were based on prejudice, and expressly rejected that argument and  
13 recognized that such considerations were valid operational concerns. Plaintiff's  
14 attempt to probe the motivations of Congress and the Executive in order to show  
15 prejudice through the type of discovery sought in Category I is, therefore, not likely  
16 to lead to the discovery of admissible evidence.

### 17 **3 Defendants Acted Reasonably and Have Not Waived Their** 18 **Objections or Privileges**

19 Plaintiff's waiver argument is without any basis. As noted, the  
20 Government's objection to discovery that seeks to probe the animus of the  
21 political branches was stated (indeed argued) in the Rule 26(f) conference and in  
22 filings before the Government's objections and responses were due under Rule  
23 34. Although ignored by the Plaintiff, the Ninth Circuit has explicitly rejected a  
24 *per se* waiver rule, see Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist.  
25 Court, 408 F.3d 1142, 1149 (9th Cir. 2005), ruling instead that questions of waiver  
26 are governed by a "holistic reasonableness analysis" in which courts are to look at  
27 the specific circumstances of each case and make a "case-by-case determination."  
28 Id. In the context of this case, the Government acted reasonably in refusing to



1 produce documents that seek to probe the intent of the political branches, or to  
2 otherwise probe deliberative processes.

3 **B. CATEGORY II: LIMITED PRODUCTION OF REQUESTED**  
4 **DOCUMENTS BASED ON THE "DELIBERATIVE PROCESS"**  
5 **PRIVILEGE [REQUESTS 32, 33, 34, 43, 44, 45, 47, 54, 55]**

6 DOCUMENT REQUEST NO. 32:

7 All studies, reports, or other documents relied upon, presented to or  
8 considered, consulted or reviewed by Defendants in connection with the formation  
9 of the rules, policies, and guidelines set forth in the Act and the DOD Regulations.

10 RESPONSE TO DOCUMENT REQUEST NO. 32:

11 Defendants object to this request, as it is currently drafted, as overly broad  
12 and unduly burdensome. Accordingly, the parties have met and conferred and  
13 Plaintiff has agreed to limit its request to documents housed at the Pentagon that  
14 were consulted during the formation of the rules, policies, and guidelines set forth  
15 in the Act and the DOD Regulations.

16 Defendants object to this request to the extent that it calls for documents that  
17 are deliberative and thus privileged.

18 Subject to the specific and general objections set forth above, Defendants  
19 will produce documents responsive to Plaintiff's narrowed request that are housed  
20 at the Pentagon.

21 DOCUMENT REQUEST NO. 33:

22 All studies, reports or recommendations of the "working group of senior  
23 officers in the Department of Defense" referred to in the Policy Memorandum,  
24 including drafts of each study, report, or recommendation and each document  
25 concerning any such study report, or recommendation.

26 RESPONSE TO DOCUMENT REQUEST NO. 33:

27 Defendants object to this request, as it is currently drafted, as overly broad  
28 and unduly burdensome. Accordingly, the parties have met and conferred and

1 Plaintiff has agreed to limit its request to documents created by the "working group  
2 of senior offices in the Department of Defense," referred to in the Policy  
3 Memorandum, during the formation of the Act or regulations.

4 Defendants object to this request to the extent it calls for drafts, which are  
5 inherently deliberative and thus privileged.

6 Subject to the specific and general objections set forth above, Defendants  
7 will produce documents responsive to Plaintiff's narrowed request that are housed  
8 at the Pentagon.

9 DOCUMENT REQUEST NO. 34:

10 All studies, report, or recommendations of the DOD staff working group  
11 responsible for drafting the DOD Regulations.

12 RESPONSE TO DOCUMENT REQUEST NO. 34:

13 Defendants object to this request, as it is currently drafted, as overly broad  
14 and unduly burdensome. Accordingly, the parties have met and conferred and  
15 Plaintiff has agreed to limit its request to documents created by the DOD staff  
16 working group responsible for drafting the DOD regulations, during the  
17 formation of the regulations.

18 Defendants object to this request to the extent it calls for drafts, which are  
19 inherently deliberative and thus privileged.

20 Subject to the specific and general objections set forth above, Defendants  
21 will produce documents responsive to Plaintiff's narrowed request that are housed  
22 at the Pentagon.

23 DOCUMENT REQUEST NO 43:

24 All reports, interim reports, and drafts or summaries of reports prepared by  
25 the United States GAO concerning United States Armed Forces personnel and  
26 homosexual conduct or homosexual orientation, including but not limited to the  
27 reports entitled "Homosexuals in the Military: Policies and Practices of Foreign  
28 Countries," "Defense Force Management: DOD's Policy on Homosexuality," and

1 "Financial Costs and Loss of Critical Skills Due to DOD's Homosexual Conduct  
2 Policy Cannot be Completely Estimated. The referenced documents can be found  
3 at: <http://archive.gao.gov/t2pbat5/149440.pdf>,  
4 <http://archive.gao.gov/d33t10/146980.pdf>, and  
5 <http://www.gao.gov/new.items/d05299.pdf>.

