

1 IAN GERSHENGORN
 Deputy Assistant Attorney General
 2 MELINDA L. HAAG
 United States Attorney
 3 VINCENT M. GARVEY
 Deputy Branch Director
 4 JOSHUA E. GARDNER
 District of Columbia Bar No. 478049
 5 KIMBERLY L. HERB
 Illinois Bar No. 6296725
 6 LILY SARA FAREL
 North Carolina Bar No. 35273
 7 BRIGHAM JOHN BOWEN
 District of Columbia Bar No. 981555
 8 JUDSON O. LITTLETON
 Texas Bar No. 24065635
 Trial Attorneys
 9 Civil Division, Federal Programs Branch
 U.S. Department of Justice
 10 P.O. Box 883
 Washington, D.C. 20044
 11 Telephone: (202) 305-7583
 Facsimile: (202) 616-8202
 12 E-mail: joshua.e.gardner@usdoj.gov

13 Attorneys for DEFENDANTS

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION

17 VIETNAM VETERANS OF AMERICA, *et al.*,
 18 Plaintiffs,
 19 v.
 20 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 21 Defendants.
 22

Case No. CV 09-0037-CW

Noticed Motion Date and Time:
 August 23, 2012
 9:00 a.m.

**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' MOTION TO
 COMPEL DISCOVERY**

1 Plaintiffs' latest motion to compel seeks documents that are both legally irrelevant to
2 any claim in this case and are cumulative of the vast discovery produced by Defendants.
3 Casting notions of proportionality aside, Plaintiffs continue to disregard Magistrate Judge
4 Larson's admonition that "Plaintiffs shall reevaluate what information is *central* to their case,
5 recognize limits on usefulness of some of the information they seek, and make a sincere effort
6 to reduce the scope of discovery sought." Dkt. 178 at 7 (emphasis added). For the reasons
7 discussed below, as well as in Defendants' previous oppositions to Plaintiffs' motions to
8 compel, *see* Dkt. 276, 371, 460, Plaintiffs' latest motion should be summarily denied.¹

9 **BACKGROUND**

10 On June 28, 2012, the Department of Veterans Affairs ("VA") provided Plaintiffs with
11 a supplemental privilege log containing nine entries and reflecting documents withheld from
12 its June 28, 2012 supplemental production of documents. These documents fall into one of
13 three categories:² (1) four emails and one memorandum containing predecisional deliberations
14 concerning the possibility of modifying the procedures used by VA for verifying the
15 exposures of former volunteer test participants; (2) two emails reflecting predecisional
16 deliberations concerning possible modifications to the VA training manual for handling claims
17 related to Project SHAD, Cold War-era, and mustard gas claims; and (3) one document
18 containing several redacted memoranda concerning predecisional recommendations regarding
19 potential VA outreach efforts.

20
21
22

¹ Defendants note for the Court that the parties are in the process of meeting and conferring over
23 certain discovery disputes related to Plaintiffs' supplemental discovery, including Plaintiffs'
24 recent privilege log, supplemental interrogatory responses and supplemental initial disclosures.
To the extent the parties reach an impasse, Defendants may need to seek the Court's intervention
on these issues.

25 ² The last document identified on VA's privilege log, DVA135 000047, was withheld on the basis
26 of the attorney-client privilege. Plaintiffs have not challenged VA's assertion of privilege over
27 this document and, accordingly, VA has not included it for *in camera* review.

ARGUMENT

I. PLAINTIFFS' CHALLENGES TO VA'S DELIBERATIVE PROCESS ASSERTIONS ARE WITHOUT MERIT

A. The Documents At Issue Are Both Predecisional And Deliberative.

Having extensively briefed the legal requirements concerning the deliberative process privilege, *see* Dkt. 276; 371; 460, Defendants incorporate those arguments here by reference. Beyond that, as reflected in the declaration of John J. Spinelli, the documents identified on VA's most recent privilege log are both predecisional and deliberative, *see* Spinelli Decl. ¶¶6-9, and Plaintiffs do not dispute that the public disclosure of these documents would have a chilling effect.

