

# Exhibit A

**MORRISON | FOERSTER**

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September 30, 2010

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*By E-Mail*

Brigham Bowen, Esq.  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
P.O. Box 883  
Washington, D.C. 20044

Re: *Vietnam Veterans of America, et. al. v. Central Intelligence Agency, et. al.*,  
No. CV 09-00037-CW (N.D. Cal.)

Dear Brigham,

Further to our September 23, 2010 meet-and-confer discussion, this letter provides additional feedback on the proposed protective order submitted with Defendants' response to Plaintiffs' pending motion for a protective order and to overrule objections ("Motion") (Docket No. 121). As you know, the proposed protective order that Defendants submitted was the very first draft provided by Defendants that would permit the production of Privacy Act or HIPPA materials in this action, despite the parties' negotiations over this issue that have extended for more than a year. Plaintiffs are disappointed that it was only *after* Plaintiffs sought relief from the Court that Defendants conceded that such an order is appropriate here. Nonetheless, it now is clear that all parties agree that a protective order is required and appropriate for this action. We are optimistic that the parties can resolve their differences and agree to the terms of an appropriate protective order to govern discovery, which will allow us to submit a stipulated proposed protective order and to forego the pending Motion and hearing. With this goal in mind, we have incorporated several of Defendants' suggested changes in the revised draft protective order enclosed with this letter. The enclosed draft order is redlined to show changes from the proposed protective order that Plaintiffs submitted with their Motion.

Below, I outline what we see as areas of agreement and disagreement, and describe Defendants' proposals that are incorporated into this draft. First, however, it appears that there may be some confusion about the scope and purpose of Plaintiffs' proposed protective order. The purpose is to protect and control the disclosure by a receiving party of designated information produced to it by any other party or non-party in the course of this litigation, and

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to allow Defendants to produce certain information that may be disclosed only pursuant to court order. The protective order would not otherwise limit or expand in any way any party's discovery obligations, nor would it limit a party's control over, access to, or use of information possessed independently of the litigation.

We have revised the draft order to address any such confusion. These revisions include changes to Section 3 to make clear that this provision only identifies the scope of materials covered by the proposed order, and that the producing party must designate protected materials as described in Section 4. We also have modified Section 7 to make clear that limitations on distribution of protected materials apply only to the receiving party and are not intended to restrict the producing party's ability to access or use information otherwise available to it independent of the litigation.

Areas of Agreement

1. *38 U.S.C. § 5701.*

Plaintiffs agree that materials protected by 38 U.S.C. § 5701 and produced in the course of this litigation should be subject to the terms of the protective order as appropriate. The enclosed draft order incorporates Defendants' proposed language on this point.

2. *Non-Classified Information Not Publically Available.*

Plaintiffs agree that materials restricted from public access under Department of Defense Directives (DoDD) 5230.24 and 5230.25 and produced in the course of this litigation should be subject to the terms of the protective order as appropriate. The enclosed draft order incorporates Defendants' proposed language on this point.

3. *Definitions.*

Disclosure or Discovery Materials

Plaintiffs agree to remove from Section 2.2 the sentence: "At least sixty days prior to the trial date, the parties shall meet and confer and submit any separate proposed protective order governing the treatment of confidential information during trial." Of course, the parties *will* have to address the treatment of designated information at trial, but Plaintiffs agree that the parties can address this issue as part of the parties' pretrial preparations (with guidance from the Court, as necessary) rather than through the text of this protective order.



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### Definitions of Counsel

Plaintiffs believe that the protective order should define “Counsel” to ensure that the organizational plaintiffs’ in-house counsel (and the staffs of all counsel) are covered by the order. We agree, however, that three separate definitions are not required; accordingly we have proposed a single definition in the revised draft order.

### Definition of Expert

Plaintiffs agree to add the phrase “or assigned by the Defendants” to the definition of Expert.

#### *4. Defendants’ access to covered information.*

The protective order does not impose limits on Defendants’ access to or use of information to which they otherwise have access outside of this litigation. Plaintiffs have revised Section 7 in the enclosed draft order to clarify this point.

