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Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN WASHINGTON  
AT TACOMA DIVISION

MAJOR MARGARET WITT,  
  
Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
THE AIR FORCE; ET AL.,  
  
Defendants.

No. C06-5195 RBL

**DECLARATION OF SHER KUNG  
IN SUPPORT OF MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS RESPONSIVE TO  
REQUESTS FOR PRODUCTION  
NOS. 33 TO 36.**

NOTE ON MOTION CALENDAR:  
MAY 28, 2010

Pursuant to 28 U.S.C. § 1746, I, Sher Kung, hereby declare as follows:

1. I am counsel for the plaintiff and have personal knowledge of the facts contained in this Declaration.
2. Attached hereto as Exhibit A is a true and correct copy of an excerpt of Plaintiff's Second Set of Requests for Production of Documents and Things to Defendants.
3. Attached hereto as Exhibit B is a true and correct copy of a letter dated April 23, 2010, from Sarah Dunne to Bryan Diederich, including the attachment to the letter—a draft Stipulation and Order that would govern disclosure of any confidential personnel and medical records in this litigation.

1           4.       Attached hereto as Exhibit C are true and correct copies of excerpts from the  
2 deposition of Captain Jill Robinson, dated March 16, 2010.

3           5.       Attached hereto as Exhibit D are true and correct copies of excerpts from the  
4 deposition of Captain Edmond Hrivnak, dated March 17, 2010.

5           6.       Attached hereto as Exhibit E are true and correct copies of excerpts from the  
6 deposition of Colonel Janette Moore-Harbert, dated February 25, 2010.

7           7.       Attached hereto as Exhibit F is a true and correct copy of an excerpt of  
8 Defendants' Objections and Responses to Plaintiff's Second Set of Requests for Production of  
9 Documents and Things.

10          8.       On April 13, 2010, government counsel, Sarah Dunne and I participated in a  
11 telephone conference concerning Defendants' Objections and Responses to Plaintiff's Second  
12 Set of Requests. Government counsel restated their position that the Privacy Act contains no  
13 exception permitting disclosure of the requested documents.

14          9.       On May 10, 2010, government counsel, Sarah Dunne and I participated in a  
15 telephonic meet and confer and government counsel conceded that there is a provision in the  
16 Privacy Act which allows for the release of Privacy Act information upon court order.  
17 Government counsel however confirmed that their client was unwilling to agree to a Stipulation  
18 and Order governing the handling of the documents requested here. The government stated that  
19 their client still maintained the position that the Privacy Act protects personnel files from  
20 disclosure. Government counsel also stated that they shared our interest in handling confidential  
21 documents in a careful manner.

22          10.       Attached hereto as Exhibit G is a true and correct copy of a letter dated May 11,  
23 2010, from Sarah Dunne to Bryan Diederich, memorializing the May 10 conversation.

24                I declare under penalty of perjury that the foregoing is true and correct, and that this  
25 Declaration was executed on May 13, 2010 in Seattle, Washington.  
26

/s/ Sher S. Kung  
Sher Kung, WSBA # 42077

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 14, 2010, I electronically filed this *Declaration Sher Kung in Sup-*  
3 *port of Motion to Compel Production of Documents Responsive to Requests for Production*  
4 *Numbers 33 to 36* with the Clerk of the Court using the CM/ECF system which will send notifi-  
5 cation of such filing to the following:

6 Peter Phipps

7 [peter.phipps@usdoj.gov](mailto:peter.phipps@usdoj.gov)

8 Marion J. Mittet

9 [Jamie.Mittet@usdoj.gov](mailto:Jamie.Mittet@usdoj.gov)

10 Bryan R. Diederich

11 [bryan.diederich@usdoj.gov](mailto:bryan.diederich@usdoj.gov)

12 Stephen J. Buckingham

13 [Stephen.Buckingham@usdoj.gov](mailto:Stephen.Buckingham@usdoj.gov)

14  
15 Attorneys for Defendants

16 DATED this 14<sup>th</sup> day of May, 2010.

17  
18 AMERICAN CIVIL LIBERTIES UNION OF  
19 WASHINGTON FOUNDATION

20 By: /s/ Nina Jenkins  
21 Nina Jenkins  
22 Legal Program Assistant  
23 705 Second Avenue, Suite 300  
24 Seattle, WA 98104  
25 Tel. (206) 624-2184  
26 [njenkins@aclu-wa.org](mailto:njenkins@aclu-wa.org)

# **EXHIBIT A**

1 THE HONORABLE RONALD B. LEIGHTON

2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 MAJOR MARGARET WITT,

11 Plaintiff,

12 v.

13 UNITED STATES DEPARTMENT OF THE  
14 AIR FORCE, et al.,

15 Defendants.

No. C06-5195 RBL

**PLAINTIFF'S SECOND SET OF  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS AND THINGS TO  
DEFENDANTS**

16 Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff Major Margaret  
17 Witt submits the following Second Set of Requests for Production of Documents and Things to  
18 Defendants (collectively the "Discovery Requests"), the Department of Air Force, Robert M.  
19 Gates, the Secretary of Defense, Michael B. Donley, the Secretary of the Air Force, and Colonel  
20 Janette Moore-Harbert.

21 **INSTRUCTIONS**

22 1. These Discovery Requests must be answered fully, in writing and under oath, and  
23 the requested documents served on counsel for Plaintiff, within thirty days of service of these

1 **Request for Production No. 31:** Produce all public statements made by the Defendants (dating  
2 from January 1, 2004 to the present), including but not limited to speeches, presentations,  
3 reports, and press releases, on the subject of United States Armed Forces personnel and sexual  
4 orientation or sexual conduct between two people of the same sex.

5  
6 **Request for Production No. 32:** Produce all documents and communications referring or  
7 relating to all studies and assessments concerning service by gay and lesbian service members in  
8 the United States Armed Forces.

9  
10 **Request for Production No. 33:** Produce **SM-A** personnel file and all  
11 documents pertaining to disciplinary action or admonishment concerning **A** relationship with  
12 **SM-B**

13  
14 **Request for Production No. 34:** Produce **SM-B** personnel file and all  
15 documents pertaining to discipline and admonishment regarding **B** relationship with  
16 **SM-A**

17  
18 **Request for Production No. 35:** Produce **SM-C** personnel file and all  
19 documents relating to **C** relationship with **SM-D**

---

23 <sup>1</sup> We believe that **SM-B** is still on active duty in the Air Force however we are unaware of **B** current rank.  
24 <sup>2</sup> We believe that **SM-D** is still on active duty in the Air Force however we are unaware of **D** current rank.

