EXHIBIT C

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May 18, 2010

Via Email & First Class Mail

Mr. Gordon P. Erspamer, Esq.
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105-2482

RE: *Vietnam Veterans of America, et al. v. CIA, et al.*, No. CV 09 0037-CW (N.D. Cal.)

Dear Mr. Erspamer:

I write in response to your letter of April 30, 2010 regarding Defendants' March 4, 2010 Response to Plaintiffs' First Request for Production of Documents ("RFPs") and April 19, 2010 Privilege Log.

As an initial and overarching matter, your letter fails to account for the Court's narrowing of the claims at issue. In the January 19, 2010 Order on Defendants' motion to dismiss or, in the alternative, for summary judgment, the Court identified three claims that will proceed: "the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to take a secrecy oath," (Order of Jan. 19, 2010 at 12-13); whether testing participants are entitled to notice of test details and associated health risks, and available documentation concerning the tests (*id.* at 14-16); and whether testing participants are entitled to Army-provided medical care (*id.* at 16-18). Thus, the questions before the Court are: Are the consent forms that servicemember testing participants signed lawful? Are servicemember testing participants entitled to notice of test details and associated health risks, and available documentation concerning the tests? And are servicemember testing participants entitled to Army-provided medical care? Where individual RFPs do not bear on the claims that remain before the Court and these questions, Defendants have objected for lack of relevance.

Defendants have produced over 14,000 pages of documents, many of which respond to requests that arguably do not bear on the issues that are before the Court.[1] Without waiving relevance and other applicable objections, in responding to Plaintiffs' first set of document requests Defendants have erred on the side of production in the interest of disclosure where information about the tests underlying this lawsuit is reasonably available. Where we have objected to a request in full or in part, we have done so because the request or, part of the request, is not reasonably calculated to lead to the discovery of admissible evidence bearing on the questions that, following the Court's ruling on Defendants' motion to dismiss, are at issue.

Your letter also asserts in several places that Plaintiffs in good faith have attempted to stipulate to entry of a protective order and suggests that Defendants have not reciprocated. However, the last communication the parties had regarding a possible protective order was a February 3, 2010 letter from your colleague Mr. Adriano Hrvatin in which he stated that "Plaintiffs will circulate a revised proposed protective order under separate cover." To date, we have not received a revised proposed protective order from Plaintiffs.

I respond to each of the specific sections of your letter below.

A. Consolidated Responses

Your letter asserts that each individual Defendant is obligated to prepare a separate set of responses to Plaintiffs' single set of document requests. However, it cites no authority in support of the assertion, nor am I aware of any such authority. Further, individual responses to each of Plaintiffs' 77 document requests from each of the eight named Defendants would be unduly burdensome. In response to Plaintiffs' document requests, each of the named Defendants has searched for documents it has reason to believe are in its possession and, subject to the objections made to specific requests, has produced the responsive documents that were found or referenced them in the privilege log. Defendants have thus satisfied their obligation under Fed. R. Civ. P. 34.

B. General Objections

Your letter incorrectly characterizes Defendants' general objections to Plaintiffs' document requests as "boilerplate." The objections set forth in the "General Objections" section of Defendants' Response apply to many of Plaintiffs' 77 document requests. Rather than copy the same objection each time that it applies to a particular request, Defendants have referred to the objection by number in responding to the particular request. Additionally, all of Defendants' general objections apply to each RFP in order to cover the possibility that documents might be identified in the course of document searches that Defendants did not reasonably anticipate in

[1] The Department of Veterans Affairs also produced over 14,000 pages in response to Plaintiffs' rule 45 subpoena.

formulating their written response to the RFPs. This use of general objections is not the sort of blanket use of general objections that *M2 Software, Inc. v. M2 Communications, L.L.C.*, 217 F.R.D. 499, 501 (C.D. Cal. 2003), and the cases it cites describe as improper. As stated above, Defendants have searched for documents they has reason to believe are in their possession, and subject to the objections to specific requests, Defendants have produced the documents that they have found or referenced them in the privilege log.