6 RESPONSE TO DOCUMENT REQUEST NO. 43:

7 Defendants object to this request, as it is currently drafted, as overly broad  
8 and unduly burdensome. Defendants also object to this request to the extent that it  
9 calls for drafts and other deliberative materials. In addition, Defendants object to  
10 this request to the extent that it call for documents that are in the possession of the  
11 Government Accountability Office, which is an investigative arm of Congress. Rule  
12 34 does not require us to search for produce documents from outside of the  
13 Department of Defense. By its terms, Fed. R. Civ. P. 34 applies only to parties—not  
14 non-parties, and thus "may [not] be used to discover matters from a nonparty."  
15 Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985); see also Viera v.  
16 Woodford, 258 Fed. Appx. 924, 2007 WL 4357761 at \*1 (9th Cir. 2007). While the  
17 United States may be named as a party to this action under section 702  
18 Administrative Procedure Act ("APA"), any action under that section must result  
19 from "agency action" and any injunctive relief sought may only be issued against  
20 the "Federal Officer or officers" responsible for compliance. Because the  
21 Department of Defense, not Congress or any other governmental agency or  
22 instrumentality, is charged with administering 10 U.S.C. § 654 and the applicable  
23 regulations, discovery obligations do not reach beyond that Department.

24 In light of these objections, the parties met and conferred, and Plaintiff  
25 agreed to reexamine this request and provide Defendants with clarification at a later  
26 date. Plaintiff has since informed Defendants that it is unwilling to clarify or narrow  
27 its request.

28

1 Subject to the specific and general objections set forth above, Defendants  
2 will produce documents housed at the Pentagon that contain analysis or studies of  
3 reports prepared by the United States GAO concerning United States Armed Forces  
4 personnel and homosexual conduct or homosexual orientation.

5 DOCUMENT REQUEST NO. 44:

6 All reports, interim reports, and drafts or summaries of reports prepared by  
7 the RAND Corporation's (RAND") National Defense Research Institute concerning  
8 United States Armed Forces personnel and homosexual conduct or homosexual  
9 orientation, including but not limited to a report entitled "Sexual Orientation and  
10 U.S. Military Personnel Policy: Options and Assessment."

11 RESPONSE TO DOCUMENT REQUEST NO. 44:

12 Defendants object to this request, as it is currently drafted, as overly broad  
13 and unduly burdensome. Accordingly, the parties have met and conferred and  
14 Plaintiff has agreed to limit its request to the RAND reports, drafts of the RAND  
15 reports, and documents that contain analysis or studies of the RAND reports.

16 Defendants object to this request to the extent it calls for drafts, which are  
17 inherently deliberative and thus privileged. The RAND reports, moreover, appear to  
18 be within Plaintiff's possession and will not be produced again by Defendants. The  
19 referenced document can be found, in parts, at:

20 [http://www.rand.org/pubs/monograph\\_reports/2009/MR323part1.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR323part1.pdf),

21 [http://www.rand.org/pubs/monograph\\_reports/2009/MR323part2.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR323part2.pdf), and

22 [http://www.rand.org/pubs/monograph\\_reports/2009/MR323part3.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR323part3.pdf).

23 Subject to the specific and general objections set forth above, Defendants  
24 will produce documents housed at the Pentagon that contain analysis or studies of  
25 the RAND reports concerning United States Armed Forces personnel and  
26 homosexual conduct or homosexual orientation.

27

28

1 DOCUMENT REQUEST NO. 45:

2 All Documents concerning reports, interim reports, and drafts or summaries  
3 of reports prepared by RAND's National Defense Research Institute, including but  
4 not limited to, all correspondence and communications between RAND and  
5 Defendants regarding the nature, scope and focus of "Sexual Orientation and U.S.  
6 Military Personnel Policy," "Individual Characteristics and Unit Performance: A  
7 Review of Research and Methods," and all other reports prepared by RAND.

8 RESPONSE TO DOCUMENT REQUEST NO. 45:

9 Defendants object to this request, as it is currently drafted, as overly broad  
10 and unduly burdensome. Accordingly, the parties have met and conferred and  
11 Plaintiff has agreed to limit its request to communications between RAND's  
12 National Defense Research Institute and the Department of Defense regarding the  
13 reports listed in the request.

14 Defendants object to this request to the extent it calls for interim reports,  
15 drafts, or summaries which are deliberative and thus privileged.

16 Subject to the specific and general objections set forth above, Defendants  
17 will produce correspondence housed at the Pentagon between RAND and the  
18 Department of Defense concerning the reports listed in the request.

19 DOCUMENT REQUEST NO. 46:

20 All reports, interim reports, and drafts or summaries of reports produced by  
21 or in countries other than the United States that were commissioned, requested, or  
22 consulted by the United States Army Research Office and that concern homosexual  
23 conduct or homosexual orientation within the armed forces of such countries,  
24 including but not limited to the report entitled "Homosexuality and Armed Forces  
25 in the Netherlands" produced by the Dutch Foundation on Armed Forces and  
26 commissioned by the European Research Office of the United States Army. The  
27 referenced document can be found at: <http://www.dtic.mil/cgi->  
28

1 bin/GetTRDoc?AD=ADA350707&Location—U2&doc—G etTRDoc.pdf on pages  
2 34-53.

