

EXHIBIT J

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Caroline Lewis Wolverton
Civil Division, Federal Programs Branch
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P.O. Box 883
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Re: *Vietnam Veterans of America, et al. v. CIA, et al.*, No. CV 09 0037-CW (N.D. Cal.)

Dear Ms. Wolverton:

I am writing regarding Defendants' March 4, 2010 response to Plaintiffs' First Set of Document Requests and April 19, 2010 privilege log. Defendants' responses and privilege log contain numerous deficiencies, which are outlined below for purposes of initiating the meet and confer process. We would like to schedule a telephone meeting to address these issues. Failing a negotiated solution, we will pursue relief from the court.

A. Failure to Provide Individual Responses for Each Defendant

As an initial matter, Defendants' responses are inadequate because they fail to provide individual responses on behalf of each Defendant. The state of knowledge and information for different agencies with different leadership and employees can hardly be identical. Plaintiffs' requests clearly specified that "each of the named defendants separately produce for inspection and copying" the documents set forth in the requests. Defendants' responses and the document production received to date do not delineate their connection to any of the named defendants.

B. Improper Use of General, Boilerplate Objections

Defendants' responses are also improper to the extent Defendants' object to nearly all of Plaintiffs' requests (all but RFP Nos. 1, 10) by incorporating by reference one or more "general objections," without specifying how the referenced objection relates to the particular request. General Objection No. 4, which states that Plaintiffs' requests are not reasonably calculated to lead to discovery of admissible evidence, is asserted 69 times. (All RFP Responses, *except* Nos. 1-5, 7, 10, 28.) Such blanket responses are improper. *M2*

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Software, Inc. v. M2 Communications, L.L.C., 217 F.R.D. 499, 501 (C.D. Cal. 2003). Please confirm that Defendants have conducted a thorough search and have produced all responsive, non-privileged documents and are not withholding anything based on one or more of the numbered general objections. Notwithstanding their impropriety, each of Defendants' general objections is discussed in more detail below.

1. General Privileges Objections & Privilege Log

Defendants' boilerplate privileges objections invoke the Privacy Act, the Health Insurance and Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations, the attorney-client privilege, the work product doctrine, the deliberative process privilege, or "any other applicable privilege or immunity." Defendants have incorporated this general objection by reference in 37 responses. (RFP Nos. 5, 9, 14, 19, 25, 27, 30, 31, 33, 35-40, 44, 45, 48-54, 58-60, 67, 69-77.)¹ In no instance have Defendants identified which privilege applies to a particular request for production. As noted above, such general boilerplate objections are insufficient to support a refusal to produce documents. *M2 Software, Inc.*, 217 F.R.D. at 501. Moreover, a party withholding documents based on privilege must "expressly make the claim," and "describe the nature of the documents" in a manner that "will enable other parties to assess the claim." Fed. R. Civ. P. 26(a)(5)(A). Defendants have referenced their general privileges objection in response to 37 requests, yet have provided a five-page privilege log with 45 entries that references a smaller, and different, set of requests.² Please confirm that Defendants' privilege log is complete, and that Defendants are not withholding any additional documents, including any documents that are responsive to RFP Nos. 1-4, 8-12, 15-19, 22-48, 50-66, 68-71, 73-77. The specific privileges claimed on Defendants' privilege log are each addressed below.

a. 403g

Defendants have withheld 29 documents based on "§ 403g."³ (Privilege Log entry nos. 14-31, 33, 35, 37-45.) These documents include, among other things, internal memoranda

¹ Defendants have specifically objected to four other requests on the grounds that they seek information protected by the Privacy Act, HIPAA, the HIPAA privacy Rule, and/or 45 C.F.R. parts 160 and 164. (RFP Nos. 11, 13, 34, 66)

² Defendants' privilege log indicates that they are withholding documents that are responsive to RFP No. 6. However, no privileges objections—not even the boilerplate objection—were asserted in Defendants' written responses to this request. Defendants' objections have therefore been waived, and the documents referenced in Privilege Log entry Nos. 11 and 13 must be produced.