1 **Request for Production No. 36:** Produce **SM-E** personnel file and all  
2 documents pertaining to **E** relationship with **SM-F**  
3

4 **Request for Production No. 37:** Produce the Unit Manning Documents for the 446th AES for  
5 the years 2002 through 2007.  
6

7 **Request for Production No. 38:** Produce all documents created, collected, obtained, produced  
8 or maintained, concerning the 446th AES, by MSgt Aaron W. Maness, the unit historian and in  
9 his role as the unit historian, from 2000 to 2006.  
10

11  
12 DATED this 23rd day of February, 2010.

13 AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION  
14

15 By: /s/ Sarah A. Dunne  
16 James Lobsenz, WSBA #8787  
17 Carney Badley Spellman  
18 700 Fifth Avenue, Ste 5800  
19 Seattle, WA 98104  
20 [lobsenz@carneylaw.com](mailto:lobsenz@carneylaw.com)  
21 (206) 622-8020

22 Sarah A. Dunne, WSBA #34869  
23 Sher Kung, WSBA #42077  
24 ACLU of Washington Foundation  
[dunne@aclu-wa.org](mailto:dunne@aclu-wa.org)  
[skung@aclu-wa.org](mailto:skung@aclu-wa.org)

25 <sup>3</sup> We believe that **SM-E** is still on active duty in the Air Force however we are unaware of **E** current  
26 rank. It is also our understanding that **E** previously went by the name of **SM-E**

27 <sup>4</sup> We have reason to believe that **SM-E** is engaged in a relationship with another unit member by the first  
28 name of **F** but we do not have knowledge of **F** rank or last name.

# **EXHIBIT B**



SARAH DUNNE  
LEGAL DIRECTOR

NANCY TALNER  
STAFF ATTORNEY

ROSE SPIDELL  
STAFF ATTORNEY  
FLOYD AND DELORES JONES  
FAMILY FELLOW

SHER KUNG  
PERKINS COIE FELLOW

LINDSEY SOFFES  
ROPES & GRAY FELLOW



April 23, 2010

Via E-mail

Bryan R. Diederich  
Peter J. Phipps  
Stephen J. Buckingham  
Civil Division, Federal Programs Branch  
U.S. Department of Justice  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001

AMERICAN CIVIL  
LIBERTIES UNION  
OF WASHINGTON  
FOUNDATION  
705 2ND AVENUE, 3RD FL.  
SEATTLE, WA 98104  
T/206.624.2184  
F/206.624.2190  
WWW.ACLU-WA.ORG

JESSE WING  
BOARD PRESIDENT

KATHLEEN TAYLOR  
EXECUTIVE DIRECTOR

Re: *Witt v. U.S. Air Force et al.*, No. C06-5195 (W.D. Wash.)

Dear Bryan,

I am writing concerning Defendants' refusal to produce any personnel files pursuant to Requests Nos. 33 to 36 set forth in Plaintiff's Second Set of Requests for Production of Documents. Requests for Production Nos. 33 through 36 request the personnel files of **SM-A**, **SM-B**, **SM-C**, and **SM-E**.

Defendants cite to the Privacy Act, 5 U.S.C. § 552a, to justify their claim that these files are protected from disclosure. We discussed your objection briefly during our April 13 conference call in which government counsel stated that the Privacy Act, 5 U.S.C. § 552a, contained no exception permitting disclosure of the requested documents. A review of the language of the Privacy Act and the relevant case law, however, establishes that this representation is incorrect.

It is well-established that the Privacy Act provides no bar to the disclosure of information in discovery during the course of litigation. *See, e.g., Laxalt v. McClatchy*, 809 F.2d 885, 888-89 (D.C. Cir. 1987); *Weahkee v. Norton*, 621 F.2d 1080, 1082-83 (10th Cir. 1980); *Hassan v. United States*, 2006 WL 681038 \*2 (W.D. Wash. 2006). Indeed, the plain language of 5 U.S. C. § 552a(b)(11) permits disclosure pursuant to court order. *Laxalt*, 809 F. 2d at 888. In reality, "a party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards, and the test of discoverability is the relevance standard of Rule 26(b)(1) of the [Federal Rules of Civil Procedure]." *Hassan*, 2006 WL 681038, at \*2 (quoting *Laxalt*, 809 F.2d at 889).

Because the Privacy Act provides no basis for Defendants' refusal to produce the documents requested in Requests for Production Nos. 33 through 36, we renew our requests. On April 13, we agreed to limit Requests for Production Nos. 33, 34, and 35 to documents pertaining to disciplinary action or admonishment, rather than the

Letter to DOJ  
April 23, 2010  
Page 2

entire personnel files. We still stand by this agreement. With respect to Request No. 36, we narrow our request to seek all documents (including emails) showing SM-E supervisors are aware of E relationship with another servicemember named SM-F, including all documents of such nature contained within SM-E personnel file. Stated simply, we believe the documents we seek are relevant to this litigation pursuant to Rule 26(b)(1) and we are willing to agree to a protective order governing the use and disclosure of such confidential records during this litigation.

Included with this letter is a draft of a Stipulation & Order (in essence a protective order) that would govern any confidential personnel and medical records disclosed during this litigation and protect against improper disclosure to the general public. Please let me know if you agree to this protective order and whether you have any revisions to the proposed Stipulation & Order.

Sincerely,



Sarah A. Dunne  
Legal Director

Enclosure

cc: James Lobsenz

**DRAFT**

Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN WASHINGTON  
AT TACOMA DIVISION

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
THE AIR FORCE; ET AL.,

Defendants.

No. C06-5195 RBL

STIPULATION AND ORDER TO  
PROTECT CONFIDENTIALITY OF  
DOCUMENTS AND INFORMATION

**I. STIPULATION**

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the parties, by and through their respective counsel of record, hereby stipulate that certain discovery material be treated as confidential and respectfully ask the Court enter an Order as follows:

1. The Complaint of Plaintiff involves Plaintiff's claims of unlawful discharge from United States Air Force in violation of the United States Constitution. Defendants deny these claims.

2. It is necessary for the parties to produce through discovery in this lawsuit confidential records, which are entitled to protection against improper disclosure to the general public.



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3. This Stipulation and Order, when and as approved by the Court, is intended to govern all productions of confidential information and documents pertaining to this litigation.

4. The following definitions shall apply to this Stipulation and Order:

4.1. "Party" or "parties" shall mean and refer to any party, Plaintiff or Defendants, in the above-captioned matter, including any counsel of record for any party signatory to this Stipulation;

4.2. "Confidential information" shall mean and refer to information a party in good faith believes contains sensitive personal information, such as medical or personnel records, and designates as "CONFIDENTIAL" as set forth below. Upon good cause shown and/or a compelling reason, the Court may determine that certain information the parties designate as "CONFIDENTIAL" shall be redacted or filed under seal, as set forth below.