3 RESPONSE TO DOCUMENT REQUEST NO. 46:

4 Defendants object to this request, as it is currently drafted, as overly broad  
5 and unduly burdensome. Accordingly, the parties have met and conferred and  
6 Plaintiff has agreed to limit its request to responsive documents housed at the  
7 Pentagon.

8 Defendants object to this request to the extent it calls for interim reports,  
9 drafts, or summaries which are deliberative and thus privileged.

10 Subject to the specific and general objections set forth above, Defendants  
11 will produce documents responsive to Plaintiff's narrowed request that are housed  
12 at the Pentagon.

13 DOCUMENT REQUEST NO 47:

14 All reports, interim reports, and drafts or summaries of reports relating to  
15 countries other than the United States' experience with, consideration of, or  
16 evaluation of military service by individuals with a homosexual orientation or by  
17 individuals who engage in homosexual conduct.

18 RESPONSE TO DOCUMENT REQUEST NO. 47:

19 Defendants object to this request, as it is currently drafted, as overly broad  
20 and unduly burdensome. Accordingly, the parties met and conferred, and Plaintiff  
21 agreed to limit its request to responsive documents housed at the Pentagon. Plaintiff  
22 has since reneged on its agreement and has informed Plaintiff that it is no longer  
23 willing to limit its request to documents in the possession of the Department of  
24 Defense.

25 Defendants object to this request to the extent it calls for interim reports,  
26 drafts, or summaries which are deliberative and thus privileged. Defendants also  
27 object to this request to the extent that it call for documents that are not in the  
28 possession of the Department of Defense. Rule 34 does not require us to search for



1 or produce documents from outside of the Department of Defense. By its terms,  
2 Fed. R. Civ. P. 34 applies only to parties—not non-parties, and thus "may [not] be  
3 used to discover matters from a nonparty." Hatch v. Reliance Ins. Co., 758 F.2d  
4 409, 415 (9th Cir. 1985); see also Viera v. Woodford, 258 Fed. Appx. 924, 2007  
5 WL 4357761 at \*1 (9th Cir. 2007). While the United States may be named as a  
6 party to this action under section 702 Administrative Procedure Act ("APA"), any  
7 action under that section must result from "agency action" and any injunctive relief  
8 sought may only be issued against the "Federal Officer or officers" responsible for  
9 compliance. Because the Department of Defense, not Congress or any other  
10 governmental agency, is charged with administering 10 U.S.C. § 654 and the  
11 applicable regulations, discovery obligations do not reach beyond that Department.

12 Subject to the specific and general objections set forth above, Defendants  
13 will produce certain documents housed at the Pentagon that relate to countries other  
14 than the United States' experience with, consideration of, or evaluation of military  
15 service by individuals with a homosexual orientation or by individuals who engage  
16 in homosexual conduct.

17 DOCUMENT REQUEST NO 54:

18 The "Report of the Board Appointed to Prepare and Submit  
19 Recommendation to the Secretary of the Navy for the Revision of Policies,  
20 Procedures and Directive Dealing with Homosexuals" (the "Crittenden Report"),  
21 any drafts of the Crittenden Report, and any Documents concerning the Crittenden  
22 Report.

23 RESPONSE TO DOCUMENT REQUEST NO. 54:

24 Defendants object to this request as overly broad and unduly burdensome.  
25 Accordingly, the parties have met and conferred, and Plaintiff has agreed to limit its  
26 request to documents housed at the Pentagon that contain studies or analysis of the  
27 Crittenden report.

28



1 Defendants object to this request to the extent it calls for drafts, which are  
2 inherently deliberative and thus privileged. The requested document, moreover,  
3 appears to be within Plaintiff's possession and will not be produced again by  
4 Defendants. The referenced document can be found at:  
5 <http://www.lonelygods.com/res/crittenderureport.pdf>.

6 Subject to the specific and general objections set forth above, Defendants  
7 will produce documents housed at the Pentagon that contain studies or analysis of  
8 the Crittenden report.

9 DOCUMENT REQUEST NO 55:

10 All reports, research, or analyses prepared or undertaken by the Defense  
11 Personnel Security Research and Education Center that concern United States  
12 Forces personnel and homosexual conduct or homosexual orientation, and drafts of  
13 such reports, research or analyses, and any Documents concerning such reports,  
14 research or analyses.

15 RESPONSE TO DOCUMENT REQUEST NO. 55:

16 Defendants object to this request as overly broad and unduly burdensome.

17 Accordingly, the parties have met and conferred but have been unable to  
18 reach a compromise as to the scope of this request.

19 Defendants also object to this request to the extent it calls for interim reports,  
20 drafts, or summaries, which are deliberative and thus privileged.

