

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
 23

Case No. CV 09-0037-CW

Noticed Motion Date and Time:
 September 22, 2011
 2:00 p.m.

**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' MOTION TO
 COMPEL DISCOVERY AGAINST
 DEFENDANT VA**

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INTRODUCTION

1
2 Plaintiffs’ only remaining claim against Defendant Department of Veterans Affairs
3 (“VA”) is an allegation of facial bias in VA’s adjudication of benefit claims by volunteer
4 participants in the Department of Defense’s chemical and biological weapons testing program.
5 Despite the narrow scope of this claim, Plaintiffs have sought far-reaching, burdensome discovery
6 against VA. And while VA has gone to substantial efforts to satisfy Plaintiffs’ desire for
7 information, Plaintiffs persist in demanding additional documents that greatly exceed an
8 appropriate and workable scope of discovery.
9

10 First, Plaintiffs seek to compel VA to produce documents withheld under the deliberative
11 process privilege. Notably, Plaintiffs do not contend that VA has not satisfied the substantive
12 requirements of privilege; namely, that the documents are predecisional and deliberative. Rather,
13 Plaintiffs claim that VA has failed to satisfy the procedural requirement of the privilege and that
14 their need for the documents outweighs VA’s interest in maintaining the privilege. Plaintiffs’
15 procedural challenge is contradicted by case law, and they have failed to satisfy their burden of
16 establishing the need for predecisional, deliberative documents in support of their facial bias
17 claim. In addition, because VA has asserted multiple privileges over many of the challenged
18 documents, yet Plaintiffs have only challenged VA’s assertion of the deliberative process
19 privilege, Plaintiffs appear to be seeking, in many instances, an advisory opinion from the Court.
20 Accordingly, Plaintiffs’ challenge to VA’s assertion of the privilege should be denied.
21

22
23 Second, Plaintiffs demand that VA undertake extraordinarily broad and substantially
24 burdensome searches without any articulation or showing of relevance to the narrow facial bias
25 claim against VA. For example, Plaintiffs seek to compel VA to search for documents
26 concerning approximately 400 separate chemical and biological agents. Beyond being irrelevant,
27 such a search is unduly burdensome on its face. Similarly burdensome is Plaintiffs’ demand that
28

1 VA search for all documents relating to testing that occurred prior to 1953. In addition, Plaintiffs
2 do not even attempt to establish how these 70-year-old documents are in any way relevant to their
3 claim against VA, and fail to acknowledge that the Defendants already have produced substantial
4 information concerning pre-1953 testing.

5
6 Third, Plaintiffs seek to compel VA to produce statistics that VA has examined and found
7 to be based on unreliable methodology. Rather than saddle Plaintiffs with such a flawed
8 statistical analysis, VA instead offered to produce the claims files of every identifiable test
9 subject, thus providing Plaintiffs not only with the information that would allow them to run their
10 own analysis, but with the additional information contained in those claims files. Yet Plaintiffs
11 continue to insist that VA expend effort and resources to provide a statistical analysis that is
12 wholly meaningless.

13
14 Finally, Plaintiffs seek an order compelling VA to search for and produce the death
15 certificates of all identifiable test subjects, despite the fact that VA already has committed to
16 searching for and producing death certificates. Accordingly, there is no live controversy between
17 the parties on this issue. Plaintiffs' motion to compel should be denied.

18 **BACKGROUND**

19 Plaintiffs filed their initial Complaint in this case in January 2009. On July 27, 2009,
20 Plaintiffs served a Rule 45 subpoena on VA, which was not a named Defendant. *See* Decl. of
21 Lily Farel ("Farel Decl.") ¶ 2, ex. A. Plaintiffs requested that VA produce more than 22
22 categories of documents, the subject matter of which ranged from all correspondence VA
23 received from or sent to any participant in the test programs (*id.* at 7), to all documents
24 concerning "the types of diseases or conditions experienced" by test veterans (*id.* at 8). As a
25 result of those search efforts, VA produced more than 14,000 pages of responsive documents to
26 the Plaintiffs. *See* Decl. of Paul Black ("Black Decl.") ¶ 22.
27
28

1 On June 7, 2010, Plaintiffs sought leave to amend their complaint for a third time to add
2 VA as a defendant. The Court denied in part and granted in part Plaintiffs' motion to amend,
3 limiting the claim Plaintiffs could bring against VA to one of facial bias. (See Dkt. 177.) The
4 Court also noted that "[t]he proposed 3AC is not clear as to the nature of Plaintiffs' new claims,"
5 but that the "Plaintiffs' reply, however, clarifies their intended challenges. First, Plaintiffs seek
6 relief under the Constitution and the APA concerning the DVA's *adjudication* of test
7 participants' claims for [service-connected death or disability compensation]. Second, they assert
8 that the DVA has unlawfully delayed the fulfillment of its obligation to locate and notify test
9 participants of their exposures, in violation of the APA." (*Id.* at 7) (emphasis added).¹

11 At the outset, the Court explained that "it is well-settled" that 38 U.S.C. § 511(a)
12 "precludes federal district courts from reviewing challenges to individual benefit determinations,
13 even if they are framed as constitutional challenges." (*Id.* at 8) (citing, among other cases, *Tietjen*
14 *v. U.S. Veterans Admin.*, 884 F.2d 514, 515 (9th Cir. 1989)). The Court then noted that it was
15 "[l]ess apparent" what the effect of section 511(a) was on an action "like this one, that purport not
16 to challenge individual benefit decisions, but rather the manner in which such *decisions* are
17 made." (*Id.*) (emphasis added). The Court then held that section 511

19 does not bar Plaintiffs' claims under the Fifth Amendment. Under this theory,
20 they mount a *facial attack on DVA as the decision-maker*. They do not challenge
21 the DVA's procedures or seek review of an individual benefits determination. Nor

22 ¹ Notably, in that same reply brief, Plaintiffs characterized their claim against VA as "narrow."
23 (See Dkt. 113 at 1). Plaintiffs further articulated the basis for their "facial bias" claim in their
24 reply brief: "Plaintiffs seek a declaration that DVA, because of its active role in the chemical and
25 biological testing programs, is an inherently biased decision maker, and is thus violating the due
26 process rights of test participants across the board. Plaintiffs also seek an injunction forbidding
27 DVA from using biased decision makers, and compelling DVA to devise procedures to resolve
28 the claims of test participants that do not violate the due process clause and which involve, at a
minimum, a neutral decision maker. Determining whether DVA is biased, and whether that bias
violates the due process clause, is *a facial challenge to DVA's procedures. It will not require
the review of any decision by the Secretary on any individual veteran's benefits claim, nor
hinge on the specific facts of any veterans' claims.*" (See Dkt. 113 at 6) (emphasis added).

1 do they attack a particular decision made by the Secretary. *The crux of their*
2 *claim is that, because the DVA allegedly was involved in the testing program at*
3 *issue, the agency is incapable of making neutral, unbiased benefits*
4 *determinations for veterans who were test participants. That bias, according to*
Plaintiffs, renders the benefits determination process constitutionally defective
as to them and other class members.”

5 (*Id.* at 11) (emphasis added).

6 The Court expressly denied Plaintiffs’ motion for leave to amend to the extent Plaintiffs
7 sought to add an APA challenge based upon VA’s training letter, explaining that any such claim
8 would be foreclosed by section 551. (*Id.* at 12-13.) The Court similarly denied Plaintiffs’ motion
9 for leave to amend regarding an APA claim predicated upon Plaintiffs’ challenges to VA’s efforts
10 to locate and notify test participants, and held that VA had no enforceable legal obligation to
11 locate or notify test subjects. (*Id.* at 14-17.)

12 Despite the limited claim of facial bias, Plaintiffs have served wide-ranging and broad
13 discovery on VA. VA has responded to 220 requests for production, more than 25
14 interrogatories, including discrete subparts, and 48 requests for admission propounded by
15 Plaintiffs, as well as designating Rule 30(b)(6) witnesses for more than eight topics noticed by the
16 Plaintiffs. Farel Decl. ¶ 5. Further, VA has already reviewed more than 600,000 pages of
17 potentially responsive documents, and produced more than 200,000 pages to the Plaintiffs. Black
18 Decl. ¶ 27. VA’s review and production efforts continue to this day. *Id.*

19 ARGUMENT

20 **I. VA PROPERLY HAS WITHHELD DOCUMENTS BASED UPON THE** 21 **DELIBERATIVE PROCESS PRIVILEGE.**

22 As reflected in VA’s privilege log, VA has withheld in full or in part 494 documents
23 on the basis of the deliberative process privilege. Notably, Plaintiffs do not dispute that the
24 challenged documents meet the substantive requirements of the deliberative process privilege;
25 namely, that the documents are both predecisional and deliberative. Nor do Plaintiffs
26
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1 challenge any assertions of other privileges, such as the attorney-client privilege. Rather,
2 Plaintiffs challenge whether VA has satisfied the procedural requirements of the privilege and
3 assert that Plaintiffs' need for the documents somehow outweighs the government's interest in
4 maintaining the privilege. As discussed below, Plaintiffs' challenge to VA's assertion of the
5 deliberative process privilege lacks merit, and their motion to compel should be denied.
6

7 **A. The Deliberative Process Privilege Protects the Internal Processes of the**
8 **Executive Branch From Disclosure.**

9 The deliberative process privilege "permits the government to withhold documents that
10 'reflect[] advisory opinions, recommendations, and deliberations comprising part of a process by
11 which governmental decisions and policies are formulated.'" *Hongsermeier v. Comm'r*, 621 F.3d
12 890, 904 (9th Cir. 2010) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)); see
13 *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 979 (9th Cir. 2009) (noting that the deliberative
14 process privilege "shields certain intra-agency communications from disclosure to allow agencies
15 freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of
16 public scrutiny.") (internal citation and quotation marks omitted), *cert. denied*, 130 S. Ct. 3493
17 (2010). The deliberative process privilege is "an ancient [one] . . . predicated on the recognition
18 'that the quality of administrative decision-making would be seriously undermined if agencies
19 were forced to operate in a fishbowl.'" *Dow Jones & Co. v. U. S. Dep't of Justice*, 917 F.2d 571,
20 573 (D.C. Cir. 1990) (citations omitted). The privilege "rests on the obvious realization that
21 officials will not communicate candidly among themselves if each remark is a potential item of
22 discovery and front page news, and its object is to enhance 'the quality of agency decisions,' by
23 protecting open and frank discussion among those who make them within the Government . . ."
24 *U. S. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001)
25 (citation omitted). Accordingly, courts have recognized that the deliberative process privilege
26 generally serves three basic purposes: (1) it protects and promotes candid discussions within a
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1 government agency; (2) it prevents public confusion from premature disclosure of agency
2 opinions before the agency establishes its final policy; and (3) it protects the integrity of an
3 agency's decision. *See Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1090 (9th Cir. 2002);
4 *FTC v. Warner Commc'ns. Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

5
6 To meet the substantive requirements of the privilege, documents must be both
7 predecisional and deliberative. *Carter*, 307 F.3d at 1090. “[A] document is predecisional if it
8 was “prepared in order to assist an agency decisionmaker in arriving at his decision,” and is
9 deliberative if its release would “expose an agency’s decisionmaking process in such a way
10 as to discourage candid discussion within the agency and thereby undermine the agency’s
11 ability to perform its functions.” *Id.*

12
13 Once these two substantive requirements are established, the party challenging the
14 assertion of the deliberative process privilege bears the burden of demonstrating sufficient
15 need to overcome the government’s interest in non-disclosure. *See Redland Soccer Club, Inc.*
16 *v. Dep’t of the Army*, 55 F.3d 827, 854 (3d Cir. 1995). In considering need, the Ninth Circuit
17 considers the following four factors: “1) the relevance of the evidence; 2) the availability of
18 other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure
19 would hinder frank and independent discussion regarding contemplated policies and
20 decisions.” *Warner Commc'ns.*, 742 F.2d at 1161-62 (holding that district court committed
21 reversible error in finding sufficient need where defendants were able to obtain and present
22 evidence on subject matter of litigation, there was no evidence of bad faith or misconduct on
23 the part of the agency, and compelled disclosure would likely hinder effective agency decision
24 making) (citations omitted). A requesting party cannot, as a matter of law, demonstrate
25 “need” in the absence of a showing of relevance. *See United States v. Farley*, 11 F.3d 1385,
26
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1 1390 (7th Cir. 1993) (holding that internal memoranda containing unpublished view of agency
2 staff regarding legal issues are not relevant to the court's interpretation of the law).

3 **B. VA Has Satisfied the Procedural Requirements of the Deliberative Process**
4 **Privilege.**

5 Plaintiffs' first contention – that VA has not satisfied the procedural requirements for
6 invocation of the privilege because it did not make a formal assertion through the submission of
7 an agency declaration prior to Plaintiffs filing their motion to compel – reflects a fundamental
8 misunderstanding of the procedures for invoking the privilege. (Dkt. 255 at 3.)

9
10 Plaintiffs cite to no authority for the proposition that an agency must formally invoke the
11 deliberative process privilege through the submission of a declaration before the plaintiffs move
12 to compel the production of those documents. Indeed, the authority is to the contrary. *See In re*
13 *Sealed Cases*, 121 F.3d 729, 741 (D.C. Cir. 1997) (holding that the White House not obligated to
14 “formally invoke its [executive] privileges in advance of the motion to compel;” it was sufficient
15 that it said, in response to a subpoena, that it “believed the withheld documents were privileged”);
16 *Huntleigh USA Corp. v. United States*, 71 Fed. Cl. 726, 727 (2006) (procedural requirements for
17 privilege assertion are satisfied through the production of a declaration or affidavit in response to
18 a motion to compel); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 n.13
19 (D.D.C. 2005); *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, Nos.
20 81 C 7076, 82 C 6895 & 85 C 3521, 1987 WL 20408, at *7 (N.D. Ill. Nov. 20, 1987) (rejecting
21 assertion that declaration must be submitted when privilege is first invoked).² Here, in response
22
23

24 ² Plaintiffs' reliance upon the Ninth Circuit's decision in *Al-Haramain Islamic Found., Inc. v.*
25 *Bush*, 507 F.3d 1190 (9th Cir. 2007), is misplaced. *Al-Haramain* discusses the procedural and
26 substantive requirements for the invocation of the state secret privilege, not the deliberative
27 process privilege. In any event, even in the context of the state secrets privilege, the Supreme
28 Court has noted that the formal invocation of the privilege through an agency declaration after
rehearing of the district court's decision on a motion to compel did not constitute a waiver of the
privilege. *See United States v. Reynolds*, 345 U.S. 1, 10-11 (1953). In addition, unlike the state
(Footnote continues on next page.)

1 to Plaintiffs' motion to compel, and in support of its invocation of the deliberative process
2 privilege, VA has timely submitted the declaration of John J. Spinnelli, Senior Advisor to the
3 Secretary to the Department of Veterans Affairs ("Spinelli Decl."). Accordingly, Plaintiffs'
4 procedural challenge to VA's invocation of the deliberative process privilege should be rejected.
5

6 **C. VA Has Satisfied the Substantive Requirements of the Deliberative Process
7 Privilege.**

8 Although Plaintiffs do not challenge, and therefore concede this point, the documents over
9 which VA has asserted the deliberative process privilege plainly are both predecisional and
10 deliberative. *See Carter*, 307 F.3d at 1089. As described in the Spinelli declaration, VA has
11 withheld the following nine categories of documents on the basis of, among other privileges, the
12 deliberative process privilege: (1) documents concerning the adjudication of an individual
13 plaintiff's claim for VA disability compensation; (2) documents concerning VA Executive
14 correspondence with members of Congress, Veterans Service Organizations, and other federal
15 government agencies; (3) documents concerning collaboration between the Department of
16 Defense ("DoD") and VA regarding providing notice to test subjects; (4) documents concerning
17 the content of VA's notice letter within the Veterans Health Administration; (5) documents
18 concerning DoD's "Fact Sheet" regarding VA health care and examinations; (6) documents
19

20 (Footnote continued from previous page.)

21 secrets privilege, the invocation of the deliberative process privilege need not be made by the
22 head of the agency. *See Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (citing, among
23 other cases, *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 511 F.2d 192 (9th Cir. 1975)); *see In*
24 *re McKesson Governmental Entities Average Wholesale Price Litig.*, 264 F.R.D. 595, 601 (N.D.
25 Cal. 2009) ("The requirement that the privilege be invoked by the agency head need not be
26 applied absolutely literally," but "the duty to invoke the privilege cannot be delegated so far down
27 the chain of command that purposes of the requirements are undermined."). This is in accord
28 with the holdings in other circuits that allow for officials other than the head of an agency to
properly invoke the deliberative process privilege. *See Marriott Int'l Resorts, L.P. v. United*
States, 437 F.3d 1302, 1307-08 (Fed. Cir. 2006) (holding that assertion of deliberative process
privilege may be delegated below agency head) (citing *Landry v. FDIC*, 204 F.3d 1125, 1135
(D.C. Cir. 2000); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 882-83 (5th Cir. 1981)).

1 concerning legislative proposals, including draft legislative proposals and analyses of those
2 proposals; (7) emails and memoranda discussing drafts of the Under Secretary for Health's
3 Information Letter; (8) documents concerning the Veterans Benefits Administration, including
4 draft training letters, outreach reports and meeting summaries, emails regarding outreach efforts,
5 drafts of the notification letter to test volunteers, and emails regarding the development of those
6 notification letters; and (9) documents concerning the Veterans Health Administration ("VHA"),
7 including emails regarding a potential response to congressional inquiry about Edgewood Arsenal
8 and emails discussing the possibility of future registries within VHA.
9

10 Based upon his personal consideration of these documents, Mr. Spinelli concludes that
11 each of the documents is predecisional, as they pre-date final decisions. *See Spinelli Decl.* ¶ 6.
12 Mr. Spinelli also concludes that each of the withheld documents contain the deliberations of
13 agency officials, the disclosure of which would substantial hinder or chill the candid
14 recommendations of agency employees. *See id.* ¶¶ 7-44. Accordingly, each of the challenged
15 documents meets the substantive requirements of the deliberative process privilege.
16

17 **D. Plaintiffs Cannot Meet Their Burden of Showing Need for the Specific**
18 **Documents at Issue.**

19 Plaintiffs' primary contention concerning VA's assertion of the deliberative process
20 privilege is that their need for the documents outweighs VA's interest in maintaining the
21 privilege. But Plaintiffs have not met their burden of establishing their need for the documents at
22 issue. *Redland Soccer Club*, 55 F.3d at 854 (party challenging privilege bears the burden of
23 demonstrating need for documents). As discussed below, a balance of the factors recognized by
24 the Ninth Circuit weighs heavily against disclosure.
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1 ***1. The Documents Plaintiffs Seek Have No Relevance to Their Sole Claim***
2 ***of Facial Bias.***

3 Plaintiffs cannot demonstrate that any of the nine categories of documents described
4 above are relevant to their narrow facial bias claim against VA and, accordingly, cannot meet
5 their burden of establishing a need for the documents at issue. *See Farley*, 11 F.3d at 1390.
6 As an initial matter, Plaintiffs categorically argue that because VA’s “intent” is at issue, the
7 deliberative process privilege may not apply. (*See* Dkt. 255 at 4) (citing *In re Subpoena*
8 *Duces Tecum Served on Office of the Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C.
9 Cir. 1998)). Notably, the Ninth Circuit has not adopted the D.C. Circuit’s holding in *In re*
10 *Subpoena*. *See Thomas v. Cate*, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010) (citing *Warner*
11 *Comm’ns*, 742 F.2d at 1156); *see also First Heights Bank, FSB v. United States*, 46 Fed. Cl.
12 312 (Fed. Cl. 2000). Accordingly, this Court’s inquiry is whether Plaintiffs can demonstrate
13 that the protected documents are relevant. Plaintiffs cannot make this showing.
14

15 Plaintiffs contend that draft documents concerning VA’s notification letters would offer
16 “evidence of the *manifestation* of DVA’s bias,” (Dkt. 255 at 1). This contention is misplaced.
17 Plaintiffs have pursued only a facial challenge to VA’s adjudication of test subjects’ claims for
18 benefits, and any “evidence of the manifestation of DVA’s bias” is irrelevant to that challenge.
19 Plaintiffs have characterized their sole claim against VA as a narrow “facial challenge” in an
20 explicit attempt to avoid the jurisdiction-stripping effects of 38 U.S.C. § 511. (Dkt. 113 at 1, 6).³
21 Under Section 511, Plaintiffs are barred from basing their bias claim on the documents
22
23

24 _____
25 ³ Section 511(a) provides that “[t]he Secretary shall decide all questions of law and fact
26 necessary to a decision by the Secretary under a law that affects the provision of benefits by the
27 Secretary to veterans or the dependents or survivors of veterans[,]” and that “the decision of the
28 Secretary as to any such question shall be final and conclusive and may not be reviewed by any
other official or by any court, whether by an action in the nature of mandamus or otherwise.” *See*
38 U.S.C. § 511(a).