4.3. "Qualified persons" shall mean and refer to:

(a) The Court and Court personnel, including stenographic reporters engaged in such proceedings as are necessarily incident to the preparation for trial and/or trial of this action;

(b) Counsel of record for any party signatory to this Stipulation, including all attorneys of that counsel's law firm or organization;

(c) Employees, paralegal assistants, stenographic, and clerical employees of counsel for the parties signatory to this Stipulation only when operating under the direct supervision of counsel;

(d) Plaintiff Margaret Witt;

1 (e) Defendants, and all managing agents and employees of the agency  
2 Defendant, who become involved in this litigation at the request of counsel of record and whose  
3 review of protected documents is specifically controlled by counsel;

4 (f) Potential witnesses who become involved in this litigation at the  
5 request of counsel of record and whose review of protected documents is specifically controlled  
6 by counsel;

7 (g) Experts or consultants employed by counsel of record for the  
8 purpose of assisting in these proceedings, preparation for trial, and/or trial of this action.

9 5. The parties shall designate records as confidential information by placing the  
10 following legend on any such record prior to production: "CONFIDENTIAL." In the event that  
11 any party inadvertently fails to designate a record as confidential information at the time of its  
12 production, they shall have five business days after discovery of such error to so designate the  
13 record.

14 6. All documents designated as confidential, and all information derived therefrom,  
15 shall be used solely for the purpose of preparing and litigating claims in this action and shall not  
16 be disclosed, directly or indirectly, or published in any medium by any party, or disseminated  
17 except to qualified persons.

18 7. Any party to this action may proffer into evidence confidential information at  
19 time of trial or by motion or otherwise and such confidential information may be introduced or  
20 shown to jurors and witnesses at the time of trial or on motion of any party, subject to normal  
21 evidentiary objections. In the event that any material designated as confidential is used in any  
22 court proceeding in this action, it shall not lose its confidential status through such use, and the  
23  
24



1 party using such confidential material shall maintain its confidentiality during such use, subject  
2 to the Court's guidance.

3 8. Any party filing with the Court confidential information must file a stipulation and  
4 proposed order to seal or motion to seal consistent with Local Civil Rule 5(g).

5 9. Any deposition testimony deemed to contain confidential information shall be  
6 brought within the protection of this Order by orally designating on the deposition record the  
7 protected portion or portions or, within ten (10) business days of receipt of the transcript, by  
8 designating such portions by page and line number.

9 10. The designating party shall have the burden of proof regarding the confidential  
10 nature of designated documents and/or information.

11 11. The parties shall resolve any disputes concerning the designation of any  
12 documents as "CONFIDENTIAL" as follows: the non-designating party shall challenge any  
13 designation of confidentiality by notifying the designating party in writing, specifically  
14 identifying the challenged item(s) as well as the basis for the challenge. If the parties cannot  
15 resolve the challenge after engaging in good-faith discussions, the designating party shall seek an  
16 order of the Court with respect to the challenged information, documents, or things designated as  
17 "CONFIDENTIAL." Both Plaintiff and Defendants will treat all materials or information  
18 designated as "CONFIDENTIAL" in accordance with the requirements of this Order for a  
19 reasonable period after notice of a challenge to confidentiality and during the pendency of related  
20 motions.

21 12. Disclosure of confidential information and confidential documents may be made  
22 only to "qualified persons" as defined above, with the following additional limitations:  
23  
24





1           14. Any party or person who knowingly violates this Order may be held in contempt  
2 of this Court. The Court and parties preserve the right to order or seek an award of other such  
3 relief as is appropriate for such disclosure.

4           15. Nothing in this Order shall preclude any party, its counsel, or any other person  
5 from disclosing or using, in any manner or for any purpose, any records or information not  
6 obtained in this action, if such records or information are lawfully obtained from a third party,  
7 even though the same records or information may have been produced in discovery as designated  
8 as "CONFIDENTIAL."

9           16. Nothing in this Order shall prohibit any party from seeking to modify any  
10 provision of this Stipulation and Order upon a showing of good cause.

11           17. Nothing in this Order shall be construed to prohibit a party from seeking an order  
12 compelling the production of confidential information in the future.

13           18. Nothing in this Order shall preclude a party from pursuing a further protective  
14 order or moving to seal any portion of the Court file at any time if such action is deemed  
15 necessary by either party.

16           19. No later than ninety (90) days after the judgment in this action becomes final and  
17 all rights of appeal are exhausted, Plaintiff and Defendants agree to destroy or return all  
18 confidential information, documents, and things and all copies of same to the counsel producing  
19 such information and documents. To the extent that the information is embodied in and is  
20 inseparable from attorney work product, the recipient may destroy the document or maintain  
21 confidentiality of such material in perpetuity.  
22  
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20. This Order is without prejudice to any party's right to demand or oppose discovery on any grounds permitted by the Federal Rules of Civil Procedure and is without prejudice to any other party's right to contest any such assertions.

21. Insofar as the provisions of this Order restrict the use of confidential information, this Stipulation and Order shall continue to be binding after the conclusion of this litigation.

Respectfully submitted,

DATED this \_\_\_ day of April, 2010.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

U.S. DEPARTMENT OF JUSTICE

By:

By:

Sarah A. Dunne, WSBA #34869  
Sher S. Kung, WSBA #42077  
705 Second Avenue, Suite 300  
Seattle, WA 98104  
Tel: (206) 624-2184  
dunne@aclu-wa.org  
skung@aclu-wa.org

PETER J. PHIPPS  
BRYAN R. DIEDERICH  
STEPHEN J. BUCKINGHAM  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001  
Tel: (202) 616-8482  
Fax: (202) 616-8470  
peter.phipps@usdoj.gov  
Stephen.Buckingham@usdoj.gov  
bryan.diederich@usdoj.gov

CARNEY BADLEY SPELLMAN

*Attorneys for Defendants*

James Lobsenz, WSBA #8787  
701 5th Ave Ste 3600  
Seattle, WA 98104-7010  
Tel. (206) 622-8020  
lobsenz@carneylaw.com

*Attorneys for Plaintiff*

II. ORDER

IT IS SO ORDERED.

DATED this \_\_\_\_\_ day of April, 2010.

Honorable Ronald B. Leighton  
United States District Judge

Presented by:

DATED this 23 day of April, 2010.

ACLU OF WASHINGTON FOUNDATION

U.S. DEPARTMENT OF JUSTICE

By: \_\_\_\_\_  
Sarah A. Dunne, WSBA #34869  
Sher S. Kung, WSBA #42077  
705 Second Avenue, Suite 300  
Seattle, WA 98104  
Tel: (206) 624-2184  
dunne@aclu-wa.org  
skung@aclu-wa.org

By: \_\_\_\_\_  
PETER J. PHIPPS  
BRYAN R. DIEDERICH  
STEPHEN J. BUCKINGHAM  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001  
Tel: (202) 616-8482  
Fax: (202) 616-8470  
peter.phipps@usdoj.gov  
Stephen.Buckingham@usdoj.gov  
bryan.diederich@usdoj.gov

CARNEY BADLEY SPELLMAN  
James Lobsenz, WSBA#8787  
701 5th Ave Ste 3600  
Seattle, WA 98104-7010  
Tel. (206) 622-8020  
lobsenz@carneylaw.com

*Attorneys for Defendants*

*Attorneys for Plaintiff*

EXHIBIT A

STATEMENT OF CONFIDENTIALITY

The undersigned acknowledges receipt of the attached STIPULATION AND ORDER  
TO PROTECT CONFIDENTIALITY OF DOCUMENTS AND INFORMATION

and that he/she has read and understands and agrees to be bound thereby.