³ This privilege was asserted in response to RFP Nos. 12, 14, 18, 24, 31, 33, 37, 54, 55, and 66, but Defendants appear to only be withholding documents responsive to RFP No. 14 based on 403g. Please confirm that there are no additional documents being withheld that are not on the privilege log.

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regarding FOIA searches and congressional correspondence. Under 50 U.S.C. § 403g, the CIA “shall be exempted from . . . the provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.” Defendant’s privilege log provides no indication that the withheld documents contain such information. Where 403g has been asserted in response to discovery requests, as opposed to FOIA requests, courts have required the government to provide detailed information supporting its claim of privilege and explaining the potential harms to national security from disclosure. *Linder v. Department of Defense*, 133 F.3d 17, 25 (D.C. Cir. 1998). No such showing has been made here. In addition, Plaintiffs have attempted in good faith to stipulate to the entry of a protective order which would protect state secrets and other sensitive information and resolve the Privacy Act issue. If Defendants continue to withhold relevant documents based on 403g, and refuse to enter into a protective order that would allow production, Plaintiffs will move the court for entry of a protective order and an order compelling production of these documents.

b. Requires Congressional Approval

Defendants have withheld 18 documents on the grounds that disclosure “requires Congressional approval to release.” (Privilege Log entry nos. 28-45.) This objection nowhere appears in the Federal Rules. Additionally, this objection does not appear in Defendants’ response to Plaintiffs’ First Request for Production, and has therefore been waived. Moreover, Defendants have failed to identify the statutory or other legal basis for the assertion of this privilege, and, to the extent it even exists, have not indicated whether Defendants have sought congressional authorization for the release of these documents. Therefore, these documents must be produced.

c. Deliberative Process

Defendants have withheld ten documents on the basis of the deliberative process privilege. (Privilege Log entry nos. 2-11.) Assertion of the deliberative process privilege requires: (1) a formal claim of privilege by the “head of the department” having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation of why it properly falls within the scope of the privilege. *Landry v. FDIC*, 204 F.3d 1125, 1135 (DC Cir. 2000). Defendants’ blanket assertions thus far are plainly inadequate. For example, no personal consideration by any officials is indicated, and one entry describes the document as “Recommendation redacted” (Privilege Log Entry No. 10), which is not even a “detailed explanation” let alone an explanation of why the privilege applies. Defendants must provide this support or foundation for its assertion of the deliberative process privilege for each document it has withheld, or produce these documents.

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d. Privacy Act

Defendants have withheld nine documents based on the Privacy Act, 7 U.S.C. § 552(a). (Privilege Log entry nos. 1, 12, 13, 30-34, and 36.) Documents subject to the Privacy Act are subject to disclosure “pursuant to the order of a court of competent jurisdiction.” 5 U.S.C. § 552a(b)(11). A court may order disclosure where the documents are relevant under FRCP 26(b)(1). *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987). These documents are relevant and directly related to the claims asserted in Plaintiffs’ Second Amended Complaint (“Complaint”). Moreover, as noted above, Plaintiffs have attempted to stipulate to the entry of a protective order which would protect information subject to the Privacy Act, including medical records and benefits claims of individual veterans. Defendants have refused to enter into a protective order. If Defendants continue to withhold relevant documents based on the Privacy Act, and refuse to enter into a protective order that would allow production, Plaintiffs will move the court for entry of a protective order and an order compelling production of all documents withheld on this basis.

e. Attorney-Client Privilege & Work Product Doctrine

Defendants have withheld two documents based on attorney-client privilege and the work product doctrine. (Privilege Log entry nos. 35, 37.) These documents are described as “internal [e-mail] correspondence concerning inquiry from Member of Congress.” These assertions of privilege are inadequate because, among other things, they fail to identify the author, recipient, or the attorney and client involved. *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. Cal. 1992). We request that Defendants produce these documents or, in the alternative, provide information sufficient to establish the privilege.

f. HIPAA

Defendants have withheld test records based on HIPAA. (Privilege Log Entry No. 12.) Disclosure of protected health information in the course of a judicial proceeding is permitted under circumstances designed to ensure that the information is disclosed only to those who need to know. 45 C.F.R. 164.512(e). As noted above, Plaintiffs have attempted in good faith to stipulate to the entry of a protective order which would adequately protect this information. If Defendants continue to withhold relevant documents based on HIPAA, and refuse to enter into a protective order that would allow production, Plaintiffs will move the court for entry of a protective order and an order compelling production of these documents under 45 C.F.R. 164.512(e)(1)(i). Failing that results in a solution, redaction of identifying information, as opposed to wholesale withholding of documents, would be an alternative.

