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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, a Non-Profit Corporation; SWORDS TO PLOWSHARES: VETERANS RIGHTS ORGANIZATION, a California Non-Profit Corporation; BRUCE PRICE; FRANKLIN D. ROCHELLE; LARRY MEIROW; ERIC P. MUTH; DAVID C. DUFRANE; and WRAY C. FORREST, individually, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY; LEON PANETTA, Director of the Central Intelligence Agency; UNITED STATES DEPARTMENT OF DEFENSE; DR. ROBERT M. GATES, Secretary of Defense; UNITED STATES DEPARTMENT OF THE ARMY; PETE GEREN, United States Secretary of the Army; UNITED STATES OF AMERICA; and ERIC H. HOLDER, JR., Attorney General of the United States,

Defendants.

Case No. CV 09-0037-CW

PROTECTIVE ORDER GOVERNING DISCOVERY

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production, by parties
3 and non-parties, of confidential, proprietary, or private information for which special protection
4 from public disclosure and from use for any purpose other than prosecuting this litigation would
5 be warranted. In particular (but without limitation), this action is likely to involve production of
6 information that is protected by the Privacy Act of 1974, 5 U.S.C. § 552a (“Privacy Act”), 38
7 U.S.C. § 5701 (“Veterans Claims”) and or Health Insurance Portability and Accountability Act,
8 42 U.S.C. § 201 (“HIPAA”). Although Plaintiffs are not technically bound by the Privacy Act
9 respecting their production of documents or filings, Plaintiffs endeavor to protect private and
10 medical information related to the right of privacy concerning individual veterans that is likely to
11 be produced during discovery or submitted to the Court, including but not limited to medical
12 records or benefits claims files related to the Individual Plaintiffs and putative class members.
13 Pursuant to 5 U.S.C. § 552a(b)(11), which permits disclosure of Privacy Act records by court
14 order, 45 C.F.R. § 164.512(e)(1)(i), which permits disclosure of protected health information by
15 court order, 38 U.S.C. § 5701(b)(2), which permits disclosure of files, records, reports, and other
16 papers and documents pertaining to a claim for veterans benefits when required by court order,
17 and Rule 26(c) of the Federal Rules of Civil Procedure, which authorizes entry of an appropriate
18 protective order, the Court hereby enters the following Protective Order Governing Discovery
19 (“Protective Order”).

20 This action is also likely to involve documents the United States withholds from
21 distribution outside of the Federal Government. The United States may designate certain
22 documents as “Protected Material” under this protective order to prevent public disclosure of
23 covered documents.

24 Defendants are authorized to release to Plaintiffs, their counsel, the Court in this case, and
25 other parties identified in Section 7.1 below, government records containing Privacy Act,
26 Veterans Claims, or HIPAA protected information without obtaining prior written consent of the
27 individuals to whom the records pertain.

1 This Protective Order does not confer blanket protections on all disclosures or responses
2 to discovery and the protection it affords extends only to the limited information or items that are
3 entitled under the applicable legal principles to treatment as confidential. As set forth in Section
4 10, below, this Protective Order creates no entitlement to file confidential information under seal;
5 Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards
6 that will be applied when a party seeks permission from the Court to file material under seal.

7 2. DEFINITIONS

8 2.1 Party: any party to this action, including all of its representatives, agents, and any
9 present or former officers, directors, employees, investigators, consultants, retained Experts, and
10 Outside Counsel (and their support staffs).

11 2.2 Disclosure or Discovery Material: all items or information, regardless of the
12 medium or manner generated, stored, or maintained (including, among other things, testimony,
13 declarations, transcripts, or tangible things) that are produced or generated in disclosures or
14 responses to pre-trial discovery or other pre-trial proceedings in this matter. This Protective
15 Order specifically excludes the production or use of material or testimony during trial.

16 2.3 Receiving Party: a Party that receives Disclosure or Discovery Material from a
17 Producing Party.

18 2.4 Producing Party: a Party or non-party that produces Disclosure or Discovery
19 Material in this action.

20 2.5 Designating Party: a Party or non-party that designates information or items that it
21 produces or includes in disclosures, responses to discovery requests, affidavits, declarations, or
22 exhibits submitted to the Court as subject to the terms of the Protective Order.

23 2.6 Protected Material: any Disclosure or Discovery Material that is designated as
24 "Confidential - Subject to Protective Order" as described in paragraph 4, below.

