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17
 18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 OAKLAND DIVISION

21 VIETNAM VETERANS OF AMERICA, *et al.*,
 22 Plaintiffs,
 23 v.
 24 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 25 Defendants.

Case No. CV 09-0037-CW

**DEFENDANTS' RESPONSE TO
 PLAINTIFFS' MOTION FOR A
 PROTECTIVE ORDER**

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1 In their Motion for Protective Order and to Overrule Objections (dkt. # 121), Plaintiffs
2 suggest that Defendants are unwilling to work with them to produce a protective order. Dkt. #121
3 at 4-5. This characterization is simply not true. Defendants are willing to discuss an appropriate
4 protective order, but Plaintiffs have repeatedly insisted on non-standard terms which would
5 require Defendants to violate their statutory obligations. Nevertheless, Defendants are willing to
6 have this Court enter an appropriate Protective Order, which will allow Plaintiffs to access third-
7 party information while also protecting the rights and obligations of both Defendants and third-
8 parties. Defendants have been diligently working in good faith to reach agreement on a
9 Protective Order despite the obstacles presented by Plaintiffs' insistence on untenable terms.¹

11 In response to Plaintiffs' Proposed Protective Order (dkt. #122), Defendants submit their
12 own Proposed Protective Order, attached here as Exhibit B. Defendants' Proposed Protective
13 Order is based on Plaintiffs' own proposal, with additions or deletions reflecting Defendants'
14 legal obligations and usual practice. In addition to being incorporated into Exhibit B, Defendants
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18 ¹ In fact, these efforts are supported by Plaintiffs' own recounting of the discussions regarding the
19 Protective Order. As Plaintiffs relate, the parties initially discussed a possible protective order
20 concerning third-party information in 2009. Defendants determined that because of the extreme
21 sensitivity of the third-party information at issue, including medical information, disclosure of
22 such information would not be appropriate, at least in advance of certification of a class.
23 As Daniel Vecchio, counsel for Plaintiffs, explains in his declaration (dkt. #123), the parties have
24 been engaged in negotiations on this topic, including a lengthy meet-and-confer on June 30,
25 2010. Dkt. # 123 ¶ 6. Following that meet-and-confer, on July 26, 2010, Plaintiffs sent
26 Defendants a proposed Protective Order. *Id.* at ¶¶ 8-9. After consulting with our clients, on July
27 30, 2010, counsel for Defendants sent Plaintiffs a letter responding to the proposed Protective
28 Order, which asked for clarification on whether Plaintiffs would agree to limit the organizational
Plaintiffs' use of and access to any protected or privileged information. *Id.* at ¶¶ 10-11. On
August 4, 2010, Defendants received correspondence from Plaintiffs' counsel explaining that the
only limitations they could accept were already incorporated into the recent draft. *See* Letter
from Daniel Vecchio, attached as Exhibit A. This letter was, prior to Plaintiffs' recent Motion,
the last piece of correspondence or negotiation about the Protective Order.

1 have noted their substantive disagreements and proposed additions or deletions as necessary in
2 this response.

3 There are eight substantive changes to Plaintiffs' Proposed Protective Order:² the first
4 excludes classified information from this Protective Order, pursuant to Defendants' legal
5 obligation. The second adds language to cover additional statutory protection, and to exclude
6 information that cannot be revealed under this Protective Order. The third addresses the
7 protection of non-classified information that is not publicly available. The fourth and fifth
8 propose alterations to Plaintiffs' Proposed Protective Order. The sixth adds language regarding
9 the safekeeping of sensitive information. The seventh removes limitations for Defendants and
10 Defendants' counsel to access covered information. Finally, Defendants propose to add
11 language at the end of the Protective Order to protect against liability from unauthorized
12 disclosures and to delineate the bounds of discovery. These edits are incorporated into the
13 proposed Protective Order, attached as Exhibit B, and explained in greater detail below.

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16 **I. Section 3(v) of Plaintiffs' Proposed Protective Order, addressing classified**
17 **information, must be deleted.**

18 Section 3(v) of Plaintiffs' proposed Protective Order provides that "[e]xcept as provided
19 in paragraph 12.3, this Protective Order shall govern the use and disclosure of any document or
20 information in connection with this action that constitutes or reflects information derived from:
21 . . (v) classified information and documents maintained by Defendants or other government
22 entities; or. . ."

23
24 _____
25 ² Defendants have also included a non-substantive change in their Proposed Protective Order,
26 which is to change the designation of material covered by this Protective Order from
27 CONFIDENTIAL to COVERED, as reflected in Sections 4.3(a), (b), (c), (d), 7.2, and 11.
28 Because "confidential" refers to a level of classification under Executive Order 13526 (relating to
national security information), Defendants propose the term "Covered" to avoid confusion.