21 Subject to the specific and general objections set forth above, Defendants  
22 will produce certain documents that contain reports, research, or analyses prepared  
23 or undertaken by the Defense Personnel Security Research and Education Center  
24 that concern United States Forces personnel and homosexual conduct or  
25 homosexual orientation.

1 **PLAINTIFF'S ARGUMENT RE CATEGORY II:**

2 **1. Defendant's Objections Are Untimely and Are Therefore**  
3 **Waived**

4 Plaintiff incorporates its arguments on this point as set forth in connection  
5 with Category I, at pp. 8, above.

6 **2. General Objections for Discovery as Overly Broad,**  
7 **Burdensome, or Oppressive, Will Not Alone Constitute a**  
8 **Successful Objection.**

9 Plaintiff incorporates its arguments on this point as set forth in connection  
10 with Category I, at pp. 9, above.

11 **3. The Deliberative Process Privilege Does Not Apply to**  
12 **Post-Decisional Communications or to Non-Deliberative**  
13 **or Factual Communications, and Must Be Invoked by the**  
14 **Agency Head**

15 Defendants object to producing documents responsive to these requests based  
16 on the deliberative process privilege, a qualified executive privilege that protects  
17 certain communications involved in government deliberations about the  
18 development of policy. See Mobil Oil Corp. v. Dep't of Energy, 520 F. Supp. 414,  
19 416 (N.D.N.Y. 1981). Their reliance on the privilege is inapposite for three  
20 reasons: first, the privilege only applies to pre-decisional communications or  
21 documents, and thus cannot justify the exclusion of documents after the Policy's  
22 adoption in 1993; second, the information must be actually deliberative, and not  
23 merely comment on the statute or regulation in question; and third, the privilege  
24 must be invoked by the agency head, or designated subordinate, upon personal  
25 review of the documents in question, a showing which has not been made here. Id.

1 a. The Deliberative Privilege Only Applies to Predecisional  
2 Communications, Terminating With the Adoption of the Policy

3 The deliberative process privilege applies only to advice, opinions,  
4 recommendations, and other information which is “pre-decisional.” Id.  
5 Information is “predecisional” if it “precedes, in temporal sequence, the decision to  
6 which it relates,” rather than “postdecisional memoranda setting forth the reason for  
7 an agency decision already made.” Hopkins v. U.S. Dep’t of Hous. and Urban Dev.,  
8 929 F.2d 81, 84 (2d Cir. 1991).

9 The operative decision in question is the adoption of DADT in 1993. Thus,  
10 only certain deliberative material transmitted prior to that time may be protected by  
11 the deliberative privilege. Here, however, Defendants claim that *every* draft  
12 document requested, regardless both of its content and whether it was written after  
13 the Policy was enacted, is subject to deliberative process privilege protection.  
14 However, the privilege simply does not apply to documents written after the 1993  
15 adoption of the Policy; they are postdecisional, not predecisional.

16 b. The Information Privileged by the Deliberative Process Privilege Must  
17 Be Actual Deliberative Communications Among Policy Executives,  
18 not Factual Information

19 The deliberative process privilege functions to protect only truly deliberative  
20 material in order to safeguard the quality and integrity of government decisions.  
21 See Mobil, 520 F. Supp. at 416. Deliberative documents are those “related to  
22 processes by which policies are formulated.” Hopkins, 929 F.2d at 84.  
23 Documents that are factual in nature, and not deliberative, are exempted from the  
24 privilege. Id.

25 Here, Defendants state generally and without specificity that the requested  
26 documents are privileged under the deliberative process. However, it is  
27 *Defendants’* burden to establish the applicability of the privilege. Many of the  
28 documents responsive to these requests are likely not deliberative; it is highly likely

1 that the government is asserting its blanket privilege claim over memoranda and  
 2 other documents describing facts relevant to an extant policy rather than  
 3 deliberation. Any such documents would not be protected by the deliberative  
 4 process privilege, and cannot be exempted from discovery on that basis. Neither  
 5 Plaintiff nor the Court can be sure, however, because Defendants have not asserted  
 6 the privilege with *any* specificity. At a minimum, Defendants should be ordered to  
 7 immediately produce a privilege log specifying, document by document, the bases  
 8 for their deliberative privilege claim.

9 c. The Deliberative Process Privilege Must Be Invoked by the Agency  
 10 Head, Which Was Not Done Here

11 The deliberative process privilege must be invoked by the head of the agency  
 12 which has control over the communications in question, or by a subordinate chosen  
 13 by the head of the agency. Hopkins, 929 F.2d at 84. The agency claiming the  
 14 privilege must provide “precise and certain” reasons for asserting confidentiality  
 15 over the requested information. Id.

16 Here, Defendants make no showing that Secretary Gates, the head of the  
 17 Department of Defense, or his personally appointed subordinate, personally  
 18 reviewed the documents for which the privilege is asserted, nor has there been a  
 19 showing that Secretary Gates personally requested that any documents at all be  
 20 protected by the deliberative process privilege. Furthermore, Defendants offer no  
 21 reasons at all to explain their assertion of the privilege. The Court, therefore, has no  
 22 information on which to determine whether the privilege applies. For this reason,  
 23 and the reasons discussed above in this section, Defendants’ assertion of the  
 24 deliberative process privilege is inappropriate procedurally and substantively.

