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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,
Plaintiffs,
v.
CENTRAL INTELLIGENCE AGENCY, *et al.*,
Defendants.

Case No. CV 09-0037-CW

**DECLARATION OF LILY SARA
FAREL IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO
COMPEL DISCOVERY**

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May 17, 2012

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

Dear Ms. Farel:

I am writing with respect to the new Department of Veterans' Affairs ("DVA") Privilege Log concerning David Abbot's files provided May 15, 2012, and also some related issues.

New Privilege Log

On May 15, DVA provided a new 25-page privilege log, identifying an additional 212 new entries for documents that DVA is withholding. The vast majority of these documents appear to fall into the exact same subject matter categories as past documents over which the parties have met-and-conferred at length and the Court has considered as part of *in camera* reviews. The Privilege Log also lists many of the same authors/recipients and past deponents as previous logs.

The sheer number of new entries from one custodian seems rather high, given that most of the recipients or senders indicated are other major witnesses in the case. And again, most of the entries are simply rote phrases phrased to try to capture a privilege element rather than actual descriptions of the documents. Furthermore, many of these documents were authored, sent, or received by past custodians, such as Joe Salvatore, Mark Brown, and Craig Hyams. It is thus unclear why these documents—which appear responsive to Plaintiffs' July 27, 2009 Rule 45 Subpoena—were not previously captured from these other custodians and logged long ago. Please explain.

To the extent there are duplicates of past entries, please identify them. In order to avoid expending the Court's limited resources, it would be useful for Defendants to identify exact

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duplicates of documents (if any) that have already been reviewed by the Court and covered by the Court's prior rulings.

As the Court has made clear through its prior orders, including its May 14, 2012 Order (Docket No. 423), Plaintiffs have a substantial need to overcome Defendants' claims of the qualified deliberative process privilege for documents in these same subject matters. In addition, given the Court's conclusions that some previously withheld documents are not deliberative and that some of "Defendant's redactions are not deliberative, but strategic" (*id.* at 7-8), Plaintiffs are concerned that these new entries may suffer from the same deficiencies.

For these reasons and those addressed in Plaintiffs' letters and filings with respect to Defendants' past privilege logs (*see, e.g.*, Docket Nos. 404, 378-4), we ask that DVA reevaluate its claims of privilege and produce the documents just logged as soon as possible. Defendants could also inform the Court in DVA's Response to the Court's May 14, 2012 Order (Docket No. 423) due Friday, that DVA provided Plaintiffs with a 25-page privilege log of David Abbot's documents, withholding 212 entries, on May 15. And DVA could ask the Court for guidance regarding resolution, including whether the Court would like DVA to submit these documents, minus exact duplicates, to include in its ongoing *in camera* review.

There are also a few documents being withheld based on assertions of both deliberative process and attorney-client privilege. Can any of these documents be redacted in a way to leave the parts which are not covered by Defendants' claim of attorney-client privilege? In addition, a few attorney-client entries include "VAVBAWAS/CO/MUSTARDGAS" as an author or recipient. Who is this e-mail entry? Is it an e-mail listserv or referring to the mustard gas mailbox? If so, it would call into question the assertion of privilege.

Abbot Production

In your May 14, 2012 production cover letter, you identify two problems with the Abbot production: (1) two attachments to e-mails are password-protected and thus far, DVA has been unable to recover the passwords, and (2) three e-mails have an error message when you attempt to open them. When were these attachments password-protected? Is the issue the same as with the Chem-Bio and Mustard Gas Mailbox encryption problems that were resolved following the December 15, 2011 Hearing? What follow-up efforts has DVA made to retrieve these two attachments and three e-mails? Do you intend to make any further efforts, and if so, what? We urge you to continue your efforts to decode these documents.

Depositions

Since Mr. Abbot's deposition, Defendants have produced over 11,000 pages of documents identified as being from or related to Mr. Abbot. Plaintiffs are in the process of reviewing

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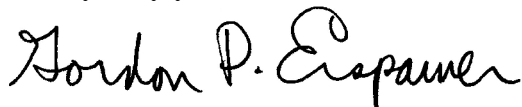
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these documents, but based on the initial review, it seems clear that resuming his deposition is appropriate. In light of these recent productions and the Court's April 6, 2012 Order (Docket No. 408 at 15), we assume that Defendants have no object to producing Mr. Abbot to resume his deposition for a limited time frame. Please let us know Defendants' position.

As with the other two deponents, Kelley Brix and Joe Salvatore, Plaintiffs at this time intend to wait until the privilege log issues are resolved and any additional withheld documents are produced before proceeding with depositions. At some point, however, we will need to discuss scheduling these depositions for after the production is complete.

As we continue our review of Defendants' recent productions and additional withheld documents ordered produced by the Court in the future, we will continue to evaluate whether other appropriate remedies, including, for example, resuming other depositions or deposing new witnesses, will be necessary.

Very truly yours,



Gordon P. Erspamer

cc: Joshua Gardner
Kimberly Herb
Brigham Bowen
Judson O. Littleton