B. Plaintiffs Have Failed To Meet Their Burden of Establishing A Substantial Need For VA's Documents Sufficient to Overcome VA's Assertion of Privilege.

Plaintiffs have once again failed to meet their burden of demonstrating substantial need over the documents identified on VA's most recent privilege log. Plaintiffs cannot establish how any of these three categories of documents are relevant to the narrow issues remaining in this case, or how the documents they now seek are not cumulative of the substantial information they already possess.

First, documents related to the potential modification of VA verification procedures have no relevance to Plaintiffs' facial bias claim against VA (a claim which, as VA has explained, is legally barred by 38 U.S.C. § 511(a)). Dkt. 431; 465.³ Plaintiffs completely fail to respond to these arguments about the legal irrelevance of the discovery sought to their claim against the VA and, instead, merely assert that VA "tries out summary judgment arguments concerning the DVA claim." Dkt. 463 at 2. Plaintiffs' argument misses the point. To be discoverable, material must

³ As discussed in VA's opposition to Plaintiffs' last motion to compel, because the legal issues associated with Plaintiffs' challenge to VA's assertion of the deliberative process privilege are, in large respects, inextricably tied to the District Court's resolution of the legal issues associated with Plaintiffs' motion for class certification, VA's motion for leave to seek reconsideration, and Plaintiffs' motion to substitute, it would be appropriate for this Court to defer consideration of Plaintiffs' motion to compel pending the District Court's resolution of those outstanding motions.

1 be both non-privileged and “relevant to any parties’ claims or defenses.” Fed. R. Civ. P. 26(b).
2 As VA has explained in multiple briefs, the discovery sought by Plaintiffs is, by definition,
3 legally irrelevant because Plaintiffs’ claim is barred by section 511. Dkt. 431; 465. Accordingly,
4 Plaintiffs’ tactical decision to ignore these arguments concerning the lack of legal relevance
5 should be deemed as either a waiver or a concession. Even if Plaintiffs’ claim somehow
6 ultimately survives the insurmountable legal barrier presented by section 511, the *en banc* Ninth
7 Circuit’s recent precedent in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir.
8 2012), and the rationale of Supreme Court’s recent decision in *Elgin v. Department of Treasury*,
9 132 S. Ct. 2126 (2012), Plaintiffs’ claim is, *at best*, only a purely legal claim to which little, if
10 any, discovery is appropriate. Indeed, any potential minimal relevance of these documents to
11 Plaintiffs’ claim against VA falls well short of the high relevance standard necessary to overcome
12 the assertion of the deliberative process privilege.

13 Furthermore, contrary to Plaintiffs’ assertions, Dkt. 467 at 2, documents reflecting internal
14 discussions within VA about potential modification to the procedures VA uses to verify the
15 participation of test participants have no relevance to the claims brought under section 706(1) of
16 the Administrative Procedure Act (“APA”) regarding notice and health care against the
17 Department of Defense and the Department of the Army (collectively, “DoD”), or the secrecy
18 oath claims against both DoD and the Central Intelligence Agency (“CIA”).⁴

19 In addition, as previously discussed (and which Plaintiffs have never disputed), Plaintiffs
20 have an abundance of information and documents on precisely this topic. Not only have
21 Plaintiffs themselves previously cited to some of the documents they already have, Dkt. 404 at 7-
22 10, they also have elicited hours of testimony from numerous deponents on this precise topic,
23 including, among others, VA employees and former employees David Abbot and Joe Salvatore,
24

25 ⁴ As discussed both in Defendants’ Opposition to Class Certification and Defendants’ Opposition
26 to Plaintiffs’ Motion to Substitute, Dkt. 393 at 10-12; Dkt. 465 at 7-8, which Defendants
27 incorporate here by reference, Plaintiffs have abandoned any constitutional claims in this case,
28 and, in any event, there is no constitutional right to notice as a matter of law.