25 2.6 Counsel: attorneys who are employees of a Party (as well as their support staffs)
26 and attorneys who are not employees of a Party but who represent or advise a Party in this action
27 (as well as their support staffs).

1 2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to
2 the litigation who has been retained by a Party or its Counsel or assigned by the Defendants to
3 serve as an expert witness or as a consultant in this action and who is not a past or a current
4 employee of a Party or of a competitor of a Party and who, at the time of retention, is not
5 anticipated to become an employee of a Party or a competitor of a Party. This definition includes
6 a professional jury or trial consultant retained in connection with this litigation.

7 2.8 Professional Vendors: persons or entities that provide litigation support services
8 (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing,
9 storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

10 3. DOCUMENTS AND INFORMATION COVERED BY THIS ORDER

11 (a) Except as provided in paragraph 12.3, this Protective Order shall govern
12 the use and disclosure of any document or information in connection with this action that
13 constitutes or reflects information derived from:

14 (i) a record subject to the requirements of the Privacy Act;

15 (ii) a medical record or other document containing information that
16 relates to the right of privacy and/or past, present or future physical or mental health or condition
17 (“Health Information”) of any person other than information specifically made public in the
18 Complaint in this action;

19 (iii) references to personal information such as Social Security
20 Numbers (“SSN”), Dates of Birth (“DOB”), telephone numbers, and financial account numbers;

21 (iv) any other confidential, proprietary, or private information for
22 which special protection from public disclosure and from use for any purpose other than
23 prosecuting this litigation may be warranted, including but not limited to information protected
24 from disclosure under the Health Insurance Portability and Accountability Act (“HIPAA”), 42
25 U.S.C. § 201, and information protected by 38 U.S. C. § 5701;

26 (v) information maintained by Defendants or other government
27 entities not otherwise publicly available, or
28

1 (vi) any other information (regardless of how generated, stored or
2 maintained) or tangible things that qualify for protection under standards developed under
3 Rule 26(c) of the Federal Rules of Civil Procedure.

4 (b) Documents that are reasonably determined to be within the scope of
5 paragraph 3(a) by a Producing Party are hereinafter referred to as "Covered Documents."
6 Covered Documents shall be marked by the Producing Party in accordance with paragraph 4,
7 below.

8 (c) Except as specified in paragraph 3(d) below, all information derived from
9 Covered Documents, even if incorporated in another document or compilation or referred to in
10 pre-trial testimony, shall be treated as "Covered Information." Covered Information shall be
11 subject to the requirements of this Protective Order.

12 (d) Document summaries, statistical compilations, or other summaries of
13 materials identified in paragraphs 3(a)(i), (ii), and (iv), however, that do not contain information
14 by which specific individuals, including Plaintiffs, can be identified (*e.g.*, by name, social security
15 number, symbol, description or other form of personal identification) are not covered by this
16 Protective Order.

17 4. DESIGNATING PROTECTED MATERIAL

18 4.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
19 or non-party that designates information or items for protection under this Protective Order must
20 take care to limit any such designation to specific material that qualifies under the appropriate
21 standards. Mass, indiscriminate, or routinized designations are prohibited. Designations that are
22 shown to be clearly unjustified, or that have been made for an improper purpose (*e.g.*, to
23 unnecessarily encumber or retard the case development process, or to impose unnecessary
24 expenses and burdens on other parties), expose the Designating Party to sanctions.

25 4.2 If it comes to a Party's or non-party's attention that information or items are not
26 designated for protection that should qualify for protection, that Party or non-party shall as soon
27 as practicable notify the Producing Party in writing. The Producing Party shall be required to
28 redesignate that information in accordance with paragraph 4.3 and reproduce the contested

1 information or items at its own expense. Should the Producing Party disagree with the notifying
2 Party or non-party regarding the propriety of the redesignation, the parties shall follow the
3 procedures set forth in Paragraph 5 of this Protective Order. If it comes to a Party's or a non-
4 party's attention that information or items that it designated for protection do not qualify for
5 protection, that Party or non-party must promptly notify all other parties that it is withdrawing the
6 mistaken designation.

7 4.3 Manner and Timing of Designations. Except as otherwise provided in this
8 Protective Order (*see, e.g.*, second paragraph of section 4.3(a), below), or as otherwise stipulated
9 or ordered, material that qualifies for protection under this Protective Order must be clearly so
10 designated before the material is disclosed or produced.