1. General Privileges Objections & Privilege Log

In response to your characterization of Defendants' objections based on the privileges listed in Defendants' General Objection No. 5, for the reasons identified above and immediately below, Defendants disagree that their assertion of the objection constitutes an improper boilerplate objection. With respect to your observation that some of Defendants' RFP objections do not identify a particular privilege, we observe that, as General Objection No. 5 specifies, Defendants' privilege log describes the documents that have been withheld as privileged or subject to attorney work product protection. Defendants have added one entry to the privilege log to identify the redactions to the compilation "Historical Documentation of the [CIA's] Role in the Human Subject Test Program at Edgewood Arsenal Research Laboratories" (Oct. 21, 1994) that was included with Defendants' initial disclosures. With that addition, the privilege log is complete as of this time. In accordance with continuing discovery obligations, Defendants will update the log if they become aware of additional documents that should be included. We further observe that, for many of the requests to which Defendants have objected on privilege grounds, Defendants have also asserted other objections, including relevance and undue burden. With respect to Privilege Log Entry Nos. 11 and 13, which are described as responsive to RFP No. 6 and for which your letter asserts that Defendants waived privilege-based objections, Defendants note that neither document is reasonably calculated to lead to the discovery of admissible evidence, which is one of the grounds on which Defendants objected to that RFP. Further, as set forth above, all of Defendants' General Objections, including General Objection No. 5, apply to each RFPs in order to cover instances where a document was identified in the course of a document search that, like Entry Nos. 11 and 13, Defendants reasonably did not anticipate in formulating their written responses to the RFPs. With respect to Entry No. 13, the Privacy Act's protections may not be waived by the omission of a document from a privilege log. *See, e.g., Byrd v. Reno*, 1998 WL 429676, at *5 (D.D.C. 1998). Thus, no waiver has occurred.

a. 50 U.S.C. § 403g

Your letter challenges Defendants' withholdings based on 50 U.S.C. § 403g and asserts that Defendants' privilege log does not indicate the reason that the withholdings are covered by that section. Defendants disagree. The privilege log's descriptions of the withheld documents make clear that they contain names of CIA personnel, which section 403g on its face protects.

The section provides an absolute disclosure exemption for the categories of information it enumerates, including the names of CIA personnel. 50 U.S.C. § 403g. Further, none of the withheld documents would appear relevant to any of the claims before the Court. Accordingly, in the absence of a reason to intrude on the interests protected by the statute, there is no basis and no reason for considering a protective order concerning information covered by 50 U.S.C. § 403g.

b. Congressional Approval

Your letter takes issue with the privilege log's reference to the need for Congressional approval with respect to certain documents. Those documents are no longer subject to such approval and the privilege log has been revised accordingly.

c. Deliberative Process

Your letter asserts that Defendants' withholdings based on the deliberative process privilege are improper in the absence of a formal claim by the head of the department with control over the requested information. Your assertion is incorrect. A formal invocation of privilege is not required in advance of a motion to compel. *See, e.g., In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 n.13 (D.D.C. 2005). Further, to require a department head to formally invoke an applicable privilege every time any discovery request in any lawsuit encompasses privileged information, and in advance of possible narrowing of the information sought through the parties' meet and confer, would impose an unreasonable burden on high-level agency officials who are charged with substantial responsibilities. *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which you cite, does not hold otherwise. Rather, it simply restates the requirements for formal invocation of the privilege. *Id.* at 1135. With respect to Privilege Log Entry No. 10's description of that withholding as "Recommendation redacted," you are incorrect in asserting that this description does not sufficiently describe the basis for withholding based on the deliberative process privilege. *See, e.g., In re Sealed Case*, 121 F.3d at 737 (recommendations are among materials protected by deliberative process privilege). Further, as we have produced a copy of the document with only the recommendation redacted, the applicability of the privilege should be clear from the context within which the recommendation is made.