Signed this \_\_\_\_ day of \_\_\_\_\_, 201\_\_.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

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# **EXHIBIT C**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

---

MAJOR MARGARET WITT, )  
 )  
Plaintiff, )  
 )  
vs. ) C065195RBL  
 )  
UNITED STATES DEPARTMENT OF )  
THE AIR FORCE; COLONEL MARY L.)  
WALKER, Commander 446th )  
Aeromedical Evacuation )  
Squadron, McChord Air Force )  
Base; and JAMES G. ROCHE, )  
SECRETARY, DEPARTMENT OF THE )  
AIR FORCE, )  
 )  
Defendants. )

---

DEPOSITION UPON ORAL EXAMINATION OF JILL ROBINSON

---

APPEARANCES:

FOR THE PLAINTIFF: JAMES E. LOBSENZ  
CARNEY, BADLEY, SPELLMAN  
701 FIFTH AVENUE, SUITE 3600  
SEATTLE, WASHINGTON 98104

FOR THE DEFENDANTS: PETER J. PHIPPS  
STEPHEN J. BUCKINGHAM  
U.S. DEPARTMENT OF JUSTICE  
20 MASSACHUSETTS AVENUE NW  
WASHINGTON, DC 20044

MARCH 16, 2010

1 but I don't -- I haven't seen since left.

2 Q Did you ever hear anyone in the unit complain that they  
3 were serving with believed to be ?

4 A No.

5 Q Did you ever hear anyone complain that they were serving  
6 with , assumed to be ?

7 A No.

8 Q No?

9 A Odd behaviors. was just a quirky and but there  
10 wasn't...

11 Q Let's see, did you say, did have a partner?

12 A I did not say. I don't know if did.

13 Q And after break up of marriage, do  
14 you know whether had a partner or not?

15 A No.

16 Q Now, aside from those three people,  
17 , there's some other people who  
18 are still in; is that correct?

19 A Yes.

20 Q Who you believe to be gay or lesbian; right?

21 A Correct.

22 Q First of all, just how many in numbers, other people is  
23 that group in your mind?

24 A Six.

25 Q Six. Okay. And of those six, how many are gay men and



1 with partner, or... Yeah.

2 Q How did you first learn about the alleged domestic  
3 violence incident?

4 A I saw bruises on SM-D arm.

5 Q Did then did you ask SM-D about that?

6 A Yes.

7 Q What did SM-D say?

8 A Myself and Leslie Pellegrini were in the office and  
9 asking D about it, and D stated that D fine,  
10 that D was fine. And bruises were there. And it came  
11 back to be centered on SM-C that had caused the  
12 bruises. And then from there, I believe what was  
13 transpired was there ended up being an exercise that  
14 went overseas to Hawaii that the majority of the  
15 squadron went on, and then at that point somebody had  
16 stated that I had gone in and up-channeled information  
17 related to SM-C up the chain of the Air Force. And  
18 SM-C approached me about it asking why. And I had no  
19 part of up-channeling of any information. So... There  
20 was an accusation made that I had turned C in, I had  
21 access to Col. Moore-Harbert's office while C was gone  
22 as the commander on this deployment and floated this  
23 upward.

24 Q So, is this right, SM-C basically approached you,  
25 approached you and accused you of outing C ?

1 A Yes.

2 Q You said that it began with a discussion I guess  
3 somewhere in the building in the office about bruises.  
4 At that point, did you know prior to that day that  
5 SM-C lived with SM-D ?

6 A Yes.

7 Q Prior to that day, did you believe SM-C and SM-D to  
8 be having a relationship?

9 A Yes.

10 Q And I take it that's something SM-C never told you;  
11 right? C never said, "I am ."?

12 A Correct.

13 Q And SM-D never said, "I am ."?

14 A Correct.

15 Q But it's something you believed?

16 A Correct.

17 Q Prior to this day that you saw the bruises on  
18 SM-D , did you know anything about how SM-C  
19 and SM-D had come to be together?

20 A I believe it was started as, I believe -- and this is  
21 where I can be wrong, that it was on a deployment  
22 overseas.

23 Q That they met?

24 A Yes.

25 Q Had you ever been to their house that they shared?



1 A Yes.

2 Q Had you been to their house prior to there domestic  
3 violence incident?

4 A Yes.

5 Q One thing I didn't understand is you mentioned something  
6 about an exercise that the whole unit was on, an  
7 exercise; is that what you said?

8 A Yes. There was -- I forgot the -- I don't remember the  
9 name of it. But it was over in Hawaii. And so  
10 Col. Moore-Harbert was over there along with many other  
11 people. And there was only a few people in the squadron  
12 back here just coming in to do their requirements.

13 Q So, I don't understand. What happened while you were in  
14 Hawaii that's related to this?

15 A I wasn't in Hawaii. I was at the squadron.

16 Q Okay.

17 A And so what came back was while I was at the squadron,  
18 SM-C was also there, and all doing our own independent  
19 things. And then I got a call while I was at home from  
20 C stating that information had gotten back to people  
21 in Hawaii that I had up-channeled information.

22 Q Oh, I see.

23 A And so, I -- Yeah, I spent a good couple hours talking  
24 to SM-C about it, and I don't...

25 Q So, at this point, when most of the unit is in Hawaii,

1 you and SM-C are not in Hawaii?

2 A Correct.

3 Q And when you're saying you spent a couple hours talking  
4 to SM-C, is that in person or over the phone?

5 A Over the phone.

6 Q I take it in this conversation SM-C is upset?

7 A Yes.

8 Q Angry at you?

9 A Maybe. Confused. Not understanding why I got  
10 information.

11 Q And because you're the executive assistant, you have  
12 access to the commander's desk; is that right?

13 A I do not.

14 Q You do not?

15 A I do not.

16 Q But SM-C thought you did?

17 A Correct. Or there was, there was a belief assumed that  
18 I did, therefore I was the one that was responsible for  
19 the information getting out there, and that I had  
20 up-channeled it.