1 A Protective Order cannot include this provision. Executive Order 13526, section 4.1(a),
2 allows a person access to classified information only when the person: (1) has an appropriate
3 security clearance, (2) has signed an approved nondisclosure agreement, and (3) has a need to
4 know. Plaintiffs and their counsel meet none of these requirements. Indeed, Plaintiffs cannot
5 meet the “need to know” element, which requires that the Executive Branch determine that a
6 person “requires access to specific classified information in order to perform or assist in a lawful
7 and authorized governmental function.” E.O. 13526 § 6.1(dd).

9 Although this case may implicate classified information, Plaintiffs cannot gain access to
10 such information through a Protective Order. First, case law makes it clear that, this Court lacks
11 authority to order the Government to grant access to classified information. Indeed, the authority
12 to determine who may have access to classified information “is committed by law to the
13 appropriate agency of the Executive Branch.” *See Department of the Navy v. Egan*, 484 U.S.
14 518, 527 (1988); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). “[T]he courts of
15 appeals have consistently held that under *Egan*, the federal courts may not review security
16 clearance decisions on the merits.” *Stehney v. Perry*, 101 F.3d 925, 932 (3rd Cir. 1996)
17 (collecting cases). As the Supreme Court explained in *Egan*,

19 For reasons . . . too obvious to call for enlarged discussion, the protection of
20 classified information must be committed to the broad discretion of the agency
21 responsible, *and this must include broad discretion to determine who may have*
22 *access to it*. Certainly, it is not reasonably possible for an outside nonexpert body
23 to review the substance of such a judgment and to decide whether the agency
should have been able to make the necessary affirmative prediction with
confidence.

24 *Id.* at 529 (internal quotation and citation omitted) (emphasis added).

25 In decisions about who may have access to classified information, a federal court is just
26 such “an outside nonexpert body,” *Dorfmont*, 913 F.2d at 1401, and is ill-equipped to
27 secondguess the Executive Branch. Agency regulations require the Executive to grant access
28

1 only where it is “clearly consistent with the interests of the national security,” *Egan*, 484 U.S. at
2 528, and agencies must also “ensure that the number of persons granted access to classified
3 information is limited to the minimum consistent with operational and security requirements.”
4 E.O. 13526 § 5.4(d)(5)(B). These are judgments that federal courts are not entrusted to make. “It
5 is the responsibility of the [Executive], not that of the judiciary, to weigh the variety of complex
6 and subtle factors in determining whether disclosure of information may lead to an unacceptable
7 risk” *CIA v. Sims*, 471 U.S. 159, 180 (1985);. A federal court may not “perform[] its own
8 calculus as to whether or not harm to the national security or to intelligence sources and methods
9 would result from disclosure,” *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990), but must
10 leave such a calculus to the Executive Branch.
11

12 Further, the fact that a party is engaged in litigation that may implicate classified
13 information does not change the requirements for access to classified information. Courts have
14 repeatedly held that private parties and counsel are not entitled to access classified information.
15 *See e.g. Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (denying private counsel access to
16 classified information in states secrets case); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir.
17 1983) (explaining that the rule denying counsel access to classified information is “well settled”
18 and that “our nation’s security is too important to be entrusted to the good faith and
19 circumspection of a litigant’s lawyer . . . or to the coercive power of a protective order.”); *Halkin*
20 *v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (rejecting argument that counsel should have been
21 permitted to participate in the *in camera* proceedings); *see also Stillman v. Cent. Intelligence*
22 *Agency*, 319 F.3d 546, 548 (D.C. Cir. 2003) (holding that district court abused its discretion in
23 finding First Amendment right for plaintiffs’ attorney to receive access to classified information
24 to assist the court in resolving the plaintiffs’ challenge to pre-publication classification review).
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1 Here, Plaintiffs and their counsel do not meet the criteria necessary for access to classified
2 information. This Protective Order cannot purport to grant them that access.

