

# Exhibit FF

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February 16, 2012

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Via E-Mail

Joshua E. Gardner, Esq.  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW  
Washington, DC 20530

Re: *Vietnam Veterans of America, et al. v. Central Intelligence Agency, et al.*,  
No. CV 09-0037 CW (N.D. Cal.)

Dear Mr. Gardner:

I am writing to memorialize some issues from our meet and confer sessions on February 13 and 14, 2012.

#### Claims Files

Of the 620 chem-bio claims files DVA identified, Defendants have agreed to produce all of those in which a veteran both (1) alleges exposure as a result of chemical or biological agent testing and (2) served in the military between 1938 and 1975, subject to DVA's agreement regarding the date limitations of the search.

We agreed that DVA will exclude from its production those claims files in which a veteran alleges only exposure to Agent Orange in Vietnam. DVA will not exclude those claims files in which a veteran claims exposure to both Agent Orange and any other test substance (*e.g.*, scopolamine). Ms. Farel will confirm that only Agent Orange exposure in Vietnam (as opposed to Dioxin or Agent Orange testing at Fort Detrick, for example) will be excluded.

On February 13, Plaintiffs requested that DVA search for the claims files of test subjects listed in the DOD's magnetic tapes printout. DVA did not agree to search for those claims files. It did, however, agree that if Plaintiffs provided specific names of veterans who were on the magnetic tapes printouts, and not in the Chem-Bio Database, that DVA would search for those specific files. On February 14, DVA reneged on the agreement, and indicated that it was not willing to search for any more claims files, despite Plaintiffs' willingness to review the printout and forward names to DVA.

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Defendants also continued to refuse to produce any of the 1,200 mustard gas and Lewisite claims files DVA has identified. Plaintiffs proposed a compromise similar to that reached with regard to the 620 chem-bio claims files: that DVA would only produce those claims files where a veteran's claim was based on exposure to mustard agents or Lewisite, and with the same time restrictions (limited to veterans who served between 1938 and 1975). DVA will not agree to this or any compromise.

#### Chem-Bio/Mustard Gas Mailbox

Plaintiffs raised questions regarding the origin of various productions that appear to be emails from the chem-bio mailbox. In response, Ms. Farel agreed to send Plaintiffs a letter regarding the emails from the chem-bio mailbox contained in the DVA074 and DVA076 productions. Specifically, the letter will address the date range of the emails, why there are no emails from 2008, why they were all produced as one document, and will confirm that the hard copy files of chem-bio emails from 2008 and before (about which Paul Black testified) had been produced.

We also discussed the fact that DVA had not produced the "back-up" of the chem-bio mailbox which David Abbot testified he saved on a C&P Service server. (Abbot Deposition Transcript at 366-67.) Plaintiffs requested that DVA provide a declaration from someone with personal knowledge regarding the efforts to locate Mr. Abbot's back-up of chem-bio emails. DVA refused. Defendants confirmed that Mr. Abbot's computer was "wiped" pursuant to DVA policy, but DVA has not searched for that computer, nor has DVA run any analysis of the hard drive.

DVA continues to refuse to produce any emails sent to the mustard gas mailbox.

#### DVA Annual Reports

DVA agreed — at multiple prior meet-and-confers — that if Plaintiffs provided the relevant pages from their review of DVA's annual reports to Congress regarding DVA studies involving test substances, DVA would confirm that all documents relating to those studies had been produced. DVA now says it will not do what it had agreed to do (even after Plaintiffs provided the relevant pages to DVA). Plaintiffs request that DVA reconsider.

Plaintiffs note that Judge Corley clearly contemplated in the August 4, 2011 Hearing that Plaintiffs' review of the annual reports would be a "first start" in tracking down documents related to DVA's tests. (Docket No. 250 at 84.) Plaintiffs have received no discovery regarding these tests. DVA now refuses to conduct any searches for documents regarding these tests. We will therefore be including this issue as a discovery dispute in a joint letter. Please let us know in writing by close of business on Friday, February 17, whether DVA will change its position.

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#### DVA Privilege Log

DVA refused to produce any of the documents from DVA's privilege log that Plaintiffs requested in their February 13, 2012 letter, including those documents DVA asserts are protected by the deliberative process or attorney-client privileges.

Ms. Farel said that many of these documents are duplicates of those listed earlier in the privilege log and, thus, part of Judge Corley's November 2011 *in camera* review. Ms. Farel agreed to send us a letter and chart clarifying what exactly DVA considers a "duplicate." For all documents requested by Plaintiffs, the chart will say whether each is a duplicate of a previous entry on the privilege log, and what is meant by duplicate (*e.g.*, it's identical, it is a forwarded email, reply of "got it," etc.) If the document is a "duplicate," the chart will include the entry number of the corresponding "original" entry from earlier in the privilege log.

In order to bring this issue to the Court's attention as quickly as possible for resolution, please provide this chart by close of business on Friday, February 17.

#### DOD Privilege Log

With the exception of the technical reports discussed below, DOD refused to produce any of the documents from DOD's privilege log requested in Plaintiffs' February 13, 2012 letter, including those DOD asserts are protected by the deliberative process or attorney-client privileges.

With regard to the two technical reports, "EA 3834: Summary Report of Status of 1 September 1969" and "Agent CX (Phosgene Oxime)," listed as entries two and three, respectively, Defendants have reviewed the Agent CX report for declassification and will produce the document with redactions. With respect to the EA 3834 report, we understand that DOD is undertaking a declassification review to determine if DOD will produce the document or a redacted version of it.

#### Magnetic Tapes

You did not provide any update regarding the status of DLA's efforts to retrieve data from the magnetic tapes. You did not know whether DOD has sent funds to DLA to secure the appropriate hardware to read the tapes, or whether DLA has, in fact, located that hardware, but agreed to get back to us on those issues. Defendants refused to produce correspondence with DLA or to provide a witness to authenticate the tapes and to testify regarding their contents. Defendants also refuse to give the tapes to a special master who would supervise the retrieval using forensic experts.

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If you disagree with any of the above characterizations from our meet-and-confer calls, please let me know as soon as possible.

Sincerely,



Ben Patterson

cc: Kimberly Herb  
Brigham Bowen  
Lily Farel  
Judson O. Littleton