d. Privacy Act

With regard to Defendants' objection to providing records covered by the Privacy Act that pertain to servicemembers who are not named plaintiffs, you indicate that release of such records pursuant to the Privacy Act's provision for disclosure of covered records to be disclosed "pursuant to the order of a court of competent jurisdiction," 5 U.S.C. § 552a(b)(11), would be appropriate. Defendants disagree. Test records of servicemembers who are not named Plaintiffs in this suit are not relevant to the three claims that remain before the Court. Indeed, none of the

remaining claims depends on the details of tests at all. Further, no class has been certified in this case. If any servicemember wishes to obtain a copy of his/her records and share them with you, that can be accomplished through a release authorization much like those that each of the named Plaintiffs has signed. Accordingly, there is no justification for impinging on the privacy interests protected by the Privacy Act. Regarding the parties' negotiations concerning a protective order, as set forth above, the last communication we received from Plaintiffs was Mr. Hrvatin's statement on February 3, 2000 that Plaintiffs would be sending us a revised proposed order, which we have not received. In any event, however, in the absence of any showing of relevance sufficient to outweigh the interests protected by the Privacy Act, a protective order allowing access to information covered by that Act would not be appropriate.

e. Attorney-Client Privilege & Work Product Doctrine

Your letter asserts that Defendants' privilege log does not sufficiently describe Entry Nos. 35 and 37 to show the basis for the attorney-client privilege and attorney work product protection with respect to those documents. Specifically, the privilege log does not include the author, recipient, and attorney and client associated with those two documents. That information, however, is protected by 403g, which is listed as an additional basis for withholding. Further, it does not appear in any event that those documents would be relevant to the claims before the Court. Indeed, Defendants objected to RFP No. 14 (to which entry nos. 35 and 37 are responsive) as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

f. HIPAA

Similar to your letter's assertions regarding Defendants' objections to producing third-party information covered by the Privacy Act, the letter suggests that a protective order allowing production of third-party information that is covered by Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is warranted in this case. Defendants disagree for the same reasons that we disagree that production of third-party Privacy Act- covered information would be appropriate. Moreover, health information covered by HIPAA is particularly sensitive and, given the lack of relevance to the claims before the Court, disclosure of such information concerning individuals who are not party to this case would be especially improper. Again, any servicemember wishing to access any HIPAA-covered information pertaining to him/her and share it with you can do so by completing the appropriate release authorization. With regard to a protective order, while we have not received a revised proposed protective order such as Mr. Hrvatin stated Plaintiffs would be sending, in the absence of justification for impinging on the privacy interests protected by HIPAA, a protective order allowing access to information covered by that statute would not be appropriate.

2. General State Secrets Objection

As set forth above and contrary to your letter's assertion, formal invocation of the state secrets privilege is not required before a motion to compel. Further, as you may be aware, a formal invocation of the state secrets privilege must be made by the head of the agency with control of the information. To require the relevant agency head to formally invoke the state secrets privilege every time a discovery request in any lawsuit encompasses classified information, and in advance of possible narrowing of the information relevant to the litigation through the parties' meet and confer, would be unduly burdensome. *See, e.g., Freeman v. Seligson*, 405 F.2d 1326, 1338 (D.C. Cir. 1968) ("matters of privilege can appropriately be deferred for definitive ruling until after the production demand has been adequately bolstered by a general showing of relevance and good cause, and at least the rough dimensions of the Secretary[of Agriculture's] burden have been set") (citing cases). Indeed, one of the functions of the meet-and-confer requirement of the Federal Rules and this Court's Local Rules is to narrow discovery disputes. Moreover, with the exception of redactions to the "Historical Documentation of the [CIA's] Role in the Human Subject Test Program at Edgewood Arsenal Research Laboratories" (Oct. 21, 1994), provided as part of Defendants' initial disclosures, Defendants have not identified materials covered by the state secrets privilege that are relevant to the issues before the Court or reasonably calculated to lead to the discovery of admissible evidence. In any event, a protective order allowing access to information protected by the state secrets privilege in a civil case such as this would not be appropriate. *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (authority to determine who may have access to classified information "is committed by law to the appropriate agency of the Executive Branch"); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983) (rule denying counsel access to classified information is "well settled"; "our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer . . . or to the coercive power of a protective order").