25 **DEFENDANT’S ARGUMENT RE CATEGORY II:**

26 **1. Plaintiffs’ Motion is Premature and Should be Denied**

27 With respect to the documents identified in Category II of Plaintiff’s motion,  
 28 Plaintiff’s motion to compel is premature and violates both the spirit and letter of

1 Local Rule 37-1. As noted, the Government has only identified one subset of  
2 documents that is responsive to the ten requests identified by Plaintiff that it  
3 intends to assert is subject to the deliberative process privilege – internal  
4 memoranda concerning reports issued by the Personnel Security Research and  
5 Education Center.

6 A pre-motion call from Plaintiff’s counsel could have allowed for discussion  
7 of the one subset of documents withheld in this “category” on deliberative process  
8 grounds. Yet, the call was not made and now the parties and the court must  
9 resolve through motion practice matters that could and should be resolved  
10 through the continued cooperative efforts of the parties. Plaintiff’s failure to  
11 properly confer pursuant to Rule 37-1 alone is grounds to deny this portion of  
12 Plaintiff’s motion. See So v. Land Base LLC, 2009 WL 2407954, \*2 (C.D. Cal.  
13 2009) (dismissing motion for, *inter alia*, failure to comply with Local Rule 37).

14 2. **The Documents Plaintiff Seeks Are Protected by the Deliberative**  
15 **Process Privilege**

16 Defendants incorporate their arguments on this point as set forth in  
17 Category I.

18 3. **Defendants Acted Reasonably and Have Not Waived Their**  
19 **Objections or Privileges**

20 Defendants incorporate their arguments on this point as set forth in Category I.

21 **C. CATEGORY III: LIMITED PRODUCTION OF**  
22 **REQUESTED DOCUMENTS TO ONLY THOSE**  
23 **WITHIN THE DEPARTMENT OF DEFENSE**  
24 **[REQUESTS NO. 56, 58]**

25 DOCUMENT REQUEST NO. 56:

26 All reports, research, or analyses prepared or undertaken by the office of the  
27 Surgeon General that concern United States Armed Forces personnel and  
28 homosexual conduct or homosexual orientation.

1 RESPONSE TO DOCUMENT REQUEST NO. 56:

2 Defendants object to this request to the extent that it call for documents that  
3 are in the possession of the Office of the Surgeon General, which is part of the  
4 Department of Health and Human Services. Rule 34 does not require us to search  
5 for or produce documents from outside of the Department of Defense. By its terms,  
6 Fed. R. Civ. P. 34 applies only to parties—not non-parties, and thus "may [not] be  
7 used to discover matters from a nonparty." Hatch v. Reliance Ins. Co., 758 F.2d  
8 409, 415 (9th Cir. 1985); see also Viera v. Woodford, 258 Fed. Appx. 924, 2007  
9 WL 4357761 at \*1 (9th Cir. 2007). While the United States may be named as a  
10 party to this action under section 702 Administrative Procedure Act ("APA"), any  
11 action under that section must result from "agency action" and any injunctive relief  
12 sought may only be issued against the "Federal Officer or officers" responsible for  
13 compliance. Because the Department of Defense, not Congress or any other  
14 governmental agency, is charged with administering 10 U.S.C. § 654 and the  
15 applicable regulation, discovery obligations do not extend beyond that Department.

16 In light of these objections, the parties met and conferred, and Plaintiff  
17 agreed to reexamine this request and provide Defendants with clarification at a later  
18 date. Plaintiff has since informed Defendants that it is unwilling to clarify or  
19 narrow its request.

20 Subject to the specific and general objections set forth above, Defendants  
21 will produce documents housed at the Pentagon that contain reports, research, or  
22 analyses prepared or undertaken by the office of the Surgeon General that concern  
23 United States Armed Forces personnel and homosexual conduct or homosexual  
24 orientation.

25 DOCUMENT REQUEST NO. 58:

26 All public statements made by the Defendants (dating from January 1, 2003  
27 to the present), including but not limited to speeches, presentations, reports, and  
28 press releases, on the subject of United States Armed Forces personnel and



1 homosexual conduct or homosexual orientation, and all drafts or prior version of  
2 those public statements.

3 RESPONSE TO DOCUMENT REQUEST NO. 58:

4 Defendants object to this request, as it is currently drafted, as overly broad  
5 and unduly burdensome. Defendants object to this request to the extent that it call  
6 for documents that are not in the possession of the Department of Defense. Rule 34  
7 does not require us to reach outside of the Department of Defense — to Congress,  
8 or to other agencies such as the Departments of Justice and Health and Human  
9 Services, that are not parties to this action — for responsive documents. By its  
10 terms, Fed. R. Civ. P. 34 applies only to parties—not non-parties, and thus "may  
11 [not] be used to discover matters from a nonparty." Hatch v. Reliance Ins. Co., 758  
12 F.2d 409, 415 (9th Cir. 1985); see also Viera v. Woodford, 258 Fed. Appx. 924,  
13 2007 WL 4357761 at \*1 (9th Cir. 2007). While the United States may be named as  
14 a party to this action under section 702 Administrative Procedure Act ("APA"), any  
15 action under that section must result from "agency action" and any injunctive relief  
16 sought may only be issued against the "Federal Officer or officers" responsible for  
17 compliance. Because the Department of Defense, not Congress or any other  
18 governmental agency, is charged with administering 10 U.S.C. § 654 or applicable  
19 regulation, discovery obligations do not reach beyond that Department.