1 concerning the adjudication of an individual’s claim for VA disability compensation.⁴ Instead,
2 any review of VA’s adjudicatory procedures must be “facial.”

3 Here, the Court held that the “crux” of Plaintiffs’ facial bias claim against VA is “that,
4 because the DVA allegedly was involved in the testing programs at issue, the agency is incapable
5 of making neutral, unbiased benefits determinations for veterans who were test participants.”
6 (Dkt. No. 177, at 11; *see* Dkt. No. 113, at 6 (alleging that VA, “because of its active role in the
7 chemical and biological testing programs, is an inherently biased decision maker, and is thus
8 violating the due process rights of test participants across the board.”)). Accordingly, Plaintiffs’
9 claim is analogous to the one brought in *Withrow v. Larkin*, 421 U.S. 35 (1975), which addressed
10 the circumstances under which an adjudicative body’s interest or other involvement in the subject
11 matter before it necessarily creates “an unconstitutional risk of bias in administrative
12 adjudication.” *Id.* at 48 (rejecting the contention that the combination of investigative and
13 adjudicative functions in a single administrative body violates due process and holding that in
14 such circumstances a plaintiff “must overcome a presumption of honesty and integrity in those
15 serving as adjudicators”). Such a claim is, by definition, a narrow legal question, and the only
16 factual development that potentially would be relevant would be the extent to which VA was
17 involved in the testing at issue.⁵ Accordingly, Plaintiffs cannot demonstrate how VA’s
18 predecisional, deliberative communications related to topics such as legislative proposals and
19 notification letters to veterans are in any way relevant to the narrow facial bias claim against VA.
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23 ⁴ Plaintiffs acknowledge this barrier, noting that “Plaintiffs’ proposed DVA claims do not involve
24 individual benefits determinations and do not seek review of any decision by the Secretary
25 relating to benefits sought by any individual veteran.” (Dkt. 113 at 6; Dkt. 177 at 8). As such,
26 these documents cannot be relevant to Plaintiffs’ claim against VA.

27 ⁵ VA admitted in the answer to the Third Amended Complaint that it has been involved in human
28 testing generally. (*See* Dkt. 236, ¶ 226.) To date, VA has discovered no evidence that it was
involved in the testing at Edgewood Arsenal.

1 Nevertheless, in an attempt to negate the applicability of the deliberative process privilege
2 altogether, Plaintiffs appear to suggest that their facial bias claim is a “constitutional claim for
3 discrimination.” (Dkt. No. 255, at 4). In proving their facial bias claim, they suggest that they
4 may rely upon statistical evidence of bias or identify a specific policy that is discriminatory on its
5 face. While such a position would be inconsistent with the scope of the facial bias claim the
6 Court has allowed to proceed, as discussed above, such a characterization still would not entitle
7 them to the discovery they seek. Such a claim would be analogous to one alleging either facial
8 disparate impact or facial disparate treatment. Facial disparate impact claims concern
9 “employment practices that are facially neutral in their treatment of different groups but that in
10 fact fall more harshly on one group than another.” *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-
11 53 (2003). Facial disparate treatment claims involve policies that on their face are discriminatory.
12 *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). In either case, the
13 Supreme Court and the Ninth Circuit have recognized that subjective motivation is irrelevant in
14 the context of a facial challenge. *Raytheon Co.*, 540 U.S. at 52-53 (holding that “evidence of the
15 employer’s subjective intent to discriminate” in a disparate impact claim is not required); *see Int’l*
16 *Union*, 499 U.S. at 199 (“Whether an employment practice involves disparate treatment through
17 explicit facial discrimination does not depend on why the employer discriminates but rather on
18 the explicit terms of the discrimination.”); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th
19 Cir. 2000) (holding that in a claim of facial disparate treatment, “a plaintiff need not otherwise
20 establish the presence of discriminatory intent”). Instead, a prima facie showing of disparate
21 impact requires a showing of significant *statistical* disparity. *See Ricci v. DeStefano*, 129 S. Ct.
22 2658, 2678 (2009). A prima facie showing of facial disparate treatment by definition requires a
23 showing that a policy *on its face* is discriminatory. Because predecisional, deliberative
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1 documents shed no light on whether a significant statistical disparity exists⁶ or whether a policy
2 is, on its face, discriminatory, Plaintiffs cannot meet their burden to show that these documents
3 are relevant to their facial bias claim against VA.⁷ Thus, VA's subjective intent as allegedly
4 manifested in emails and drafts of VA correspondence with members of Congress and other
5 Federal agencies, notice and training letters, reports of VA/DoD collaboration on notice efforts,
6 VHA legislative proposals, and responses to congressional inquiries is not relevant to Plaintiffs'
7 remaining claim against VA.⁸

9 Finally, Plaintiffs allege that "DVA's decisions regarding how and why to notify test
10 subjects about the test programs and associated health risks go to the heart" of their claim that VA
11 is biased in adjudicating benefits claims.⁹ (*See* Dkt. No. 255, at 6.) Yet Plaintiffs fail to explain
12 how VA's decisions regarding the provision of notice to veterans relate in any way to VA's
13 alleged facial bias in adjudicating claims for benefits. First, it is undisputed that VA's notice
14 letter and training letter were written by employees at VA's Central Office, not adjudicators at
15 VA regional offices. *See* Black Decl. ¶ 53. As such, Plaintiffs cannot demonstrate any
16 relationship between the development of the notice letters and the adjudication of claims by a
17

18
19 ⁶ As discussed below, VA will produce to Plaintiffs the claims files for identifiable test veterans
20 who have made claims for service-connected injury, including claims based upon their
21 participation in the test program, from which Plaintiffs may perform a statistical analysis.

22 ⁷ By definition, VA's predecisional documents could not reflect a policy or practice of the
23 Agency, as they pre-date a decision concerning a policy or practice. And, as discussed above,
24 Plaintiffs do not address, much less dispute, that each of the documents withheld by VA is
25 predecisional. And, importantly, the Court has expressly foreclosed Plaintiffs' challenge to the
26 VA training letter to adjudicators on the basis of 38 U.S.C. § 511(a) and, thus, Plaintiffs may not
27 rely upon the training letter as the basis for their bias claim. *See* Dkt. No. 177, at 13.

28 ⁸ Plaintiffs' motion to compel drafts of documents concerning VBA, including such items as
draft training letters, is foreclosed by the District Court. (*See* dkt. 117 at 13) (finding that as a "a
preliminary decision necessary to a final decision" made by the Secretary, training letters were
unreviewable under section 511.)

⁹ Defendants disagree that the content of the notice letters is at issue in this case. *See* Dkt. No.
177, n.3 & p.14 (Plaintiffs previously "disavow[ed] any challenge to the adequacy of the content
of [VA's] notice.")

1 separate component of VA. Second, VA neither retains a copy of its notice letters sent to test
2 subjects nor places these letters in the claims files reviewed by adjudicators. *See* Black Decl. ¶
3 54. Accordingly, the only way a notice letter would appear in a claimant's file is if he submitted
4 it as part of his claims submission. *See id.* Yet, this type of individualized inquiry of specific
5 claims files by the Court is expressly foreclosed by 38 U.S.C. § 511(a). Accordingly, Plaintiffs
6 cannot meet their burden of showing that the challenged documents are relevant, and this first
7 factor weighs heavily against disclosure.
8

9 **2. *Plaintiffs Have Access to Substantial Information in Connection with***
10 ***Their Claim.***

11 Plaintiffs contend that they “cannot obtain information about DVA’s decision to
12 understate the risks associated with the test programs other than through contemporaneous
13 correspondence and memoranda that were prepared in the process of making that decision.”
14 (Dkt. 255. at 6). This argument fails for two reasons. First, as discussed above, in a facial bias
15 claim, the inquiry is an objective one. Accordingly, the pertinent inquiry is not whether the
16 subjective decision by the VA to include or not include information in any particular final
17 document submitted to VA’s adjudicators, but rather whether the documents on their face
18 evidence bias.
19

20 Second, it is undisputed that VA has produced to Plaintiffs many pages of documents
21 reflecting its decision concerning the provision of health care to veterans. Indeed, Plaintiffs
22 concede that they have information that they believe establishes their facial bias claim when they
23 state in their motion to compel that “in its notification letter to test subjects, DVA falsely
24 suggested that *no* significant long-term health effects were associated with the testing [citing Ex.
25 H], despite the fact that DVA was aware that studies showed long-term health effects were a
26 likely consequence of the test programs [citing Ex. P].” (Dkt. 255 at 4). In other words, Plaintiffs
27 possess information they believe reflects VA’s alleged bias. Accordingly, because Plaintiffs
28

1 already possess substantial information regarding VA's notification efforts and administration of
2 health care and will soon possess the claims files of all identifiable test subjects, this factor tilts
3 against disclosure. *See Warner Commc'ns*, 742 F.2d at 1161-62 (holding that, in affirmative
4 antitrust case brought by the federal government, defendants had little need for deliberative
5 documents given the availability of other information concerning market structure and
6 competitive effect).

7
8 **3. *The Government's Role in the Litigation Does Not Make These***
9 ***Documents Relevant to Plaintiffs' Claim of Facial Bias.***

10 Plaintiffs claim that because VA's actions are "the focal point of the litigation," these
11 documents are relevant to their case. But this factor is substantially outweighed by the fact that
12 the challenged documents have little, if any, relevance to Plaintiffs' narrow facial bias claim.
13 Further, as discussed above, Plaintiffs have available substantial information concerning VA's
14 notification efforts and adjudication processes. Indeed, VA's internal deliberative documents are
15 entirely collateral to Plaintiffs' narrow facial bias claim against VA.

16
17 **4. *Public Disclosure of These Documents Would Substantially Hinder***
18 ***Frank and Independent Discussion.***

19 This factor also weighs strongly against disclosure. As reflected in the Spinelli
20 declaration, disclosure of the challenged documents would substantially hinder frank and
21 independent discussion of policymakers. *See Spinelli Decl.* ¶ 3; *see also Warner Commc'ns*, 742
22 F.2d at 1161-62 (holding that disclosure of internal memoranda would "almost certainly injure[]
23 the quality of agency decisions" because it "chills frank discussion and deliberation in the future
24 among those responsible for making governmental decisions."). Because each of these four
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1 factors considered by the Ninth Circuit weighs against disclosure, Plaintiffs cannot meet their
 2 burden of showing need for the documents at issue, and Plaintiffs' motion should be denied.¹⁰

3 **E. Plaintiffs' Contention That VA is Using the Privilege as Both a Sword and a**
 4 **Shield Lacks Merit.**

5 Plaintiffs further assert that because VA released certain draft documents, it necessarily
 6 follows that VA "is not concerned with protecting the confidentiality of the decision-making
 7 process but rather is attempting to shield highly relevant, incriminating evidence." (*See* Dkt. 255
 8 at 7-8.) Plaintiffs are incorrect; VA is not seeking to use the privilege as a sword and a shield.
 9 Rather, VA inadvertently produced a limited number of draft documents over which the privilege
 10 potentially could have been asserted. Contrary to Plaintiffs' suggestion, the inadvertent
 11 disclosure of these documents does not constitute a subject matter waiver. *In re Sealed Case*, 121
 12 F.3d at 741 (holding that "all-or-nothing" approach of subject matter waiver have not been
 13 applied to deliberative process documents); *Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 218
 14 (Fed. Cl. 2010) ("There is no subject matter waiver associated with the deliberative process
 15 privilege."¹¹ To the extent Plaintiffs are concerned that at some future point in the litigation VA
 16
 17

18
 19 ¹⁰ Plaintiffs cite to *North Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118 (N.D. Cal.
 20 2003) for the proposition that the Court may consider additional factors beyond those recognized
 21 by the Ninth Circuit in *Warner Communications*. (Dkt. 255 at 5-6). The Ninth Circuit has not
 22 recognized these additional factors cited by *North Pacifica*. And, in any event, these additional
 23 factors do not otherwise tilt the balance in favor of disclosure or override the factors recognized
 24 by the Ninth Circuit. For example, Plaintiffs' facial due process challenge does not implicate any
 25 fundamental rights. *See N. Pacifica*, 274 F. Supp. 2d at 1124 ("even though NP has alleged a
 26 violation of equal protection, no suspect class such as race or gender or some other basis for
 27 heightened scrutiny is involved. Thus, the seriousness of the litigation and the issues involved is
 28 somewhat lessened as compared to cases involving, for example, racial discrimination."). And,
 as discussed above, because Plaintiffs' allegations of governmental misconduct are a facial
 challenge, there can be no need for draft or otherwise internal deliberative materials.

¹¹ Accordingly, Plaintiffs' reliance upon a decision concerning subject matter waiver in the
 attorney-client privilege context is misplaced. (Dkt 255 at 8) (citing *Chiron Corp. v. Genetech,
 Inc.*, 179 F. Supp. 2d 1182, 1186 (E.D. Cal. 2001)). Similarly, the other case relied upon by
 Plaintiffs, *Allstate Ins. Co. v. Serio*, No. 97 CIV. 0670, 2000 WL 554221, at *11 (S.D.N.Y. May
 5, 2000), is distinguishable because, in that case, the government sought to rely upon the *same*
 document that it had previously withheld on privilege grounds. In this case, Plaintiffs argue that,

(Footnote continues on next page.)

1 will attempt to affirmatively use documents over which it properly has asserted the deliberative
2 process privilege, VA represents to the Court that it has no intention of doing so.

3 **F. Plaintiffs' Motion Is, In Many Instances, Moot Because VA Has Asserted**
4 **Additional Bases for Privilege, Which Have Not Been Challenged, Over**
5 **Certain Documents.**

6 Plaintiffs' motion to compel purports to challenge only VA's assertion of the deliberative
7 process privilege. But as clearly reflected on VA's privilege log, many of the documents over
8 which that privilege has been asserted also contain assertions of other privileges, such as the
9 attorney-client privilege. *See* Spinelli Decl. ¶¶ 14, 27, 30, 36, 38, 40, 43 . Accordingly,
10 Plaintiffs' motion to compel documents over which multiple privilege assertions have been
11 invoked should be denied as moot, because even if the Court were to overrule VA's assertion of
12 the deliberative process privilege, VA is entitled to rely upon its timely invocation of other
13 privileges given the absence of any challenge to those claims. *See Eberle v. City of Anaheim*, 901
14 F.2d 814, 818 (9th Cir. 1990) (holding that legal issues raised for the first time in reply briefs are
15 waived); *Dilley v. Gunn*, 64 F.3d 1365, 1367 (9th Cir. 1995).

17 **II. PLAINTIFFS' REQUESTS FOR PRODUCTION ARE BOTH IRRELEVANT AND**
18 **UNDULY BURDENSOME IN LIGHT OF THE LIMITED FACIAL BIAS CLAIM**
19 **AGAINST VA.**

20 Although VA already has responded to extensive discovery from Plaintiffs, producing
21 more than 200,000 pages of responsive documents, and despite the narrow claim of facial bias
22 against VA, Plaintiffs now seek to compel VA to search for documentation concerning the
23 approximately 400 substances contained in the Department of Defense Chemical and Biological
24 ("Chem-Bio") database and to search for documents related to all testing prior to 1953. (Dkt. 255
25

26 (Footnote continued from previous page.)

27 because VA inadvertently produced a limited number of predecisional drafts, it cannot withhold
28 on deliberative process grounds *different* documents that may relate to the same subject matter.

1 at 8-11.) These requests have limited, if any, relevance to the claims in this case and would result
2 in a huge burden on VA resources. As such, Plaintiffs' motion to compel should be denied.

3 **A. Courts May Limit Discovery When Burden Outweighs Relevance.**

4 The burden caused by discovery requests must be proportional to the relevance of the
5 documents sought. Wright & Miller § 2008.1 (noting that "Judges relatively frequently limit or
6 forbid discovery when the cost and burden seem to outweigh the likely benefit in producing
7 evidence, as demonstrated by [a] plentitude of cases..."); *see also Rivera v. NIBCO, Inc.*, 364
8 F.3d 1057, 1063 (9th Cir. 2004) (stating that Rule 26 is "subject to limitation").

9
10 In determining whether a discovery request is proportional to its likely benefit, courts
11 "consider[] the needs of the case, the amount in controversy, the parties' resources, the
12 importance of the issues at stake in the action, and the importance of the discovery in resolving
13 the issues." Fed. R. Civ. P. 26(b)(2)(c)(iii); *see also Moon v. SCP Pool Corp.*, 232 F.R.D. 633,
14 637 (C.D. Cal., 2005). The Ninth Circuit has held that this need for proportionality is especially
15 important in cases such as this, where a government agency is the responding party. *See Exxon*
16 *Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 779 -780 (9th Cir. 1994) (holding that "a
17 court may use Rule 26(b) to limit discovery of agency documents...if the desired discovery is
18 relatively unimportant when compared to the government interests in conserving scarce
19 government resources.").

20
21
22 In this case, as demonstrated by the attached declarations, the burden of searching for
23 Plaintiffs requests far outweighs the relevance, if any, of documents that may be discovered.

24 **B. Plaintiffs' Request that VA Search for Documents Related to Approximately**
25 **400 Substances Is Irrelevant, Cumulative, and Unduly Burdensome.**

26 Plaintiffs seek to compel VA to search for documents using the names of approximately
27 400 substances contained in the Chem-Bio database. (Dkt. 255 at 10). As explained in the
28

1 Declaration of Lisa Thomas (“Thomas Decl.”), such information is irrelevant and the burden of
2 the proposed discovery is substantial.

3 ***1. The Search Plaintiffs Demand Is Unlikely to Result in Additional***
4 ***Relevant Documents.***

5 Plaintiffs fail to articulate why the documents identified through this expanded search are
6 relevant to their claim of facial bias against the VA or their claims against any other Defendant.
7 The District Court noted that the basis of Plaintiffs’ claim is that “because the DVA allegedly was
8 involvement in the testing program at issue, the agency is incapable of making neutral, unbiased
9 benefits determinations for veterans who were test participants.” (Dkt. 177 at 11). VA has
10 already searched for any evidence of its involvement in the test programs at issue and will continue
11 to search for any evidence of its involvement. Thomas Decl. ¶ 8.

13 To the extent Plaintiffs contend that information concerning these specific biological and
14 chemical agents is relevant to claims against DoD, that argument also lacks merit. Plaintiffs’
15 claims against DoD do not rest upon discovery related to every chemical and biological agent
16 contained in the Chem-Bio database. On March 21, 2011, counsel for Plaintiffs sent a letter to
17 counsel for Defendants explaining that “in the spirit of moving this case forward, a key purpose
18 of this letter is to narrow the scope of discovery by providing a narrowed list of test substances”
19 for which Plaintiffs would seek discovery from the Department of Defense. Farel Decl. ¶ 4, Ex.
20 C. The narrowed list, approximately 60 substances, was intended to “permit Defendants to focus
21 their energy on the key items and help expedite Defendants’ provision of the information
22 necessary for Plaintiffs to pursue and evaluate their claims.” *Id.* As such, it cannot be the case
23 that Plaintiffs now need VA to search substances, beyond those Plaintiffs identified, so that
24 Plaintiffs may pursue their claims against DoD. The documents that would be identified through
25 this expanded search would have limited, if any relevance, to the claims remaining in this case.
26
27
28

1 2. ***Expansion of VHA's search to include all chemical and biological agents***
2 ***would be prohibitively expensive and time-consuming.***

3 As described above, VA has undertaken a broad search for responsive documents using
4 both specific substances and the Plaintiffs' own discovery requests for guidance. Thomas Decl. ¶
5 9. In undertaking this search, VHA, the office within VA that is most likely to have responsive
6 documents, searched both electronic and paper files. *Id.* Expanding this search would engender
7 substantial cost, an effort that is unwarranted in light of the relevance of the information that such
8 an expansion may recover. *Id.* ¶¶ 12-17.

9
10 Finally, Plaintiffs' requested searches would be unnecessarily cumulative. Beginning in
11 1955, VA reported annually to Congress on its medical research. VA has made these reports,
12 which include numerous chemical agents also listed in the Chem-Bio database, available for
13 Plaintiffs' inspection and copying, consistent with Federal Rule of Civil Procedure 34. Plaintiffs
14 have not yet reviewed these reports.

15 In sum, if forced to undertake these searches, the burden on VA would be disproportionate
16 to the potential results. Plaintiffs' production demands would place tremendous strain on VA's
17 time and resources, a strain that far outweighs the minimal, if any, potentially relevant documents
18 that may be discovered.