11 Designation in conformity with this Protective Order requires:

12 (a) for information in documentary form (apart from transcripts of depositions
13 or other pretrial proceedings), that the Producing Party mark the document as
14 "CONFIDENTIAL — PRODUCED SUBJECT TO PROTECTIVE ORDER," or with a similar
15 marking in a way that brings its attention to a reasonable examiner.

16 A Party or non-party that makes original documents or materials available for inspection
17 need not designate them for protection until after the inspecting Party has indicated which
18 material it would like copied and produced. After the inspecting Party has identified the
19 documents it wants copied and produced, the Producing Party must determine which documents
20 qualify for protection under this Order, then, before producing the specified documents, the
21 Producing Party must mark those documents as "CONFIDENTIAL — PRODUCED SUBJECT
22 TO PROTECTIVE ORDER," or with a similar marking in a way that brings its attention to a
23 reasonable examiner.

24 (b) for testimony given in deposition or in other pretrial proceedings, that the
25 Party or non-party offering or sponsoring the testimony identify on the record, before the close of
26 the deposition, hearing, or other proceeding, all protected testimony, and further specify any
27 portions of the testimony that qualify for protection under paragraph 3(a) of this Protective Order.
28 When it is impractical to identify separately each portion of testimony that is entitled to

1 protection, and when it appears that substantial portions of the testimony may qualify for
2 protection, the Party or non-party that sponsors, offers, or gives the testimony may invoke on the
3 record (before the deposition or proceeding is concluded) a right to have up to 30 days from
4 receipt of the deposition or hearing transcript to identify the specific portions of the testimony as
5 to which protection is sought. Only those portions of the testimony that are appropriately
6 designated for protection within the 30 days shall be covered by the provisions of this Protective
7 Order.

8 Transcript pages containing Protected Material must be separately bound by the court
9 reporter, who must affix to the bottom of each such page the legend “CONFIDENTIAL –
10 SUBJECT TO PROTECTIVE ORDER,” or with a similar marking in a way that brings its
11 attention to a reasonable examiner, as instructed by the Party or non-party offering or sponsoring
12 the witness or presenting the testimony.

13 (c) for any Covered Document whose medium makes marking the Covered
14 Document impractical, such as computer data, that the Producing Party mark the diskette case and
15 any accompanying paper or e-mail cover letter “CONFIDENTIAL — PRODUCED SUBJECT
16 TO PROTECTIVE ORDER,” or with a similar marking in a way that brings its attention to a
17 reasonable examiner. Designation and marking of Covered Documents in accordance with this
18 paragraph shall be deemed effective to bring information contained in such documents under the
19 protection of this Protective Order unless and until the Court orders otherwise.

20 (d) for information produced in some form other than documentary, and for
21 other tangible items, that the Producing Party mark the exterior of the container(s) in which the
22 information or item is stored with the legend “CONFIDENTIAL — PRODUCED SUBJECT TO
23 PROTECTIVE ORDER,” or with a similar marking in a way that brings its attention to a
24 reasonable examiner.

25 5. CHALLENGING CONFIDENTIALITY DESIGNATIONS

26 5.1 Available Challenges. The Receiving Party may challenge the Producing Party’s
27 designation of material for protection or the Producing Party’s failure to designate material for
28 protection under this Protective Order.

1 5.2 Timing of Challenges. Unless a prompt challenge to a Designating Party's
2 confidentiality designation, or to the Producing Party's failure to designate material for protection
3 under this Protective Order, is necessary to avoid foreseeable substantial unfairness, unnecessary
4 economic burdens, or a later significant disruption or delay of the litigation, a Party does not
5 waive its right to challenge a confidentiality designation, or failure to designate, by electing not to
6 mount a challenge promptly after the original designation is made.

7 5.3 Meet and Confer. A Party that elects to initiate a challenge to a Designating
8 Party's confidentiality designation or lack thereof must do so in good faith and must begin the
9 process by conferring with Counsel for the Designating Party. In conferring, the challenging
10 Party must explain the basis for its belief that the confidentiality designation or lack thereof was
11 not proper and must give the Designating Party an opportunity to review the designated material,
12 to reconsider the circumstances, and, if no change in designation is offered, to explain the basis
13 for the chosen designation or lack thereof. A challenging Party may proceed to the next stage of
14 the challenge process only if it has engaged in this meet and confer process first.

