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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, a Non-Profit Corporation; SWORDS TO PLOWSHARES: VETERANS RIGHTS ORGANIZATION, a California Non-Profit Corporation; BRUCE PRICE; FRANKLIN D. ROCHELLE; LARRY MEIROW; ERIC P. MUTH; DAVID C. DUFRANE; and WRAY C. FORREST, individually, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY; LEON PANETTA, Director of the Central Intelligence Agency; UNITED STATES DEPARTMENT OF DEFENSE; DR. ROBERT M. GATES, Secretary of Defense; UNITED STATES DEPARTMENT OF THE ARMY; PETE GEREN, United States Secretary of the Army; UNITED STATES OF AMERICA; and ERIC H. HOLDER, JR., Attorney General of the United States,

Defendants.

Case No. CV 09-0037-CW

**[PROPOSED] PROTECTIVE ORDER GOVERNING DISCOVERY**

1 1. PURPOSES AND LIMITATIONS

2 (i) Disclosure and discovery activity in this action are likely to involve  
3 production, by parties and non-parties, of confidential, proprietary, or private information for  
4 which special protection from public disclosure and from use for any purpose other than  
5 prosecuting this litigation would be warranted. In particular (but without limitation), this action is  
6 likely to involve production of information that is protected by the Privacy Act of 1974, 5 U.S.C.  
7 § 552a (“Privacy Act”) and or Health Insurance Portability and Accountability Act (“HIPAA”),  
8 42 U.S.C. § 201 (“HIPAA”). Although Plaintiffs are not technically bound by the Privacy Act  
9 respecting their production of documents or filings, Plaintiffs endeavor to protect private medical  
10 information related to the right of privacy concerning individual veterans that is likely to be  
11 produced during discovery or submitted to the Court, including but not limited to medical records  
12 or benefits claims files related to the Individual Plaintiffs and putative class members. Pursuant  
13 to 5 U.S.C. § 552a(b)(11), which permits disclosure of Privacy Act records by court order, 45  
14 C.F.R. § 164.512(e)(1)(i), which permits disclosure of protected health information by court  
15 order, and Rule 26(c) of the Federal Rules of Civil Procedure, which authorizes entry of an  
16 appropriate protective order, the Court hereby enters the following Protective Order Governing  
17 Discovery (“Protective Order”).

18 This Protective Order does not confer blanket protections on all disclosures or responses  
19 to discovery and the protection it affords extends only to the limited information or items that are  
20 entitled under the applicable legal principles to treatment as confidential. As set forth in Section  
21 10, below, this Protective Order creates no entitlement to file confidential information under seal;  
22 Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards  
23 that will be applied when a party seeks permission from the Court to file material under seal.

24 2. DEFINITIONS

25 2.1 Party: any party to this action, including all of its representatives, agents, and any  
26 present or former officers, directors, employees, investigators, consultants, retained Experts, and  
27 Outside Counsel (and their support staffs).

1           2.2    Disclosure or Discovery Material: all items or information, regardless of the  
2 medium or manner generated, stored, or maintained (including, among other things, testimony,  
3 declarations, transcripts, or tangible things) that are produced or generated in disclosures or  
4 responses to pre-trial discovery or other pre-trial proceedings in this matter. This Protective  
5 Order specifically excludes the production or use of material or testimony during trial. At least  
6 sixty days prior to the trial date, the parties shall meet and confer and submit any separate  
7 proposed protective order governing the treatment of confidential information during trial.

8           2.3    Receiving Party: a Party that receives Disclosure or Discovery Material from a  
9 Producing Party.

10          2.4    Producing Party: a Party or non-party that produces Disclosure or Discovery  
11 Material in this action.

12          2.5    Designating Party: a Party or non-party that designates information or items that it  
13 produces or includes in disclosures, responses to discovery requests, affidavits, declarations, or  
14 exhibits submitted to the Court as subject to the terms of the Protective Order.

15          2.6    Protected Material: all Covered Documents and Covered Information as defined  
16 in paragraph 3, below.

17          2.6    Outside Counsel: attorneys who are not employees of a Party but who represent or  
18 advise a Party in this action (as well as their support staffs). The Department of Justice attorneys  
19 designated as counsel of record in this action (and their support staff) shall be considered Outside  
20 Counsel for Defendants. The Morrison & Foerster attorneys designated as counsel of record in  
21 this action (and their support staff) shall be considered Outside Counsel for Plaintiffs.

