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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA;
SWORDS TO PLOWSHARE;
VETERANS RIGHTS ORGANIZATION;
BRUCE PRICE; FRANKLIN D.
ROCHELLE; LARRY MEIROW; ERIC P.
MUTH; DAVID C. DUFRANE; WRAY C.
FORREST, on behalf of themselves and
all other similarly situated,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, et
al.,

Defendants.

No. C 09-0037 CW (JL)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR PROTECTIVE ORDER
AND TO OVERRULE OBJECTIONS**

(Docket #121)

I. Introduction

Plaintiffs' Motion for Protective Order and to Overrule Objections came on for hearing before this Court on October 27, 2010. All discovery in this case was referred by the district court (Hon. Claudia Wilken) under 28 U.S.C. § 636(b) and Civil Local Rule 72-1. (Docket # 79). Attorneys Gordon P. Erspamer, Timothy W. Blakely, and Daniel J. Vecchio of MORRISON & FOERSTER LLP appeared for Plaintiffs Vietnam Veterans of America, Swords to Plowshares: Veterans Rights Organization, Bruce Price, Franklin D. Rochelle,

1 Larry Meirow, Eric P. Muth, David C. Dufrane and Wray C. Forrest. Attorneys Kimberly L.
2 Herb, Lily Sara Farel, and Brigham John Bowen appeared for Defendants Central
3 Intelligence Agency, et al. The Court carefully considered the pleadings and arguments of
4 counsel and hereby GRANTS Plaintiffs' Motion for Protective Order and to Overrule
5 Objections.

6 **II. Factual Background**

7 Plaintiffs Vietnam Veterans of America (VVA), Swords to Plowshares: Veterans Rights
8 Organization and six individual veterans ("Plaintiffs") assert claims against Defendants
9 Central Intelligence Agency (CIA), et al. ("Defendants"), arising from United States' human
10 experimentation programs that occurred from approximately 1950 through 1975.

11 Plaintiffs allege that beginning in the early 1950's, the CIA and the Army engaged in
12 experiments involving human subjects. The experiments ranged from biological and
13 chemical weapons to researching "psychological warfare." The experiments exposed
14 subjects to various chemicals, drugs, and the implantation of electronic devices. Many of
15 the tests occurred at Edgewood Arsenal and Fort Detrick, both located in Maryland.
16 Approximately 7,800 armed services personnel, including the six individual veterans named
17 in this action, volunteered to participate in the experiments. However, the volunteers
18 participated without giving informed consent because the risks of the experiments were not
19 fully disclosed. Test subjects were required to sign a secrecy oath.

20 In September 2006, some, but not all, subjects in these programs received letters
21 from the Department of Veterans Affairs (DVA), advising them that the Department of
22 Defense (DOD) had authorized the subjects to discuss their exposure with their health care
23 providers. Although some subjects have been notified and have received information on
24 their exposure, others have not.

25 **III. Procedural Background**

26 Plaintiffs filed their original complaint on January 7, 2009, amended it on July 24 ,
27 2009 as their First Amended Complaint (FAC), then filed their Second Amended Complaint
28

1 (SAC) on December 17, 2009. Plaintiffs requested declaratory and injunctive relief.
2 Plaintiffs have not filed a jury demand. Plaintiffs served their First Set of Requests for
3 Production on May 15, 2009 seeking *inter alia*, information about the identities of test
4 subjects and the effects of the substances administered to them. Between October 2009 -
5 April 2010, Defendants produced approximately 15,000 pages of documents, most of which
6 were related to the individual named Plaintiffs' military files and were heavily redacted.
7 Defendants objected to producing any documents subject to the Privacy Act and the Health
8 Insurance Portability and Accountability Act of 1996 ("HIPAA"), particularly documents
9 relating to third parties. In July 2009, counsel for both parties began discussing the content
10 of a protective order and several drafts of stipulated protective orders were exchanged over
11 the course of several months.

12 Defendants moved to dismiss or, in the alternative, for summary judgment on January
13 5, 2010. On January 19, 2010, Judge Claudia Wilken granted Defendants' dispositive
14 motion in part and denied it in part. (Docket # 59). Judge Wilken's ruling reduced the
15 number of remaining claims to: (1) the validity of the secrecy oaths; (2) whether the
16 individual Plaintiffs are entitled to notice of chemicals to which they were exposed and any
17 known health effects; and (3) whether Defendants are obligated to provide medical care to
18 the individual Plaintiffs. Defendants filed an Answer on March 17, 2010 and subsequently
19 filed an Amended Answer on April 7, 2010. The case was referred by Judge Wilken to this
20 Court for all Discovery purposes on April 21, 2010.