19
20 **C. Plaintiffs' Request That VA Search for Documents Related to Pre-1953**
21 **Testing Is Both Irrelevant and Unduly Burdensome.**

22 Despite purporting to "focus[] on the relevance of the information sought" (Dkt. 255 at 2),
23 Plaintiffs fail to explain how documents related to pre-1953 testing are relevant to their claim of
24 facial bias against the VA.¹² Instead, Plaintiffs incorporate by reference the argument articulated
25 in their Motion to Compel 30(b)(6) Testimony and Production of Documents from the

26
27 ¹² Notably, however, VA has already produced to Plaintiffs a number of documents related to pre-
28 1953 testing as a result of its prior search efforts. Black Decl. ¶ 28.

1 Department of Defense and the Central Intelligence Agency, (Dkt. 258), despite the fact that the
2 claims remaining against the other Defendants differ substantially from the claim against VA.
3 Without showing any relevance as to VA, this request should be considered *de facto* unduly
4 burdensome. *See Compaq Computer Corp. v. Packard Bell Elecs. Inc.*, 163 F.R.D. 329, 335-36
5 (N.D. Cal., 1995) (“if the sought-after documents are not relevant nor calculated to lead to the
6 discovery of admissible evidence, then *any burden whatsoever* imposed . . . would be by
7 definition ‘undue.’”); *Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D. Cal., 1995) (noting that
8 “in general the party seeking to compel discovery bears the burden of showing that his request
9 satisfies the relevance requirement of Rule 26”).¹³

11 But even if Plaintiffs could demonstrate that such documents are relevant for their claims
12 against the VA, such a search would be unduly burdensome. *See* Black Decl. ¶¶ 35-43; Thomas
13 Decl. ¶¶ 16-18. Accordingly, the extreme burden associated with Plaintiffs’ requests for
14 information regarding tests conducted prior to 1953 is disproportionate to any potential relevance.
15

16 **III. PLAINTIFFS’ REQUEST THAT VA RE-CREATE END PRODUCT 683** 17 **STATISTICS IS IRRELEVANT AND CUMULATIVE.**

18 Plaintiffs also seek an order compelling VA to produce “updated statistics regarding
19 Chem-Bio’ claims for service connected benefits based on test subjects’ exposure to the test
20 substances administered during the test programs.” (Dkt. 255 at 8). Plaintiffs’ request is based
21 on information contained in VA’s Outreach Reports, which were provided on a monthly basis to
22 the Under Secretary for Benefits, Admiral Daniel J. Cooper during his tenure in that position to
23 provide updates on ongoing outreach activities being conducted by the VA Compensation and
24

25 ¹³ To the extent Plaintiffs contend that information in VA’s possession concerning pre-1953
26 material is relevant to claims against DoD, that argument lacks merit. DoD has admitted a
27 number of Rule 36 Requests for Admission concerning the health effects of full-body exposure to
28 mustard gas and lewisite. With respect to DoD’s alleged obligations regarding notice, whether
VA may know about testing cannot legally be imputed to DoD.

1 Pension Service. *See* Black Decl. ¶ 5. The Outreach Reports contained statistics based on the
2 number of claims with End Product 683 (“EP 683”), which was a designator VA used in certain
3 electronic databases to denote claims related to chemical or biological exposure in Edgewood
4 Arsenal testing programs. *See* Black Decl. ¶¶ 6-7.

5
6 As explained below and in VA’s responses to Plaintiffs’ Second Set of Interrogatories,
7 updating these statistics using the same methodology would be fundamentally unreliable. *See*
8 Black Decl. at 8; *see also* Farel Decl. ¶ 3, ex. B. Instead, and in an effort to provide Plaintiffs
9 with more reliable information regarding the outcome of claims based on exposures at Edgewood
10 Arsenal, VA has offered to produce the claims files of all identifiable test subjects who have
11 sought VA service-connected disability compensation and whose survivors have sought DIC
12 based upon the veteran’s alleged service-connected deaths.¹⁴ *See* Black Decl. ¶ 20. These files
13 will contain all claims made by the identifiable test subjects and their survivors, including claims
14 based on exposure to test substances. Production of these claims files requires an extraordinary
15 effort. Because Plaintiffs’ requested analysis could be derived from the information contained
16 in those claim files and because any statistical analysis of EP 683 using the same methodology as
17 before is fundamentally unreliable, Plaintiffs’ request is irrelevant and cumulative.
18

19 **A. VA Statistics Regarding EP 683 Claims are Irrelevant Because the EP is**
20 **Unreliable.**

21 Any statistics VA could produce using EP 683 would be fundamentally flawed and are,
22 therefore, irrelevant to Plaintiffs’ claims. EP 683 does not itself provide a viable mechanism for
23 discerning whether claims based on human-subject testing have been granted or denied. Black
24

25 _____
26 ¹⁴ Pursuant to the statutory requirements of 38 U.S.C. § 7332, records containing information
27 about drug abuse, alcoholism or alcohol abuse, HIV, or sickle cell anemia will either be removed
28 from the claims file or VA will seek the consent of the veteran whose records contain such
information before producing the file.

1 Decl. ¶¶ 8, 17. The purpose of the EP 683 is to enable VA to track and manage its current
2 caseload with respect to specific types of issues, rather than to track the outcome of claims
3 retrospectively. *Id.* ¶ 9. Accordingly, EP 683 has been assigned to a variety of different issues at
4 different time periods. *Id.* ¶ 10. Currently, EP 683 is used to track not only claims based on
5 testing at Edgewood Arsenal, but also claims based on exposures in Project Shipboard Hazard
6 and Defense (“SHAD”) and claims based on other hazardous exposures, including current-day
7 exposures. *Id.* For this reason, a search of cases flagged with EP 683 would not be capable of
8 distinguishing claims based on Edgewood Arsenal testing from other unrelated claims. *Id.* ¶ 10,
9 12, 13. Further, such a search would not identify any claim based on Edgewood Arsenal testing
10 filed prior to September 2006, when VA began using EP 683 for such claims. *Id.* ¶ 11.

11
12 Plaintiffs’ only articulation of their need for EP 683 statistics is that these statistics would
13 reflect claims based on exposure for veterans whose participation in the testing programs was
14 unverified, whereas the claims files that VA is producing only include veterans for whom DoD
15 has verified participation in the testing programs. (Dkt. 255 at 9). It is conceivable that, as the
16 Plaintiffs note, an EP 683 *may* have been added to the claim of a veteran who alleged exposure at
17 Edgewood Arsenal, but whose name is not contained in the DoD chem-bio database or for whom
18 DoD could not further verify participation. But given the inherent unreliability of the EP 683 as a
19 whole, it is impossible to state that statistics based on EP 683 are likely to include such veterans.
20
21 Black Decl. ¶ 20.

22
23 Simply put, Plaintiffs are asking this Court to order VA to expend an unwarranted amount
24 of money and time to undertake a meaningless exercise that would result in unreliable data, and at
25 the end of the process, Plaintiffs would have no additional information than they would otherwise
26 obtain from VA. Such a request is contrary to Rule 26, and as such, should be denied.
27
28

1 **B. Plaintiffs’ Request that VA Recreate EP 683 Statistics is Cumulative.**

2 Rule 26 requires that courts preclude discovery if it “is unreasonably cumulative or
3 duplicative, or can be obtained from some other source that is more convenient, less burdensome,
4 or less expensive ...” Fed. R. Civ. P. 26(b)(2)(C)(i). Courts generally will preclude discovery
5 where production would result in information that has already been provided or encapsulated in a
6 different form. *See Robinson v. Adams*, No. 1:08cv01380, 2011 WL 2118753 at *17 (E.D. Cal.,
7 2011) (“much of the information requested would be duplicative of documents that Defendants
8 have already been ordered to produce. No further production is required.”); *Pub. Serv. Enter.*
9 *Grp. Inc. v. Philadelphia Elec. Co.*, 130 F.R.D. 543, 551–52 (D.N.J. 1990) (denying discovery
10 that is unreasonably cumulative where “the essential information . . . is readily available” by
11 virtue of government hearings and other litigation); *Carlson Cos. v. Sperry and Hutchinson Co.*,
12 374 F. Supp. 1080, 1085 (D. Minn. 1974) (refusing to require document productions, “the
13 contents of which will possibly serve only to supplement material already revealed”).

14 Here, VA’s production of the claims files, which contain the very information from which
15 reliable statistics regarding claims adjudication would be derived, means that Plaintiffs’ request
16 for statistics is, by definition, cumulative. Plaintiffs’ purported need for this information is to
17 support their allegation that claims brought by test veterans are unfairly adjudicated. (*See* Dkt.
18 255 at 9.) The claims files being produced by VA will contain all the information Plaintiffs seek
19 to prove their claim; there would be no additional information provided by a statistical analysis
20 that is not already contained in the claims files. Black Decl. ¶ 20.
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1 **IV. VA HAS ALREADY AGREED TO PRODUCE DEATH CERTIFICATES FOR**
2 **IDENTIFIABLE TEST PARTICIPANTS.**

3 Finally, Plaintiffs move to compel the VA to produce the “death certificates of all
4 deceased test subjects.”¹⁵ (Dkt. at 11.) Plaintiffs concede that VA has already agreed to produce
5 the claims files of identifiable test subjects, which contain death certificates that are provided to
6 VA by veterans’ family members. *Id.*, Black Decl. ¶ 46. VA has also agreed, as Plaintiffs
7 acknowledge, to search the two other repositories likely to contain death certificates: Notice of
8 Death (“NOD”) folders for identifiable test subjects, which are kept at regional offices and VA’s
9 electronic recordkeeping system, to which the VBA currently uploads evidence submitted in
10 support of claims for burial benefits. (Dkt. 255 at 11.) As explained in the Black Declaration,
11 there is no other repository likely to contain death certificates. Black Decl. ¶ 52.
12

13
14 Given the fact that VA is searching for death certificates in the places most likely to
15 contain death certificates and because Plaintiffs do not contend that VA’s search for death
16 certificates is somehow inadequate, there is no actual dispute between the parties and Plaintiffs’
17 motion should be denied.

18 **CONCLUSION**

19 For the foregoing reasons, Plaintiffs’ Motion to Compel should be denied.
20

21 Respectfully submitted,

22 September 1, 2011

23 IAN GERSHENGORN
24 Deputy Assistant Attorney General
25 MELINDA L. HAAG
26 United States Attorney
27 VINCENT M. GARVEY
28 Deputy Branch Director

26 ¹⁵ Plaintiffs concede that their request for death certificates is only relevant to their “claims
27 against the other Defendants,” (Dkt. 255 at 11), and not to their facial bias claim against the VA.
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/s/ Joshua E. Gardner
JOSHUA E. GARDNER
KIMBERLY L. HERB
LILY SARA FAREL
BRIGHAM JOHN BOWEN
JUDSON O. LITTLETON
Trial Attorneys
U.S. Department of Justice
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

Attorneys for Defendants

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IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director
JOSHUA E. GARDNER
District of Columbia Bar No. 478049
KIMBERLY L. HERB
Illinois Bar No. 6296725
LILY SARA FAREL
North Carolina Bar No. 35273
BRIGHAM JOHN BOWEN
District of Columbia Bar No. 981555
JUDSON O. LITTLETON
Texas Bar No. 24065635
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Phone: (202) 305-7583
Facsimile: (202) 616-8460
Email: joshua.e.gardner@usdoj.gov

Attorneys for DEFENDANTS

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**

1 I, Lily Sara Farel, declare as follows:

- 2 1. I am a Trial Attorney in the Federal Programs Branch, Civil Division of the United States
3 Department of Justice. I am assigned to represent Defendants in this case. I submit this
4 declaration in support of Defendant Department of Veterans Affairs' Opposition to Plaintiffs'
5 Motion to Compel Discovery. This declaration is based on my personal knowledge and based
6 upon my review of documents provided to me in my official capacity as counsel in this
7 litigation.
- 8 2. Attached hereto as Exhibit A is a true and accurate copy of the Rule 45 Subpoena, dated July
9 27, 2009, served on the Department of Veterans Affairs.
- 10 3. Attached hereto as Exhibit B is a true and accurate copy of the Department of Veterans
11 Affairs' written responses to Plaintiffs' Second Set of Interrogatories, dated July 15, 2011.
- 12 4. Attached hereto as Exhibit C is a true and correct copy of a March 21, 2011 letter from
13 Gordon Erspamer, counsel for Plaintiffs, to Joshua Gardner, counsel for Defendants.
- 14 5. Since being named as a Defendant in this lawsuit, the Department of Veterans Affairs has
15 responded to 220 requests for production, 25 interrogatories, many of them with discrete
16 subparts, and 48 requests for admission, as well as designated Rule 30(b)(6) witnesses for
17 more than eight topics noticed by the Plaintiffs.

18
19 I declare under penalty of perjury that the foregoing is true and correct. Executed in
20 Washington, D.C. on August 30, 2011.

21 
22 Lily Sara Farel

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1 GORDON P. ERSPAMER (CA SBN 83364)
Gerspamer@mofo.com
2 TIMOTHY W. BLAKELY (CA SBN 242178)
TBlakely@mofo.com
3 ADRIANO HRVATIN (CA SBN 220909)
AHrvatn@mofo.com
4 STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@mofo.com
5 MORRISON & FOERSTER LLP
425 Market Street
6 San Francisco, California 94105-2482
Telephone: 415.268.7000
7 Facsimile: 415.268.7522

8 Attorneys for Plaintiffs
Vietnam Veterans of America; Swords to Plowshares;
9 Veterans Rights Organization; Bruce Price; Franklin D.
Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane;
10 and Wray C. Forrest

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION
14

15 VIETNAM VETERANS OF AMERICA, *et al.*,

Case No. CV 09-0037-CW

16
17 Plaintiffs,

**NOTICE OF SUBPOENA TO THE
UNITED STATES DEPARTMENT OF
VETERANS AFFAIRS COMMANDING
PRODUCTION OF DOCUMENTS**

18 v.

19 CENTRAL INTELLIGENCE AGENCY, *et al.*,

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21 Defendants.
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TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Rule 45(a) of the Federal Rules of Civil Procedure, Plaintiffs Vietnam Veterans of America, Swords to Plowshares: Veterans Rights Organization, Bruce Price, Franklin D. Rochelle, Larry Meirow, Eric P. Muth, David C. Dufrane and Wray C. Forrest, by and through their attorneys, Morrison & Foerster LLP, will serve the attached subpoena on the United States Department of Veterans Affairs, commanding the production of records specified therein.

Dated: July 27, 2009

GORDON P. ERSPAMER
TIMOTHY W. BLAKELY
ADRIANO HRVATIN
STACEY M. SPRENKEL
MORRISON & FOERSTER LLP

By: *Gordon P. Erspamer / ah*
Gordon P. Erspamer

Attorneys for Plaintiffs
Vietnam Veterans of America; Swords to
Plowshares: Veterans Rights Organization;
Bruce Price; Franklin D. Rochelle; Larry
Meirow; Eric P. Muth; David C. Dufrane;
and Wray C. Forrest

AO 88B (Rev. 01/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises

UNITED STATES DISTRICT COURT
for the
District of Columbia

Vietnam Veterans of America, et al.,
Plaintiff
v.
Central Intelligence Agency, et al.,
Defendant

Civil Action No. CV 09-0037-CW
Northern District of California,
Oakland Division

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES

To: Custodian of Records
United States Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, District of Columbia 20420

Production: YOU ARE COMMANDED to produce at the time, date and place set forth below the following documents, electronically stored information or objects, and permit their inspection, copying, testing or sampling of the material: See attached Exhibit A.

Place: Morrison & Foerster LLP 2000 Pennsylvania Avenue, NW, Suite 5500 Washington, District of Columbia 20006-1888	Date and Time: August 26, 2009 at 10:00 a.m.
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Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: July 27, 2009

CLERK OF COURT

OR

Gordon P. Erspamer

Signature of Clerk or Deputy Clerk

Attorney's signature

Gordon P. Erspamer, Esq.

The name, address, e-mail, and telephone number of the attorney representing (name of party) Plaintiffs
Gordon P. Erspamer, Esq., Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105,
gerspamer@mofo.com, 415.268.6411 who issues or requests this subpoena, are:

AO 88B (Rev. 01/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises (Page 2)

Civil Action No. CV 09-0037-CW

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* Custodian of Records, U.S. Department of Veterans Affairs;
was received by me on *(date)* July 27, 2009.

I personally served the subpoena on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the subpoena at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the subpoena to *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because _____; or

other *(specify)*:

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

\$ _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

1 **EXHIBIT A TO SUBPOENA**

2 TO THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS: Pursuant to
3 Rule 45 of the Federal Rules of Civil Procedure, YOU are hereby requested to produce and
4 permit the inspection and copying of the DOCUMENTS described below that are in YOUR
5 possession, custody or control, or in the possession, custody or control of anyone acting on
6 YOUR behalf, including without limitation, YOUR present and former employees, agents,
7 representatives, accountants, attorneys, investigators or consultants. The production shall take
8 place on August 26, 2009 at 10:00 a.m., at the law offices of Morrison & Foerster LLP, 2000
9 Pennsylvania Avenue, NW, Suite 5500, Washington, District of Columbia 20006-1888, or
10 another place as may be mutually agreed upon.

11 **DEFINITIONS**

12 Unless otherwise indicated, the following definitions shall apply:

13 1. "ARTICHOKE" means, including without limitation, the official code name given in
14 or around 1951 to the secret test program conducted by one or more of DEFENDANTS
15 CONCERNING the study of special interrogation techniques and the use of chemicals, among
16 other methods, to produce amnesia and other vulnerable states in human test subjects.

17 2. "BLUEBIRD" means, including without limitation, the official code name given in
18 or around 1950 to the secret test program conducted by one or more of DEFENDANTS
19 CONCERNING special interrogation methods, including the use of drugs, hypnosis, and
20 isolation, upon human test subjects.

21 3. "COMMUNICATION" or "COMMUNICATIONS" means, unless otherwise
22 specified, any of the following: (a) any written letter, memorandum, DOCUMENT or any other
23 writing; (b) any telephone call between two or more PERSONS, whether or not such call was by
24 chance or prearranged, formal or informal; and (c) any conversation or MEETING between two
25 or more PERSONS, whether or not such contact was by chance or prearranged, formal or
26 informal, including without limitation, conversations or MEETINGS occurring via telephone,
27 teleconference, video conference, electronic mail (e-mail) or instant electronic messenger.

1 4. "CONCERNING" means constituting, summarizing, memorializing, referring to,
2 regarding and/or relating to.

3 5. "DEFENDANTS" means the Central Intelligence Agency; Leon Panetta, Director of
4 the Central Intelligence Agency; the United States Department of Defense; Dr. Robert M. Gates,
5 Secretary of Defense; the United States Department of the Army; Pete Geren, United States
6 Secretary of the Army; the United States of America; and Eric H. Holder, Jr., Attorney General of
7 the United States.

8 6. "DOCUMENT" or "DOCUMENTS" means any tangible thing upon which any
9 expression, COMMUNICATION or representation has been recorded by any means, including
10 but not limited to, handwriting, typewriting, printing, photostating, photographing, magnetic
11 impulse or mechanical or electronic recording and any non-identical copies (whether different
12 from the original because of notes made on such copies, because of indications that said copies
13 were sent to different individuals than were the originals, or because of any other reason),
14 including but not limited to, working papers, preliminary, intermediate or final drafts,
15 correspondence, memoranda, charts, notes, records of any sort of MEETINGS, invoices, financial
16 statements, financial calculations, diaries, reports of telephone or other oral conversations, desk
17 calendars, appointment books, audio or video tape recordings, e-mail or electronic mail,
18 electronic folders, microfilm, microfiche, computer tape, computer disk, computer printout,
19 computer card and all other writings and recordings of every kind that are in YOUR actual or
20 constructive possession, custody or control.

21 7. "EDGEWOOD ARSENAL" means the southern sector of the military installation
22 located northeast of Baltimore, Maryland, in the Northern Chesapeake Bay along a neck of land
23 between the Gunpowder and Bush rivers.

24 8. "INDIVIDUAL PLAINTIFFS" means Bruce Price, Franklin D. Rochelle, Larry
25 Meirow, Eric P. Muth, David C. Dufrane and Wray C. Forrest.

26 9. "MATERIAL TESTING PROGRAM EA 1729" means, including without limitation,
27 the official code name given to the secret test program conducted by one or more of
28

1 DEFENDANTS CONCERNING the testing of lysergic acid diethylamide ("LSD") as, among
2 other purposes, an intelligence-gathering technique.

3 10. "MEETING" or "MEETINGS" means any coincidence of, or presence of, or
4 telephone, television, radio or other electronic communication between or among persons,
5 whether such was by chance or prearranged, informal or formal.