22          2.7    House Counsel: attorneys who are employees of a Party (as well as their support  
23 staffs).

24          2.8    Counsel (without qualifier): Outside Counsel and House Counsel (as well as their  
25 support staffs).

26          2.9    Expert: a person with specialized knowledge or experience in a matter pertinent to  
27 the litigation who has been retained by a Party or its Counsel to serve as an expert witness or as a  
28 consultant in this action and who is not a past or a current employee of a Party or of a competitor

1 of a Party and who, at the time of retention, is not anticipated to become an employee of a Party  
2 or a competitor of a Party. This definition includes a professional jury or trial consultant retained  
3 in connection with this litigation.

4 2.10 Professional Vendors: persons or entities that provide litigation support services  
5 (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing,  
6 storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

7 3. DOCUMENTS AND INFORMATION COVERED BY THIS ORDER

8 (a) Except as provided in paragraph 12.3, this Protective Order shall govern  
9 the use and disclosure of any document or information in connection with this action that  
10 constitutes or reflects information derived from:

- 11 (i) a record subject to the requirements of the Privacy Act;
- 12 (ii) a medical record or other document containing information that  
13 relates to the right of privacy and/or past, present or future physical or mental health or condition  
14 (“Health Information”) of any person other than information specifically made public in the  
15 Complaint in this action;
- 16 (iii) references to personal information such as Social Security Numbers  
17 (“SSN”), Dates of Birth (“DOB”), telephone numbers, and financial account numbers;
- 18 (iv) any other information protected by constitutional or statutory rights  
19 to privacy, including but not limited to information protected from disclosure under the Health  
20 Insurance Portability and Accountability Act (“HIPAA”), 42 U.S.C. § 201;
- 21 (v) classified information and documents maintained by Defendants or  
22 other government entities; or
- 23 (vi) any other information (regardless of how generated, stored or  
24 maintained) or tangible things that qualify for protection under standards developed under  
25 Rule 26(c) of the Federal Rules of Civil Procedure.

26 (b) Documents that are reasonably determined to be within the scope of  
27 paragraph 3(a) by a Producing Party are hereinafter referred to as “Covered Documents.”  
28

1 Covered Documents shall be marked by the Producing Party in accordance with paragraph 4,  
2 below.

3 (c) Except as specified below, all information derived from Covered  
4 Documents, even if incorporated in another document or compilation or referred to in pre-trial  
5 testimony, shall be treated as “Covered Information.” Covered Information shall continue to be  
6 subject to the requirements of this Protective Order regardless of whether the document,  
7 compilation or pre-trial testimony containing information derived from a Covered Document has  
8 been marked in accordance with paragraph 4. Document summaries, statistical compilations, or  
9 other summaries of information covered by the Privacy Act, however, that do not contain  
10 information by which specific individuals, including Plaintiffs, can be identified (*e.g.*, by name,  
11 social security number, symbol, description or other form of personal identification) are not  
12 covered by this Protective Order.

#### 13 4. DESIGNATING PROTECTED MATERIAL

14 4.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party  
15 or non-party that designates information or items for protection under this Protective Order must  
16 take care to limit any such designation to specific material that qualifies under the appropriate  
17 standards. Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
18 shown to be clearly unjustified, or that have been made for an improper purpose (*e.g.*, to  
19 unnecessarily encumber or retard the case development process, or to impose unnecessary  
20 expenses and burdens on other parties), expose the Designating Party to sanctions.

21 4.2 If it comes to a Party’s or non-party’s attention that information or items are not  
22 designated for protection that should qualify for protection, that Party or non-party shall as soon  
23 as practicable notify the Producing Party in writing. The Producing Party shall be required to  
24 redesignate that information in accordance with paragraph 4.3 and reproduce the contested  
25 information or items at its own expense. Should the Producing Party disagree with the notifying  
26 Party or non-party regarding the propriety of the redesignation, the parties shall follow the  
27 procedures set forth in Paragraph 5 of this Protective Order. If it comes to a Party’s or a non-  
28 party’s attention that information or items that it designated for protection do not qualify for

1 protection, that Party or non-party must promptly notify all other parties that it is withdrawing the  
2 mistaken designation.

3 4.3 Manner and Timing of Designations. Except as otherwise provided in this  
4 Protective Order (*see, e.g.*, second paragraph of section 4.3(a), below), or as otherwise stipulated  
5 or ordered, material that qualifies for protection under this Protective Order must be clearly so  
6 designated before the material is disclosed or produced.