20 In light of these objections, the parties met and conferred, and Plaintiff  
21 agreed to reexamine this request and provide Defendants with clarification at a later  
22 date. Plaintiff has since informed Defendants that it is unwilling to clarify or  
23 narrow this request.

24 Defendants will not produce documents pursuant to this request absent  
25 clarification and narrowing. Defendants also note that "public statements" are  
26 publically available and can be readily accessed by Plaintiff.



1 **PLAINTIFF'S ARGUMENT RE CATEGORY III:**

2 **1. Defendant's Objections Are Untimely and Are Therefore**  
3 **Waived**

4 Plaintiff incorporates its arguments on this point as set forth in connection  
5 with Category I, at pp. 8, above.

6 **2. General Objections for Discovery as Overly Broad,**  
7 **Burdensome, or Oppressive, Will Not Alone Constitute a**  
8 **Successful Objection.**

9 Plaintiff incorporates its arguments on this point as set forth in connection  
10 with Category I, at pp. 9, above.

11 **3. The Administrative Procedure Act Does Not Absolve**  
12 **Defendants from the Obligation to Produce Responsive**  
13 **Documents, Regardless Where Within the Executive**  
14 **Branch of the Government They May Be Located**

15 Defendants' invocation of Section 702 of the Administrative Procedure Act  
16 to limit the scope of discovery only to the Department of Defense is mistaken for  
17 two reasons: first, this suit was not brought under the Administrative Procedure  
18 Act, so it cannot apply to limit discovery; and second, the Administrative Procedure  
19 Act does not function to insulate agencies of the United States from the discovery  
20 process when the United States is a named defendant.

21 a. The Administrative Procedure Act Does Not Apply

22 Defendants assert, citing no authority, that they need not search for or  
23 produce documents that are in the Government's possession but are fortuitously  
24 housed in executive branch departments other than the Department of Defense.  
25 Although the United States is a named defendant herein, Defendants claim that the  
26 Administrative Procedure Act applies to limit discovery only to the Department of  
27 Defense in this case. This claim is meritless; the Administrative Procedure Act  
28 does not apply in any way. The Administrative Procedure Act governs the way in

1 which administrative agencies of the federal government may propose and establish  
2 regulations, and broadly authorizes judicial review of an agency's actions. Here,  
3 however, Plaintiff seeks review of both the Department of Defense's regulations  
4 and actions under the Policy, and also the federal statute that authorizes those  
5 regulations and actions. To obtain relief, Plaintiff has brought a claim against both  
6 the Secretary of Defense and the United States as named Defendants. Because the  
7 APA cannot and does not authorize or otherwise affect claims against the United  
8 States, it is inapplicable here, and cannot apply to limit discovery.

9 b. Even if Applicable, the Administrative Procedure Act Does Not  
10 Exclude the United States as Party to the Lawsuit, and Therefore All  
11 United States Agencies and Representatives Must Comply With the  
12 Discovery Process

13 Defendants claim that the Administrative Procedure Act applies to limit  
14 discovery to the Department of Defense, and excludes from the scope of discovery  
15 anything housed outside DOD offices. Even if the APA applied to this case, it  
16 would not absolve agencies and representatives of the U.S. other than the  
17 Department of Defense of their responsibilities to comply with the Federal Rules of  
18 Civil Procedure.

19 Fed. R. Civ. P. 34 states that "a party may serve on any other party a request  
20 [for documents] within the scope of Rule 26(b)." A party may discover all  
21 reasonably obtainable information within the responding party's possession,  
22 custody, or control, where control may be established by the existence of a  
23 principal-agent relationship. Tyler v. Suffolk County, 256 F.R.D. 34, 37 (D. Mass.  
24 2009). Here, the United States is a party to the suit, and as such, all its agents,  
25 agencies, representatives, and officers are subject to the requirements of Rule 34.  
26 Thus, all information in the custody, possession, or control of the United States or  
27 any of its agencies, agents, or representatives is discoverable. Cf. Harvey  
28 Aluminum v. NLRB, 335 F.2d 749, 745-55 (9th Cir. 1964) (witness statements

1 discoverable regardless what agency or department of the United States have  
2 possession of them).