6 11. "MKCHICKWIT" or "CHICKWIT" means, including without limitation, the
7 official code name given to the secret test program conducted by one or more of DEFENDANTS
8 CONCERNING the identification of new drugs in Europe and Asia and collection of information
9 and samples CONCERNING same.

10 12. "MKDELTA" means, including without limitation, the official code name given in
11 or around 1952 to the secret test program conducted by one or more of DEFENDANTS
12 CONCERNING the use of biochemicals in clandestine military operations.

13 13. "MKNAOMI" means, including without limitation, the official code name given to
14 the secret test program conducted by one or more of DEFENDANTS CONCERNING the
15 stockpiling of severely incapacitating and lethal materials and the development of gadgetry for
16 the dissemination of these materials.

17 14. "MKOFTEN" means, including without limitation, the official code name given to
18 the secret test program conducted by one or more of DEFENDANTS CONCERNING the
19 behavioral and toxicological effects of certain drugs on animals and humans.

20 15. "MKSEARCH" means, including without limitation, the official code name given
21 in or around 1964 to the secret test program conducted by one or more of DEFENDANTS
22 CONCERNING the development of methods to manipulate human behavior through the use of
23 drugs and other chemical substances.

24 16. "MKULTRA" means, including without limitation, the official code name given in
25 or around 1953 to the secret test program conducted by one or more of DEFENDANTS
26 CONCERNING the surreptitious use of many types of drugs, as well as other methods, to
27 manipulate individual mental states and to alter brain function, and that continued at least through
28 the late 1960s.

1 17. "TEST PROGRAMS" means, without limitation, Projects "BLUEBIRD,"
2 "ARTICHOKE," "MKDELTA," "MKULTRA," "MKNAOMI," "MKSEARCH,"
3 "MKCHICKWIT," "MKOFTEN," and any other program of experimentation involving human
4 testing of any substance, including but not limited to, "MATERIAL TESTING PROGRAM EA
5 1729."

6 18. "YOU" or "YOUR" means the United States Department of Veterans Affairs and
7 any representative or agent acting on YOUR behalf, including without limitation, any present or
8 former employees, accountants, attorneys, investigators or consultants.

9 **CONSTRUCTION**

10 The following rules of construction shall also apply:

- 11 1. "All" or "each" shall be construed as "all and each."
- 12 2. "Any" should be understood to include and encompass "all"; "all" should be
13 understood to include and encompass "any."
- 14 3. "And" or "or" shall be construed either disjunctively or conjunctively as necessary to
15 bring within the scope of the discovery request all responses that might otherwise be construed to
16 be outside of its scope.
- 17 4. The use of the singular form of any word shall include the plural, and vice versa.

18 **INSTRUCTIONS**

19 The following instructions shall apply:

- 20 1. In the event YOU produce original DOCUMENTS for inspection and copying, such
21 production shall be as the DOCUMENTS are kept in the usual course of business.
- 22 2. In lieu of production for inspection and copying, YOU may produce the requested
23 DOCUMENTS by mail or delivery of true copies thereof to Morrison & Foerster LLP at the
24 address identified above, or make the originals available for inspection and copying at a mutually
25 agreed-upon location, during normal business hours and upon reasonable notice. The
26 DOCUMENTS copied shall be copied as they are kept in the normal course of business, and any
27 titles, labels or other descriptions on any box, folder, binder, file cabinet or other container shall
28 be copied as well.

1 3. Each DOCUMENT is to be produced, along with all non-identical copies, drafts,
2 alterations and translations thereof, in its entirety, without abbreviations or redactions.

3 4. If any part of a DOCUMENT is responsive to any of the following requests, the
4 entire DOCUMENT shall be produced.

5 5. If YOU withhold any of the requested DOCUMENTS from production under a claim
6 of privilege or other protection, YOU must serve within thirty (30) days of the service of this
7 request a list of such withheld DOCUMENTS ("privilege log") indicating, for each DOCUMENT
8 withheld, the following information if known or available to YOU: (i) the date composed or date
9 appearing on the DOCUMENT; (ii) the author; (iii) the number of pages; (iv) the number of
10 copies made; (v) the identity of all PERSONS or entities who saw the original DOCUMENT or
11 saw or received a copy of such DOCUMENT, and the job titles of each such PERSON; (vi) the
12 subject matter; and (vii) the basis for claim of privilege or other immunity asserted. The privilege
13 log should be sufficiently detailed to permit Plaintiffs to determine whether to make a motion
14 with respect thereto.

15 6. If YOU are aware of the existence of any requested items that YOU are unable to
16 produce, specify in writing and serve upon the undersigned a list indicating the identity of such
17 DOCUMENTS within thirty (30) days of the service of this subpoena. Such identification
18 should, for each such DOCUMENT, set forth whether the DOCUMENT: (i) has been destroyed;
19 (ii) has been lost, misplaced or stolen; or (iii) has never been or is no longer, in the possession,
20 custody or control of the responding party, in which case the name and address of any PERSON
21 or entity known or believed by YOU to have possession, custody or control of that DOCUMENT
22 or category of DOCUMENTS should be identified. In each such instance, YOU are to identify
23 the DOCUMENT by author, addressee, date, subject matter, number of pages, attachments or
24 appendices, all PERSONS to whom it was distributed, shown or explained, date and manner of
25 destruction or other disposition, the reason for destruction or other disposition and PERSONS
26 destroying or disposing of the DOCUMENT.

27 7. If YOU contend that any of the following requests is objectionable in whole or in
28 part, YOU shall state with particularity each objection, the basis for it and the categories of

1 information and DOCUMENTS to which the objection applies, and YOU shall respond to the
2 request insofar as it is not deemed objectionable.

3 8. If YOU find the meaning of any term in these requests unclear, YOU shall assume a
4 reasonable meaning, state what the assumed meaning is and respond to the request according to
5 the assumed meaning.

6 9. Unless otherwise specified, each request calls for all DOCUMENTS created,
7 received or dated between January 1, 1940 and the date of YOUR response.

8 **DOCUMENTS TO BE PRODUCED**

9 1. All lists identifying veterans who participated in the TEST PROGRAMS.

10 2. All DOCUMENTS CONCERNING the consent of participants, including but not
11 limited to, the INDIVIDUAL PLAINTIFFS, in the TEST PROGRAMS at the EDGEWOOD
12 ARSENAL, including but not limited to, all participation agreements, consent forms and
13 "volunteer handbooks" prepared for, given to, received from or signed by any test participant.

14 3. All DOCUMENTS CONCERNING any notices provided to any participants in the
15 TEST PROGRAMS at the EDGEWOOD ARSENAL, including the INDIVIDUAL
16 PLAINTIFFS, CONCERNING the nature of the TEST PROGRAMS at the EDGEWOOD
17 ARSENAL and/or possible health effects resulting from their participation in the TEST
18 PROGRAMS at the EDGEWOOD ARSENAL.

19 4. All DOCUMENTS CONCERNING any correspondence or notice sent by YOU to
20 veterans who claimed to have participated in the TEST PROGRAMS regardless of whether their
21 participation was confirmed by YOU.

22 5. All DOCUMENTS CONCERNING any notice YOU provided to health care
23 providers or personnel, including without limitation, the Veterans Health Administration,
24 CONCERNING the nature of the TEST PROGRAMS at the EDGEWOOD ARSENAL and/or
25 possible health effects resulting from test subjects' participation in the TEST PROGRAMS at the
26 EDGEWOOD ARSENAL.

27 6. All DOCUMENTS CONCERNING any of the INDIVIDUAL PLAINTIFFS,
28 including but not limited to, military service records, medical, physical or mental health records,

1 correspondence and records CONCERNING all COMMUNICATIONS with any INDIVIDUAL
2 PLAINTIFF.

3 7. All letters, correspondence, inquiries, FOIA requests or other DOCUMENTS YOU
4 received from any participant, including the INDIVIDUAL PLAINTIFFS, in the TEST
5 PROGRAMS at the EDGEWOOD ARSENAL.

6 8. ALL DOCUMENTS CONCERNING YOUR efforts, if any, to identify and notify
7 participants, including the INDIVIDUAL PLAINTIFFS, of their involvement in the TEST
8 PROGRAMS at the EDGEWOOD ARSENAL.

9 9. All DOCUMENTS CONCERNING MEETINGS or COMMUNICATIONS between
10 YOU and (i) DEFENDANTS named in this action; and (ii) any participant, including the
11 INDIVIDUAL PLAINTIFFS, in the TEST PROGRAMS CONCERNING the TEST
12 PROGRAMS.

13 10. All requests received by YOU for any DOCUMENTS CONCERNING any of the
14 INDIVIDUAL PLAINTIFFS, and all DOCUMENTS that YOU produced pursuant to any such
15 request.

16 11. All DOCUMENTS CONCERNING any complaint, claim, allegation or notice by
17 any participant, including the INDIVIDUAL PLAINTIFFS, in the TEST PROGRAMS
18 CONCERNING physical and/or mental harm attributable in whole or in part to the administration
19 of the TEST PROGRAMS.

20 12. Studies, reports, surveys or other analyses of the health effects of any exposure to
21 substances used or administered during the TEST PROGRAMS at the EDGEWOOD ARSENAL.

22 13. All unpublished papers, reports or manuscripts CONCERNING the results of the
23 TEST PROGRAMS.

24 14. All tabulations, summaries, analyses or descriptions of the types of medical
25 problems (both physical and mental) experienced by participants, including the INDIVIDUAL
26 PLAINTIFFS, in the TEST PROGRAMS at the EDGEWOOD ARSENAL.

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1 15. Mortality data and/or statistics CONCERNING participants in the TEST
2 PROGRAMS, including but not limited to, at the EDGEWOOD ARSENAL, and comparisons to
3 the general population and/or an unexposed population group or groups.

4 16. DOCUMENTS CONCERNING the types of diseases or conditions experienced by
5 veterans who participated in the TEST PROGRAMS, including without limitation, all medical
6 studies CONCERNING the same.

7 17. All DOCUMENTS and MEETINGS CONCERNING YOUR Report No. 08-02725-
8 127, dated May 15, 2009, entitled *Healthcare Inspection, Review of Informed Consent in the*
9 *Department of Veterans Affairs Human Subjects Research.*

10 18. All DOCUMENTS, including but not limited to, reports, studies or other analyses
11 submitted by YOU to any Congressional Committee CONCERNING the TEST PROGRAMS,
12 including without limitation, efforts, if any, to identify and notify participants.

13 19. DOCUMENTS CONCERNING violations or suspected violations reported to YOU
14 CONCERNING the 1947 Nuremberg Code, the directive — known as the “Wilson Directive” —
15 prepared and issued by the Central Intelligence Agency and the Department of Defense on
16 February 26, 1953 that purported to bring the U.S. government in compliance with the 1947
17 Nuremberg Code on medical research, or any other law, regulation, rule or policy
18 CONCERNING the need for informed consent from human test research subjects, as well as
19 MEETINGS and COMMUNICATIONS CONCERNING the same.

20 20. Statistics CONCERNING the success rates and/or the disposition of claims filed
21 with YOU by participants in any of the TEST PROGRAMS.

22 21. Statistics CONCERNING the nature and type of health care provided by YOU to
23 the participants in any of the TEST PROGRAMS.

24 22. DOCUMENTS CONCERNING the priority class for health care of veterans who
25 participated in the TEST PROGRAMS, and all MEETINGS and COMMUNICATIONS
26 CONCERNING the same.

27
28

1 GORDON P. ERSPAMER (CA SBN 83364)
Gerspamer@mofo.com
2 TIMOTHY W. BLAKELY (CA SBN 242178)
TBlakely@mofo.com
3 ADRIANO HRVATIN (CA SBN 220909)
AHrvatn@mofo.com
4 STACEY M. SPRENKEL (CA SBN 241689)
SSprenkel@mofo.com
5 MORRISON & FOERSTER LLP
425 Market Street
6 San Francisco, California 94105-2482
Telephone: 415.268.7000
7 Facsimile: 415.268.7522

8 Attorneys for Plaintiffs
Vietnam Veterans of America; Swords to Plowshares;
9 Veterans Rights Organization; Bruce Price; Franklin D.
Rochelle; Larry Meiorow; Eric P. Muth; David C. Dufrane;
10 and Wray C. Forrest

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION
14

15 VIETNAM VETERANS OF AMERICA, *et al.*,

Case No. CV 09-0037-CW

16
17 Plaintiffs,

PROOF OF SERVICE

18 v.

19 CENTRAL INTELLIGENCE AGENCY, *et al.*,

20
21 Defendants.
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PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on July 27, 2009, I served a copy of:

NOTICE OF SUBPOENA TO THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS COMMANDING PRODUCTION OF DOCUMENTS

PROOF OF SERVICE

BY FACSIMILE [Code Civ. Proc. Sec. 1013(e)] by sending a true copy from Morrison & Foerster LLP's facsimile transmission telephone number 415.268.7522 to the fax number(s) set forth below. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

I am readily familiar with Morrison & Foerster LLP's practice for sending facsimile transmissions, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be transmitted by facsimile on the same date that it (they) is (are) placed at Morrison & Foerster LLP for transmission.

BY U.S. MAIL [Code Civ. Proc. Sec. 1013(a)] by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices.

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

Caroline Lewis Wolverton, Esq.
United States Department of Justice
Federal Programs Branch, Civil Division
P.O. Box 883
Washington, District of Columbia 20040
Facsimile: 202.616.8470

Attorneys for Defendants

I declare under penalty of perjury that the foregoing is true and correct.

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Executed at San Francisco, California, this 27th day of July 2009.

Gary Stenger
(typed)


(signature)

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
 9 Trial Attorneys
 Civil Division, Federal Programs Branch
 10 U.S. Department of Justice
 P.O. Box 883
 11 Washington, D.C. 20044
 Tele: (202) 305-7583
 12 Facsimile: (202) 616-8202
 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

18 VIETNAM VETERANS OF AMERICA, *et al.*,
 19 Plaintiffs,
 20 v.
 21 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 22 Defendants.
 23
 24
 25

Case No. CV 09-0037-CW

**DEFENDANT'S RESPONSES TO
 PLAINTIFFS' SECOND SET OF
 INTERROGATORIES TO UNITED
 STATES DEPARTMENT OF
 VETERANS AFFAIRS**

1 Defendant Department of Veterans Affairs (“VA” or “Defendant”), by and through
2 undersigned counsel, hereby submit the following objections and responses to Plaintiffs’ Second
3 Set of Interrogatories to United States Department of Veterans Affairs:

4 **GENERAL RESPONSES**

5
6 1. The information submitted herewith is being provided in accordance with the
7 Federal Rules of Civil Procedure, which permit the discovery of any matter not privileged that is
8 relevant to the claims in this civil action. Fed. R. Civ. P. 26(b)(1). Accordingly, Defendant does
9 not, by providing such information, waive any objection to its admissibility on the grounds of
10 relevance, materiality, or any other appropriate ground.

11 **GENERAL OBJECTIONS**

12
13 1. Defendant objects to Plaintiffs’ definition of “TEST PROGRAMS”, “TEST
14 SUBJECT”, and “TEST SUBJECTS” as overly broad. The term “TEST PROGRAM” is defined
15 to encompass activities at 30 locations, many of which do not appear in Plaintiffs’ Third
16 Amended Complaint and/or have no nexus to the testing of volunteer service members. The term
17 “TEST SUBJECT” is defined to include “any PERSON who . . . was a human subject in any
18 experiment in any of the TEST PROGRAMS.” This definition has the potential to encompass a
19 wide array of clinical trials and other human tests in any setting, under any circumstances, and
20 within any time frame, irrespective of any relation to the events that are the subject of the Third
21 Amended Complaint.

22
23 2. VA is only aware of those volunteer Cold War-era chemical and biological test
24 participants that are contained within the Chemical and Biological database maintained by the
25 Department of Defense (“Chem-Bio database”), for whom sufficient identifying information
26 exists, and: (1) who have filed VA claims for disability compensation; (2) whose survivors have
27 filed VA claims for Dependency and Indemnity Compensation (“DIC”); or (3) who have received
28

1 health care from VA and as such, any response VA offers is limited to that population.

2 Accordingly, insofar as Plaintiffs' second set of interrogatories seeks information concerning
3 VA's actions with respect to "TEST PROGRAMS" and "TEST SUBJECT", VA's responses are
4 necessarily limited to such individuals.

5
6 3. Defendant objects to Plaintiffs' definitions of "TEST SUBSTANCES" as overly
7 broad because the Chemical and Biological Database ("Chem-Bio Database") contains hundreds
8 of substances, including such substances as caffeine. Defendant further objects to the definition
9 of "TEST SUBSTANCES" as overly broad and unduly burdensome because Plaintiffs have
10 defined "TEST SUBSTANCES" to include chemical and biological substances that were not –
11 and which Plaintiffs have not alleged to have been – tested on volunteer service members by VA.
12 In addition, this definition is inconsistent with Plaintiffs' purportedly narrowed list of test
13 substances, sent on March 21, 2011.

14
15 4. Defendant objects to the definitions of "YOU and "YOUR," which includes
16 "attorneys," and therefore implicates the attorney-client privilege and work product immunity.

17
18 5. Defendant objects to Plaintiffs' instruction number 4, which purports to seek
19 documents "created, received, or dated between January 1, 1941" and the present day, as being
20 unduly burdensome and seeking information wholly unrelated to the claims remaining in this
21 litigation. The DoD chemical and biological test program concerning volunteer service members
22 ran from 1953 through 1975.

23
24 6. Defendant objects to Plaintiffs' interrogatories to the extent they seek information
25 that could be discerned only from review of individual VA claims files of veterans identified in
26 the Chem-Bio database. Obtaining such information would require VA: to conduct searches to
27 identify the location of VA claims files, which may be at one of 57 VA Regional Offices
28 nationwide or at a records archive facility; to pull the claims files, which are often voluminous,

1 and review them to identify the specific information sought; and to copy the relevant documents
2 from the file. VA estimates that this would take more than 2,155 hours of labor.

3 VA has identified 862 identifiable test subjects who have filed claims for disability
4 compensation or DIC with VA, to the extent such information has been made available by DoD in
5 the ChemBio database. An attempt to locate and review the claim files of those 862 identifiable
6 test subjects would be unduly burdensome. Defendant estimates that it would take a GS-7 Claims
7 Assistant at least 30 minutes to locate each claim file, for a total of at least 431 hours, and it
8 would take a GS-10, Step 5 Veterans Claims Examiner 2 hours to manually review each file to
9 identify any and all responsive material (adding 1,724 hours) for a total of
10 2,155 hours to locate and review each file.

11 VA cannot determine whether the above described files are active or inactive before
12 attempting to retrieve such files. Active files are located at one of the 57 Regional Offices
13 (“ROs”); inactive files are likely archived in the VA Records Management Center in St. Louis,
14 Federal Records Centers in Seattle and San Francisco, or National Archives in Lee’s Summit,
15 Missouri. Archival research for records at these facilities would require significant additional
16 time, estimated at approximately 4 hours per file. Generally, VBA archive retrieval, from date of
17 the initial request to the date of receipt of records, can take up to 90 days or more to complete.
18 The cost associated with retrieval of archived records varies depending on the size of the request.
19 In addition, all claims files would have to be screened to determine whether each file contains
20 records relating to diagnosis, prognosis, or treatment related to drug abuse, alcoholism or alcohol
21 abuse, infection with the human immunodeficiency virus, or sickle cell anemia. *See* 38 U.S.C.
22 § 7332. Such records may only be disclosed as provided by 38 U.S.C. § 7332(b).

23 Such a burden is unwarranted in this case. As noted in the Court’s Order Granting in Part
24 and Denying in Part Plaintiffs’ Motion to File a Third Amended Complaint, 38 U.S.C. § 511(a)
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1 “precludes federal district courts from reviewing challenges to individual benefits
2 determinations.” Order at 8. Plaintiffs’ sole claim against VA does not involve “review of an[y]
3 individual benefits determination,” but rests solely on the claim that “because the DVA allegedly
4 was involved in the testing programs at issue, the agency is incapable of making neutral, unbiased
5 benefit determinations for veterans who were test participants.” *Id.* at 11. Because Plaintiffs do
6 not and cannot challenge the propriety of VA’s actions in individual cases, the substantial burden
7 of retrieving case-specific information from paper claims files is not justified in view of the
8 minimal, if any, relevance of such information to Plaintiffs’ facial bias claim.