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2. General State Secrets Objection

Defendants have objected to 60 out of 77 of Plaintiffs' requests to the extent they seek information that is classified pursuant to EO 12,958 and subject to the "state secrets" privilege. (RFP Nos. 7-9, 12, 15, 16, 18-27, 29-34, 36-40, 44-67, 69-77.) Additionally, Defendants object to RFP No. 1 "on the ground that it is subject to the state secrets privilege." However, the privilege log does not list any documents withheld on the basis of the states secrets privilege.⁴ Please confirm no documents have been withheld.

Moreover, in order to claim privilege against discovery of military and state secrets, Defendants must make a formal request "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). No such claim has been made here. In addition, as noted above, Plaintiffs have attempted to stipulate to the entry of a protective order that would protect states secrets and other sensitive information. If Defendants are actually withholding documents based on state secrets privilege, and continue to refuse to enter into a protective order that would allow production, Plaintiffs will move the court for entry of a protective order and an order compelling production of all documents withheld on this basis.

3. General Objection to Definition of "Test Programs"

Defendants have objected to 39 of Plaintiffs' requests on the ground that the definition of "Test Programs" is overly broad (RFP Nos. 3-6, 8, 11-13, 15, 17-27, 29, 34, 36, 44-46, 48-50, 56, 58-66), and have limited their response to testing involving service members conducted in conjunction with Edgewood Arsenal and Fort Ord. This limitation is not acceptable. Plaintiffs' definition of "test programs" almost exactly parallels the description of the test programs in the Complaint. (Complaint ¶¶ 100-155.) Moreover, Defendants conducted testing at other sites which may have direct bearing on this case. For example, the Defendants contracted with outside researchers at hospitals, universities, and prisons to conduct additional human tests of chemical and biological substances; and MKULTRA testing was conducted at Edgewood Arsenal together with other sites such as Fort McClellan, Alabama, Fort Benning, Georgia, and Fort Bragg, North Carolina. (Complaint ¶¶ 9, 115.) To the extent such tests involved the same substances or types of substances as those used on the individual or putative class plaintiffs, documents related to the tests will be relevant to this litigation. Please confirm that Defendants will produce all documents responsive to these requests.

⁴ An initial review of Defendants' production indicates, however, that several documents have been produced in redacted form, likely based on outdated claims of privilege. Defendants should be prepared to justify all redactions.

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4. General Burdensome Objection

Defendants have objected to 21 requests as “unduly burdensome” and “not reasonably calculated to lead to the discovery of admissible evidence” to the extent that they seek production of records that are not in word-searchable format. (RFP Nos. 9, 11-14, 24, 28, 59-65, 67, 69, 72, 73, 75-77.) These requests are directly tied to claims asserted in the Complaint. They include requests for rosters and other documents identifying personnel involved in the test programs (RFP #11); FOIA requests, and other documents received from the participants in the test programs (RFP #13); and documents that concern the definitive technical name of substances used in the test programs (RFP #60). In order to meaningfully meet and confer on Defendants’ burdensome objection, please identify, by category and type, the sources containing potentially responsive information that you are neither searching nor producing. Fed. R. Civ. Pr. 26 2006 Notes of Advisory Committee ¶ 5.

5. General Relevance Objections

Defendants have objected that 70 out of 77 requests are not reasonably calculated to lead to the discovery of admissible evidence. (All RFP Responses, *except* Nos. 1-2, 4-5, 7, 10, 28.) Defendants have also objected to 34 requests based specifically on relevance. (RFP Nos. 8, 12, 14, 22, 24, 27, 31-33, 35, 37-43, 47-48, 51-55, 57, 58, 62, 65, 68, 69-73.) As noted above, such boilerplate objections are improper. *M2 Software, Inc.*, 217 F.R.D. at 501. Moreover, these requests clearly seek relevant information. For example, RFP No. 11 requests rosters, lists, or other documents identifying service personnel who were involved in the test programs. Testimony by service personnel is directly relevant to issues such as the types of substances used in the test programs, the health effects of these substances, and the plaintiffs’ consent to participate in the test programs. RFP No. 20 requests studies, reports, surveys or other analysis of the health effects of any exposure to substances used or administered in the test programs, information that is critical in establishing the harms suffered by the plaintiffs as a result of their participation in the test programs. Please confirm that Defendants are not withholding any documents based on these objections.