3 Defendants base their objection on a tortured reading of a facially irrelevant  
4 section of the APA authorizing judicial review of a U.S. agency's actions, 5 U.S.C.  
5 § 702 ("A person suffering legal wrong because of agency action, or adversely  
6 affected or aggrieved by agency action within the meaning of a relevant statute, is  
7 entitled to judicial review thereof."). Nothing in the APA contemplates that the  
8 United States, a named party in this suit, does not have to comply with its  
9 responsibilities as a defendant. Nor does any part of the APA insulate any or all of  
10 the United States' agencies or representatives from the control of the federal  
11 government.

### 12 **DEFENDANT'S ARGUMENT RE CATEGORY III:**

#### 13 **1. The Government Properly Limited Its Search to the DOD**

14 Plaintiff has not identified a waiver of sovereign immunity in this case, but  
15 courts in the Ninth Circuit have applied the waiver of sovereign immunity found in  
16 the Administrative Procedures Act ("APA"), 5 U.S.C. § 702, to Constitutional  
17 claims seeking nonmonetary relief. See, e.g., The Presbyterian Church v. United  
18 States, 870 F.2d 518, 525 n. 9 ("This court has previously held that the 1976  
19 amendment to § 702 waives sovereign immunity not only for suits brought under §  
20 702 itself, but for constitutional claims brought under the general federal-question  
21 jurisdiction statute, 28 U.S.C. § 1331." (citations ommitted)). While the United  
22 States may be named as a party to this action under section 702 of the  
23 Administrative Procedure Act (the "APA"), any action under that section must  
24 result from "agency action" and any injunctive relief sought may only be issued  
25 against the "Federal Officer or officers" responsible for compliance. Because the  
26 DOD, not Congress or any other governmental agency, is charged with  
27 administering 10 U.S.C. § 654 and the applicable regulations, discovery obligations  
28 do not reach beyond that Department. Plaintiff's position that its suit, based on

1 actions taken by the DOD, permits government-wide discovery is illogical and  
2 unsupported by law. In addition, because the DADT policy applies exclusively  
3 to the DOD, documents housed outside of the DOD are unlikely to be relevant to  
4 Plaintiff's claims in this case.

5       2.     **The Documents Plaintiff Seeks Are Protected by the Deliberative**  
6             **Process Privilege**

7       Defendants incorporate their arguments on this point as set forth in  
8 Category I.

9       3.     **Defendants Acted Reasonably and Have Not Waived Their**  
10            **Objections or Privileges**

11       Defendants incorporate their arguments on this point as set forth in Category I.

12       **D.     CATEGORY IV: LIMITED PRODUCTION OF**  
13            **REQUESTED DOCUMENTS BASED ON ATTORNEY-**  
14            **CLIENT PRIVILEGE AND/OR WORK-PRODUCT**  
15            **DOCTRINE [REQUESTS NO. 38, 39, 40]**

16       DOCUMENT REQUEST NO. 38:

17       The Defensibility Memorandum and all drafts or prior versions of that  
18 Memorandum.

19       RESPONSE TO DOCUMENT REQUEST NO. 38:

20       The parties have met and conferred, and Plaintiff has agreed to limit this  
21 request to drafts and implemented iterations of the Defensibility Memorandum.

22       Defendants object to this request to the extent it calls for drafts, which are  
23 inherently deliberative and thus privileged. The requested document, moreover,  
24 appears to be within Plaintiff's possession and will not be produced again by  
25 Defendants. The referenced document can be found at:

26       <http://dont.stanford.edu/regulations/RenoMemo.htm>.

1 Subject to the specific and general objections set forth above, Defendants  
2 will produce versions of the Defensibility Memorandum that were implemented and  
3 are housed at the Pentagon.

4 DOCUMENT REQUEST NO. 39:

5 All Documents prepared by the Attorney General of the United States, any  
6 attorney or any other employee of the DOD or the Department of Justice, or any  
7 attorney for Defendants concerning United States Armed Forces personnel and  
8 homosexual conduct or homosexual orientation, other than documents solely  
9 concerning specific servicemembers.

10 RESPONSE TO DOCUMENT REQUEST NO. 39:

11 Defendants object to this request, as it is currently drafted, as overly broad  
12 and unduly burdensome. Accordingly, the parties have met and conferred but  
13 Plaintiff has refused to narrow its request.

14 Defendants object to this request as overly broad and unduly burdensome. In  
15 addition, it inappropriately calls for the production of documents subject to the  
16 attorney-client privilege and attorney work-product doctrine.

17 Defendants also object to this request to the extent that it calls for  
18 documents prepared by the Attorney General or from the Department of Justice.  
19 Rule 34 does not require us to search for or produce documents from outside of  
20 the Department of Defense. By its terms, Fed. R. Civ. P. 34 applies only to  
21 parties—not non-parties, and thus "may [not] be used to discover matters from a  
22 nonparty." Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985); *see also*  
23 Viera v. Woodford, 258 Fed. Appx. 924, 2007 WL 4357761 at \*1 (9th Cir. 2007).  
24 While the United States may be named as a party to this action under section 702  
25 Administrative Procedure Act ("APA"), any action under that section must result  
26 from "agency action" and any injunctive relief sought may only be issued against  
27 the "Federal Officer or officers" responsible for compliance. Because the  
28 Department of Defense, not Congress or any other governmental agency, is

1 charged with administering 10 U.S.C. § 654 and the applicable regulations,  
2 discovery obligations do not reach beyond that Department.