10 7. With respect to the burden of Plaintiffs’ discovery requests, VA further notes that,
11 in response to the Rule 45 subpoena and Plaintiffs’ Requests for Production VA has to date
12 provided Plaintiffs’ more than 177,000 pages of documents within VA’s possession, custody, or
13 control related to VA’s efforts to provide notice to test subjects; meetings and communications
14 between VA and DoD regarding compilation of the Chem-Bio database and the DoD Fact Sheet;
15 VA adjudication procedures for claims for disability compensation and DIC based on exposure to
16 test substances during the Edgewood Arsenal test programs; correspondence between VA and the
17 other Defendants regarding VA’s efforts to notify test participants; guidance provided to VA
18 medical personnel regarding the testing; data regarding claims filed alleging death or disability
19 due to the testing; Board of Veterans’ Appeals decisions regarding claims alleging death or
20 disability due to the testing; and claims files and health records for the individual Plaintiffs. VA
21 is in the process of reviewing an additional four-to-five million pages of documents pursuant to
22 those requests. VA has also provided Plaintiffs with statistical information concerning the
23 number of claims received by identifiable test subjects and their survivors that have been granted
24 and denied by VA, including identification of the veterans’ disabilities and the ratings assigned by
25 VA to those disabilities. In view of the substantial time and expense already undertaken by VA
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1 with respect to Plaintiffs' narrow facial bias claim, the additional burden of reviewing individual
 2 claims files, where district court review of VA's actions on individual claims is barred by statute,
 3 is unwarranted.

4 8. Defendant objects to Plaintiffs' interrogatories on the grounds that they greatly
 5 exceed the scope of permissible discovery as to either the narrow facial bias case against VA or
 6 the APA claims remaining against the other Defendants. Defendant further objects to Plaintiffs'
 7 interrogatories on the grounds that they greatly exceed the scope of permissible discovery in a
 8 putative class action.
 9

10 9. Defendant objects to each interrogatory to the extent that it is deemed to require
 11 disclosure of classified, confidential, or proprietary information or matters subject to the attorney-
 12 client privilege, the attorney work product doctrine, other applicable privileges, or any statutory
 13 or regulatory restriction upon disclosure.
 14

15 10. Defendant objects to each interrogatory to the extent it seeks information derived
 16 from records relating to diagnosis, prognosis, or treatment of drug abuse, alcoholism or alcohol
 17 abuse, infection with the human immunodeficiency virus, or sickle cell anemia. *See* 38 U.S.C.
 18 § 7332(a). Such records may only be disclosed as provided by 38 U.S.C. § 7332(b) and 38
 19 C.F.R. §§ 1.460-1.496. *See* 38 U.S.C. § 7332.
 20

21 **SPECIFIC OBJECTIONS AND SUPPLEMENTAL AND AMENDED RESPONSES TO
 22 PLAINTIFFS' INTERROGATORIES**

23 Each of the foregoing statements and/or objections is incorporated by reference into each
 24 and every specific response set forth below, and Defendant's responses below are not a waiver of
 25 any of its General Objections.

26 **INTERROGATORY NO. 13:**

27 For each TEST SUBJECT, please IDENTIFY whether that TEST SUBJECT received any
 28 notice or warning from YOU CONCERNING the TEST SUBJECT'S participation in the TEST

1 PROGRAMS or CONCERNING any substance to which the TEST SUBJECT was exposed after
2 the TEST SUBJECT's participation in the TEST PROGRAMS had concluded and IDENTIFY
3 the notice or warning and the date on which it was sent.

4 OBJECTIONS

5 Defendant objects to this interrogatory for the reasons described in General Objections
6 1-8. Defendant also objects on the grounds that this interrogatory is overly broad and unduly
7 burdensome because, as noted in General Objections 1 and 2, VA does not know the identity of
8 "each TEST SUBJECT" as defined by Plaintiffs. Defendant also objects to this interrogatory as
9 compound and overly burdensome to the extent it requires review of 3,223 individual claims files,
10 as explained in General Objections 6 and 7. In addition to the standard notices VA provided to
11 identifiable veterans on DoD's Chem-Bio database, individuals may have received notice from
12 VA of potential exposures in the context of communications concerning that individual's VA
13 claim.
14
15

16 RESPONSE

17 Subject to these objections and Defendant's General Objections above, and pursuant to
18 Rule 33(d), Defendant responds as follows:

19 Defendants previously produced the following reports in connection with VA's provision
20 of notice to veterans who may have been tested at Edgewood Arsenal.
21

- 22 • "Timeline for CBRNE" (DVA003 004533-004535);
- 23 • "Chem-Bio Follow-On Database cont." (DVA003 002485);
- 24 • "Biennial Report to Congress on VA's Outreach Activities – Chemical
25 Exposures"(DVA003 004501);
- 26 • "Outreach Activities Compensation and Pension Service; Chem-Bio Exposures"
27 (VET001_000419);
- 28 • "Status Paper – Chem-Bio, SHAD, and Mustard Gas" (DVA003 002602-002603)

1
2 Additionally, Defendant will produce to Plaintiffs the most current copy of VA's
3 spreadsheet of known veterans to whom VA has sent notification letters. This current spreadsheet
4 reflects 3,223 names of veterans to whom VA has sent notification letters. VA does not have
5 records verifying the date on which such letters were sent to each veteran.

6 **INTERROGATORY NO. 14:**

7 Please IDENTIFY the individual(s) or departments involved in drafting the various
8 documents that were sent to TEST SUBJECTS in order to provide them with notice regarding the
9 TEST PROGRAMS.
10

11 **OBJECTIONS**

12 Defendant objects to this interrogatory for the reasons described in General Objections
13 1; 5; 8. Defendant objects to this interrogatory as overly broad and unduly burdensome as it
14 requests the identity of all individuals and departments who have ever participated in drafting
15 documents that would provide notice to veterans exposed to chemical agents at Edgewood
16 Arsenal. VA has not compiled a complete list of all individuals or departments who participated
17 in that drafting. Moreover, many of the individuals involved have since retired and are no longer
18 available. In addition, Defendant objects to the interrogatory in light of the limited, if any,
19 relevance of such information to the narrow facial bias claim remaining against VA in the case.
20

21 **RESPONSE**

22 Subject to these objections and Defendant's General Objections above, and pursuant to
23 Rule 33(d), Defendant responds as follows:
24

25 VA does not have a comprehensive list of all individuals or offices who were involved in
26 drafting documents sent to test subjects to provide notice regarding the test programs. However,
27 documents previously provided to plaintiffs identify several individuals who participated or may
28 have participated in that matter. Defendants previously produced the following documents

1 regarding the individuals and departments involved in VA efforts to draft the notification letter
 2 mailing sent to veterans in order to provide them with notice regarding potential exposures at
 3 Edgewood Arsenal:

- 4 • Email correspondence among Joe Salvatore (Veterans Benefits Administration (VBA)), Mike McLendon (Office of Policy and Planning (OPP)), Dat Tran (OPP),
 5 Mark Brown (Veterans Health Administration (VHA)), Dr. Kenneth Craig
 6 Hymans (VHA), Kim Tibbitts (VBA), Glen Wallick (VBA), David Abbot (VBA)
 7 regarding attending a "Chem/Bio Meeting" to discuss the letters to be issued to
 8 Edgewood Arsenal veterans. (VET007_000607-617);
- 9 • Email correspondence among Joe Salvatore (VBA), Tom Pamperin (VBA), Mark
 10 Brown (VHA), Renee Szybala (VBA), Janice Jacobs (VBA), William McLemore
 11 (Office of Public and Intergovernmental Affairs), Steve Simmons (VBA), Kim
 12 Tibbitts (VBA), Diane Fuller (VBA), Mike McLendon (VBA), Glen Wallick
 13 (VBA), and David Abbot (VBA) regarding development of the draft Edgewood
 14 Arsenal notification letter (VET007_000580-585);
- 15 • Email correspondence among Dr. Kenneth Craig Hyams (VHA), Joe Salvatore
 16 (VBA), David Abbot (VBA), Glen Wallick (VBA), Dat Tran (OPP), Kim Tibbitts
 17 (VBA), Mark Brown (VHA), Dale Burnell (VBA), Dr. Lawrence Deyton (VHA),
 18 Doug Dembling (VHA), Gary Baker (VHA), Roscoe Butler (VHA), Gerald Cross
 19 (VHA), Betty Anderson (VBA), Kathleen Heaphy (Office of General Counsel),
 20 Tony Guagliardo (VHA), Katrice Pasteur (VHA), Neil Otchin (VHA) regarding
 21 the "CBRNE notification letter-Further comment." (VET007_000469-474;
 22 VET007_000489-493; VET007_000512-513; VET007_000517-000527;
 23 VET007_000537-000541; VET007_000547-000566);
- 24 • Email correspondence among Dee Dodson Morris (DoD Deployment Health
 25 Support Directorate), Joe Salvatore (VBA), David Abbot (VHA), Mark Brown
 26 (VHA), Roy Finno (DoD Contractor), and Michael Kilpatrick (DoD
 27 (VET007_000622-000623);
- 28 • Email correspondence among Nicole Kratzer (DoD Deployment Health Support
 Directorate), David Abbot (VBA), Dee Dodson Morris (DoD Deployment Health
 Support Directorate), Roy Finno (DoD Contractor), and James Pullen (DoD
 Contractor) (VET001_014331).

INTERROGATORY NO. 15:

Please IDENTIFY the number of claims by TEST SUBJECTS for service-connected
 disability compensation in connection with their exposure or participation as TEST SUBJECTS

1 that have been granted, the number of such claims that have denied, and the number of such
2 claims that are currently pending.

3 **OBJECTIONS**

4 Defendant objects to this interrogatory for the reasons described in General Objection
5 Nos. 1-2; 5-10. Defendant also objects to this interrogatory as compound, overly broad and
6 unduly burdensome because the interrogatory requests detailed claim information that VA does
7 not track and that could be obtained only from manual review of individual veterans' VA claims
8 files, a task that would require an estimated 2,155 hours of labor.

9 **RESPONSE**

10 Subject to these objections and Defendant's General Objections above, and pursuant to
11 Rule 33(d), Defendant responds as follows:
12

13 VA does not have reports identifying the number of test subjects who have filed claims for
14 service-connected disability compensation that are based on the assertion that their claimed
15 disability was caused by their exposure or participation as test subjects during service. Although
16 VA data systems may indicate whether VA has granted or denied a veteran's claim for service-
17 connected disability compensation, those systems do not indicate whether the claim was
18 predicated upon an assertion that the claimed disability was caused by exposure or participation
19 as a test subject, as distinguished from other aspects of the veteran's service.
20

21 In September 2006, VA began using End Product 683 (EP 683) in certain VA electronic
22 databases to mark claims related to chemical or biological exposure in Edgewood Arsenal testing
23 programs. *See* 9/12/2006 VA Training Letter (VET001_015121). However, EP 683 does not
24 itself provide a viable mechanism for discerning whether claims based on human-subject testing
25 have been granted or denied. The purpose of the EP 683 is to enable VA to track and manage its
26 current caseload with respect to specific types of issues, rather than to track the outcome of claims
27
28

1 retrospectively. Accordingly, EP 683 has been assigned to a variety of different issues at
2 different time periods. Currently, EP 683 is used to track not only claims based on testing at
3 Edgewood Arsenal, but also claims based on exposures in Project Shipboard Hazard and Defense
4 (SHAD) and claims based on other hazardous exposures, including current-day exposures. For
5 this reason, a search of cases flagged with EP 683 would not be capable of distinguishing claims
6 based on Edgewood Arsenal testing from other unrelated claims. Further, such a search would
7 not identify any claim based on Edgewood Arsenal testing filed prior to September 2006, when
8 VA began using EP 683 for such claims.
9

10 Defendant previously produced a statistics report that addresses the grant and denial rate
11 of claims for disability compensation VA has received from identifiable test subjects, irrespective
12 of the theory on which such claims were based. That data is reproduced below in response to
13 Interrogatory 16 and is incorporated here by reference.
14

15 **INTERROGATORY NO. 16:**

16 Please IDENTIFY the total number of claims by TEST SUBJECTS for service-connected
17 disability compensation that have been granted, the total number of such claims that have been
18 denied, and the total number of such claims that are currently pending.
19

20 **OBJECTIONS**

21 Defendant objects to this interrogatory for the reasons described in General Objection
22 Nos. 1-2; 5-10. Defendant also objects to this interrogatory as compound, overly broad and
23 unduly burdensome because, as noted in General Objections 1 and 2, VA does not know the
24 identity of "each TEST SUBJECT" as defined by Plaintiffs.
25

26 **RESPONSE**

27 Subject to these objections and Defendant's General Objections above, Defendant
28 responds as follows:

1 Based on a search of VA electronic databases for data on claims for VA benefits filed by
2 identifiable individuals on DoD's Chem-Bio database, Defendant previously produced a statistics
3 report in response to Interrogatories No. 1 and 2 in Plaintiffs' First Set of Interrogatories to VA
4 titled "Statistics on Known Claims Filed by ChemBio Veterans." As stated in that report, VA's
5 search indicated that VA has received 843 claims for service-connected disability compensation
6 from identifiable veterans on DoD's Chem-Bio database. The search further indicated that VA
7 has granted service-connected disability benefits in 717 such cases and has denied such benefits
8 in 193 cases. Although the total of grants and denials exceeds the number of claims received, this
9 is in part because some claims involved multiple issues, some of which were granted while others
10 were denied. Additionally, as explained in the statistical report, 38 of the denials were in cases in
11 which VA's database did not indicate that a claim had been received. VA does not know the
12 basis for this discrepancy in the data input to that database. VA currently does not have an
13 accounting of pending disability compensation claims filed by identifiable test subjects, but will
14 supplement its response with data on pending claims if it becomes available.

15
16
17 **INTERROGATORY NO. 17:**

18 Please IDENTIFY the number of claims by survivors of TEST SUBJECTS for
19 Dependency and Indemnity Compensation in connection with a TEST SUBJECT's exposure or
20 participation as a TEST SUBJECT that have been granted, the number of such claims that have
21 been denied, and the number of such claims that are currently pending.

22
23 **OBJECTIONS**

24 Defendant objects to this interrogatory for the reasons described in General Objections
25 1-2; 5-10. Defendant objects to this interrogatory as compound, overly broad and unduly
26 burdensome because, as noted in General Objections 1 and 2, VA does not know the identity of
27 each "TEST SUBJECT" as defined by Plaintiffs. Defendant also objects to this interrogatory as
28

1 overly broad and unduly burdensome because it requests detailed claim information that VA does
2 not track and that could be obtained only from manual review of individual veterans' VA claims
3 files, a task that would require an estimated 2,155 hours of labor.

4 **RESPONSES**

5 Subject to these objections and Defendant's General Objections above, Defendant
6 responds as follows:
7

8 VA does not have reports identifying the number of survivors of test subjects who have
9 filed claims for dependency and indemnity compensation that are based on the assertion that the
10 veteran's death was due to his or her exposure or participation as a test subject during service.
11 Although VA data systems may indicate whether VA has granted or denied a claim for
12 dependency and indemnity compensation filed by the survivor of a known test subject, those
13 systems do not indicate whether the claim was predicated upon an assertion that the veteran's
14 death was related to exposure or participation as a test subject, as distinguished from other aspects
15 of the veteran's service.
16

17 Defendant previously produced a statistics report that addresses the grant and denial rate
18 of DIC claims VA has received from survivors of identifiable test subjects, irrespective of the
19 theory on which such claims were based. That data is reproduced below in response to
20 Interrogatory 18 and is incorporated here by reference.
21

22 **INTERROGATORY NO. 18:**

23 Please IDENTIFY the total number claims by survivors of TEST SUBJECTS for
24 Dependency and Indemnity Compensation that have been granted, the total number of such
25 claims that have been denied, and the total number of such claims that are currently pending.
26

27 **OBJECTIONS**

1 Defendant objects to this interrogatory for the reasons described in General Objections
2 1-2; 5-10. Defendant also objects to this interrogatory as compound, overly broad and unduly
3 burdensome because, as noted in General Objections 1 and 2, VA does not know the identity of
4 each "TEST SUBJECT" as defined by Plaintiffs.
5

6 **RESPONSE**

7 Subject to these objections and Defendant's General Objections above, Defendant
8 responds as follows:

9 Based on a search of VA electronic databases for data on claims for VA benefits filed by
10 identifiable individuals on DoD's Chem-Bio database, Defendant previously produced a claims
11 statistics report, in response to Interrogatories No. 1 and 2 in Plaintiffs' First Set of Interrogatories
12 to VA, titled "Statistics on Known Claims Filed by ChemBio Veterans." As stated in this report,
13 VA's search indicated that VA has received 69 claims for dependency and indemnity
14 compensation from survivors of identifiable test participants and VA has granted 51 of those
15 claims. The database does not indicate the disposition of the remaining 18 claims. VA currently
16 does not have an accounting of pending dependency and indemnity compensation claims filed by
17 identifiable test subjects, but will supplement its response here with data on pending claims if it
18 becomes available.
19

20 **INTERROGATORY NO. 19:**

21 Please IDENTIFY up-to-date statistics regarding claims by TEST SUBJECTS for service-
22 connected disability compensation compiled in the same manner that Compensation and Pension
23 Service has previously compiled statistics regarding "Chem-Bio Claims" in its report on Outreach
24 Activities (*see* DVA003 013252).
25

26 **OBJECTIONS**

1 Defendant objects to this interrogatory for the reasons described in General Objections 1-
2 2; 5-10. Defendant further objects to Plaintiffs' interrogatory as overly broad and unduly
3 burdensome because, as noted in General Objections 1 and 2, VA does not know the identity of
4 each "TEST SUBJECT" as defined by Plaintiffs. Defendant further objects to Plaintiffs'
5 interrogatory as unduly burdensome because the statistics in the "Chem-Bio Claims" section of
6 the "Outreach Activities" document (DVA003 013252) apparently were compiled based upon
7 monitoring and analysis of contemporaneous data regarding VA's pending inventory of claims
8 with an EP 683 and it is presently uncertain whether VA can, feasibly and without undue burden,
9 retrospectively recreate the same or similar data with respect to claims that were pending after
10 December 2009 but are not currently pending. Finally, Defendant objects to the terms "in the
11 same manner" as vague and undefined.
12

13
14 **RESPONSE**

15 Subject to these objections and Defendant's General Objections above, Defendant
16 responds as follows:

17 The statistics in the "Chem-Bio Claims" section of the "Outreach Activities" document
18 (DVA003 013252) apparently were compiled pursuant to a multi-step process that involved
19 generating contemporaneous reports of VA's pending inventory of claims with an EP 683,
20 monitoring changes in the pending inventory based on such reports, and manually comparing the
21 extracted data with other electronic records received via e-mail or maintained in VA's corporate
22 data warehouse to identify claim dispositions. Because the EP 683 is used to monitor VA's
23 pending inventory rather than to record dispositions historically, this approach may only identify
24 contemporaneous dispositions made during the periods for which specific operational reports
25 were generated and analyzed. VA has not continuously produced reports and analyses in the
26 same manner as those in the "Outreach Activities" report and, therefore, does not have the
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28

1 statistics requested by this interrogatory. As a result, VA cannot produce current statistics
2 reported in the same manner as the "Outreach Activities" document (DVA003 013252).

3 VA will update this response as necessary if additional information becomes available
4 regarding the feasibility of retrospectively recreating or approximating the methodology used to
5 generate the statistics reported in the "Outreach Activities" document (DVA003 013252).
6

7 **INTERROGATORY NO. 20:**

8 Please IDENTIFY the rates at which claims by all veterans for service-connected
9 disability compensation has been granted and denied.