3. Definition of "Test Programs"

Your letter takes issue with Defendants' objection to the definition of "Test Programs" set forth in Plaintiffs' first set of document requests. "Test Programs" is defined to include, "without limitation," specifically identified test programs "and any other program of experimentation involving human testing of any substance." As we explained in General Objection 3, that definition is overly broad. It encompasses clinical trials and other human tests in any setting, under any circumstances, and within any time frame. Such an overly broad definition renders any corresponding requests unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence, as this definition has the potential to encompass clinical trials and other human tests in any setting, under any circumstances, and within any time frame. The unbounded search that Plaintiffs request would be extraordinarily time- and resource-consuming. That the definition of "Test Programs" of the document requests parallels

the definition of "test programs" in the Second Amended Complaint does not obligate Defendants to undertake that search. As described above, the Court has narrowed the scope of the case. In light of the discrete nature of the questions that remain before the Court – Are the consent forms that servicemember testing participants signed lawful? Are servicemember testing participants entitled notice of test details and associated health risks, and available documentation concerning the tests? And are servicemember testing participants entitled to Army-provided medical care? -- the extremely burdensome search necessitated by Plaintiffs' definition of "Test Programs" is not warranted or appropriate under the Federal Rules.

4. Burdensome Objections

Defendants have made a general objection to Plaintiffs' document requests insofar as they are unduly burdensome and not reasonably calculated to lead to discovery of admissible evidence, and have also objected to specific requests to the extent that they are unduly burdensome and not reasonably calculated to lead to discovery of admissible evidence. Notwithstanding those objections, Defendants have produced documents that they identified through reasonable search efforts in response to most of the RFPs your letter references. Contrary to your letter's suggestion, Defendants have produced rosters identifying the service personnel who participated in testing with a substituted ID number in response to RFP 11, a list of FOIA requests from persons who participated in test programs and other documents reflecting such requests, with names and other identifying information redacted, and copies of the named Plaintiffs' FOIA requests in response to RFP 13, and a large number of documents that identify the definitive technical name as well as the chemical make-up for each identifiable substance used in the tests at Edgewood and Ft. Detrick in response to RFP 60. *See* Productions of Nov. 11, 2009, Mar. 25, 2010 and Apr. 9, 2010 and accompanying cover letters identifying produced documents responsive to particular RFPs by Bates range.

5. Relevance Objections

As described above, Defendants have objected to Plaintiffs' requests insofar as they do not bear on the issues that are before the Court. Contrary to your letter's characterization, this objection is not boilerplate for the reasons previously set forth. Indeed, your letter recognizes that the objection is not made for every request. Rather, Defendants assert the objection where an RFP is not related to any of the issues remaining in the case and/or is broader than what can be reasonably calculated to lead to the discovery of admissible evidence. Nevertheless, we have produced documents in response to many of those RFPs. With respect to RFP No. 11, contrary to your letter's suggestion, we have produced service personnel rosters as described immediately above. For the reasons previously stated, providing the names of individuals who are not party to this lawsuit would not be appropriate. With respect to RFP No. 20, you assert that studies, reports, surveys or other analysis of the health effects of any exposure to substances used or administered in the test programs is "critical in establishing the harms suffered by the plaintiffs

as a result of their participation in the test programs." What, if any, harms the plaintiffs suffered as a result of test participation is not a question remaining before the Court. Nevertheless, Defendants have produced documents addressing health effects of exposure to substances that were tested at Edgewood Arsenal in response to RFP 20.

6. RFPs that Do Not Identify Any Documents

The requests to which we have objected on the ground that they do not identify any document on their face do not indicate that they seek documents. Nevertheless, subject to Defendants' objections, Defendants have produced the documents identified after reasonable search that respond to the subjects identified in those RFPs. Accordingly, our production is consistent with your letter's clarification that those RFPs sought only documents concerning the subjects identified in the individual RFPs.