21 Q So, you told C I take it, "I did not up-channel  
22 it. I did not tell Moore-Harbert anything"?

23 A I -- Right. I mean, Col. Moore-Harbert was over there,  
24 and I went through the whole explanation of my access,  
25 my inability to get access to that information. I don't

- 1 have access to her office. Don't have access to the  
2 information that C thought was forwarded upward.
- 3 Q So, you told SM-C this?
- 4 A Correct.
- 5 Q And what did C say?
- 6 A I felt as though I lost a friendship.
- 7 Q Did C say whether C believed you or not when you  
8 said, "I didn't do this"?
- 9 A No, I don't believe that C actually said anything. It  
10 was a matter of I was put in a place to convince.
- 11 Q Then what happened?
- 12 A I spoke to Col. Moore-Harbert about it when she got  
13 back --
- 14 Q What did --
- 15 A -- and asked her to explain it to C, that I don't  
16 have this information.
- 17 Q And was she willing to do that?
- 18 A Yes.
- 19 Q Did she do that?
- 20 A I believe she did.
- 21 Q What makes you say you believe that she spoke to --
- 22 A -- because I was there when the three of us talked.
- 23 Q So --
- 24 A -- And so it was explained in C office that while this  
25 allegation was there, that I wasn't the source, that I

1 didn't have access.

2 Q Did Col. Moore-Harbert explain what was the source of  
3 her information?

4 A No.

5 Q Did she mention the police report?

6 A The police report was part of what the source was, but I  
7 don't recall her actually explaining it to SM-C about  
8 the specific police report. I remember the  
9 conversations that when reports come through with  
10 domestic violence and the police officers arrive at the  
11 house and they're military, it still gets crossed over  
12 to the military side. So, that I recall is information,  
13 and so...

14 Q That information that the police share their reports  
15 with the military, was that information, did it come  
16 from Col. Moore-Harbert or someone else?

17 A I believe it came from Col. Moore-Harbert.

18 Q In this three-person conversation, did you form an  
19 opinion as to whether SM-C was convinced that you were  
20 not the person who outed C ?

21 A I don't think C ever be convinced.

22 Q You don't?

23 A (Non-verbal negative response.)

24 Q So, did it permanently damage the friendship?

25 A Uh-huh.

1 Q You said at one point, SM-A was the  
2 commander of the unit; correct?

3 A Correct.

4 Q A was succeeded by ; correct?

5 A Correct.

6 Q What's your understanding of why SM-A was  
7 replaced by ?

8 A I think it's multi-faceted.

9 Q Okay.

10 A I believe part of it may be time. I believe another  
11 component was A commanded the squadron and gave  
12 special privileges to A executive officer related to  
13 time and flexible hours and a perception that -- B was  
14 married. SM-B is B name. SM-B is  
15 married but would ride in with SM-A in the  
16 morning and take A home. They would go to lunches  
17 together. It was just, it was... It was a dirty  
18 feeling. It wasn't -- didn't seem appropriate. So,  
19 over time, it got to be suffocating for us to watch, so  
20 a group of us that were present from different AFCs went  
21 across to Command, across the street to 446, and I  
22 believe it was Col. Spencer at the time, and had a  
23 sit-down discussion about the perceptions and impact  
24 that it had and the angst it had on the squadron.

25 Q It did have an effect on the squadron?

# **EXHIBIT D**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

---

MAJOR MARGARET WITT, )

Plaintiff, )

vs. )

C065195RBL )

UNITED STATES DEPARTMENT OF )  
THE AIR FORCE; COLONEL MARY L. )  
WALKER, Commander 446th )  
Aeromedical Evacuation )  
Squadron, McChord Air Force )  
Base; and JAMES G. ROCHE, )  
SECRETARY, DEPARTMENT OF THE )  
AIR FORCE, )

Defendants. )

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DEPOSITION UPON ORAL EXAMINATION OF EDMOND HRIVNAK

---

APPEARANCES:

FOR THE PLAINTIFF:

JAMES E. LOBSENZ  
CARNEY, BADLEY, SPELLMAN  
701 FIFTH AVENUE, SUITE 3600  
SEATTLE, WASHINGTON 98104

FOR THE DEFENDANTS:

PETER J. PHIPPS  
STEPHEN J. BUCKINGHAM  
U.S. DEPARTMENT OF JUSTICE  
20 MASSACHUSETTS AVENUE NW  
WASHINGTON, DC 20044

MARCH 17, 2010



1 you're talking five years ago.

2 Q So, let's talk about May 2005 when you really left the  
3 unit.

4 A Yeah.

5 Q How many gays and lesbians combined?

6 A Well, I didn't keep count.

7 MR. PHIPPS: Objection. Foundation.

8 MR. LOBSENZ: That's okay.

9 A I didn't keep count, but I would guess six to eight gays  
10 and lesbians.

11 Q I'm not at this moment anyway, asking you for any names,  
12 okay?

13 A Okay.

14 Q But just at this moment what proportion of that six to  
15 eight or so, is it evenly divided men and women, do you  
16 think it's more one gender than the other, what?

17 A I would say, yeah, more female than male. I mean, we're  
18 a medical unit, so there's generally more females than  
19 males.

20 Q Okay.

21 A So, just the numbers?

22 Q Okay.

23 A And so I would say six female lesbians, two gay men.

24 Q Are any of the people that you believe are gay or  
25 lesbian now presently retired from the Air Force?



1 A and I deployed together in 2003.

2 Q I am informed, as of yesterday anyway that  
3 retired?

4 A Okay. That's news to me.

5 Q So, with that preface I'm going to ask you did you have  
6 a suspicion that was when you served  
7 with ?

8 A No. That's also news to me.

9 Q Did you at some point hear about some kind of argument,  
10 altercation between SM-C and  
11 SM-D ?

12 A Not firsthand.

13 Q What do you mean by "not firsthand"? Did you hear about  
14 it secondhand? I don't...

15 A Gosh, who told me? You know, I heard third person that  
16 they were dating and that they were living together.  
17 And the only reason that I would remember this is  
18 because SM-C deployed with me in 2003, and  
19 was on another med-evac crew. We were at the same  
20 squadron, and I know that, that that person was also  
21 over there in another squadron; that's how they met was  
22 on a deployment.

23 Q That person, meaning the person C dating?

24 A Yeah, the person C dating, because they had met --  
25 Because when I was told there was an altercation, they

1 were living together. "Gosh, I know that name  
2 somewhere." "Of course you do. That person was  
3 deployed when you guys were overseas." That's the only  
4 reason that sticks in the memory, otherwise I probably  
5 would have forgotten the whole conversation.

6 Q Make any difference to you that apparently SM-C  
7 was ?

8 A No, because C was in charge of a combat crew over  
9 there, and C actually evac'd more casualties and flew  
10 more combat missions than I did. And, in fact, after I  
11 left the 446 C volunteered for duty again on several  
12 occasions and now has cared for thousands of casualties  
13 from both wars and probably puts my military record to  
14 shame. And I personally know that the CCATT person that  
15 C was dating -- Critical Care Transport Team -- I had  
16 a particular patient that was critically short of  
17 breath. And I could not figure out in flight why this  
18 person was short of breath. And the CCATT team was on  
19 the aircraft with me. SM-D ?