21 **IV. Legal Analysis**

22 **A. Fed. R. Civ. P. 26(c) Protective Order - Legal Standard**

23 Plaintiffs' motion is made pursuant to Fed. R. Civ. P. 26(c)(1), which states that "[a]
24 party or any person from whom discovery is sought may move for a protective order in the
25 court where the action is pending... The court may, for good cause, issue an order to
26 protect a party or person from annoyance, embarrassment, oppression, or undue burden or
27

1 expense...” Plaintiffs argue that they attempted in good faith to meet and confer with
 2 Defendants to stipulate on the terms of a protective order without court intervention for over
 3 a year. However, Defendants have repeatedly objected to Plaintiffs’ stipulated protective
 4 orders. Plaintiffs are now asking for this Court to intervene and to prevent further delay in
 5 the case. Plaintiffs’ proposed protective order aims to allow production of necessary
 6 documents, while protecting Defendants’ interest in preventing disclosures or use of
 7 information outside this litigation.

8 **B. Defendants’ Previous Objections: Privacy and HIPAA**

9 In response to Defendants’ earlier Privacy and HIPAA objections, Plaintiffs cite 5
 10 U.S.C. § 522a(b)(11), which provides that information subject to the Privacy Act may be
 11 disclosed “pursuant to the order of a court of competent jurisdiction.” A court may order the
 12 disclosure of information subject to the Privacy Act if the information is relevant under Fed.
 13 R. Civ. P. 26(b)(1), where “[for] good cause, the court may order discovery of any matter
 14 relevant to the subject matter involved in the action.” Plaintiffs argue there is good cause
 15 for discovery of relevant documents because they are relevant to potential witnesses and
 16 putative class members. More specifically, Plaintiffs seek discovery of the names of test
 17 subjects and the types of drugs they were exposed to.

18 Additionally, with respect to HIPAA, “[a] covered entity may disclose protected health
 19 information in the course of any judicial or administrative proceeding: (i) In response to an
 20 order of a court or administrative tribunal, provided that the covered entity discloses only
 21 the protected health information expressly authorized by such order” 45 C.F.R. §
 22 164.512(e)(1). Disclosure is also permitted “in response to a subpoena, discovery request,
 23 or other lawful process . . . if the party seeking the information . . . makes a reasonable
 24 effort to secure a qualified protective order, that is, an order that prohibits the use or
 25 disclosure of the information outside the litigation and requires the return or destruction of
 26 the information at the end of the litigation.” 45 C.F.R. § 164.512(e)(1)(v). This protective
 27
 28

1 order prohibits use or disclosure of information outside of this litigation and requires all
2 documents to be returned or destroyed at the conclusion of the case. Therefore, this
3 protective order complies with the above referenced regulations.

4 **C. Parties' Successful Meet and Confer - Previous Disputes No Longer**
5 **an Issue For the Court**

6 Plaintiffs' filed this Motion for Protective Order and to Overrule Objections on August
7 19, 2010. Following the filing of the motion, the parties held a further meet-and-confer
8 teleconference on September 23, 2010 and exchanged additional written communications
9 regarding the protective order on September 30, October 8, and October 11, 2010. As a
10 result of these discussions, the parties stipulated on a number of issues, which no longer
11 requires the attention of this Court. Namely, they are:

- 12 1. Section 3(v) regarding classified information has been deleted
- 13 2. Sections 1 & 3 include references to 38 U.S.C. § 5701 to the list of statutory
14 protections
- 15 3. Sections 1 & 3 do not exclude VA records implicated by 38 U.S.C. § 7332
- 16 4. Section 3(a)(iv) regarding privacy protections has been modified
- 17 5. Sections 1 & 3 include language regarding non-classified information that is not
18 publically available
- 19 6. Section 2.2 regarding disclosure or discovery material has been modified
- 20 7. Section 2.6 has been modified to combine Plaintiffs' original three definitions of
21 "Counsel" into a single definition
- 22 8. Section 2.7 definition of "Expert" has been modified
- 23 9. Section 4.3(b) regarding testimony given in deposition or in other pretrial
24 proceedings has been modified
- 25 10. Sections 12.4, 12.5, and 12.6 as proposed by Defendants will not be included
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1 **D. Remaining Issues to be Decided**

2 **1. Plaintiffs' Proposed Section 7.1(b)**

3 Section 7.1(b) restricts the number of designated representatives of Plaintiffs and
 4 each Defendant agency that protected material may be disclosed to. Plaintiffs argue that
 5 the protective order should have reciprocal limitations to both parties. Alternatively,
 6 Plaintiffs believe that Section 7.1(b) should be stricken in its entirety. Defendants argue that
 7 limitations are warranted to ensure protection of information obligated by the Privacy Act
 8 and HIPAA, especially because Defendants are unsure how the organizational Plaintiffs
 9 intend to proceed. Defendants further argue that fact finding for the government involves
 10 many different entities within the same agency. Thus, to limit the Defendants' designated
 11 representatives would hamper and delay their discovery efforts.

12 This Court finds that this protective order will adequately protect information and both
 13 parties should have equal access to all discovery governed by this protective order.
 14 Therefore, this Court approves Section 7.1(b) as modified to remove the limitations on the
 15 number of designated representatives of the parties.