15 5.4 Judicial Intervention. A Party that elects to press a challenge to a confidentiality
16 designation or lack thereof after considering the justification offered by the Designating Party
17 may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule
18 79-5, if applicable) that identifies the challenged material and sets forth in detail the basis for the
19 challenge. Any such motion must be accompanied by a competent declaration that affirms that
20 the movant has complied with the meet and confer requirements imposed in the preceding
21 paragraph and that sets forth with specificity the justification for the confidentiality designation
22 that was given by the Designating Party in the meet and confer dialogue. The burden of
23 persuasion in any such challenge proceeding shall be on the Party advocating the inclusion of a
24 confidentiality designation on Disclosure or Discovery Material. Until the Court rules on the
25 Party's challenge, all parties shall provisionally treat the challenged material as subject to the
26 protections of this Protective Order.

1 6. DURATION

2 Even after the termination of this litigation, the confidentiality obligations imposed by this
3 Protective Order shall remain in effect until a Designating Party agrees otherwise in writing or a
4 court order otherwise directs.

5 7. DISCLOSURE AND USE OF PROTECTED MATERIAL

6 7.1 Disclosure of Protected Material. Except upon the prior written consent of the
7 Producing Party originally designating Protected Material as containing information within the
8 scope of paragraph 3(a) of this Order, or as otherwise expressly provided in this Order, a
9 Receiving Party may disclose Protected Material it receives from a Producing Party only to:

10 (a) Counsel in this action, as well as employees or consultants of Counsel to
11 whom it is reasonably necessary to disclose the information for this litigation and who have
12 signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

13 (b) Certain designated representatives of Plaintiffs and Defendants who have
14 signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

15 (c) Experts (as defined in this Protective Order) to whom disclosure is
16 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
17 Protective Order” (Exhibit A);

18 (d) the Court and its personnel;

19 (e) court reporters, their staffs, and professional vendors to whom disclosure is
20 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
21 Protective Order” (Exhibit A);

22 (f) fact witnesses in the action (and their counsel) during depositions or in
23 preparation of affidavits or declarations for pretrial testimony, to whom disclosure is reasonably
24 necessary for this litigation and who have signed the “Agreement to Be Bound by Protective
25 Order” (Exhibit A). As set forth in paragraph 4.3(b), pages of transcribed deposition testimony or
26 exhibits to depositions that reveal Protected Material must be separately bound by the court
27 reporter and may not be disclosed to anyone except as permitted under this Protective Order;

1 (g) the author or listed recipient of the document or the original source of the
2 Protected Material; and

3 (h) the person to whom the Protected Material pertains.

4 7.2 Use of Protected Material. Except as provided in paragraph 12.3, unless otherwise
5 ordered by a court or otherwise provided in this Order, Protected Material received by a Party
6 during the course of this litigation may be used only in connection with the prosecution or
7 defense of this litigation and for no other purpose and shall be marked by the Producing Party as
8 “CONFIDENTIAL — PRODUCED SUBJECT TO PROTECTIVE ORDER,” or with a similar
9 marking in a way that brings its attention to a reasonable examiner.

10 7.3 Encryption of Electronic Covered Material. Specifically with regard to Covered
11 Material produced by Defendants in this action on electronic storage media, the Receiving Party
12 must maintain, transmit and store such data using an encryption program that is certified by the
13 National Institute of Standards and Technology as FIPS 140-2 compliant. Defendants or
14 Defendants’ agents will supply all necessary encryption software and encryption keys with any
15 media that it produces pursuant to this Protective Order to Plaintiffs’ Counsel and Experts (as
16 defined in this Protective Order) to whom disclosure is reasonably necessary for this litigation
17 and who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A). Further, all
18 encryption keys supplied by Defendants or Defendants’ agents must be continuously protected in
19 such a way as to not be disclosed to any other person under any circumstances.

20 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
21 LITIGATION

22 If a Receiving Party is served with a subpoena or an order issued in other litigation that
23 would compel disclosure of Protected Material, the Receiving Party must so notify the
24 Designating Party, in writing (by electronic mail, if possible) immediately, and in no event more
25 than what is reasonable with the exercise of due diligence, after receiving the subpoena or order.
26 Such notification must include a copy of the subpoena or court order. The Receiving Party also
27 must immediately inform in writing the party who caused the subpoena or order to issue in the
28 other litigation that some or all the material covered by the subpoena or order is the subject of this

1 Protective Order. In addition, the Receiving Party must deliver a copy of this Protective Order
2 promptly to the party in the other action that caused the subpoena or order to issue. The purpose
3 of imposing these duties is to alert the interested parties to the existence of this Protective Order
4 and to afford the Designating Party in this case an opportunity to try to protect its confidentiality
5 interests in the court from which the subpoena or order issued. The Designating Party shall bear
6 the burdens and the expenses of seeking protection in that court of its confidential material – and
7 nothing in these provisions should be construed as authorizing or encouraging a Receiving Party
8 in this action to disobey a lawful directive from another court.