#### *5. Section 4.2(b) — reference to material produced or used during trial.*

Plaintiffs agree to remove the last sentence of Section 4.3(b) which read: “As set forth in Section 2.2, this Protective Order specifically excludes any material or testimony to be produced or used during trial and a separate order will govern trial testimony.”

### Areas of Disagreement

#### *1. Classified Information.*

Plaintiffs do not agree that including “classified information” within the terms of the protective order will give Plaintiffs access to information that Defendants are not permitted to produce. As stated above, the order does not in any way expand, limit or modify any party’s discovery obligations, nor will it require Defendants to produce classified information that is not properly subject to discovery. Including “classified information” within the scope of the protective order will, however, allow Defendants to appropriately designate for protection any classified information that a party (or non-party) may disclose during discovery (during deposition testimony, for example).

As a separate matter, Plaintiffs do not agree that there are no circumstances under which “classified information” should be made available in this action — especially in light of Defendants’ admission that this case “may implicate” such information. Relevant information may have been “classified” long ago, and Defendants (and governmental non-parties) should be required to conduct a new classification review for all responsive relevant material. Given the age of the bulk of information at issue, the presumption should be that

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such information no longer is entitled to a classified designation. The parties may litigate that issue during the course of this action, but it is beyond the scope of the contemplated protective order, which will govern documents actually *produced* in discovery.

2. *38 U.S.C. § 7332.*

Plaintiffs see no need for the protective order to explicitly exclude information subject to 38 U.S.C. § 7332. The protective order as drafted does not provide blanket authorization for disclosure without individualized safeguards, nor does it require Defendants to disclose to Plaintiffs information covered by § 7332. As discussed above, Plaintiffs' proposed protective order does not *require* disclosure of *any* information — instead, it provides protection for designated information produced in the action. If a party has custody, possession, or control of responsive information properly subject to § 7332, it can require (as appropriate) a separate order satisfying the applicable regulations before agreeing to produce that information.

3. *Designation of pretrial testimony (Section 4.3(b)).*

Plaintiffs do not agree to Defendants' proposed deletion of language in Section 4.3(b) limiting coverage to information explicitly designated for protection. Only by requiring parties to designate information for coverage will the parties be able to comply with the terms of the order and appropriately safeguard protected information. Plaintiffs have, however, amended Section 3 and the definition of Protected Materials (Section 2.6) to clarify that protected materials must be designated by the producing party as set forth in Section 4, which should resolve any confusion about the scope of material covered by the order.

4. *Encryption and location requirements (Section 7).*

As we discussed on September 23, Plaintiffs do not agree to Defendants' proposals in Section 7 that would require designated material to be encrypted and maintained only at the offices of Plaintiffs' Counsel of Record. Defendants have provided no justification for these extraordinary and costly measures which would greatly inhibit the ability of Plaintiffs to appropriately use designated information in this litigation. Although Defendants suggested when we spoke on September 23 that these provisions are required by the VA so that it can produce information subject to 38 U.S.C. § 5701, Defendants have not provided any support for this assertion. The Northern District of California's model protective order (revised June 2010) includes a provision requiring protected material to "be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this order." We believe that this provision sufficiently addresses security without unduly restricting any party's ability to use designated material in this litigation. This model provision is included as Section 7.3 of the enclosed draft.



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*5. Defendants' proposed additions to Section 12.*

Plaintiffs do not agree to Defendants' proposed Sections 12.4, 12.5, and 12.6. These provisions seem unnecessary and beyond the scope of an appropriate protective order. As stated above, there is nothing in the protective order that affects in any way a party's discovery obligations, places limits on a party's ability to assert a privilege, or limits a party's ability to move for appropriate relief, and we question the need for a provision limiting liability for unauthorized disclosure. We are open to hearing Defendants' justifications for these provisions, but upon initial review they appear unnecessary.