7 Designation in conformity with this Protective Order requires:

8 (a) for information in documentary form (apart from transcripts of depositions  
9 or other pretrial proceedings), that the Producing Party mark the document as  
10 “CONFIDENTIAL — PRODUCED SUBJECT TO PROTECTIVE ORDER,” or with a similar  
11 marking in a way that brings its attention to a reasonable examiner.

12 A Party or non-party that makes original documents or materials available for inspection  
13 need not designate them for protection until after the inspecting Party has indicated which  
14 material it would like copied and produced. After the inspecting Party has identified the  
15 documents it wants copied and produced, the Producing Party must determine which documents  
16 qualify for protection under this Order, then, before producing the specified documents, the  
17 Producing Party must mark those documents as “CONFIDENTIAL — PRODUCED SUBJECT  
18 TO PROTECTIVE ORDER,” or with a similar marking in a way that brings its attention to a  
19 reasonable examiner.

20 (b) for testimony given in deposition or in other pretrial proceedings, that the  
21 Party or non-party offering or sponsoring the testimony identify on the record, before the close of  
22 the deposition, hearing, or other proceeding, all protected testimony, and further specify any  
23 portions of the testimony that qualify for protection under paragraph 3(a) of this Protective Order.  
24 When it is impractical to identify separately each portion of testimony that is entitled to  
25 protection, and when it appears that substantial portions of the testimony may qualify for  
26 protection, the Party or non-party that sponsors, offers, or gives the testimony may invoke on the  
27 record (before the deposition or proceeding is concluded) a right to have up to 30 days from  
28 receipt of the deposition or hearing transcript to identify the specific portions of the testimony as

1 to which protection is sought. Only those portions of the testimony that are appropriately  
2 designated for protection within the 30 days shall be covered by the provisions of this Protective  
3 Order. As set forth in Paragraph 2.2, this Protective Order specifically excludes any material or  
4 testimony to be produced or used during trial and a separate order will govern trial testimony.

5 Transcript pages containing Protected Material must be separately bound by the court  
6 reporter, who must affix to the bottom of each such page the legend “CONFIDENTIAL –  
7 SUBJECT TO PROTECTIVE ORDER,” or with a similar marking in a way that brings its  
8 attention to a reasonable examiner, as instructed by the Party or non-party offering or sponsoring  
9 the witness or presenting the testimony.

10 (c) for any Covered Document whose medium makes marking the Covered  
11 Document impractical, such as computer data, that the Producing Party mark the diskette case and  
12 any accompanying paper or e-mail cover letter “CONFIDENTIAL — PRODUCED SUBJECT  
13 TO PROTECTIVE ORDER,” or with a similar marking in a way that brings its attention to a  
14 reasonable examiner. Designation and marking of Covered Documents in accordance with this  
15 paragraph shall be deemed effective to bring information contained in such documents under the  
16 protection of this Protective Order unless and until the Court orders otherwise.

17 (d) for information produced in some form other than documentary, and for  
18 other tangible items, that the Producing Party mark the exterior of the container(s) in which the  
19 information or item is stored with the legend “CONFIDENTIAL — PRODUCED SUBJECT TO  
20 PROTECTIVE ORDER,” or with a similar marking in a way that brings its attention to a  
21 reasonable examiner.

## 22 5. CHALLENGING CONFIDENTIALITY DESIGNATIONS

23 5.1 Available Challenges. The Receiving Party may challenge the Producing Party’s  
24 designation of material for protection or the Producing Party’s failure to designate material for  
25 protection under this Protective Order.

26 5.2 Timing of Challenges. Unless a prompt challenge to a Designating Party’s  
27 confidentiality designation, or to the Producing Party’s failure to designate material for protection  
28 under this Protective Order, is necessary to avoid foreseeable substantial unfairness, unnecessary

1 economic burdens, or a later significant disruption or delay of the litigation, a Party does not  
2 waive its right to challenge a confidentiality designation, or failure to designate, by electing not to  
3 mount a challenge promptly after the original designation is made.

4       5.3    Meet and Confer. A Party that elects to initiate a challenge to a Designating  
5 Party's confidentiality designation or lack thereof must do so in good faith and must begin the  
6 process by conferring with counsel for the Designating Party. In conferring, the challenging  
7 Party must explain the basis for its belief that the confidentiality designation or lack thereof was  
8 not proper and must give the Designating Party an opportunity to review the designated material,  
9 to reconsider the circumstances, and, if no change in designation is offered, to explain the basis  
10 for the chosen designation or lack thereof. A challenging Party may proceed to the next stage of  
11 the challenge process only if it has engaged in this meet and confer process first.