20 Q Apparently you don't know the name ( SM-D but  
21 you know that there is this CCATT person that was  
22 dating --

23 A -- I'm having trouble. This was a long time ago. There  
24 was a lot of missions and a lot of casualties, but I  
25 remember going to SM-D and going to D team and

1 Q Okay. So, does this change? I mean, I think earlier  
2 today you said something about you didn't realize that  
3 Maj. Witt had brought a lawsuit. Is there a difference  
4 in your mind between a case and a lawsuit?

5 A See, I never made the connection between case, lawsuit.  
6 To me I heard "don't talk about a case;" I thought it  
7 was just Margie trying to get reinstated in the  
8 military. I never asked.

9 Q Do you know whether it was the commander or not who made  
10 this comment about don't talk about it?

11 A No, I honestly can't recall.

12 Q Did you say that you had served for some period of time  
13 under SM-A ?

14 A Correct.

15 Q Do you know why SM-A retired?

16 A No.

17 Q At some point in time, do you remember members of the  
18 unit making complaints about SM-A behavior  
19 with another member of the unit?

20 A Yeah. Actually found out after the fact, because  
21 several of the enlisted under my commanding op' section  
22 had made comments about, I'm not going to call it an  
23 affair because I have no firsthand knowledge. But under  
24 the UCMJ I would definitely call it an unprofessional  
25 relationship with SM-A and SM-B the

1 executive officer. It got to the point -- And, again,  
2 it was affecting my morale, too, their behavior with  
3 each other. I mean, they were, they were glued at the  
4 hip. I mean, constantly together. That it didn't  
5 matter if they were having an affair or not, that's  
6 irrelevant. Under the UCMJ, the perception of an  
7 unprofessional relationship is enough justification  
8 under the UCMJ that the superior officer should take  
9 action. So, after quite a bit of time of this, I went  
10 over and formally complained to the Op's group commander  
11 Col. Brian Spencer that we have a morale issue, esprit  
12 de corps issue, because of the conduct of our commander  
13 and executive officer. He asked me, "Are they having an  
14 affair?" I said, "I don't know; it doesn't matter if  
15 they're having an affair, it's an unprofessional  
16 relationship and affecting morale, and I feel like you  
17 need to do something about it." I had no idea that the  
18 enlisted had come in on their own and had talked to him  
19 also. I found this out four months after the fact that  
20 that had occurred.

21 Q So, he, Col. Spencer did not mention to you at that time  
22 that he'd already had complaints from enlisted  
23 personnel?

24 A No, I don't recall. I may have spoken to him first. I  
25 honestly don't know. Please don't ask me for a date,

# **EXHIBIT E**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

---

MAJOR MARGARET WITT, )  
 )  
 )  
 Plaintiff, )  
 )  
 v. ) No. C06-5195 RBL  
 )  
 UNITED STATES DEPARTMENT OF THE )  
 AIR FORCE, et al, )  
 )  
 Defendants. )

---

DEPOSITION UPON ORAL EXAMINATION OF  
COLONEL JANETTE MOORE-HARBERT

---

TAKEN AT  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104

FEBRUARY 25, 2010

THURSDAY, 9:00 A.M.

Reported by:

MARIE WHITE, CSR # WH-IT-EM-\*29906



1 crosses your mind to think this person probably is of  
2 this sexual orientation. In thirty-two years other  
3 than Major Witt have you ever suspected any other  
4 person in the Armed Forces to be gay or lesbian?

5 MR. PHIPPS: Objection, characterization and  
6 form.

7 A. I don't know.

8 Q. You don't remember ever suspecting any such person?

9 MR. PHIPPS: Objection, vague.

10 A. My focus is I focus on the fact that I try to keep  
11 myself professional. I am not interested in finding  
12 out.

13 Q. I am not asking if you're interested.

14 A. And from the standpoint of I don't lead myself down  
15 that line of trying to say I am going to suspect one  
16 way or the other.

17 Q. So are you saying that you actively prevent yourself  
18 from considering the possibility whenever you meet  
19 anyone, you just don't want to consider it?

20 A. I don't think that is an important avenue unless it  
21 brought to me specifically against that criteria that  
22 we discussed with the military.

23 Q. Okay.

24 A. That there is a concern.

25 Q. How about outside the military?

- 1 A. That's correct. It is a fraternization issue.
- 2 Q. Does it cross your mind that they were having a sexual  
3 relationship?
- 4 A. Did it cross my mind?
- 5 Q. Yes.
- 6 A. No, my focus was fraternization.
- 7 Q. It didn't cross your mind?
- 8 A. My focus was fraternization.
- 9 Q. Did it cross your mind?
- 10 A. My focus was fraternization.
- 11 Q. Did it cross your mind that they were having a sexual  
12 relationship?
- 13 I don't care what your focus was.
- 14 Did it cross your mind?
- 15 A. No, because my issue was fraternization.
- 16 Q. Okay, and did you learn how they came to be living  
17 together?
- 18 A. I had someone that I actually had initiation of what  
19 was called a command directive investigation on the  
20 issue of fraternization. And I don't know how they  
21 came together. The issue was the fact that the  
22 fraternization issue of the two of them renting, one  
23 renting from the other, the officer and the enlisted,  
24 was inappropriate.
- 25 Q. Didn't you learn that -- what is the name of the other



- 1 woman? It was SM-C and the other woman was?
- 2 A. SM-D .
- 3 Q. SM-D ?
- 4 A. That's correct?
- 5 Q. Did you learn how where SM-D had been
- 6 before she was with the 446th?
- 7 A. No.
- 8 Q. You never learned that?
- 9 A. She was -- she came into our squadron as a [REDACTED]
- 10 [REDACTED]. And the only thing in that I knew
- 11 was that she was also what is called a [REDACTED]
- 12 [REDACTED].
- 13 Q. You didn't learn why she came and transferred to the
- 14 446th?
- 15 A. No, I was unaware why she came, she came over and was
- 16 hired as the [REDACTED].
- 17 Q. So no one ever suggested to you that she came in order
- 18 to live with SM-C ?
- 19 A. Nope.
- 20 Q. Okay. Did you discipline either of these people?
- 21 A. Yes, I did.
- 22 Q. Who did you discipline?
- 23 A. I gave SM-C , it's SM-C now, a
- 24 Letter of Admonishment for the fraternization issue.
- 25 And SM-D got a Letter of Counseling.