3 Subject to the specific and general objections set forth above, Defendants  
4 will produce documents housed at the Pentagon concerning United States Armed  
5 Forces personnel and homosexual conduct or homosexual orientation, other than  
6 documents solely concerning specific service members.

7 DOCUMENT REQUEST NO. 40:

8 All Documents relating to Lawrence v. Texas, 593 U.S. 558 (2003) and its  
9 effect or lack of effect on the Policy, the implementation of the Policy, or the  
10 legality of the Policy.

11 RESPONSE TO DOCUMENT REQUEST NO. 40:

12 Defendants object to this request, as it is currently drafted, as overly broad  
13 and unduly burdensome. In addition, this request inappropriately calls for the  
14 production of documents subject to the attorney-client privilege and attorney  
15 work-product doctrine.

16 Defendants also object to this request to the extent that it calls for documents  
17 that are not in the possession of the Department of Defense. Rule 34 does not  
18 require us to search for or produce documents from outside of the Department of  
19 Defense. By its terms, Fed. R. Civ. P. 34 applies only to parties—not non-  
20 parties, and thus "may [not] be used to discover matters from a nonparty." Hatch  
21 v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985); see also Viera v. Woodford,  
22 258 Fed. Appx. 924, 2007 WL 4357761 at \*1 (9th Cir. 2007). And while the  
23 United States may be named as a party to this action under section 702  
24 Administrative Procedure Act ("APA"), any action under that section must  
25 result from "agency action" and any injunctive relief sought may only be issued  
26 against the "Federal Officer or officers" responsible for compliance. Because  
27 the Department of Defense, not Congress or any other governmental agency, is  
28



1 charged with administering 10 U.S.C. § 654 and the applicable regulations,  
2 discovery obligations do not reach beyond that Department.

3 In light of these objections, the parties met and conferred and Plaintiff  
4 agreed to reexamine this request and provide Defendants with clarification at a later  
5 date. Plaintiff has since informed Defendants that it is unwilling to clarify or  
6 narrow its request.

7 Subject to the specific and general objections set forth above, Defendants  
8 will produced non-privileged, responsive documents housed at the Pentagon.

9 **PLAINTIFF'S ARGUMENT RE CATEGORY IV:**

10 Defendants assert objections to the document requests in this category based  
11 on the same asserted grounds of overbreadth and undue burden, deliberative  
12 process privilege, and discovery limitation to the Department of Defense as they  
13 asserted to the other requests set forth above. Plaintiff incorporates its arguments  
14 on those points as set forth in connection with Categories I-III above. Defendants  
15 also assert objections based on the attorney-client privilege and the attorney work  
16 product doctrine, though they provided no privilege log listing documents to which  
17 these privileges purportedly apply. Those objections should also be overruled,  
18 since they were not timely asserted and have therefore been waived.

19 **DEFENDANT'S ARGUMENT RE CATEGORY IV:**

20 **1. The Requests in Category IV Call for Privileged Documents**  
21 **and Are Unduly Burdensome**

22 The document requests in Category IV seek privileged documents and are  
23 unduly burdensome. Document Request No. 38 seeks "all drafts or prior  
24 versions" of a memorandum that was created in the Department of Justice (the  
25 "DOJ"). The drafts and prior versions of the memorandum contain deliberations  
26 that predate the ultimate decision that was set forth in the memorandum.

27 Document Requests No. 39 seeks "all documents" prepared by attorneys for the  
28 DOD, DOJ and the government at large, concerning service members and



1 homosexual conduct. Document Request No. 40 calls for “all documents relating to  
2 Lawrence v. Texas, 593 U.S. 558 (1993), and its effect or lack of effect on the  
3 Policy.” These requests call for documents that are protected under the attorney  
4 work product doctrine. Moreover, they are unduly burdensome. Even if it were  
5 possible to search the files of every government attorney, such a search would be  
6 impractical and unlikely to yield discoverable information.

7           2.     **The Documents Plaintiff Seeks Are Protected by the Deliberative**  
8                           **Process Privilege**

9           Defendants incorporate their arguments on this point as set forth in  
10 Category I.

11           3.     **Defendants Acted Reasonably and Have Not Waived Their**  
12                           **Objections or Privileges**

13           Defendants incorporate their arguments on this point as set forth in  
14 Category I.

15 Dated: February 22, 2010

WHITE & CASE LLP

17 By: /s/ Patrick O. Hunnius  
18 Patrick O. Hunnius  
19 Attorneys for Plaintiff  
20 Log Cabin Republicans

21 Dated: February 22, 2010

U.S. DEPARTMENT OF JUSTICE

23 By: /s/ Paul G. Freeborne  
24 Paul G. Freeborne  
25 Attorneys for Defendants  
26 United States of America and  
27 Robert M. Gates, Secretary of Defense  
28