12       5.4    Judicial Intervention. A Party that elects to press a challenge to a confidentiality  
13 designation or lack thereof after considering the justification offered by the Designating Party  
14 may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule  
15 79-5, if applicable) that identifies the challenged material and sets forth in detail the basis for the  
16 challenge. Any such motion must be accompanied by a competent declaration that affirms that  
17 the movant has complied with the meet and confer requirements imposed in the preceding  
18 paragraph and that sets forth with specificity the justification for the confidentiality designation  
19 that was given by the Designating Party in the meet and confer dialogue. The burden of  
20 persuasion in any such challenge proceeding shall be on the Party advocating the inclusion of a  
21 confidentiality designation on Disclosure or Discovery Material. Until the Court rules on the  
22 Party's challenge, all parties shall provisionally treat the challenged material as subject to the  
23 protections of this Protective Order.

## 24       6.       DURATION

25       Even after the termination of this litigation, the confidentiality obligations imposed by this  
26 Protective Order shall remain in effect until a Designating Party agrees otherwise in writing or a  
27 court order otherwise directs.



1 7. DISCLOSURE AND USE OF PROTECTED MATERIAL

2 7.1 Disclosure of Protected Material. Defendants are authorized to release records  
3 protected under the Privacy Act, without obtaining prior written consent of the individuals to  
4 whom the records pertain, to the persons identified in subparagraphs (a)-(h), below. Except upon  
5 the prior written consent of the Producing Party originally designating Protected Material as  
6 containing information within the scope of paragraph 3(a) of this Order, or as otherwise expressly  
7 provided in this Order, Protected Material may be disclosed only to:

8 (a) Counsel in this action, as well as employees or consultants of said Counsel  
9 to whom it is reasonably necessary to disclose the information for this litigation and who have  
10 signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

11 (b) Certain designated representatives of Plaintiffs and Defendants (two  
12 representatives from each Defendant agency or Plaintiff non-profit corporation and three  
13 representatives of the Individual Plaintiffs) who have signed the “Agreement to Be Bound by  
14 Protective Order” (Exhibit A);

15 (c) Experts (as defined in this Protective Order) to whom disclosure is  
16 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by  
17 Protective Order” (Exhibit A);

18 (d) the Court and its personnel;

19 (e) court reporters, their staffs, and professional vendors to whom disclosure is  
20 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by  
21 Protective Order” (Exhibit A);

22 (f) during depositions or in preparation of affidavits or declarations for pretrial  
23 testimony, to fact witnesses in the action (and their counsel) to whom disclosure is reasonably  
24 necessary for this litigation and who have signed the “Agreement to Be Bound by Protective  
25 Order” (Exhibit A). As set forth in paragraph 4.3(b), pages of transcribed deposition testimony or  
26 exhibits to depositions that reveal Protected Material must be separately bound by the court  
27 reporter and may not be disclosed to anyone except as permitted under this Protective Order;

1 (g) the author or listed recipient of the document or the original source of the  
2 Protected Material; and

3 (h) the person to whom the Protected Material pertains.

4 7.2 Use of Protected Material. Except as provided in paragraph 12.3, unless otherwise  
5 ordered by a court or otherwise provided in this Order, Protected Material received by a Party  
6 during the course of this litigation may be used only in connection with the prosecution or  
7 defense of this litigation and for no other purpose and shall be marked by the Producing Party as  
8 “CONFIDENTIAL — PRODUCED SUBJECT TO PROTECTIVE ORDER,” or with a similar  
9 marking in a way that brings its attention to a reasonable examiner.