\* \* \*

We look forward to Defendants' response to the issues set forth above and to the enclosed revised proposed protective order. This revised protective order is offered as a compromise and to offer the Magistrate Judge some evidence that the parties are able to work through their substantial differences. We hope that the parties can agree to a stipulated protective order for submission to the Court, which would remove the present Motion from the Court's docket. Given the current case schedule and planned upcoming productions, we request Defendants' response by the end of next week. Please let me know if that timetable will not work for Defendants. In the meantime, please feel free to reach out with any questions or to seek clarification as necessary.

Very truly yours,



Timothy W. Blakely

Enclosure

cc: Caroline Lewis Wolverton, Esq.  
Kimberly L. Herb, Esq.  
Lily Farel, Esq.  
Gordon P. Erspamer, Esq.

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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

**[PROPOSED] PROTECTIVE ORDER  
GOVERNING DISCOVERY**

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## 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.

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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).  
28

**Deleted:** At least sixty days prior to the trial date, the parties shall meet and confer and submit any separate proposed protective order governing the treatment of confidential information during trial.

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**Deleted:** The Department of Justice attorneys designated as counsel of record in this action (and their support staff) shall be considered Outside Counsel for Defendants. The Morrison & Foerster attorneys designated as counsel of record in this action (and their support staff) shall be considered Outside Counsel for Plaintiffs.

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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.

**Deleted:** <#>House Counsel: attorneys who are employees of a Party (as well as their support staffs).¶  
<#>Counsel (without qualifier): Outside Counsel and House Counsel (as well as their support staffs).¶  
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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 Numbers  
20 (“SSN”), Dates of Birth (“DOB”), telephone numbers, and financial account numbers;

21 (iv) any other information protected by constitutional or statutory rights  
22 to privacy, including but not limited to information protected from disclosure under the Health  
23 Insurance Portability and Accountability Act (“HIPAA”), 42 U.S.C. § 201, and information  
24 protected by 38 U.S. C. § 5701;

25 (v) classified information and documents maintained by Defendants or  
26 other government entities;

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

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1 (vii) 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.

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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.

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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.

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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

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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. As set forth in Paragraph 2.2, this Protective Order specifically excludes any material or  
8 testimony to be produced or used during trial and a separate order will govern trial testimony.

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

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

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

26 5. CHALLENGING CONFIDENTIALITY DESIGNATIONS  
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1           5.1 Available Challenges. The Receiving Party may challenge the Producing Party’s  
2 designation of material for protection or the Producing Party’s failure to designate material for  
3 protection under this Protective Order.

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

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

18           5.4 Judicial Intervention. A Party that elects to press a challenge to a confidentiality  
19 designation or lack thereof after considering the justification offered by the Designating Party  
20 may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule  
21 79-5, if applicable) that identifies the challenged material and sets forth in detail the basis for the  
22 challenge. Any such motion must be accompanied by a competent declaration that affirms that  
23 the movant has complied with the meet and confer requirements imposed in the preceding  
24 paragraph and that sets forth with specificity the justification for the confidentiality designation  
25 that was given by the Designating Party in the meet and confer dialogue. The burden of  
26 persuasion in any such challenge proceeding shall be on the Party advocating the inclusion of a  
27 confidentiality designation on Disclosure or Discovery Material. Until the Court rules on the  
28

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1 Party’s challenge, all parties shall provisionally treat the challenged material as subject to the  
2 protections of this Protective Order.

3 6. DURATION

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

7 7. DISCLOSURE AND USE OF PROTECTED MATERIAL

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

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

15 (b) Certain designated representatives of Plaintiffs and Defendants (two  
16 representatives from each Defendant agency or Plaintiff non-profit corporations and three  
17 representatives of the Individual Plaintiffs) who have signed the “Agreement to Be Bound by  
18 Protective Order” (Exhibit A);

19 (c) Experts (as defined in this Protective Order) 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 (d) the Court and its personnel;

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

26 (f) fact witnesses in the action (and their counsel) during depositions or in  
27 preparation of affidavits or declarations for pretrial testimony, to whom disclosure is reasonably  
28 necessary for this litigation and who have signed the “Agreement to Be Bound by Protective

**Deleted:** Defendants are authorized to release records protected under the Privacy Act, without obtaining prior written consent of the individuals to whom the records pertain, to the persons identified in subparagraphs (a)-(h), below.