10 **OBJECTIONS**

11 Defendant objects to this interrogatory for the reasons described in General Objections 7-
12 8. Defendant further objects to Plaintiffs' interrogatory as overly broad and unduly burdensome,
13 because VA has not formally compiled any list or database of the rates at which all claims filed
14 by all veterans for disability compensation have been granted. In addition, Defendant objects to
15 Plaintiff's interrogatory as overly broad given that there is no defined time frame. Defendant
16 further objects that the term "claims by all veterans for service-connected disability
17 compensation" is vague and undefined as to whether it refers to original claims for such
18 compensation, claims for increased or additional compensation based on changed circumstances,
19 reopened claims, and/or other types of claims.
20

21 **RESPONSES**

22 Subject to these objections and Defendant's General Objections above, Defendant
23 responds as follows:
24

25 When a veteran files a claim for VA disability compensation, he or she may seek
26 compensation for one or more disabilities that the veteran alleges are service connected. VA
27 refers to each disability that is alleged to be service connected as an "issue." Based on a database
28

1 search conducted for purposes of responding to this interrogatory, in fiscal year 2010, VA
2 rendered decisions on 2,541,115 issues for service connected disability and granted service
3 connection for 1,089,733 issues or disabilities (43%). The grants of service connection were
4 contained in 657,003 rating decisions. As a result, 56% of the decisions issued by VA granted
5 service connection for at least one disability. A granted claim includes those claims in which
6 service connected was granted for a disability that VA rated as non-compensable, i.e., 0%
7 disabling. It does not include any claims granted as a result of an appeal or claims for an
8 increased evaluation due to worsening of a service-connected disability.
9

10 **INTERROGATORY NO. 21:**

11 Please IDENTIFY the rates at which claims by all survivors of veterans for DIC have
12 been granted and denied.
13

14 **OBJECTIONS**

15 Defendant objects to this interrogatory for the reasons described in General Objections 7-
16 8. Defendant further objects to Plaintiffs' interrogatory as overly broad and unduly burdensome,
17 because VA has not formally compiled any list or database of the rates at which all claims filed
18 by all survivors of veterans for DIC are granted. In addition, Defendant objects to Plaintiff's
19 interrogatory as overly broad given that there is no defined time frame. Defendant further objects
20 that the term "claims by all survivors of veterans for DIC" is vague and undefined as to whether it
21 refers to original claims for DIC, claims for increased or additional DIC, reopened claims, and/or
22 other types of claims.
23

24 **RESPONSES**

25 Subject to these objections and Defendant's General Objections, Defendant responds as
26 follows:
27
28

1 Based on a database search conducted for purposes of responding to this interrogatory, in
2 fiscal year 2010, VA granted 69% of DIC claims based on a service-connected death or because
3 the veteran was rated at 100% for a service-connected disability for ten or more years. See 38
4 U.S.C. § 1318. This included all claims that considered service connected death as an issue.
5

6 **INTERROGATORY NO. 22:**

7 Please IDENTIFY the rates at which the Board of Veterans' Appeals reverses or remands
8 the decisions of regional offices regarding TEST SUBJECTS' claims for service-connected
9 disability compensation made in connection with their exposure or participation as TEST
10 SUBJECTS.

11 **OBJECTIONS**

12 Defendant objects to this interrogatory for the reasons described in General Objections
13 1-2; 5-10. VA further objects to this interrogatory's request for "rates" at which the Board
14 "reverses or remands" regional office decisions as ambiguous. Because the Board often affirms
15 in part and remands in part where a claim involves multiple issues and may remand for reasons
16 other than VA error (e.g., change in law), "rates" at which the Board "reverses or remands" is
17 ambiguous. VA further objects to this interrogatory as unduly burdensome because VA does not
18 maintain reports or data concerning the rates at which the Board reverses or remands RO
19 decisions in such appeals. In addition, VA has produced to Plaintiffs copies of all Board
20 decisions involving claims based on exposure or participation as test subjects that could be found
21 upon reasonably diligent search. Those decisions indicate the Board's disposition of each appeal
22 and provide Plaintiffs the data that could be used to evaluate such reversal or remand rates as
23 Plaintiffs seek. As such, the burden of obtaining this information is substantially the same for
24 both parties. Further, because the Board may remand claims, in whole or in part, for a variety of
25 reasons, including changes in law or routine procedural defects, the marginal, if any, relevance of
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1 this information to Plaintiffs' facial bias claim does not justify imposing on VA the burden of
2 analyzing and summarizing documents that Plaintiffs themselves possess.

3 **RESPONSE**

4 Subject to these objections and Defendant's General Objections above, Defendant
5 responds as follows:
6

7 Information responsive to this interrogatory is equally available to Plaintiffs. VA does not
8 maintain reports or data on the rates at which the Board reverses or remands RO decisions on
9 claims for disability compensation based on exposure or participation as a test subject. VA has
10 provided Plaintiffs with copies of all Board decisions involving claims based on exposure or
11 participation as test subjects that could be found upon reasonably diligent search. Those
12 decisions provide Plaintiffs, to the same extent as VA, the data to assess the Board's rate of
13 reversal or remand. Further, the Board's adjudication of test subjects' claims relating to testing
14 exposure is commonly available in the legal database of Board decisions at
15 <http://www.index.va.gov/search/va/bva.html>. On this VA website, Plaintiffs can search for
16 information regarding Board decisions on claims relating to testing exposure in Edgewood
17 Arsenal programs. Using relevant search terms, Plaintiffs can use the search tool to locate the
18 Board's decisions on any test subjects' claims based on alleged test participation. Such a search
19 does not detect individual test subjects' names, as the public Board decisions have redacted
20 veterans' names and other personal identifying information.
21
22

23 **INTERROGATORY NO. 23:**

24 Please IDENTIFY the rates at which the Board of Veterans' Appeals reverses or remands
25 the decisions of regional offices regarding claims by survivors of TEST SUBJECTS for DIC
26 made in connection with TEST SUBJECTS' exposures or participation as TEST SUBJECTS.
27

28 **OBJECTIONS**

1 Defendant objects to this interrogatory for the reasons described in General Objections
2 1-2; 5-10. VA further objects to this interrogatory's request for "rates" at which the Board
3 "reverses or remands" regional office decisions as ambiguous. Because the Board often affirms
4 in part and remands in part where a claim involves multiple issues and may remand for reasons
5 other than VA error (e.g., change in law), "rates" at which the Board "reverses or remands" is
6 ambiguous. VA further objects to this interrogatory as unduly burdensome because VA does not
7 maintain reports or data concerning the rates at which the Board reverses or remands RO
8 decisions in such appeals and because VA has produced to Plaintiffs copies of all Board decisions
9 involving claims based on exposure or participation as test subjects that could be found upon
10 reasonably diligent search in connection with Plaintiffs' Rule 45 subpoena. Those decisions
11 indicate the Board's disposition of each appeal and provide Plaintiffs, to the same extent as VA,
12 the data that could be used to evaluate such reversal or remand rates as Plaintiffs seek. Further,
13 because the Board may remand claims, in whole or in part, for a variety of reasons, including
14 changes in law or routine procedural defects, the marginal, if any, relevance of this information to
15 Plaintiffs' facial bias claim does not justify imposing on VA the burden of analyzing and
16 summarizing documents that Plaintiffs themselves possess.

17
18
19 **RESPONSE**

20 Subject to these objections and Defendant's General Objections above, Defendant
21 responds as follows:

22
23 The burden of obtaining this information is substantially the same for both parties. VA
24 does not maintain reports or data on the rates at which the Board reverses or remands RO
25 decisions on claims for DIC based on exposure or participation as a test subject. VA has
26 provided Plaintiffs with copies of all Board decisions involving claims based on exposure or
27 participation as test subjects that could be found upon reasonably diligent search. Those
28

1 decisions provide Plaintiffs, to the same extent as VA, the data to assess the Board's rate of
2 reversal or remand. Further, the Board's adjudication of test subjects' claims relating to testing
3 exposure is commonly available in the legal database of Board decisions at
4 <http://www.index.va.gov/search/va/bva.html>. On this VA website, Plaintiffs can search for
5 information regarding Board decisions on claims relating to testing exposure in Edgewood
6 Arsenal programs. Using relevant search terms, Plaintiffs can use the search tool to locate the
7 Board's decisions on any test subjects' claims based on alleged test participation. The website
8 does not detect individual test subjects' names, as the public Board decisions have redacted
9 veterans' names and other personal identifying information.

10
11 **INTERROGATORY NO. 24:**

12 Please IDENTIFY the rates at which the Court of Appeals for Veterans Claims reverses or
13 remands the decisions of the Board of Veterans' Appeals regarding TEST SUBJECTS' claims for
14 service-connected disability compensation made in connection with their exposure or
15 participation as TEST SUBJECTS.
16

17 **OBJECTIONS**

18 Defendant objects to this interrogatory for the reasons described in General Objections
19 1-2; 5-8. VA further objects to this interrogatory's request for "rates" at which the Court of
20 Appeals for Veterans Claims (CAVC) "reverses or remands" Board decisions as ambiguous.
21 Because the CAVC often affirms in part and remands in part where a claim involves multiple
22 issues and may remand for reasons other than VA error (e.g., change in law), "rates" at which the
23 CAVC "reverses or remands" is ambiguous. Defendant further objects on the grounds that this
24 interrogatory is overbroad and unduly burdensome because it seeks information that is not
25 maintained by VA. Neither the Board nor any other VA office tracks statistics on reversal or
26 remand by the CAVC of claims based on exposure or participation as test subjects. To determine
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1 the CAVC remand/reversal rate for test subjects' cases, VA would first have to obtain a copy of
2 the CAVC decision for each test subject and then read each decision to determine how the Court
3 ruled – an unduly burdensome process. Further, because the CAVC's decisions are publicly
4 available and can be term-searched on widely used legal research databases such as Westlaw and
5 LexisNexis, this information is available to Plaintiffs to the same extent it is available to VA.
6 Defendant further objects that, because the CAVC may remand claims for a wide variety of
7 reasons, the marginal, if any, relevance of that information to the facial bias claim remaining
8 against VA, does not warrant imposing this burden on VA.
9

10 **RESPONSE**

11 Subject to these objections and Defendant's General Objections above, Defendant
12 responds as follows:

13
14 The information requested in this interrogatory is publicly available to Plaintiffs to the
15 same extent it is available to Defendants. The CAVC's decisions are publicly available and may
16 be term-searched on widely used legal research databases such as Westlaw and LexisNexis to
17 identify claims based on exposure or participation as a test subject. Further, Defendant has
18 produced to Plaintiffs a disc titled DVA007 (containing DVA007-000001-000071), which
19 contains a list of names of identifiable test subjects who have filed disability compensation
20 claims, to the extent such information is available. Plaintiffs can use this list of names to search
21 on their own using the CAVC website (<http://www.uscourts.cavc.gov/>) or at the CAVC
22 courthouse, located at 625 Indiana Avenue, NW, Suite 900, Washington, D.C. 20004-2950.
23

24 **INTERROGATORY NO. 25:**

25 Please IDENTIFY the rates at which the Court of Appeals for Veterans Claims reverses or
26 remands the decisions of the Board of Veterans' Appeals regarding claims by survivors of TEST
27
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1 SUBJECTS for DIC made in connection with TEST SUBJECTS' exposure or participation as
2 TEST SUBJECTS.

3 **OBJECTIONS**

4 Defendant objects to this interrogatory for the reasons described in General Objections
5 1-2; 5-8. VA further objects to this interrogatory's request for "rates" at which the Court of
6 Appeals for Veterans Claims (CAVC) "reverses or remands" Board decisions as ambiguous.
7 Because the CAVC often affirms in part and remands in part where a claim involves multiple
8 issues and may remand for reasons other than VA error (e.g., change in law), "rates" at which the
9 CAVC "reverses or remands" is ambiguous. Defendant further objects on the grounds that this
10 interrogatory is overbroad and unduly burdensome because it seeks information that is not
11 maintained by VA. Neither the Board nor any other VA office tracks statistics on reversal or
12 remand by the CAVC of DIC claims based on a veteran's exposure or participation as a test
13 subject. To determine the CAVC remand/reversal rate for DIC claims filed by survivors of test
14 subjects, VA would first have to obtain a copy of the CAVC decision for each test subject and
15 then read each decision to determine how the Court ruled on any DIC claims filed – an unduly
16 burdensome process. Further, because the CAVC's decisions are publicly available and can be
17 term-searched on widely used legal research databases such as Westlaw and LexisNexis, this
18 information is available to Plaintiffs to the same extent it is available to VA. Defendant further
19 objects that, because the CAVC may remand claims for a wide variety of reasons, the marginal, if
20 any, relevance of that information to the facial bias claim remaining against VA, does not warrant
21 imposing this burden on VA.

22 **RESPONSE**

23 Subject to these objections and Defendant's General Objections above, Defendant
24 responds as follows:
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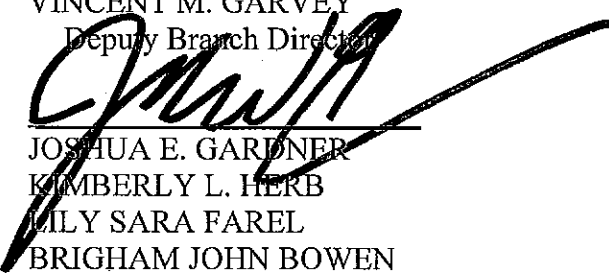
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The information requested in this interrogatory is publicly available to Plaintiffs to the same extent it is available to Defendants. The CAVC's decisions are publicly available and may be term-searched on widely used legal research databases such as Westlaw and LexisNexis to identify claims based on exposure or participation as a test subject. Further, Defendant has produced to Plaintiffs a disc titled DVA007 (containing DVA007-000001-000071), which contains a list of names of identifiable test subjects who have filed disability compensation claims, and who have had DIC claims filed on their behalf, to the extent such information is available. Plaintiffs can use this list of names to search on their own using the CAVC website (<http://www.uscourts.cavc.gov/>) or at the CAVC courthouse, located at 625 Indiana Avenue, NW, Suite 900, Washington, D.C. 20004-2950.

As to the interrogatories, see Attachment A.

As to the objections:


Dated: July 15, 2011

IAN GERSHENGORN
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
VINCENT M. GARVEY
Deputy Branch Director

JOSHUA E. GARDNER
KIMBERLY L. HERB
LILY SARA FAREL
BRIGHAM JOHN BOWEN
JUDSON O. LITTLETON
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8470
E-mail: joshua.e.gardner@usdoj.gov

Attorneys for Defendant

For Interrogatories 13-19 and 24-25, I declare under penalty of perjury that the foregoing is true and correct as it relates to the Department of Veterans Affairs.

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Paul Black
Assistant Director, Procedures,
Compensation Service,
Veterans Benefits Administration
Department of Veterans Affairs

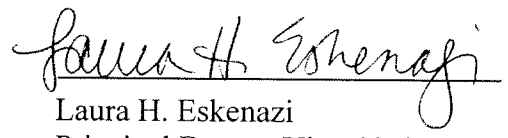
1 For Interrogatories 20-21, I declare under penalty of perjury that the foregoing is true and
2 correct as it relates to the Department of Veterans Affairs.

3 

4 Kenneth Smith
5 Assistant Director,
6 Office of Performance Analysis & Integrity,
7 Veterans Benefits Administration
8 Department of Veterans Affairs
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For Interrogatories 22-23, I declare under penalty of perjury that the foregoing is true and correct as it relates to the Department of Veterans Affairs.



Laura H. Eskenazi
Principal Deputy Vice Chairman,
Board of Veterans' Appeals
Department of Veterans Affairs

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PROOF OF SERVICE

I declare that I am over the age of eighteen and not a party to the above captioned action.

My business address is 20 Massachusetts Avenue, NW, P.O. Box 883, Washington, DC 20530.

I further declare that on July 15, 2011, I served a copy of:

DEFENDANT DEPARTMENT OF VETERANS AFFAIRS' RESPONSE TO
PLAINTIFFS' SECOND SET OF INTERROGATORIES TO UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS

on counsel for Plaintiffs, as addressed below:

Gordon Erspamer
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

(X) By overnight delivery: I placed a true copy in a sealed envelope, with delivery provided, to the address and person stated above and, pursuant to the usual business practice of the Department of Justice for collection and processing of mail, deposited on the same day in a collection box regularly maintained by Federal Express.

(X) By electronic mail: I caused said document to be delivered to the above named individual by electronic mail.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 15, 2011 at Washington, D.C.



LILY SARA FAREL

MORRISON | FOERSTER

425 MARKET STREET
SAN FRANCISCO
CALIFORNIA 94105-2482

TELEPHONE: 415.268.7000
FACSIMILE: 415.268.7522

WWW.MOFO.COM

MORRISON & FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.
NORTHERN VIRGINIA, DENVER,
SACRAMENTO, WALNUT CREEK
TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

March 21, 2011

Writer's Direct Contact
415.268.6411
GERSpamer@mofo.com

Via E-Mail and U.S. Mail

Joshua E. Gardner, Esq.
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 09-0037 CW (N.D. Cal.)

Dear Mr. Gardner:

This letter responds to certain items raised in your March 11 letter, provides a narrowed list of test substances, identifies a narrowed and critical set of Rule 30(b)(6) topics, encloses discovery directed to the Department of Veterans Affairs (“DVA”), most of which is directly related to the new claim against that agency, and seeks to move discovery forward expeditiously. Given the case deadlines currently in place — including the May 31, 2011 fact discovery cutoff — it is imperative that we receive Defendants’ responses to this letter by no later than March 25, 2011, so that the parties can evaluate priorities and construct an appropriate plan for the completion of discovery.

Response to Your March 11 Letter

Although your March 11 letter addresses numerous issues concerning interrogatory responses, the parties’ earlier meet-and-confer efforts, and Defendants’ belief regarding the appropriate scope of discovery — some of which we dispute — I wanted to respond briefly to two points.

First, you state that you believe that a “threshold issue about the scope of discovery” must be resolved to proceed with the remaining discovery in this case. We believe that the Court already has provided guidance about the scope of discovery, has compelled Defendants to provide additional information (including twice compelling full and complete responses to Plaintiffs’ interrogatories), and that Defendants have not yet lived up to their discovery obligations. Defendants’ inability or unwillingness to complete their document production

MORRISON | **FOERSTER**

Joshua E. Gardner, Esq.
March 21, 2011
Page Two

has jeopardized Plaintiffs' ability to complete expert reports on the timetable set by the Court, as even at this late date, we continue to receive documents.

At the same time, in the spirit of moving this case forward, a key purpose of this letter is to narrow the scope of discovery by providing a narrowed list of test substances and consolidating and clarifying requested Rule 30(b)(6) deposition topics. We trust that these efforts will permit Defendants to focus their energy on the key items and help expedite Defendants' provision of the information necessary for Plaintiffs to pursue and evaluate their claims. You concluded your letter by reiterating your desire to work cooperatively with Plaintiffs in an effort to complete discovery in this case. Plaintiffs likewise are committed to working cooperatively with Defendants, but also are committed to obtaining the information to which they are entitled and which they require to evaluate and prosecute this litigation. We believe that this letter moves us towards that goal.

Second, with respect to Battelle, your letter overstates the explanation provided to Plaintiffs during the meet-and-confer session and is not consistent with the information provide by the Department of Defense ("DOD") representative at that meeting. Regardless, as mentioned during the call, Defendants' effort to prevent Plaintiffs from obtaining discovery from Battelle by invoking the Touhy regulations is obstructionist and misguided. The Southern District of Ohio, which will enforce the subpoena, is among the many courts to have rejected Defendants' position that a party agency can require compliance with the Touhy regulations to impede discovery — as the DOD is attempting to do here. *See Roby v. Boeing Co.*, 189 F.R.D. 512, 516-18 (S.D. Ohio 1999) ("fundamental fairness dictates that the Touhy regulations should not apply where the Government is a party to the litigation"). We are preparing to move to compel Battelle's response to the subpoena, which clearly calls for the production of information that Defendants have refused to provide in discovery, including Defendants' communications with Battelle concerning the scope and execution of the contract at issue, and Defendants' (and DOJ's) communications with Battelle concerning this litigation. It is clear to us based on our conversations with Battelle (and from Battelle's objections to the subpoena) that Defendants actively have interceded and induced Battelle's non-compliance with the subpoena. In fact, Battelle itself told us that Defendants' counsel instructed Battelle not to respond to Plaintiffs' initial subpoena. Although you were dismissive of this issue when we raised it during our meet-and-confer call, we ask one more time for Defendants to reconsider their position with respect to the Battelle subpoena and to cease their obstruction of Plaintiffs' efforts to obtain this relevant information. Please let us know whether Defendants intend to stand on their Touhy objections and whether Defendants otherwise will oppose our motion to compel discovery from Battelle.

Narrowed List of Test Substances

Enclosed with this letter, please find a preliminary list of primary chemical and biological substances for trial, including both separately and in various combinations. Each substance

Joshua E. Gardner, Esq.
March 21, 2011
Page Three

includes all variants and analogs of that substance, and we reserve the right to amend this list as discovery progresses, noting Defendants are still producing large volumes of documents.

Depositions of Defendants

Despite prevailing on most of the topics in our Motion to Compel, we have reevaluated the scope of Plaintiffs' Rule 30(b)(6) deposition topics, and have narrowed our requests to the topics set forth below. To be clear about the information Plaintiffs intend to seek through these depositions, and to add clarity to the requests in light of Defendants' comments during our meet-and-confer discussion, I have grouped these requests topically and provided a narrative collectively summarizing the information sought in each category. To the extent that Defendants believe that the narrative descriptions below contemplate testimony about information not fairly called for in the identified topics, and Defendants object to providing the described testimony, please let us know so that we can send formal Rule 30(b)(6) notices encompassing any such information. All of this information goes to the core of Plaintiffs' claims and should be uncontroversial, so we trust that it will not be necessary to do so.

Given changes at the agencies since Defendants responded to Plaintiffs' deposition notice, please identify designated witnesses on each of these topics and provide dates on which these witnesses are available for deposition. If Defendants are unable to provide dates at this time because educating witnesses on these topics will require Defendants to complete their document production and to analyze the relevant information, please provide your best estimate about when these depositions can commence. Also, unless you inform us otherwise, we assume that these depositions will go forward in Washington, D.C., at Morrison & Foerster's office.