6. General Objection that RFPs Do Not Identify Any Documents.

Defendants have objected to fourteen requests on the grounds that they do not identify any documents. (RFP Nos. 3, 5, 7-9, 15, 16, 18, 29, 37-40, 50.) Defendants appear to have overlooked the preamble to all of Plaintiffs’ requests, which asks for “ALL DOCUMENTS CONCERNING any one or more of the following.” Please provide responses to these requests and confirm that Defendants are not actually withholding any documents based on this objection.

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7. General Objection Limiting RFPs to Military Service-Members

Defendants have objected to four requests on the grounds that they are overbroad as they are not limited to military service-members. (RFP Nos. 7, 15, 16, 29.) For example, Defendants objected to RFP No. 16, which requests all documents concerning “[t]he planning, financial support for, conduct of, and results of mind control or behavior modification experiments upon inmates at the Vacaville Medical Facility and/or Prison.” Even if they do not directly involve experimentation on military personnel, such documents are relevant. For example, documents explaining the negative health effects of the civilian experiment human testing program are obviously relevant to the health consequences of exposure and to the Plaintiffs’ health care needs and may lead to the discovery of other critical documents. Please confirm that Defendants will expand their production of documents accordingly.

B. Improper Specific Burdensome & Vagueness Objections

Defendants have objected that seven of Plaintiffs’ requests are unduly burdensome. (RFP Nos. 25, 29, 34, 51, 61, 63, 64.) For example, Defendants object that RFP No. 25 is unduly burdensome “insofar as it encompasses numerous papers, reports, or manuscripts prepared during the Cold War timeframe which began over 50 years ago,” that RFP No. 34 is “unduly burdensome insofar as it encompasses documents pertaining to several thousand individuals,” and that RFP No. 61 is unduly burdensome “as it encompasses the quantity of each administration of each nerve gas, psychochemical, toxic chemical and biological substance used.” Plaintiffs believe, however, that these requests are appropriate given the vast scope of Defendants’ program of human experimentation. For example, between 1950 and 1975, at least 6,720 soldiers were used as human guinea pigs for experiments involving exposure to at least 254 toxic biological and chemical warfare agents at Edgewood Arsenal alone. (Complaint ¶ 108.) Please confirm whether Defendants have withheld any documents, or failed to search potential sources of documents, based on these objections.

Defendants have also objected to RFP Nos. 61 and 64 as vague and unclear, yet have not explained why they are vague or unclear.⁵ RFP No. 61 requests “[a]ll DOCUMENTS that CONCERN the quantity of each 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.” RFP No. 64 requests 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.

⁵ Defendants have also objected to RFP No. 7 on the grounds that the term “septal implant” is not defined. For the purposes of this request for production, “septal implant” may be defined as any electrical device implanted in any region of the human brain for any purpose, including, but not limited to activating human behavior by remote means, creating feelings and emotions, and testing drugs.

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Although these requests appear straight-forward, Plaintiffs are available to meet and confer with Defendants to explain these requests for production.

Please confirm in no later than 10 days that Defendants will agree to comply with these requests. I am also available to discuss any of the above over the phone. If the parties are unable to reach an agreement on any of the above, including the entry of a suitable protective order, Plaintiffs are prepared to submit the matter to the Court for resolution. Because of the large scale of non-compliance and the raising of spurious objections, I also wanted to warn you that we will soon reach a point where sanctions will be sought.

Very truly yours,

A handwritten signature in black ink that reads "Gordon P. Erspamer". The signature is written in a cursive, flowing style.

Gordon P. Erspamer

cc: Kimberly L. Herb, Esq. (by e-mail)