

Exhibit B



U.S. Department of Justice

Civil Division
Federal Programs Branch

Mailing Address
P.O. Box 883
Washington, D.C. 20044

Overnight Delivery Address
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Tel: (202) 353-7633
Fax: (202) 616-8460
lily.farel@usdoj.gov

October 8, 2010

Via Email

Mr. Timothy W. Blakely, 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. Blakely:

I write in response to your letter on September 30, 2010, in which you outline Plaintiffs' concerns with Defendants' Proposed Protective Order. Defendants share Plaintiffs' hope that the parties can agree on a stipulated Protective Order without the intervention of the Court.

I will address each of the outstanding areas of disagreement individually.

1. Protection of Materials Produced by Plaintiffs and Third Parties

Plaintiffs expressed concern that Defendants' proposal does not acknowledge the right of Plaintiffs and nonparties to produce information subject to confidentiality protection. In order to protect those interests to the fullest extent possible, we request that you articulate the type of information for which you seek protection. The language in Plaintiffs' Proposed Protective Order seeks to protect "any other information protected by constitutional or statutory rights to privacy," Section 3(iv). Defendants are unsure what rights, aside from those identified by name in the Proposed Protective Order, Plaintiffs seek to protect and cannot agree to a Protective Order before those rights have been explained.

2. Classified Information

Plaintiffs' position on why the Protective Order should include a reference to classified information is to "allow Defendants to appropriately designate for protection any classified information that a party (or a non-party) may disclose during discovery." This Protective Order does not need to address classified information, which is (as explained in greater detail in our Opposition to Plaintiffs' Motion for Protective Order and to Overrule Objections) protected by

other measures. Defendants cannot agree to a Protective Order that includes the language in Section 3(v).

3. 38 U.S.C. § 7332

Because Plaintiffs acknowledge that a separate protective order is necessary for the release of any information covered by 38 U.S.C. § 7332, Defendants will agree to remove the language regarding section 7332.

4. Designation of Pretrial testimony

Defendants' Proposed Protective Order removed the following language from section 4.3(b):

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

Plaintiffs have reinserted this language in their Proposed Protective Order. Defendants cannot agree to the provision that if Defendants fail to designate information within 30 days, it would somehow lose its protection. The personal privacy information discussed in either Protective Order is protected by statute—HIPAA, the Privacy Act, or 38 U.S.C. § 5701. The need to protect that personal privacy information is not lost merely because of a party's inadvertent failure to designate. While Defendants will obviously make every effort to designate all covered information as protected, we cannot agree to waive that protection. In addition, this language appears to contradict the intent of Section 3(a), which presumes that any information in one of the delineated categories is, by definition, protected. To avoid suggesting otherwise, Plaintiffs' current language should be deleted.

In addition, Defendants do not agree to include the second sentence in that section because it is unnecessary. As you acknowledge in your letter of September 30, 2010, if covered information will be used at trial, there is ample time to discuss that use and propose an appropriate Protective Order.

5. Encryption and location requirements

Plaintiffs' counsel noted that they find the requirements outlined in Sections 7.3 and 7.4 of Defendants' Proposed Protective Order to be unnecessarily burdensome. As you know, the Department of Veterans Affairs is obligated to restrict the disclosure of protected information. *See* 38 USC 5725(a)(1). Further, it is important to note that these safeguards are in place to protect the privacy of your clients and of third parties. VA is amenable, however, to discussing options that both achieve the necessary protection and allow Plaintiffs to use the information they receive through discovery.

With regard to section 7.3 of Defendants' Proposed Protective Order, you expressed concern that Plaintiffs' counsel would be unable to find an encryption program that is certified by the National Institute of Standards and Technology as FIPS 140-2 compliant. The Federal Information Security Management Act, at 44 USC 3544, requires that Federal agency officials institute policies designed to protect the security of digital information within the possession, ownership or control of their agencies. Pursuant to the discretion afforded by that statutory authority, VA has promulgated Handbook 6500, which contains several relevant requirements, including: (1) that VA data remain in an encrypted state whenever it leaves the protective environment of VA's data servers, paragraph 6(c)(4)(d); (2) that non-VA systems on which VA data is stored conform to, or exceed, applicable VA security policies, paragraph 6(c)(4)(k); and (3) that VA transmit electronic data in a format that is encrypted, paragraph 6(c)(4)(o). The third requirement effectively means that any CDs, DVDs, back-up tapes, thumb drives, etc., that VA employs as media through which to transfer electronic data to Plaintiffs must be encrypted. Therefore, Plaintiffs must have complementary encryption software in order to be able to decrypt the data that VA provides pursuant to a Protective Order. VA has advised us that their Office of Information and Technology will provide encryption keys with any media that it produces pursuant to this Protective Order, but it will not waive the requirement that such media be encrypted, nor will it waive the requirement that Plaintiffs store any electronic information produced by VA in encrypted format.

With regard to section 7.4, we would agree to limit the language contained in that section to electronically-stored information. This change would allow anyone to whom the documents are disclosed to receive those documents in hard copy. With this change, section 7.4 would read:

Location of Electronic Covered Material Produced by Defendants. All Electronic Covered Material 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 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 as to not be disclosed to any other person under any circumstances.

6. Proposed Additions to Section 12

Defendants believe the inclusion of sections 12.5 and 12.6 is necessary. These paragraphs provide clarification for the use and protection of information covered by a Protective Order and protect the interests of all parties—the Plaintiffs, the Defendants, and all third-parties whose information is covered by this Protective Order. Because Plaintiffs do not appear to have a specific objection to their inclusion, Defendants believe that these sections should be included in a Protective Order.

7. Designation of Protected Materials

As we explained in our Opposition, Defendants believe that it is necessary to change the designation of material covered by this Protective Order from CONFIDENTIAL to COVERED,

as reflected in Sections 4.3(a), (b), (c), (d), 7.2, and 11. Because “confidential” refers to a level of classification under Executive Order 13526 (relating to national security information), we proposed the term “Covered” to avoid confusion.

Finally, please understand that while we believe that we will be able to stipulate to a proposed protective order, any final order to be proposed to the Court will have to be approved by the appropriate officials in our office and our client agencies.

Sincerely,

/s/

Lily Farel