1 A. He confirmed fraternization.

2 Q. That is not what I am asking.

3 A. I don't have the Police Report in front of me. He  
4 confirmed fraternization.

5 Q. Okay. To you that means that he confirmed they lived  
6 together in the same house?

7 A. He confirmed that an officer and an enlisted were  
8 living together.

9 Q. Anything else he confirmed?

10 A. Not in the CDI.

11 Q. Did he confirm they had a domestic incident?

12 A. I don't have the report in front of me to be able to  
13 refer to.

14 Q. Who did he interview?

15 MR. PHIPPS: Objection, foundation.

16 A. Again I don't have the report.

17 Q. You don't remember who he interviewed?

18 A. It more than likely would have been the parties  
19 involved. But I don't have it in front of me.

20 Q. Okay. And after you got the report did you at that  
21 point have any reason to suspect that either one of  
22 these women was a lesbian?

23 A. Suspect based off of the criteria that we talked about  
24 suspect?

25 Q. Suspect the way that I have consistently asked you the

- 1 question about suspect. Did it cross your mind?
- 2 A. And in this particular instance, I am using suspect  
3 based off of the criteria.
- 4 Q. Okay, but I'm not. I'm asking you after you read this  
5 report did it cross your mind?
- 6 A. I don't know.
- 7 Q. SM-C is still with the unit?
- 8 A. Yes, she is.
- 9 Q. Did this incident cause in your opinion any morale  
10 problems in the unit?
- 11 A. I don't know that the information went out in the unit  
12 regarding this. This is not something that we will  
13 discuss --
- 14 Q. You think nobody else knows it?
- 15 A. I have no idea. I don't go out and tell the unit of  
16 the incident?
- 17 Q. So you have no sense of whether anyone else in the unit  
18 knows about it?
- 19 A. That's correct.
- 20 Q. When you gave the Letter of Admonishment to  
21 SM-C was anyone else present?
- 22 A. There was. I can't remember who it was.
- 23 Q. Did you instruct whoever it was to keep it secret and  
24 not tell anyone?
- 25 A. Well, it's an action that occurs between a Commander

# **EXHIBIT F**

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MAJOR MARGARET WITT,  
  
Plaintiff,  
  
v.  
  
UNITED STATES DEPARTMENT OF  
THE AIR FORCE, et al.,  
  
Defendants.

No. C06-5195 RBL

**DEFENDANTS' OBJECTIONS AND  
RESPONSES TO PLAINTIFF'S  
SECOND SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND  
THINGS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendants the Department of the Air Force, Robert M. Gates, the Secretary of Defense, Michael B. Donley, the Secretary of the Air Force, and Colonel Janette Moore-Harbert, the commander of the 446th Aeromedical Evacuation Squadron, McChord Air Force Base, hereby submit the following objections and responses to Plaintiff's Second Set of Requests for Production of Documents and Things (the "Requests").

**GENERAL OBJECTIONS**

1. Defendants object to the definitions and instructions in the to the extent that they conflict with or purport to expand upon Defendants' obligations under the Federal Rules of Civil Procedure or the Civil Rules for the United States District Court for the Western District of



1 Defendants object to Request for Production No. 32 as overly broad and unduly  
2 burdensome insofar as it apparently seeks any communication of any sort, even a forwarded  
3 newspaper article, referring to studies about homosexuals in the military. Defendants object to  
4 Request for Production No. 32 as overly broad and unduly burdensome insofar as it is not limited  
5 as to time, potentially calling for the production of decades-old documents not germane to  
6 Plaintiff's circumstances. Defendants object to Request for Production No. 32 as calling for  
7 materials protected from disclosure by the deliberative process privilege. The military is in the  
8 process of conducting a review of the statute and regulations at issue in this matter. Requiring  
9 the Government to produce materials associated with that review impermissibly interferes with  
10 the Executive Branch's deliberative process. Finally, Defendants object to Request for  
11 Production No. 32 as overly broad and unduly burdensome insofar as it purports to require the  
12 production of documents maintained outside of the Office of the Secretary of Defense, the Office  
13 of the Secretary of the Air Force, or the 446th AES. Defendants further object to Request for  
14 Production No. 32 as unduly burdensome and overly broad to the extent that it seeks documents  
15 without limitation to time frame. Defendants object to producing documents dated prior to 2004.

16 Subject to, and without waiving, their objections, Defendants state that they have  
17 conducted a reasonable search for documents responsive to Request No. 32 and will produce  
18 responsive, non-privileged documents.

19 **Request for Production No. 33:** Produce SM-A personnel file and all  
20 documents pertaining to disciplinary action or admonishment concerning A relationship with  
21 SM-B.

22 **RESPONSE:** Defendants object to Request for Production No. 33 as calling for the production  
23 of materials protected from disclosure by the Privacy Act, 5 U.S.C. § 552a. Defendants further  
24 object to Request for Production No. 33 as unduly burdensome to the government as it is not  
25 reasonably calculated to lead to the discovery of admissible evidence. The actual or purported  
26 relationships of other members of Plaintiff's unit have no bearing on Plaintiff's effect on unit  
27 morale and cohesion, the sole facts at issue in this matter as remanded from the Ninth Circuit.

28 In light of these objections, Defendants decline to produce documents in response to

1 Request for Production No. 33.

2 **Request for Production No. 34:** Produce SM-B personnel file and all  
3 documents pertaining to discipline and admonishment regarding B relationship with SM-A

5 **RESPONSE:** Defendants object to Request for Production No. 34 as calling for the production  
6 of materials protected from disclosure by the Privacy Act, 5 U.S.C. § 552a. Defendants further  
7 object to Request for Production No. 34 as unduly burdensome to the government as it is not  
8 reasonably calculated to lead to the discovery of admissible evidence. The actual or purported  
9 relationships of other members of Plaintiff's unit have no bearing on Plaintiff's effect on unit  
10 morale and cohesion, the sole facts at issue in this matter as remanded from the Ninth Circuit.

11 In light of these objections, Defendants decline to produce documents in response to  
12 Request for Production No. 34.

13 **Request for Production No. 35:** Produce SM-C personnel file and all  
14 documents relating to C relationship with SM-D

15 **RESPONSE:** Defendants object to Request for Production No. 35 as calling for the production  
16 of materials protected from disclosure by the Privacy Act, 5 U.S.C. § 552a. Defendants further  
17 object to Request for Production No. 35 as unduly burdensome to the government as it is not  
18 reasonably calculated to lead to the discovery of admissible evidence. The actual or purported  
19 relationships of other members of Plaintiff's unit have no bearing on Plaintiff's effect on unit  
20 morale and cohesion, the sole facts at issue in this matter as remanded from the Ninth Circuit.

21 In light of these objections, Defendants decline to produce documents in response to  
22 Request for Production No. 35.