1 and DoD employees and contractors Dee Dodson Morris, Martha Hamed, and Roy Finno. Dkt.
2 371 at 19, n.19. In addition, Defendants have produced to Plaintiffs the final version of these
3 documents.⁵ *See* Spinelli Decl. ¶7. Accordingly, even if Plaintiffs could meet their burden of
4 demonstrating the legal relevance of these documents (which they cannot), given the
5 extraordinary amount of information that Plaintiffs already possess, they cannot demonstrate a
6 substantial need sufficient to overcome VA's legitimate interest in withholding these documents.

7
8 Second, Plaintiffs have failed to demonstrate how the two emails reflecting internal VA
9 deliberations concerning the possibility of modification to VA's training manual concerning
10 Project SHAD, Cold War-era, and WWII-era claims is relevant to any claim remaining in this
11 case. Indeed, Plaintiffs' motion is entirely silent as to these two documents. As with VA's
12 deliberative discussions concerning the potential modification of VA's procedures for verifying
13 participation, internal VA deliberations concerning potential modifications to guidance for
14 adjudicating claims has no relevance to Plaintiffs' facial bias claim against VA and is similarly
15 barred by section 511. Nor could these two emails have any relevance to the claims against DoD
16 for notice and health care, or against DoD and the CIA related to purported secrecy oaths. In
17 addition, Plaintiffs possess the final version of VA's training manual. *See* Spinelli Decl. ¶8.

18 Finally, Plaintiffs challenge VA's assertion of the deliberative process privilege over three
19 redacted portions of several memoranda attached to an email that reflect recommendations
20 concerning potential outreach efforts and which predate decisions on those recommendations.
21 *See* DVA132 000034-68. Notably, the Court has previously reviewed these same or similar
22 redactions and concluded that they were properly withheld from public disclosure based upon the
23 deliberative process privilege. *See* Spinelli Decl. ¶9.

24 ⁵ The document Bates labeled DVA088 000001-35 was reproduced to Plaintiffs as DVA093
25 000001-35. Although referred to by the DVA093 designation by Mr. Spinelli in his declaration,
26 the version VA has provided to the Court is labeled DVA088. These two documents are
27 identical.

1 For example, the redacted recommendations contained on page DVA 132 00041 are
 2 substantively identical to the redacted recommendations reflected on page DVA078 000136 of
 3 document DVA078 000134-136, over which the Court previously upheld VA's assertion of the
 4 deliberative process privilege. Dkt. 423; 430 at 6-9. The redactions of the recommendations
 5 reflected on DVA132 000057-58 are substantively identical to the redacted recommendations
 6 contained on page DVA078 000132 within the document DVA078 000130-133, and which the
 7 Court upheld VA's assertion of the deliberative process privilege. *Id.* Plaintiffs have provided no
 8 legal justification for seeking to have the Court revisit its prior decisions on these redactions.⁶
 9 Plaintiffs' motion to compel should be denied.

10 CONCLUSION

11 For the foregoing reasons, Plaintiffs' Motion to Compel should be denied.

12
 13 July 27, 2012

Respectfully submitted,

14 IAN GERSHENGORN
 15 Deputy Assistant Attorney General
 16 MELINDA L. HAAG
 17 United States Attorney
 18 VINCENT M. GARVEY
 19 Deputy Branch Director

20 /s/ Lily Sara Farel
 21 JOSHUA E. GARDNER
 22 KIMBERLY L. HERB
 23 LILY SARA FAREL
 24 BRIGHAM JOHN BOWEN
 25 JUDSON O. LITTLETON
 26 Trial Attorneys
 27 U.S. Department of Justice

28
 29 _____
 30 ⁶ VA also had asserted privilege over the recommendations reflected in DVA132 00043-44,
 31 which was identical to the recommendations contained in DVA078 002348-2350 and DVA078
 32 02970-2972. The Court previously upheld VA's assertion of the deliberative process privilege
 33 over these two documents. Dkt. 423; 430 at 6-9. However, the Court also ordered production
 34 over a duplicate of these same documents, which was identified as DVA078 02466-2468 on VA's
 35 earlier privilege log. Accordingly, VA will produce the redacted portion of DVA132 00043-44
 36 contained within DVA132 000034-000068.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8202
E-mail: Joshua.E.Gardner@usdoj.gov