1. *Defendants' Obligations to Provide Notice and Health Care:* Topics 1, 18, 38, 39, 54, 56, and 57. Through depositions on these topics, Plaintiffs intend to seek information concerning the duties to provide notice and healthcare that serve as the core of Plaintiffs' APA claims. To that end, Plaintiffs seek information concerning the meaning, interpretation, application, enactment, and modification of the directives, policies, and regulations governing notice and health care related to the testing at issue.¹ Plaintiffs also seek information concerning Defendants' efforts (if any) to meet these duties by providing: (a) information to Test Subjects about the tests in which they were involved and the possible effects on the health or person of the test subjects from participation in these tests, including the sources and amounts of funding for any notification and outreach efforts conducted or directed by Defendants; and (b) medical treatment of any kind at any time to the Test Subjects,

¹ Consistent with Defendants' amended and supplemental responses to Interrogatory No. 22, these include — but are not limited to — the Wilson Memorandum, CS: 385, AR 70-25 (and its various amendments), as well as any relevant internal plans, policies, letters to the field, instructional memoranda, or directives.

Joshua E. Gardner, Esq.
March 21, 2011
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including Defendants' systems for providing health care or medical treatment to current or former service members, including Defendants' agreements with any federal or state agencies or private organizations to provide health care or medical treatment on Defendants' behalf.

2. *Possible Health Effects Related to Test Programs*: Topics 4, 15, 55. Through depositions on these topics, Plaintiffs intend to seek information concerning the possible health effects of participation in Defendants' Test Programs — learned by Defendants at any time — including physical, psychological, mental, emotional, or other effects from exposure to the substances administered during the program or any health effects otherwise arising from participation in the Test Programs.

3. *Secrecy Oaths*: Topic 33. Plaintiffs intend to seek information concerning the secrecy oaths administered to Test Subjects (or other non-disclosure obligations imposed on Test Subjects), including the content, nature, and duration of the secrecy oaths, Defendants' policies and practices with respect to such oaths, and any contemplated or actual release of Test Subjects from any secrecy or non-disclosure obligation.²

4. *Databases and Information Gathering*: Topics 18, 30. Through depositions on these topics, Plaintiffs seek to obtain information concerning Defendants' sources of information concerning participants in the Test Programs, such as information obtained from Test Participants and any information compiled in any database, including but not limited to the Chem-Bio database being compiled by the DoD with the assistance of Battelle, including the purpose of the database, scope of information included in the database, status and timing for completion of the database, and cost of the database.

5. *Interaction With DVA*: Topics 2, 36. Through depositions on these topics, Plaintiffs seek to obtain information concerning Defendants' interactions and communications with DVA concerning claims asserted by Test Subjects or the use of DVA patients in testing conducted or funded by Defendants related to chemical and/or biological weapons.

6. *Resources and Capacities*: Plaintiffs seek testimony concerning the source and amount of funding for any notification or outreach efforts that potentially could apply to the Test Subjects, the source and amount of funding for Defendants' health care or

² These releases include the information disclosed in Defendants' amended and supplemental responses to Interrogatory No. 11, including the 1993 Perry Memorandum (VET001_011181-82) and the January 2011 DoD Memorandum (VET021_000001-2).

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medical treatment systems, and Defendants' budget since 2006 and any annual budget surplus since 2006.

7. *CIA Involvement:* Topic 6. Through deposition on this topic, Plaintiffs seek to obtain testimony concerning the CIA's involvement (whether direct or through financial support) in the Test Programs, including — but not limited to — CIA involvement of any kind in any test or experiments involving military service members and any CIA experimentation involving substances also administered to any military service member as part of the Test Programs. Plaintiffs also seek testimony concerning the compilation and certification of the "Administrative Record" filed with the Court on February 18, 2011, and on the CIA's Victims Task Force.

In addition, please provide us with available dates, times, and locations for depositions of the following witnesses, all of whom were on the list of initial deponents that Plaintiffs provided to Defendants in advance of the February 3 discovery conference:

- Dr. James Baker (initial disclosures)
- Laura Ruse Brosch (initial disclosures)
- Lloyd Roberts (initial disclosures)
- Len Sisteck Jr.
- Paul Black (initial disclosures)
- Michael Peterson (initial disclosures)
- Joseph Salvatore

In addition, to the extent that Defendants no longer intend to identify Dr. Michael Kilpatrick or Dr. Arthur Anderson or Martha Hamed as Rule 30(b)(6) designees, please let us know so that we can evaluate the need separately to depose them in their individual capacities.

Status of Defendants' Document Production

During our latest meet-and-confer discussion, you provided us with an interim update on the status of Defendants' document production and likely timing for completion. Please provide us with an update on the progress for each Defendant, including an update on the DoD's review of the magnetic tapes referenced in your March 11 letter and the anticipated timing of the additional search results from DTIC mentioned in your letter. We are concerned that unless Defendants complete their document productions very shortly, the parties will be unable to complete all fact discovery in accordance with the current case schedule. We also reiterate our request that, if Defendants have identified additional individuals or documents upon which they intend to rely in their defense that are not currently reflected in Defendants' initial disclosures, you provide updated initial disclosures for Defendants. (As you know,

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Plaintiffs updated their initial disclosures at Defendants' request.) In the past you have expressed that it may make sense to push out the fact discovery deadline to accommodate the parties' efforts to complete that portion of discovery. Let's plan on discussing that topic once we have a chance to consider Defendants' latest document production status report.

Discovery Requests Directed to DVA

I also enclose with this letter a set of discovery requests directed to the DVA related to the Fourth Claim for Relief in the Third Amended Complaint. We are willing to meet and confer with you about these requests as necessary, but given current discovery deadlines, we expect that the DVA will promptly provide the requested information.

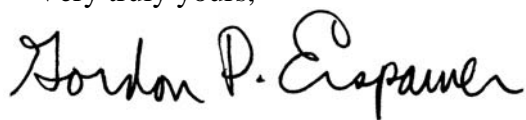
Class Certification

During our meet-and-confer videoconference, you stated that Defendants preferred to depose the named plaintiffs prior to briefing on class certification. With that in mind, Plaintiffs have held off for now on filing their motion for class certification. Please confirm that if Plaintiffs continue to defer filing their class certification motion until Defendants have had the opportunity to depose the named plaintiffs, Defendants will not seek to re-depose any named plaintiff during the course of class certification briefing.

* * *

We look forward to Defendants' response to this letter. Please call to schedule a time to talk.

Very truly yours,



Gordon P. Erspamer

Enclosures

Vietnam Veterans of America v. C.I.A.
U.S.D.C. (N.D. Cal. 2009) No. 09-cv-0037-CW

Testing Agents at Issue

A. Chemical Substances

123.175
12202
220548
2-PAM CL
Adamsite
Arsenic
Artane
Atropine
Bromobenzyl Cyanide
BZ
CAR 302668
Chloropicrin
Cogentin
CS, CS Arsenic
CX
Cyanide
Dioxin
DMT
EA 3443, EA 3580
EA 3834
EA 1778
Ecstasy
Eserine
Lewisite
Lidocaine
LSD
Mace, CN 12375
Mescaline
Mustard Gas
Mylaxen
P2S
PCMG
PCP
Pepper Spray (OC)
Phenobarbitol
Phosgene
Prolixin
Psilocybin
Pyridine
Ritalin
Sarin
Scopolamine

Vietnam Veterans of America v. C.I.A.
U.S.D.C. (N.D. Cal. 2009) No. 09-cv-0037-CW

Seconal
Sodium Amytal
Soman
Tabun
Tacrine
THC
Thorazine
TMB-4
Toxogonin
Trilafon
VX

B. Biological Substances

Anthrax
Bacillus Globibii
Botulinum toxin
Brucella
Bubonic Plague
Q Fever
Ricin
Tularemia
Typhus
Venezuelan Equine Encephalomyelitis
Viral Encephalitis

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 OAKLAND DIVISION

4 VIETNAM VETERANS OF AMERICA, *et al.*,

Case No. CV 09-0037-CW

5 Plaintiffs,

6 v.

DECLARATION OF PAUL BLACK

7 CENTRAL INTELLIGENCE AGENCY, *et al.*,

8 Defendants.

9 I, Paul Black, declare as follows:

10 1. I am the Assistant Director of the Procedures Staff in the Compensation Service, Veterans
11 Benefits Administration (“VBA”), U.S. Department of Veterans Affairs (“VA”). I have held this
12 position since February 2008. In this capacity, I report to Danny Pummill, Deputy Director for
13 Policy and Procedures of the Compensation Service.

14 2. As the Assistant Director for Procedures for the Compensation Service, I am responsible
15 for: (1) developing procedures and processing guidance for field stations to ensure uniformity
16 and consistency in the compensation claims adjudication process nationwide; (2) the means by
17 which field employees implement policy regarding the compensation program; and
18

19 (3) evaluating the effectiveness of the means used to implement the policies. I also serve in an
20 oversight role for interagency data sharing, which entails developing objectives and operations
21 for new and existing programs between the Department of Defense (“DoD”), Social Security
22 Administration, Internal Revenue Service, other agencies, and VBA related to process
23 development. I also serve as the principle senior advisor to the Director of the Compensation
24 Service on VA/DoD collaboration. I am also a senior advisor to the Director of the
25 Compensation Service on procedural matters and ensure that the VBA Adjudication Procedures
26 Manual is properly maintained. I also manage staff conducting research and development of
27
28

1 methods for improving the claims adjudication process and oversee claims-processing
2 procedures for VA compensation benefits.

3 3. In this role, I am familiar with VA's operations and organizations. I am aware of this
4 litigation, the Plaintiffs' claim against VA, and Plaintiffs' discovery requests directed to VA.

5 4. I am aware that Plaintiffs have requested that the VA produce "up-to-date statistics
6 regarding 'Chem-Bio Claims.'" I understand that, when Plaintiffs refer to "Chem-Bio Claims,"
7 they are referring to the number of claims for disability compensation and dependency and
8 indemnity compensation ("DIC") filed by test subjects and their survivors based on alleged
9 exposure to chemical or biological agents during the testing at issue in this case.

10 5. I also understand that when Plaintiffs request "statistics regarding 'Chem-Bio Claims'"
11 they are asking VA to compile statistics similar to what VA produced as part of "Outreach
12 Reports," which were provided on a monthly basis to the Under Secretary for Benefits, Admiral
13 Daniel J. Cooper, during his tenure in that position, to provide updates on ongoing outreach
14 activities being conducted by the VA Compensation and Pension Service.

15 6. The up-to-date statistics compiled in the same manner as those in the Under Secretary's
16 monthly reports requested by Plaintiffs would be based upon a multi-step process that involved
17 review of contemporaneous reports of VA's inventory of pending claims to which End Product
18 683 ("EP 683") may have been applied.

19 7. EP 683 is a designator that VA uses in certain VA electronic databases to mark claims
20 related to chemical or biological exposure in Edgewood Arsenal testing programs. The
21 designator was first used for these claims in September 2006.

22 8. Contrary to Plaintiffs' statement in the motion to compel, the Outreach Reports were not
23 compiled by running a simple computer query. Rather, they were based on a periodic and
24 ongoing monitoring of operational reports concerning pending EP 683 claims and additional
25 case-by-case investigations of individual claims. Therefore, as explained below, although EP
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1 683 is still in use today, merely counting the number of claims with EP 683 attached does not by
2 itself provide a viable or reliable mechanism for discerning whether claims based on human-
3 subject testing have been granted or denied.

4 9. The purpose of the EP 683 is to enable VA to track and manage its current pending
5 caseload with respect to specific types of issues, rather than to track the outcome of claims
6 retrospectively. Because EP 683 is not used to record dispositions historically, a review of
7 claims to which EP 683 may have been applied may only identify cases flagged by VA
8 employees as potentially involving a claim based on testing at Edgewood Arsenal or another
9 type of exposure to which EP 683 applies or previously applied.

10 10. EP 683 has been assigned to a variety of different issues during different time periods.
11 For example, currently, EP 683 is used to track not only claims based on testing at Edgewood
12 Arsenal, but also claims based on exposures in Project Shipboard Hazard and Defense
13 (“SHAD”) and claims based on other chemical and biological exposures, including current-day
14 exposures to hazardous substances unrelated to Edgewood Arsenal testing, such as exposure to
15 jet fuel at a military airfield.

16 11. Because VA began to use the EP 683 to identify claims based on Edgewood testing
17 exposure on or after September 12, 2006, a calculation of the number of EP 683 claims would
18 not account for any claims related to testing exposure filed prior to that date.

19 12. In addition, the value of EP 683 is further limited because if a veteran files a claim
20 alleging two bases for a disability, *e.g.*, Agent Orange exposure and chemical exposure at
21 Edgewood Arsenal, and VA grants service connection on the non-Edgewood Arsenal basis, the
22 claim may not be assigned EP 683.

23 13. Further, if a veteran alleged that his or her disability is due to exposure to mustard gas or
24 Lewisite at Edgewood Arsenal between 1953 and 1975, the claim would be coded with EP 688,
25 not EP 683.
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1 14. For this reason, a search of cases flagged with EP 683 would not be capable of
2 distinguishing claims based on Edgewood Arsenal testing from other unrelated claims.

3 15. As a result, any current-day statistical analysis of claims using the methodology in the
4 Outreach Reports will not reflect the actual number of Chem-Bio claims filed.

5 16. Also, it appears that the statistics in the Outreach reports did not include claims for DIC
6 filed by survivors of test subjects alleging that the veteran's death is related to exposures at
7 Edgewood Arsenal, as the reports refer only to claims filed by veterans for disability
8 compensation.
9

10 17. As such, the EP 683 has proved to be unreliable and inappropriate basis for tracking
11 Chem-Bio claims.

12 18. Nor does VA have an alternate database or tracking system for identifying the number of
13 claims for service-connected disability compensation filed by veterans that are based on the
14 assertion that their claimed disability was caused by their exposure or participation as test
15 subjects during service or the number of claims for DIC filed by survivors of such veterans
16 alleging that the veteran's death was caused by such exposure. The only way to accurately count
17 Chem-Bio claims is to review the claims files for each test veteran, which was not done in
18 preparing the Outreach Reports.
19

20 19. Although VA data systems may indicate whether VA has granted or denied a veteran's
21 claim for service-connected disability compensation, those systems do not always indicate
22 whether the claim was predicated upon an assertion that the claimed disability was caused by
23 exposure or participation as a test subject, as distinguished from other aspects of the veteran's
24 service.
25

26 20. The only reliable means to determine how many compensation and DIC claims were
27 granted by VA for disability or death alleged to be related to exposures at Edgewood Arsenal is
28 to review the VA decisions on the claims which are filed in the VA claims files and which VA

1 has stated it will produce to Plaintiffs, subject to both a protective order and review under 38
2 U.S.C. § 7332. These claims files contain all claims for disability compensation and DIC made
3 by any identifiable test veteran or a survivor of an identifiable test veteran.

4 21. I am also aware that Plaintiffs have filed a motion to compel VA to search for documents
5 regarding any chemical or biological testing prior to 1953. Pls.' Mot. to Compel Discovery at 1,
6 Pls.' Mot. to Compel 30(b)(6) Depositions & Prod. Of Docs. At 15-17. Specifically, Plaintiffs'
7 motion seeks all documents regarding testing "created, received, or dated between January 1,
8 1940" and the present day, a request that is unduly burdensome for the reasons stated below. As
9 an initial matter, the burden associated with searches for documents related to pre-1953 testing
10 must be put into the context of what VA has already searched and produced.

12 22. Prior to becoming a party in this litigation, Plaintiffs served a Rule 45 subpoena upon VA.
13 In responding to that subpoena, VA produced to Plaintiffs approximately 14,000 pages of
14 documents, both in whole and redacted in part, related to VA's efforts to provide notice to test
15 subjects; meetings and communications between VA and DoD regarding compilation of the
16 Chem-Bio database and the DoD Fact Sheet; VA adjudication procedures for claims for disability
17 compensation and DIC based on exposure to test substances during the Edgewood Arsenal test
18 programs; correspondence between VA and the other Defendants regarding VA's efforts to notify
19 test participants; guidance provided to VA medical personnel regarding the testing; data regarding
20 claims filed alleging death or disability due to the testing; Board of Veterans' Appeals ("BVA")
21 decisions regarding claims alleging death or disability due to the testing; and claims files and
22 health records for the individual Plaintiffs.

24 23. Since the production of these 14,000 pages in late 2010, VA has continued to conduct a
25 Department-wide search (described below), and will continue to produce relevant, non-privileged
26 documents to Plaintiffs on a rolling basis, subject to the protective order entered in this case.
27
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1 24. Since October 2010, the following offices have searched, and are continuing to search, for
2 email, electronic, and hardcopy files for relevant documents: VBA, Board of Veterans' Appeals
3 ("BVA"), Veterans Health Administration ("VHA"), and other agencies at VA Central Office
4 ("VACO"), which include Executive Secretariat, Office of Congressional and Legislative Affairs,
5 Office of Policy and Planning, Records Management Service in the Office of Information and
6 Technology, and the Office of Public and Intergovernmental Affairs. These offices searched for
7 documents relating to each of the following search terms and subjects: Bruce Price; Franklin D.
8 Rochelle; Larry Mierow; Eric P. Muth; David C. Dufrane; Tim Michael Josephs; William
9 Blazinski; BLUEBIRD, ARTICHOKE, MKDELTA, MKULTRA, MKNAOMI, MKSEARCH,
10 MKCHICKWIT, MKOFTEN, MATERIAL TESTING PROGRAM, EA 1729, THIRD
11 CHANCE, DERBY HAT, Project Whitecoat, Edgewood Arsenal, Ft. Detrick, EA-1476, EA-
12 2233, dimethylheptyl or DHMP, LSD Follow-up Study Report (1980), Possible Long-Term
13 Health Effects of Short-Term Exposure to Chemical Agents; Vol. 1: Anticholinesterases and
14 Anticholinergics (1982), Possible Long-Term Health Effects of Short-Term Exposure to
15 Chemical Agents, Vol. 2: Cholinesterase Reactivators, Psychochemicals, and Irritants and
16 Vesicants (1984), Possible Long-Term Health Effects of Short-Term Exposure to Chemical
17 Agents, Vol. 3: Final Report: Current Health Status of Test Subjects (1985), Septal implant,
18 VOLS TEAS Data, Use of Volunteers in Chemical Agent Research, Report DAIG-IN 21-75
19 (1976), Nuremberg Code, Wilson Directive, Official Directives, Dr. Russell Monroe, Morse
20 Allen, Paul Gaynor, and Report to Congress by the Comptroller General of the United States,
21 Federal Control of New Drug Testing is Not Adequately Protecting Human Test Subjects and the
22 Public, Pub. No. HRD-76-96 (July 15, 1976).

23
24
25
26 25. In addition, VA's Office of Information and Technology ("OI&T") has been conducting at
27 least 4,646 individual searches resulting from the above 46 search terms that Plaintiffs requested
28 VA to utilize. VA OI&T has used these 46 search terms to search through approximately 9.4

1 terabytes (9,400 gigabytes) of data space in the attempt to locate documents responsive to
2 Plaintiffs' ongoing discovery requests. These searches have been conducted since October 2010,
3 and are still in the process of being completed.

4 26. Since August 2010, VA has also been conducting an exhaustive search of the email
5 archives of 105 VA employees identified as potentially involved in topics allegedly at issue in
6 this lawsuit. These electronic searches have consisted of using all 46 search terms listed in the
7 above paragraph to search each of the 105 VA employees' email archives, and decrypting each
8 employee's password-protected emails separately in order to review all potentially responsive
9 documents. Starting in August 2010, this email search and review process has taken a total of one
10 year to complete. In addition to these electronic searches, VA hand-searched at least two file
11 cabinets of paper files in an attempt to find potentially responsive materials.
12

13 27. As of August 26, 2011, VA has reviewed more than 680,000 pages of documents, and has
14 produced, in addition to the 14,000 pages produced in late 2010, another 195,000 pages of
15 responsive documents. In addition, based on a search of VA electronic databases for data on
16 claims for VA benefits filed by identifiable individuals on DoD's Chem-Bio database, VA
17 previously produced a statistics report in response to Interrogatories No.1 and 2 in Plaintiffs' First
18 Set of Interrogatories to VA titled "Statistics on Known Claims Filed by Chem-Bio Veterans."
19 This previously produced statistics report addresses the grant and denial rate of claims for
20 disability compensation and DIC that VA has received from survivors of identifiable test subjects,
21 irrespective of the theory on which such claims were based. VA also has produced to Plaintiffs
22 copies of all Board decisions involving claims based on exposure or participation as test subjects
23 that could be found upon a reasonably diligent search. Further, VA has produced to Plaintiffs a
24 list of names of identifiable test subjects who have filed disability compensation claims, to the
25 extent such information is available. In addition, in response to Plaintiffs' ongoing discovery
26 requests, VA continues to conduct a Department-wide search facilitated by OI&T (described
27
28

1 above), and will continue to produce relevant, non-privileged documents to Plaintiffs on a rolling
2 basis, subject to the protective order entered in this case.