16 **2. Defendants' Proposed Sections 7.3 and 7.4**

17 Defendants seek to include the following language:

18 7.3 Encryption of Electronic Covered Material. Specifically with regard to Covered
 19 Material produced by Defendants in this action on electronic storage media,
 20 the Receiving Party must maintain, transmit and store such data using an
 21 encryption program that is certified by the National Institute of Standards and
 22 Technology as FIPS 140-2 compliant.

23 7.4 Location of Electronic Covered Material Produced by Defendants. All
 24 Electronic Covered Material produced by Defendants to Plaintiffs must be
 25 stored and maintained at all times at the offices of Plaintiffs' Counsel of
 26 Record. Further, all encryption keys supplied by Defendants or Defendants'
 27 agents must be kept exclusively in the offices of Plaintiffs' Counsel of Record
 28 and must be continuously protected in such a way as to not be disclosed to
 any other person under any circumstances.

1 Defendants argued that they would provide Plaintiffs' Counsel with the encryption keys
2 and software in order to comply with statutory obligations and thereby removing some of
3 the burden this section imposes on the Plaintiffs. Plaintiffs argue that it is unreasonable to
4 only allow Plaintiffs to share electronically stored documents in hard copy to their experts.
5 Discovery in this action is voluminous and it is unknown how many documents will be
6 produced electronically that may be pertinent to an expert's review. Moreover, it is overly
7 burdensome to require all electronically stored documents and encryption keys be kept at
8 the offices of Plaintiffs' Counsel of Record is overly burdensome because experts for this
9 action may be located throughout the country and it would be unreasonable to require each
10 of them to fly out to the office of Plaintiffs' Counsel of Record for an indefinite amount of
11 time to conduct a thorough document review of all the pertinent documents or to search all
12 documents by hand in hard copy.

13 This Court finds that it is overly burdensome to restrict Plaintiffs from sharing
14 documents with their experts only in hard copy. Not only is it burdensome in terms of
15 expenses, like photocopying and printing, but also in time. The discovery in this action is
16 highly voluminous dating back over fifty years. It is unreasonable to require Plaintiffs and
17 their experts to review each document by hand in hard copy if it is available in an electronic
18 format. Documents stored electronically are searchable, making document review easier
19 and more efficient. This Court also finds that the encryption keys and software provided by
20 Defendants should be extended to designated experts in this action to effectuate proper
21 disclosure and use of protected material, per Section 7.1(c) of this protective order.

22 Therefore, Defendants' proposed Section 7.3 is granted in part and modified as set
23 forth below. Section 7.4 is omitted from the protective order. Section 7.3 is modified as
24 follows:

25 7.3 Encryption of Electronic Covered Material. Specifically with regard to Covered
26 Material produced by Defendants in this action on electronic storage media,
27 the Receiving Party must maintain, transmit and store such data using an
28 encryption program that is certified by the National Institute of Standards and
Technology as FIPS 140-2 compliant. Defendants or Defendants' agents will
supply all necessary encryption software and encryption keys with any media

1 that it produces pursuant to this Protective Order to Plaintiffs' Counsel and
 2 Experts (as defined in this Protective Order) to whom disclosure is reasonably
 3 necessary for this litigation and who have signed the "Agreement to Be Bound
 4 by Protective Order" (Exhibit A). Further, all encryption keys supplied by
 Defendants or Defendants' agents must be continuously protected in such a
 way as to not be disclosed to any other person under any circumstances.

5 The modified Section 7.3 has been added to the final protective order governing discovery
 6 filed by this Court.

7 **3. Designation of Protected Material - Section 4.3 "CONFIDENTIAL" or**
 8 **"COVERED"**

9 Defendants seek to change the designation of protected materials from
 10 "CONFIDENTIAL" to "COVERED." Documents have differing levels of classification under
 11 Executive Order 13526, such that, some may already be deemed "confidential."
 12 Defendants proposed term "covered" seeks to eliminate any confusion with documents
 13 already classified as "confidential." Defendants further argue that the change is warranted
 14 under Title 38 U.S.C. § 5725, which provides information security for Veterans' records.
 15 However, that statute does not discuss how documents should be designated as protected
 16 material. Additionally, Defendants have not cited any authority which supports their
 17 argument.

18 While Defendants have valid concerns for confusion due to "CONFIDENTIAL"
 19 designations, however, the protective order provides that materials will be marked as
 20 "CONFIDENTIAL – PRODUCED SUBJECT TO PROTECTIVE ORDER." Thus, there would
 21 be no such confusion in the marked materials. This Court finds that the designation of
 22 protected material will remain as is.

Beaudoin, Kathy E.

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ORDER by Judge James Larson Granting Plaintiffs' Motion for Protective Order and to Overrule Objections [121] Motion for Protective Order (jlsec, COURT STAFF) (Filed on 11/12/2010)

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