

1 Panel of Experts meetings. The names of transgender services members are to be provided
2 pursuant to the parties' protective order, and for "attorneys' eyes only."

3 IT IS FURTHER ORDERED, regarding Interrogatory No. 18, that the Defendants will
4 provide information describing in detail, for each attendee and person supporting the Panel who
5 has been identified, the information or input provided by that person.

6 IT IS FURTHER ORDERED that the Defendants shall comply with the above by no later
7 than **March 16, 2020**.

8 Discussion

9 This motion concerns Plaintiffs' contention that the Government has not fully responded
10 to Interrogatories No. 16-18. Interrogatory No. 16 requests the Government to identify the
11 persons who "reviewed, revised, or commented on any drafts" of Secretary Mattis' February 22,
12 2018 Memorandum for the President. Interrogatory No. 17 seeks the identities of all persons
13 who "reviewed, revised, or commented on any drafts" of the "February 2018 Department of
14 Defense Report and Recommendations on Military Service by Transgender Persons."
15 Interrogatory No. 18 asks that the Government identify the attendees of any meeting of the
16 "Panel of Experts," and/or individuals who "provided the Panel of Experts or its members any
17 information, statement, advice, opinion, or other input of any nature or kind."

18 In the face of Plaintiffs' objections to the responses to Interrogatories 16 and 17,
19 Defendants supplemented their interrogatory responses with a list of individuals who "reviewed,
20 revised, or commented" on drafts of Secretary Mattis' February 22, 2018 Memorandum and
21 February 2018 Department of Defense Report. Dkt. No. 446, Barsanti Decl. ¶ 7, Ex. 6 at 5-7, 9-
22 12. However, the supplemental responses fail to include the identity of the "principal authors" of
23 the Mattis Memorandum and DoD Report, information which is necessary and relevant to permit
24 Plaintiffs to properly focus their discovery efforts.

1 Concerning Interrogatory No. 18, the Government maintains that it has a privacy
2 obligation to withhold the names of the transgender services members and commanders who
3 participated in the Panel of Experts meeting. Discovery related to those individuals, both as to
4 the nature of their testimony before the Panel and what they witnessed at the Panel meetings, is
5 relevant to understanding the Panel’s process and how it arrived at its recommendations. (The
6 Court also agrees with Plaintiffs that the privacy concerns interposed by the Government do not
7 apply to the non-transgender commanders.) Additionally, there is a protective order in place in
8 this case; Plaintiffs have indicated a willingness to treat the names of the transgender service
9 members who attended the Panel meetings as “attorneys’ eyes only,” and the Court will include
10 that stipulation in its order.

11 The Government also contends that FRCP 33(d) allows it to shift to Plaintiffs the burden
12 of discovering what each person identified actually contributed to the Panel’s deliberations on
13 the grounds that it has previously provided Plaintiffs with documents from which that
14 information may be derived. However, as Plaintiffs point out,

15 the Panel minutes and other documents pointed to in [the Government’s]
16 response do not actually reveal who provided what input to the Panel...
17 the Government’s responses do not even identify all minutes of meetings
of the Panel, and the minutes the government [*sic*] cites contain only
anonymized and minimal information.

18 Dkt. No. 445, LCR 37 Joint Submission at 22 (citing Barsanti Decl., ¶¶ 3-5, Exs. 2-5). The
19 Defendants may not rely on Rule 33(d) where they have produced documents which do not
20 completely respond to the legitimate request of the interrogatory. Plaintiffs have a right to know
21 who contributed what to the Panel’s deliberations and Defendants have an obligation to provide
22 any documents in their possession which reveal that information.
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24

1 Finally, it is not clear from the Government's response in the LCR 37 Joint Submission
2 whether it is still relying on the interrogatory objections it interposed on the grounds of attorney
3 work product, attorney-client privilege or the deliberative process privilege. *Id.* at 12. The Court
4 has previously ruled that "the deliberative process privilege does not apply to documents that
5 were used or considered in the development of the Mattis Plan." Dkt. No. 394, Order at 4-6.
6 And Defendants provide no evidence in support of any argument that the material sought through
7 this interrogatory qualifies for protection as work product or privileged attorney-client
8 communication. In the absence of any evidentiary support, the objections will not stand.

9 Conclusion

10 Plaintiffs have established their right, on grounds of relevance and lack of privilege, to
11 the identities of the "principal authors" of the Mattis Memorandum and DoD report, and the
12 transgender services members and commanders who attended meetings of the Panel of Experts.
13 The names of any transgender services member-attendees will be provided under the terms of the
14 parties' protective order and "for attorneys' eyes only." Additionally, the Defendants are
15 ordered to provide any information in their possession indicating what each person identified
16 pursuant to Interrogatory No. 18 actually contributed to the Panel's deliberations.

17 The deadline for compliance with this order will be **March 16, 2020**.

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19 The clerk is ordered to provide copies of this order to all counsel.

20 Dated March 5, 2020.

21 

22 Marsha J. Pechman
23 United States Senior District Judge