3 **II. Section 1 and Section 3 must refer to information under 38 U.S.C. § 5701,**
4 **which will be included under the Proposed Protective Order, and 38 U.S.C.**
5 **§ 7332, which must be excluded from disclosure under the Order.**

6 Defendants propose to add 38 U.S.C. § 5701, which refers to records kept by the
7 Department of Veterans Affairs (“VA”), to the list of statutory protections that may be implicated
8 by discovery sought by Plaintiffs. *See* exhibit A, section 1. Plaintiffs have sought discovery from
9 VA under Federal Rule of Civil Procedure 45 and, indeed, seek to add VA as a defendant in this
10 action. *See* dkt #87. Section 5701 requires that all VA files and records related to a claim must
11 be protected as confidential and privileged and cannot be disclosed except in limited
12 circumstances. The statute requires that “[a]ll files, records, reports, and other papers and
13 documents pertaining to any claim under any of the laws administered by the Secretary and the
14 names and addresses of present or former members of the Armed Forces, and their dependents, in
15 the possession of the Department shall be confidential and privileged . . .” 38 U.S.C. § 5701(a).
16 The Protective Order proposed by Defendants would provide the protection warranted by
17 documents covered under section 5701 and would thus facilitate production of those documents.

18 Plaintiffs’ discovery requests are also likely to implicate 38 U.S.C. §7332, which requires
19 procedures for protection of information not contemplated by the proposed Protective Orders.

20 Section 7332 provides additional protection for certain types of VA records, specifically:

21
22
23 Records of the identity, diagnosis, prognosis, or treatment of any patient or
24 subject which are maintained in connection with the performance of any program
25 or activity (including education, training, treatment, rehabilitation, or research)
26 relating to drug abuse, alcoholism or alcohol abuse, infection with the human
27 immunodeficiency virus, or sickle cell anemia.

28 §7332(a)(1). Section 7332 requires enhanced protection, and under the statute, that information
cannot be produced unless additional safeguards (beyond those provided in either Proposed

1 Protective Order) are in place. Those requirements are outlined in 38 C.F.R. § 1.493, which
2 requires that before a Court orders the disclosure of VA patient records subject to § 7332, “[t]he
3 patient and VA facility from whom disclosure is sought must be given: (1) Adequate notice in a
4 manner which will not disclose patient identifying information to other persons; and (2) An
5 opportunity to file a written response to the application, or to appear in person, for the limited
6 purpose of providing evidence on whether the statutory and regulatory criteria for the issuance of
7 the court order are met.” 38 C.F.R. § 1.493(a),(b)(1)-(2); *see also United States v.*
8 *Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1138 n.11 (9th Cir. 2008). Because Plaintiffs’
9 Proposed Protective Order would simply provide blanket authorization for disclosure without
10 these individualized safeguards, it cannot satisfy the requirements of § 7332 that the *individual*
11 named in the records be given specific notice of the disclosure. Accordingly, Defendants cannot
12 agree to an order permitting (or requiring) disclosure to Plaintiffs of the information covered by §
13 7332 because there is no practical way that a general protective order, such as the one proposed
14 here, could satisfy the specific and particularized requirements 38 C.F.R. § 1.493.

17 Section 3(a)(iv) is also amended to remove the ambiguous language regarding “other
18 information protected by constitutional and statutory rights to privacy.” Defendants cannot agree
19 to a general waiver of all privacy rights without knowing whose equities are implicated.

20
21 **III. The Protective Order must address non-classified information not publicly
22 available.**

23 In addition to the classified information discussed above, this case also involves technical
24 data related to chemical and biological substances and testing that is unclassified or has been
25 declassified. The Department of Defense has nonetheless restricted public access to some of this
26 information under Department of Defense Directive (DoDD) 5230.24, “Distribution Statements
27 on Technical Documents,” and DoDD 5230.25, “Withholding of Unclassified Technical Data
28 from Public Disclosure.” Documents restricted from public disclosure under these authorities

1 contain “technical data that disclose critical technology with military or space application.”
2 Dep’t of Def. Directive 5230.25, 1 (Nov. 6, 1984).

3 Foreign disclosure of technical information governed by these authorities could harm the
4 national interest of the United States. “Because public disclosure of technical data subject to
5 [DoDD 5230.25] is tantamount to providing uncontrolled foreign access, withholding such data
6 from public disclosure, unless approved, authorized, or licensed in accordance with export
7 control laws, is necessary and in the national interest.” *Id.* at 4. However, disclosing covered
8 technical information under a protective order that precludes public disclosure addresses the need
9 to protect the covered information.
10

11 **IV. Defendants propose alterations to the Section II definitions included in**
12 **Plaintiffs’ Proposed Order.**

13 Defendants propose three changes to the Section II definitions. The first change is to
14 remove the sentences “At least sixty days prior to the trial date, the parties shall meet and confer
15 and submit any separate proposed protective order governing the treatment of confidential
16 information during trial” from Section 2.2 of Plaintiffs’ Proposed Order. Since there is no
17 indication that such a requirement is necessary at this time, Plaintiffs’ proposed wording is
18 superfluous. With Defendants’ proposed deletion, the section would mirror language from the
19 Northern District of California’s sample Protective Order.³ With this deletion, Section 2.2 reads:
20

21 Disclosure or Discovery Material: all items or information, regardless of the medium or
22 manner generated, stored, or maintained (including, among other things, testimony,
23 declarations, transcripts, or tangible things) that are produced or generated in disclosures
24 or responses to pre-trial discovery or other pre-trial proceedings in this matter. This
25 Protective Order specifically excludes the production or use of material or testimony
26 during trial.