9 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

10 Except as provided in paragraph 12.3, if a Receiving Party learns that, by inadvertence or
11 otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized
12 under this Protective Order, the Receiving Party must immediately (a) notify in writing the
13 Designating Party of the unauthorized disclosure(s), (b) use its best efforts to retrieve all copies of
14 the Protected Material, (c) inform the person or persons to whom unauthorized disclosure(s) were
15 made of all the terms of this Protective Order, if they are not already so informed, and (d) request
16 such person or persons to execute the “Acknowledgment and Agreement to Be Bound” attached
17 hereto as Exhibit A, if they have not already done so. Failure to designate any materials as
18 subject to the terms of this Protective Order shall not constitute a waiver of any subsequent
19 assertion that the materials are covered by this Protective Order. Unauthorized disclosure for an
20 improper purpose may subject the disclosing party to sanctions.

21 10. FILING PROTECTED MATERIAL

22 Without written permission from the Designating Party or a court order secured after
23 appropriate notice to all interested persons, a Party may not file in the public record in this action
24 any Protected Material. A Party that seeks to file under seal any Protected Material must comply
25 with Civil Local Rule 79-5.

26 11. FINAL DISPOSITION

27 Except as otherwise required by statute, including the Federal Records Act, 44 U.S.C. §
28 3010, *et seq.*, or regulation, within ninety (90) days after the final termination of this action, each

1 Receiving Party must return all Protected Material to the Producing Party, unless otherwise
2 ordered or agreed in writing by the Producing Party. As used in this subdivision, “all Protected
3 Material” includes all copies, abstracts, compilations, summaries or any other form of
4 reproducing or capturing any of the Covered Documents or Covered Information. With
5 permission in writing from the Designating Party, the Receiving Party may destroy some or all of
6 the Protected Material instead of returning it. Whether the Protected Material is returned or
7 destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if
8 not the same person or entity, to the Designating Party) by the ninety (90) day deadline that
9 identifies (by category, where appropriate) all the Protected Material that was returned or
10 destroyed and that affirms that the Receiving Party has not retained any copies, abstracts,
11 compilations, summaries or other forms of reproducing or capturing any of the Covered
12 Documents and Covered Information. Notwithstanding this provision, Counsel are entitled to
13 retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda,
14 correspondence or attorney work product, even if such materials contain Protected Material. Any
15 such archival copies that contain or constitute Protective Material remain subject to this
16 Protective Order as set forth in Section 6 (DURATION), above.

17 12. MISCELLANEOUS

18 12.1 Right to Further Relief. Nothing in this Protective Order abridges the right of any
19 person to seek its modification by the Court in the future.

20 12.2 Right to Assert Other Objections. No Party waives any right it otherwise would
21 have to object to disclosing or producing any information or item on any ground not addressed in
22 this Protective Order. Similarly, no Party waives any right to object on any ground to the use in
23 evidence of any of the material covered by this Protective Order.

24 12.3 No Effect on Existing Rights. The status of a document or information as
25 Protected Material in this litigation shall not prevent disclosure or use as permitted by law or
26 compelled by order of any court, or restrict a party’s use outside of this litigation of materials
27 produced by that Party. This Protective Order does not restrict individual Plaintiffs’ use of
28 Privacy-Act, 38 U.S.C. § 5701, or HIPAA protected records pertaining to them. Nothing in this

1 Protective Order shall be construed to confer rights on any third party, except to the extent that a
2 third party produces documents or other information in this action subject to the terms of this
3 Protective Order.

4
5 IT IS SO ORDERED.

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7 DATED: December 1, 2010


8 JAMES LARSON
9 UNITED STATES MAGISTRATE JUDGE

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

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I, [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Protective Order that was issued by the United States District Court for the Northern District of California on [date] in the case of *Vietnam Veterans of America, et al., v. Central Intelligence Agency, et al.*, Case No. CV 09-0037-CW. I agree to comply with and to be bound by all the terms of this Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Protective Order to any person or entity except in strict compliance with the provisions of this Protective Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Protective Order, even if such enforcement proceedings occur after termination of this action. I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Protective Order.

Date: _____
City and State where sworn and signed: _____
Printed name: _____
 [printed name]
Signature: _____