10 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER  
11 LITIGATION

12 If a Receiving Party is served with a subpoena or an order issued in other litigation that  
13 would compel disclosure of Protected Material, the Receiving Party must so notify the  
14 Designating Party, in writing (by electronic mail, if possible) immediately, and in no event more  
15 than what is reasonable with the exercise of due diligence, after receiving the subpoena or order.  
16 Such notification must include a copy of the subpoena or court order. The Receiving Party also  
17 must immediately inform in writing the party who caused the subpoena or order to issue in the  
18 other litigation that some or all the material covered by the subpoena or order is the subject of this  
19 Protective Order. In addition, the Receiving Party must deliver a copy of this Protective Order  
20 promptly to the party in the other action that caused the subpoena or order to issue. The purpose  
21 of imposing these duties is to alert the interested parties to the existence of this Protective Order  
22 and to afford the Designating Party in this case an opportunity to try to protect its confidentiality  
23 interests in the court from which the subpoena or order issued. The Designating Party shall bear  
24 the burdens and the expenses of seeking protection in that court of its confidential material – and  
25 nothing in these provisions should be construed as authorizing or encouraging a Receiving Party  
26 in this action to disobey a lawful directive from another court.

1 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

2 Except as provided in paragraph 12.3, if a Receiving Party learns that, by inadvertence or  
3 otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized  
4 under this Protective Order, the Receiving Party must immediately (a) notify in writing the  
5 Designating Party of the unauthorized disclosure(s), (b) use its best efforts to retrieve all copies of  
6 the Protected Material, (c) inform the person or persons to whom unauthorized disclosure(s) were  
7 made of all the terms of this Protective Order, if they are not already so informed, and (d) request  
8 such person or persons to execute the “Acknowledgment and Agreement to Be Bound” attached  
9 hereto as Exhibit A, if they have not already done so. Failure to designate any materials as  
10 subject to the terms of this Protective Order shall not constitute a waiver of any subsequent  
11 assertion that the materials are covered by this Protective Order. Unauthorized disclosure for an  
12 improper purpose may subject the disclosing party to sanctions.

13 10. FILING PROTECTED MATERIAL

14 Without written permission from the Designating Party or a court order secured after  
15 appropriate notice to all interested persons, a Party may not file in the public record in this action  
16 any Protected Material. A Party that seeks to file under seal any Protected Material must comply  
17 with Civil Local Rule 79-5.

18 11. FINAL DISPOSITION

19 Except as otherwise required by statute, including the Federal Records Act, 44 U.S.C. §  
20 3010, *et seq.*, or regulation, within ninety (90) days after the final termination of this action, each  
21 Receiving Party must return all Protected Material to the Producing Party, unless otherwise  
22 ordered or agreed in writing by the Producing Party. As used in this subdivision, “all Protected  
23 Material” includes all copies, abstracts, compilations, summaries or any other form of  
24 reproducing or capturing any of the Covered Documents or Covered Information. With  
25 permission in writing from the Designating Party, the Receiving Party may destroy some or all of  
26 the Protected Material instead of returning it. Whether the Protected Material is returned or  
27 destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if  
28 not the same person or entity, to the Designating Party) by the ninety (90) day deadline that

1 identifies (by category, where appropriate) all the Protected Material that was returned or  
2 destroyed and that affirms that the Receiving Party has not retained any copies, abstracts,  
3 compilations, summaries or other forms of reproducing or capturing any of the Covered  
4 Documents and Covered Information. Notwithstanding this provision, Counsel are entitled to  
5 retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda,  
6 correspondence or attorney work product, even if such materials contain Protected Material. Any  
7 such archival copies that contain or constitute Protective Material remain subject to this  
8 Protective Order as set forth in Section 6 (DURATION), above.

9 12. MISCELLANEOUS

10 12.1 Right to Further Relief. Nothing in this Protective Order abridges the right of any  
11 person to seek its modification by the Court in the future.

12 12.2 Right to Assert Other Objections. No Party waives any right it otherwise would  
13 have to object to disclosing or producing any information or item on any ground not addressed in  
14 this Protective Order. Similarly, no Party waives any right to object on any ground to the use in  
15 evidence of any of the material covered by this Protective Order.

16 12.3 No Effect on Existing Rights. The status of a document or information as  
17 Protected Material in this litigation shall not prevent disclosure or use as permitted by law or  
18 compelled by order of any court, or restrict a party's use outside of this litigation of materials  
19 produced by that Party. This Protective Order does not restrict individual Plaintiffs' use of  
20 Privacy-Act protected records pertaining to them. Nothing in this Protective Order shall be  
21 construed to confer rights on any third party, except to the extent that a third party produces  
22 documents or other information in this action subject to the terms of this Protective Order.

23  
24 IT IS SO ORDERED.

25  
26 DATED: August \_\_\_\_, 2010

27 \_\_\_\_\_  
JAMES LARSON  
UNITED STATES MAGISTRATE JUDGE