26 ³ Found at
27 <http://www.cand.uscourts.gov/cand/form.nsf/7813fd3053452aef88256d4a0058fb31/5e428ee77bf8e03b88256dd3005d9450?OpenDocument>
28

1 Defendants' second proposed change is to delete the three definitions of "Counsel"
2 contained in Plaintiffs' Proposed Protective Order. Because Defendants' counsel are both
3 employees of a party (the Department of Justice) as well as counsel of record, the delineations (as
4 defined in Plaintiffs' Proposed Order) do not seem to apply to Defendants. Further, because the
5 varying definitions of Counsel (Outside, House, and Counsel-without-Qualifier") are not
6 discussed further in Defendants' Proposed Protective Order, the definitions are unnecessary.
7

8 Finally, Defendants propose an amendment to Plaintiffs' definition of "Expert" in order to
9 include experts and consultants in a case involving the Government. Defendants' Proposed
10 Definition reads:

11 2.7 Expert: a person with specialized knowledge or experience in a matter
12 pertinent to the litigation who has been retained by a Party or its Counsel or
13 assigned by the Defendants to serve as an expert witness or as a consultant in this
14 action. This definition includes a professional jury or trial consultant retained in
connection with this litigation."

15 **V. Defendants propose two changes to Section 4.3(b) of Plaintiffs' Proposed**
16 **Order.**

17 Defendants propose that the first paragraph of Section 4.3(b) read as follows:

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

25 This proposed change deletes the following language from Plaintiffs' Proposed Order:

26 "Only those portions of the testimony that are appropriately designated for protection
27 within the 30 days shall be covered by the provisions of this Protective Order." This
28 language appears to contradict the intent of Section 3(a), which presumes that any

1 information in one of the delineated categories is, by definition, protected. To avoid
2 suggesting otherwise, Plaintiffs' current language should be deleted.

3 In addition, Defendants propose deleting the final sentence in the same paragraph,
4 which reads "As set forth in Paragraph 2.2, this Protective Order specifically excludes
5 any material or testimony to be produced or used during trial and a separate order will
6 govern trial testimony." As explained in Section IV, *supra*, it is premature and
7 unnecessary to plan for use of covered information at trial. If covered information will be
8 used at trial, there is ample time to discuss that use and propose an appropriate Protective
9 Order.
10

11 **VI. A Protective Order must include adequate safeguards to protect covered**
12 **material.**

13 Under any proposed Protective Order, Plaintiffs will have access to covered material.
14 That information, both electronic and hard-copy, must be protected while in Plaintiffs'
15 possession. To ensure that there are adequate safeguards, Defendants propose the addition of the
16 following language into Section 7:
17

18 Encryption of Electronic Covered Material. Specifically with regard to Covered
19 Material produced by Defendants in this action on electronic storage media, the
20 Receiving Party must maintain, transmit and store such data using an encryption
program that is certified by the National Institute of Standards and Technology as
FIPS 140-2 compliant.

21 Location of Covered Material Produced by Defendants. All Covered Material
22 produced by Defendants to Plaintiffs must be stored and maintained at all times at
the offices of Plaintiffs' Counsel of Record. Further, all encryption keys supplied
23 by Defendants or Defendants' agents must be kept exclusively in the offices of
Plaintiffs' Counsel of Record and must be continuously protected in such a way
24 as to not be disclosed to any other person under any circumstances. Absent prior
approval of this Court, no person to whom Plaintiffs are authorized to disclose
25 such information shall be allowed to remove Protected Material, including all
copies, abstracts, compilations, summaries or any other form of reproducing or
26 capturing such Covered Material, from the offices of Plaintiffs' Counsel of
Record.
27
28

1 **VII. The Protective Order cannot limit Defendants’ access to covered information.**