7. Objection to Requests to the Extent They Concern Non- Military Servicemembers

As explained above, the allegations of the Second Amended Complaint are concerned with testing that involved military servicemembers. Defendants disagree that information concerning tests on prison inmates and non- military servicemembers is relevant to the questions that are before the Court or is reasonably calculated to lead to the discovery of admissible evidence. With respect to the example your letter provides of how such information could be relevant – any negative health effects associated with civilian tests could bear on Plaintiffs' health care needs – Defendants disagree that the details of the type of any health care that individual Plaintiffs might need bears on the claims before the Court. The Court identified whether there is a duty to provide care as a claim that may proceed. Exhaustive information regarding health effects that may be associated with sets of tests entirely separate from the tests that Plaintiffs underwent at Edgewood Arsenal is not reasonably calculated to lead to the discovery of admissible evidence. Even if there were some minimal relevance, it would be outweighed by the burden associated with gathering information about health effects associated with every human test involving any substance that Defendants may have conducted at any time.

C. Specific Burdensome and Vagueness Objections

Your letter challenges Defendants' objection of undue burden with respect to RFP Nos. 25, 29, 34, 51, 61, 63 and 64. Each of the undue burden objections, except as to RFP No. 51, is a partial objection. Defendants have objected to the extent that the request is unduly burdensome, and Defendants have produced documents responsive to the request that could be obtained without undue burden and expense.[2] Because those RFPs, with the exception of RFP No. 51,

[2] With respect to RFP No. 29, as Defendants' written responses reflect, Defendants did not identify any responsive documents concerning military servicemembers or veterans after reasonable search. With respect to RFP 64, please note that my March 25 cover letter

request "all documents" concerning events that began over 50 years ago, they could encompass a large volume of material that was created far in the past. Given the limited scope of the case and questions remaining before the Court as discussed above, it would be unduly burdensome for Defendants to search for and produce additional documents in response to those requests. With respect to RFP No. 51, which seeks consent forms pertaining to all experiments involving human subjects over the last five years, Defendants objected on relevance grounds, as well as undue burden and the other objections listed in Defendants' response. That RFP does not bear on the issues before the Court. Even if there were any minimal bearing, it would be outweighed by the burden and privacy invasions identified in Defendants' response. (And any responsive information that is covered by the states secrets privilege would unavailable for the reasons discussed above.)

Your letter asserts that Defendants have not explained why RFP Nos. 61 and 64 are vague and unclear. RFP No. 61 seeks "All DOCUMENTS that CONCERN the quantity of each nerve gas, psychochemical, toxic chemical and biological substance used in the TEST PROGAMS at the EDGEWOOD ARSENAL or any other project identified in the Complaint." The request does not indicate whether it seeks the total amount of each of substance involved in the tests or the amount administered to individual test subjects. Defendants nevertheless have produced responsive documents. Specifically, the copy of the chem-bio database that we produced identifies the amount (dose) of each substance given to the test subjects who have been entered in the database. RFP No. 64 seeks "All DOCUMENTS that CONCERN the toxicity of all nerve gas, psychochemical, toxic chemical and biological substance used in the TEST PROGRAMS at the EDGEWOOD ARSENAL or any other project identified in the Complaint." The term "toxicity" is not defined. Defendants nevertheless have produced in response general information about the toxicity of substances tested at Edgewood Arsenal. If you are able to provide a clear description of any further information that is sought by RFP Nos. 61 and 64 Defendants will of course consider the clarified requests. However, it would appear that information about quantity and toxicity beyond what Defendants have already produced would not bear on the claims that remain before the Court.

We look forward to the telephone conference regarding these issues that is scheduled for tomorrow, May 19.

Sincerely,

Caroline Lewis Wolverton

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inadvertently omitted referring to VVA 0024597-0024696 as responsive to RFP No. 64 as well as to RFP No. 57. Additionally, the cover letter's reference to that bates-range incorrectly begins VVA002497 instead of VVA 0024597. I apologize for those errors.