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1 Order” (Exhibit A). As set forth in paragraph 4.3(b), pages of transcribed deposition testimony or  
2 exhibits to depositions that reveal Protected Material must be separately bound by the court  
3 reporter and may not be disclosed to anyone except as permitted under this Protective Order;

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

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

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

13 7.3 Protected Material must be stored and maintained by a Receiving Party at a  
14 location and in a secure manner that ensures that access is limited to the persons authorized under  
15 this Order.

16 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER  
17 LITIGATION

18 If a Receiving Party is served with a subpoena or an order issued in other litigation that  
19 would compel disclosure of Protected Material, the Receiving Party must so notify the  
20 Designating Party, in writing (by electronic mail, if possible) immediately, and in no event more  
21 than what is reasonable with the exercise of due diligence, after receiving the subpoena or order.  
22 Such notification must include a copy of the subpoena or court order. The Receiving Party also  
23 must immediately inform in writing the party who caused the subpoena or order to issue in the  
24 other litigation that some or all the material covered by the subpoena or order is the subject of this  
25 Protective Order. In addition, the Receiving Party must deliver a copy of this Protective Order  
26 promptly to the party in the other action that caused the subpoena or order to issue. The purpose  
27 of imposing these duties is to alert the interested parties to the existence of this Protective Order  
28 and to afford the Designating Party in this case an opportunity to try to protect its confidentiality

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1 interests in the court from which the subpoena or order issued. The Designating Party shall bear  
2 the burdens and the expenses of seeking protection in that court of its confidential material – and  
3 nothing in these provisions should be construed as authorizing or encouraging a Receiving Party  
4 in this action to disobey a lawful directive from another court.

5 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

17 10. FILING PROTECTED MATERIAL

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

22 11. FINAL DISPOSITION

23 Except as otherwise required by statute, including the Federal Records Act, 44 U.S.C. §  
24 3010, *et seq.*, or regulation, within ninety (90) days after the final termination of this action, each  
25 Receiving Party must return all Protected Material to the Producing Party, unless otherwise  
26 ordered or agreed in writing by the Producing Party. As used in this subdivision, “all Protected  
27 Material” includes all copies, abstracts, compilations, summaries or any other form of  
28 reproducing or capturing any of the Covered Documents or Covered Information. With



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

13 12. MISCELLANEOUS

14 12.1 Right to Further Relief. Nothing in this Protective Order abridges the right of any  
15 person to seek its modification by the Court in the future.

16 12.2 Right to Assert Other Objections. No Party waives any right it otherwise would  
17 have to object to disclosing or producing any information or item on any ground not addressed in  
18 this Protective Order. Similarly, no Party waives any right to object on any ground to the use in  
19 evidence of any of the material covered by this Protective Order.

20 12.3 No Effect on Existing Rights. The status of a document or information as  
21 Protected Material in this litigation shall not prevent disclosure or use as permitted by law or  
22 compelled by order of any court, or restrict a party's use outside of this litigation of materials  
23 produced by that Party. This Protective Order does not restrict individual Plaintiffs' use of  
24 Privacy-Act, [38 U.S.C. § 5701](#), or [HIPAA](#) protected records pertaining to them. Nothing in this  
25 Protective Order shall be construed to confer rights on any third party, except to the extent that a  
26 third party produces documents or other information in this action subject to the terms of this  
27 Protective Order.  
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IT IS SO ORDERED.

DATED: August \_\_\_\_, 2010

\_\_\_\_\_  
JAMES LARSON  
UNITED STATES MAGISTRATE JUDGE

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

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: \_\_\_\_\_

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