2 Plaintiffs’ Proposed Protective Order seeks to limit Defendants’ and Defendants’
3 counsel’s access to the covered information in a manner similar to the limitations placed on the
4 Organization Plaintiffs and counsel. *See* dkt. # 122, section 7(1)(a), (b). These limitations are
5 unnecessary for Defendants and Defendants’ counsel, all of whom, as government employees, are
6 granted access to covered information in the scope of their employment. To limit these
7 employees’ access to covered information would be to restrict each employee’s ability to perform
8 his or her professional duties, which require access to covered information in many different
9 contexts.⁴

10 Nor is the Proposed Protective Order necessary to prevent Defendants or Defendants’
11 counsel from mishandling the sensitive information. Aside from access to sensitive information
12 being a fundamental part of their professional duties, Defendants and Defendants’ counsel are
13 also subject to punitive measures if the covered information is not adequately protected or
14 handled. *See* 5 U.S.C. § 552a. Since such statutory safeguards and restrictions are already in
15 place for Defendants and Defendants’ counsel, additional limitations through Plaintiffs’ Proposed
16 Protective Order are unnecessary.

17 **VIII. Three additions should be made to Section 12 of Plaintiffs’ Proposed**
18 **Protective Order**

19 Defendants propose to add the following language to the “Miscellaneous” section of
20 Plaintiffs’ Proposed Protective Order:

21 **a) Section 12.4**

22 Neither the United States of America, United States Department of Justice,
23 Central Intelligence Agency, United States Department of Defense, United States
24 Department of the Army, United States Department of Veterans Affairs, nor any
25 of their officers, employees, or attorneys, shall bear any responsibility or liability

26

⁴ Plaintiffs should also consider the fact that if the Defendant agencies are limited in how
27 many employees can access this information, the rate of production of discovery documents will
28 slow dramatically.

1 for any unauthorized disclosure of any documents obtained by Plaintiffs' counsel
2 under this Order, or of any information contained in such documents.

3 This language is necessary to protect the interests of the United States by removing liability for
4 any unauthorized disclosures.

5 **b) Section 12.5**

6 This Order does not constitute any ruling on the question of whether any
7 particular document or category of information is properly discoverable and does
8 not constitute any ruling on any potential objection to the discoverability,
9 relevance, or admissibility of any record, other than objections based on the
10 Privacy Act, 38 U.S.C. § 5701, or HIPAA.

11 This language is necessary to protect covered information while also delineating the boundaries
12 of proper discovery.

13 **c) Section 12.6**

14 This Order does not operate to waive any statutory or common law privileges, or any
15 legal duties, not to disclose information.

16 Defendants believe that this language is necessary to underscore the importance of protecting
17 any covered information.

18 **IX. The Court should consider the appropriateness of any limitations regarding
19 Plaintiffs' contact with possible test subjects.**

20 Defendants have significant concerns about how to protect the interests of these non-
21 parties who may be identified as test subjects. These veterans may not wish to be contacted.
22 Indeed, they may not want to discuss this period of their life or be reminded of the past. Plaintiffs
23 have stated that they plan to contact veterans named in discovery as potential witnesses or
24 plaintiffs. *See Vecchio Letter, exhibit A* (stating that "Plaintiffs are unable to agree to any
25 condition that they refrain from contacting these individuals – the test subjects are percipient
26 witnesses who may have relevant information that is critical to the case, and are putative class
27 members.") However, if the Court deems such contact, without limitation, to be appropriate,
28 Defendants submit the Proposed Protective Order, attached as Exhibit B.

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CONCLUSION

For the reasons stated above, Defendants oppose the entry of Plaintiffs' Proposed Protective Order.

Dated: September 15, 2010

Respectfully submitted,

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Document Number: [139](#)

Docket Text:

Memorandum in Opposition re [121] MOTION for Protective Order *and to Overrule Objections* filed by Central Intelligence Agency, Robert M. Gates, Pete Geren, Michael V. Hayden, Eric H. Holder, Jr, Leon Panetta, United States Department of Defense, United States Department of the Army, United States of America. (Attachments: # (1) Exhibit A: Letter from Plaintiffs' Counsel, # (2) Exhibit B: Proposed Protective Order)(Farel, Lily) (Filed on 9/15/2010)

4:09-cv-00037-CW Notice has been electronically mailed to:

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4:09-cv-00037-CW Please see [General Order 45 Section IX C.2 and D](#); Notice has NOT been electronically mailed to:

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Document description:Exhibit A: Letter from Plaintiffs' Counsel

Original filename:K:\My Documents\Active Cases\Vietnam Veterans\Protective Order\Vecchio Letter Exhibit A.pdf

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Document description:Exhibit B: Proposed Protective Order

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