23 **Request for Production No. 36:** Produce SM-E personnel file and all  
24 documents pertaining to E relationship with SM-F

25 **RESPONSE:** Defendants object to Request for Production No. 36 as calling for the production  
26 of materials protected from disclosure by the Privacy Act, 5 U.S.C. § 552a. Defendants further  
27 object to Request for Production No. 36 as unduly burdensome to the government as it is not  
28 reasonably calculated to lead to the discovery of admissible evidence. The actual or purported



1 relationships of other members of Plaintiff's unit have no bearing on Plaintiff's effect on unit  
2 morale and cohesion, the sole facts at issue in this matter as remanded from the Ninth Circuit.

3 In light of these objections, Defendants decline to produce documents in response to  
4 Request for Production No. 36.

5 **Request for Production No. 37:** Produce the Unit Manning Documents for the 446th AES for  
6 the years 2002 through 2007.

7 Defendants state that they have conducted a reasonable search for documents responsive  
8 to Request No. 37 and will produce responsive, non-privileged documents.

9 **Request for Production No. 38:** Produce all documents created, collected, obtained, produced  
10 or maintained, concerning the 446th AES, by MSgt Aaron W. Maness, the unit historian and in  
11 his role as the unit historian, from 2000 to 2006.

12 **RESPONSE:** Defendants object to Request for Production No. 38 as overly broad, unduly  
13 burdensome and not reasonably calculated to lead to the discovery of admissible evidence. The  
14 history of 446th AES is not defined entirely by Plaintiff, her discharge, and the military's policy  
15 with respect to homosexuals. Defendants will limit their search for responsive documents to  
16 those relating to Plaintiff and/or her discharge.

17 Subject to, and without waiving, their objections, Defendants state that they have  
18 conducted a reasonable search for documents responsive to Request No. 38 and will produce  
19 responsive, non-privileged documents.

# **EXHIBIT G**

SARAH DUNNE  
LEGAL DIRECTOR

NANCY TALNER  
STAFF ATTORNEY

ROSE SPIDELL  
STAFF ATTORNEY  
FLOYD AND DELORES JONES  
FAMILY FELLOW

SHER KUNG  
PERKINS COIE FELLOW

LINDSEY SOFFES  
ROPES & GRAY FELLOW



May 11, 2010

*Via E-mail*

Bryan R. Diederich  
Peter J. Phipps  
Stephen J. Buckingham  
Civil Division, Federal Programs Branch  
U.S. Department of Justice  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001

AMERICAN CIVIL  
LIBERTIES UNION  
OF WASHINGTON  
FOUNDATION  
705 2ND AVENUE, 3RD FL.  
SEATTLE, WA 98104  
T/206.624.2184  
F/206.624.2190  
WWW.ACLU-WA.ORG

JESSE WING  
BOARD PRESIDENT

KATHLEEN TAYLOR  
EXECUTIVE DIRECTOR

Re: *Witt v. U.S. Air Force et al.*, No. C06-5195 (W.D. Wash.)

Dear Bryan and Steve,

Thank you for the productive phone conference yesterday concerning Defendants' Objections and Responses to Plaintiff's Second Set of Requests for Production of Documents and Things. I am writing to confirm our understanding of the agreements we reached yesterday relating to certain outstanding discovery matters.

*Requests Nos. 1-8, 10 and 11*

First, we asked about Defendants' ongoing efforts to respond to Requests for Production Nos. 1-8, 10 and 11. Our understanding is that you tasked an Information Technology (IT) group at Joint Base Lewis-McChord to run a search on the local server for the 446th AES for responsive documents, that some documents were found, and that DOJ will have an opportunity to review those documents and produce any responsive documents in the next week. We further understand that you have tasked an IT group located at a separate military base that has access to the 446th AES server at a different level to re-run similar searches to identify responsive documents. The target date for completion of this search is the end of this week with any responsive documents being produced shortly thereafter on a rolling basis. Finally, you also mentioned that because you suspect that reservists may not use their military email accounts regularly due to the infrequency of being on base, DOJ has tasked a JAG officer to call and speak with members directly to ask about their use of private email accounts. If members confirm that they do in fact use other services such as gmail or yahoo, the JAG officer will ask them to run a search with specific key terms in order to identify responsive documents. All responsive, non-privileged documents will be produced on a rolling basis, but no later than June 7.

Second, we asked whether Defendants, key decision makers (such as Generals Jumper, Dguinan or Sherrard), and 446th unit members with relevant knowledge



Letter to DOJ

May 11, 2010

Page 2

about Major Witt's suspension and discharge were asked to retain any files or documents concerning Major Witt's suspension and discharge via a litigation hold, either in writing or by oral instruction. Our understanding from you is that the Air Force has never given such an instruction either orally or in writing to Defendants, key decision makers, and 446th unit members with relevant knowledge about Major Witt's suspension and discharge. Thus, no litigation holds were put in place to prevent the destruction of documents that may have been relevant to Major Witt's suspension or discharge.

Based on your representation that DOJ is conducting a search for documents responsive to Requests Nos 1-8, 10 and 11 and will produce any remaining responsive documents on or before June 7, coupled with the absence of litigation holds, Plaintiff will not file a motion to compel with respect to these particular Requests because such a motion has no purpose if there are no documents remaining, either because they were destroyed or because they do not exist. Instead, Plaintiff may seek remedial relief relating to spoliation of evidence from the Court at a later date.

**Request Nos. 25 and 31**

We also discussed Request for Production No. 25 and you confirmed that Defendants have produced all responsive, non-privileged documents subject to any supplemental production pursuant to Rule 26(e). With respect to Request for Production No. 31, Defendants initially objected to the request for "all public statements made by the Defendants" concerning "U.S. Armed Forces personnel and sexual orientation or sexual conduct between two people of the same sex" on the basis that the materials are equally available to both parties because the documents were at some point in the public domain (either via a speech presented in a public forum or available on the Internet). To confirm whether Plaintiff has all responsive documents, I agreed that Plaintiff's counsel will search for any documents responsive to Request No. 31 available over the internet and produce the same; DOJ will contact the Department of Defense press office to confirm whether any responsive documents other than the ones produced by Plaintiff exist and if so, Defendants will produce those additional responsive documents.

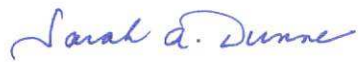
**Request Nos. 33-36**

With respect to Requests for Production Nos. 33-36, we understand that your client is unwilling to agree to a protective order, and objects to the production of members' personnel files, in whole or in part, based on the Privacy Act. Parties agree that Plaintiff will file a motion to compel on the above document requests, and will redact members' names in order to maintain privacy.

Letter to DOJ  
May 11, 2010  
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Please contact me if any of the above representations is inaccurate, or if you have any questions about the contents of the letter.

Sincerely,

A handwritten signature in blue ink that reads "Sarah A. Dunne". The signature is written in a cursive style with a large initial 'S'.

Sarah A. Dunne  
Legal Director

cc: James Lobsenz