3 28. VA did not specifically exclude pre-1953 material from its searches, and the searches
4 conducted by VA did uncover some of the very documents Plaintiffs seek – “information about
5 pre-1953 exposure and notification . . . encompass[ing] mustard gas and Lewisite testing” – are
6 already available to them. Pls.’ Mot. To Compel 30(b)(6) Depositions & Prod. of Docs. at 12.
7 VA has already produced a number of documents relating to mustard gas and Lewisite testing,
8 including the following as examples:
9

- 10 • Under Secretary for Benefits Notification Letter for Mustard Gas Exposure
11 (VET001_015110) (VVA-VA 009384);
- 12 • VA Fact Sheet, Mustard Gas Exposure and Long-Term Health Effects, April 1999
13 (VET 001_015438-39);
- 14 • Under Secretary for Health's Information Letter (IL) 10-2005-004, HEALTH
15 EFFECTS AMONG VETERANS EXPOSED TO MUSTARD AND LEWISITE
16 CHEMICAL WARFARE AGENTS (Mar. 14, 2005) (VET001_015445-57);
- 17 • “Mustard Gas Claims” (VVA-VA 023723);
- 18 • “Declassification of Tests” Powerpoint excerpt (VVA-VA023474);
- 19 • Under Secretary for Health's Information Letter (IL) 10-2005-004, HEALTH
20 EFFECTS AMONG VETERANS EXPOSED TO MUSTARD AND LEWISITE
21 CHEMICAL WARFARE AGENTS (Feb. XX, 2005) (DVA003 000106);
- 22 • Executive Mustard Agent (Mustard Gas and Lewisite) Notification Plan and
23 Database Overview (Feb. 7, 2005) (VVA-VA 030524);
- 24 • Compensation and Pension Service Director's Training Letter 05-01 (Mar. 28,
25 2005), "Revised Mustard Agent and Lewisite Claims Processing Procedures"
26 (VET001_014953-70); and
- 27 • Institute of Medicine, “Veterans at Risk: The Health Effects of Mustard Gas and
28 Lewisite” (Washington, D.C., 2003) (VET001_013857-013860).

29. Expansion of VA’s discovery searches beyond those discussed above to also explicitly
include testing before 1953 would be unduly burdensome. VA estimates that an expanded search,

1 such as appears to be contemplated by Plaintiffs' extremely broad production requests, would
2 include the following burdens:

3 Burdens of the Specific Search for Potential Locations of pre-1953 testing

4 32. In order to locate any evidence of pre-1953 testing, VBA would have to conduct an
5 extensive, burdensome electronic search in all of its systems to locate any such evidence. VBA
6 has already spent more than 11 months of labor (a search which is still ongoing) by at least 4
7 employees in VA OI&T, who have been conducting an electronic search using 46 search terms
8 across all VA computer file servers, in addition to dozens of VBA employees searching with the
9 46 search terms across VBA's sub-components. Thus, Plaintiffs' demand that VBA conduct
10 more searches for pre-1953 testing will likely require a number of additional search terms, and
11 would be arduous, time consuming, and unduly burdensome for VA database systems to handle.
12

13 33. As stated above, VA OI&T has expended at least 11 months of time searching across its
14 servers for 46 search terms, for a total of 4,646 unique searches conducted using more than 9.4
15 terabytes (9,400 gigabytes) of data space. Compliance with Plaintiffs' request for pre-1953 test
16 documentation would require that VA replicate the breadth of the search it has performed thus far
17 for the additional search terms related to pre-1953 testing. Hypothetically speaking, if, for
18 example, VBA were to add 10 more search terms in order to capture all potentially responsive
19 documents, based on the burdens VBA has previously experienced, it would take VBA a
20 minimum of 3 additional months to conduct electronic searches, and would require more than 975
21 individual searches across VA servers, navigating more than 2.0 terabytes (2,000 gigabytes)
22 alone, for an electronic search.
23

24
25 34. The aforementioned electronic search would be just the beginning of VBA's burden of
26 locating any responsive documents. Given the age of the documents Plaintiffs are seeking it is
27 likely that any such records VBA may possess were never entered into a computer or an
28

1 electronically searchable system. In order to complete a thorough search, each VBA storage
2 facility would have to manually search its inventory logs for all records concerning any of
3 research or testing conducted prior to 1953. This manual search would involve trial-and-error
4 efforts to match where VBA may have located any research or testing records for such activity
5 that may have been conducted prior to 1953. Without any more detailed knowledge on where
6 testing or research records are stored, VBA cannot locate the correct records in an efficient or
7 logical manner. Such a search would be both repetitive and extraordinarily difficult for several
8 reasons.

9
10 35. As an initial matter, VBA is unaware that any records relating to pre-1953 testing exists
11 within VBA, aside from the documents it has already produced to Plaintiffs regarding mustard
12 gas and Lewisite. The Records Control Schedule (“RCS”) is a VBA publication that categorizes
13 and identifies every type of document produced in the course of regular business by VBA, and
14 designates how VBA will dispose of each type of document – taking into consideration its
15 sensitivity and content –after the document is no longer needed for VBA operations. The most
16 recent RCS issued by VBA is dated November 4, 1997. However, this RCS does not list any
17 categories that would suggest that they include documents Plaintiffs seek concerning information
18 relating to testing prior to 1953. The RCS does not contain a category for any VBA documents
19 related to research and development, notification letters for testing volunteers, chemical or
20 biological agents, or any other type of testing with substances. Thus, the Plaintiffs’ demand for
21 VBA to search for “information about pre-1953 exposure and notification . . . encompass[ing]
22 mustard gas and Lewisite testing” is unlikely to retrieve any additional documents from VBA,
23 given the absence of such documents from the VBA RCS.

24
25
26 36. However, assuming that VBA does possess responsive information somewhere in its
27 archives, VBA employees would have to conduct a widespread, and yet unguided, manual file
28 search at several VA record storage facilities scattered throughout the United States in order to

1 find the actual hard copy of any responsive documents. The time and expense of retrieving these
2 potential records may be affected by variations in the records management and storage process in
3 place at each off-site storage facility. There is no single facility where active and/or inactive
4 research or testing records are known to be stored. For example, some facilities have contracted
5 with other private record storage vendors to hold paper records at alternative sites throughout the
6 country. Due to space issues, some storage facilities have moved their paper records to contract
7 storage facilities, which may house both active and inactive paper records. Thus, potential
8 documentation concerning pre-1953 testing, if maintained by VBA, may be scattered throughout
9 storage sites nationwide.
10

11 37. In general, VA's inactive paper records are often destroyed within a certain number of
12 years, or are moved to off-site VA storage sites, such as the climate-controlled VA Records
13 Center & Vault ("RC&V") Storage Facility in Neosho, Missouri. The RC&V is a National
14 Archives Records Administration ("NARA") approved storage facility through which VA
15 maintains custody and control of VBA records. VBA stores over 1.5 million boxes of records at
16 the RC&V. Potentially responsive hard copy records may also be held at a variety of other VA
17 records storage sites around the United States. Manual file review of inventory records at these
18 facilities would require a significant amount of time, especially given that the VBA Records
19 Control Schedule does not list or indicate the existence of storage of any VBA research or testing
20 documents. However, in general, VBA archive retrieval can take up to 90 days or more to
21 complete from the date of the initial request to the date of the receipt of records. The cost
22 associated with retrieval of archived records varies depending on the size of the request.
23

24 38. VBA maintains a supply of valid accession and box sequence number on all electronic
25 requests to enable RC&V to locate individual files. Based on the accession and box number
26 information, the VBA facility would then make a retrieval request for the record to the RC&V or
27 other storage site. The RC&V and storage sites would have to search for the records by box
28

1 number and accession number. If successful, the RC&V and storage sites would then ship a
2 located record to the VBA research facility or medical center.

3 39. If VBA can somehow discern a method – unbeknownst to me at this time – for
4 determining that responsive information is located in the RC&V regarding pre-1953 chemical and
5 biological testing concerning volunteer service members, and has the accession or box number,
6 the RC&V estimates that each request for a single record will take 15 minutes to retrieve the file.
7 Below, I outline the time required to locate, copy and review a typical file in the RC&V, based on
8 averages for VBA's claims file retrievals, since no approximations have ever been calculated for
9 locating a pre-1953 testing document that VBA has no knowledge about or method for
10 identifying its existence. VBA estimates that it would take a GS-7 Claims Assistant at least 30
11 minutes to locate a record, and it would take a GS-10, Step 5 Veterans Claims Examiner 2 hours
12 to manually review each file to determine if it contains responsive material. Copying each
13 document would require the work rate standard of 0.84 man-hours (50.4 minutes) per claim used
14 for completing Privacy Act and Freedom of Information Act responses. However, the time
15 required to copy testing or research records will be dependent on the condition of the documents
16 and number of documents. Many of the older documents are fragile and may not be able to be
17 batch copied.

20 40. Thus, I estimate that it would take a total of at least 3 hours and 20 minutes to retrieve any
21 single record that VBA somehow becomes aware is responsive to pre-1953 testing information
22 and is located in the RC&V. Using the GS-7, Step I base rate of \$16.28 per hour, VBA
23 estimates personnel costs for this review to be a minimum of \$54.27 per each responsive record to
24 pre-1953 testing. As of now, VBA has no system for identifying these records, where they would
25 be located in hard copy, or whether they even exist.

27 41. Such a search would divert enormous staff and resources from VBA and would have a
28 substantial adverse effect on VBA's ability to timely provide benefits to the veterans and their

1 survivors. The labor-intensive reviews and searches that would be required to respond
2 to Plaintiffs' motion to compel would divert substantial staff and resources from VA's
3 adjudication of benefits claims and would be likely to significantly and adversely affect VA's
4 ability to timely provide veterans benefits through the VBA. VBA administers programs that
5 provide financial and other forms of assistance to veterans and their survivors including
6 compensation, pension, survivors' benefits, rehabilitation and employment assistance, education
7 assistance, home loan guaranties, and life insurance. Within VBA, the Compensation Service
8 administers disability compensation and dependency and indemnity compensation benefit
9 programs. In fiscal year (FY) 2010, VA paid compensation and dependency and indemnity
10 compensation and pension benefits totaling more than \$41.5 billion dollars to over 3.5 million
11 veterans and survivors. VA also paid disability and death pension benefits totaling nearly \$4.25
12 billion dollars to approximately 513,000 veterans and survivors.

14 42. The time required to search for the information requested by Plaintiffs will substantially
15 detrimentally impact VA's ongoing and increasing responsibilities to claimants. New disability
16 claims from returning war veterans, as well as from veterans of earlier periods, have increased 39
17 percent between 2006 and 2010. VBA found that disability claims rose to more than 865,766
18 new claims in 2010, a steady 5.4 percent increase from the 818,954 new claims in 2009. The
19 increasing claims volume has significantly increased VBA's inventory of pending claims (now
20 over 800,000) and the length of time veterans must wait for decisions on their claims (averaging
21 179 days in July 2011).

23 43. In the past several years, VBA has been aggressively hiring additional staff to address its
24 growing workload, improve the timeliness of decisions, and expedite processing of veterans'
25 claims. The Plaintiffs' discovery requests would divert many of our regional office employees
26 from their primary mission of delivering benefits to veterans and their survivors to searching
27 records and reviewing files. Similarly, new employees, who require at least two years to gain
28

1 proficiency, would lose valuable training time if tasked with responding to the Requests for
2 Production (“RFPs”). Although the subject of this litigation is service connected compensation,
3 were VBA employees required to search for the information sought in the RFPs, all programs
4 administered by VBA would be adversely affected because VBA employees generally adjudicate
5 all types of benefits claims. Overall, this would have a negative effect on our efforts to increase
6 resources devoted to claims processing and expediting claims.

7
8 44. I am also aware of the Plaintiffs’ motion to compel VA to produce death certificates of
9 deceased test subjects. Pls.’ Mot. to Compel Discovery at 11, Pls.’ Third Set of Requests for
10 Production of Documents to Defendant Department of Veterans Affairs, at 5.

11 45. Specifically, I am aware that Plaintiffs in this lawsuit have requested that the VA produce
12 “Death Certificates of Deceased Test Subjects.” I understand that, when Plaintiffs refer to “Test
13 Subjects,” they are referring to veterans who participated in the testing at issue in this case.

14 46. There are three places within VA that are reasonably likely to contain death certificates
15 responsive to Plaintiffs’ discovery request: (1) individual veterans’ claims files; (2) notice of
16 death (“NOD”) folders located at VA’s regional offices; and (3) with the Virtual VA
17 recordkeeping system.

18
19 47. VBA creates a claims folder when an initial claim for benefits is received by VA. A
20 claims folder is a red-rope, three flap folder. The folder is labeled with the name of the veteran
21 who is the basis of the claim, the veteran’s claim number, and an identifying barcode. All
22 evidence regarding the claim is stored in the claims folder, as well as all forms and other
23 documents pertaining to the claim, including documents related to payments and allowances,
24 applications in support of the claim(s), birth and marriage certificates, divorce decrees, and legal
25 documents.
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1 48. If a family of an identifiable deceased test veteran provides a death certificate to VA, it is
2 probable that the death certificate would be placed in the veteran's claims file, and VA has agreed
3 to produce to Plaintiffs, at great expense, all claims files for identifiable test subjects.

4 49. Alternatively, upon receipt of a death certificate, the VA regional office may create a file,
5 which is stored in the VA regional offices. The folder, which is a light-weight, two-flap manila
6 folder, is established upon receipt of a First Notice of Death ("NOD") and whether either (a) no
7 prior claim or file exists for the veteran; or (b) a claim number exists but there is no claims folder
8 or the claims folder is located at a Records Processing Center. In such circumstances, evidence
9 supporting a burial benefits claim would be placed in the NOD folder rather than the claims file.
10

11 50. In addition, VBA currently uploads evidence submitted in support of claims for burial
12 benefits into the new Virtual VA recordkeeping system.

13 51. VA has agreed to search the regional offices' NOD folders for identifiable test subjects for
14 death certificates and Virtual VA for death certificates for identifiable test subjects and produce
15 any such certificates to Plaintiffs.

16 52. I am unaware of any other repository, used in the regular course of business, for death
17 certificates.
18

19 53. The letter that VA sent to identifiable veterans in the Department of Defense Chemical
20 and Biological Database notifying them of their exposure to biological and chemical substances at
21 Edgewood Arsenal was drafted and approved by VA employees at VA Central Office.
22


23 54. Prior to August 1, 2011, VA did not retain a copy of notice letters the Department sent to
24 test subjects or place these letters in the claims files reviewed by adjudicators. Accordingly, the
25 only way a notice letter would have appeared in a claimant's file is if the veteran submitted it as
26 in connection with a claim.
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55. VA claims for disability compensation and DIC are adjudicated at VA's regional offices located in the United States, Pasay City, Philippines, and San Juan, Puerto Rico, and the Appeals Management Center.

56. Claims for compensation and DIC alleging exposure to hazardous substances at Edgewood Arsenal are adjudicated by VA based upon the statutes in title 38, United States Code, and regulations in title 38, Code of Federal Regulations, which are applicable to all VA claims.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, D.C., on August 30, 2011.


Paul Black
Assistant Director for Procedures
Compensation Service
Veterans Benefits Administration
U.S. Department of Veterans Affairs

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 OAKLAND DIVISION

4 VIETNAM VETERANS OF AMERICA, *et al.*,

Case No. CV 09-0037-CW

5 Plaintiffs,

6 v.

DECLARATION OF LISA THOMAS

7 CENTRAL INTELLIGENCE AGENCY, *et al.*,

8 Defendants.
9

10 I, Lisa Thomas, declare:

11 1. I am employed as Chief of Staff for the Veterans Health Administration (VHA) of the
12 U.S. Department of Veterans Affairs (VA). VHA is the United States' largest integrated health
13 care system. The information contained in this declaration is based on my personal knowledge
14 and information made available to me in my official capacity.

15
16 2. As the Chief of Staff for VHA and the senior executive and confidential advisor to the
17 Under Secretary for Health, I represent and speak for the Under Secretary in high level
18 negotiations involving the establishment or implementation of all policies, practices,
19 management, and operational activities of VHA. As Chief of Staff, I am responsible for
20 coordinating policies, plans, and operational approaches designed to most effectively carry out
21 VHA's mission. In this role, I am very familiar with VA's operations and organizations.

22
23 3. I am aware of this litigation, the plaintiffs' claims against VA, the plaintiffs' discovery
24 requests and plaintiffs' motion to compel VA to produce information on approximately 340 test
25 substances that are identified in the Department of Defense (DoD) Chemical and Biological
26 (ChemBio) database in response to Requests for Production 194, 195, 206, 214, and 215. I am
27 also aware that plaintiffs have moved to compel VA to produce information on chemical and
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1 biological testing that occurred prior to 1953.

2 4. VHA is the office within VA that is most likely to have documents related to the test
3 substances at issue in plaintiffs' motion.

4 5. VHA would also most likely have information, if any exists, on pre-1953 testing.

5 6. This declaration describes the search efforts undertaken by VHA to date and the
6 substantial burden on VHA in searching for the documents sought by plaintiffs.

7 VHA Has Already Undertaken Significant Efforts to Respond to Plaintiffs' Discovery Requests

8 7. Prior to becoming a party in this litigation, Plaintiffs served a Rule 45 subpoena upon VA.
9 In responding to that subpoena, VHA produced to Plaintiffs all health records for the individual
10 Plaintiffs.

11 8. VHA has continued to conduct a Department-wide search (described below), and will
12 continue to produce relevant, non-privileged documents to Plaintiffs on a rolling basis, subject to
13 the protective order entered in this case.

14 9. Since becoming a defendant in this case, in response to plaintiffs' discovery requests,
15 VHA tasked each of the 21 Veterans Integrated Service Networks (VISNs) and 152 VA Medical
16 Centers as well as each of the 20 VHA program offices and all of their components to conduct a
17 search based on plaintiffs' requests for production, which included a list of 60 ChemBio
18 substances identified by plaintiffs in a March 2011 letter sent to counsel for VA (123.75; 12202;
19 220548; 302198; 2-PAM CL; Adamsite; Arsenic; Artane; Atropine; Bromobenzyl Cyanide; BZ;
20 CAR 302668; Chloropicrin; Cogentin; CS, CS Arsenic; CX; Cyanide; Dioxin; DMT; EA 3443,
21 EA 3580; EA 3834; EA 1778; Ecstasy; Eserine; Lewisite; Lidocaine; LSD; Mace, CN 12375;
22 Mescaline; Mustard Gas; Mylaxen; P2S; PCMG; PCP; Pepper Spray (OC); Phenobarbitol;
23 Phosgene; Prolixin; Psilocybin; Pyridine; Ritalin; Sarin; sf-2969828; Scopolamine; Seconal;
24 Sodium Amytal; Soman; Tabun; Tacrine; THC; Thorazine; TMB-4; Toxogonin; Trilafon; VX;
25 Anthrax; Bacillus Globibii; Botulinum toxin; Brucella; Bubonic Plague; Q Fever; Ricin;
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1 Tularemia; Typhus; Venezuelan Equine Encephalomyelitis; Viral Encephalitis). This required
2 each component office to identify the individuals who were likely to have any information
3 responsive to the RFP and have those individuals search their hard drives and paper files.

4 Additionally, each of the VISNs, medical centers, and program offices conducted electronic
5 searches of their shared drives to find any responsive documents.

6 10. As a result, VHA provided 22,076 pages for internal review. Of those, 2,232 pages were
7 responsive and have been produced to plaintiffs either in part or in whole. In addition, VHA has
8 provided 22 disks and 2 external hard drives of potentially responsive information which VA is
9 still in the process of reviewing for production. Therefore, VHA is still reviewing and producing
10 documents to plaintiffs.

11 Expanding VHA's Search Terms to Include All Substances in the ChemBio Database Would be
12 Unduly Burdensome
13

14 11. I understand that Plaintiffs have moved to compel VHA to search for the remaining 340
15 substances contained within the Department of Defense's ChemBio Database.

16 12. In order to search these additional 340 terms, VHA would have to conduct an additional
17 extensive, unduly burdensome electronic search in all of its systems. This would require each of
18 VHA's component offices (the VISNs, medical centers, and program offices) to complete new
19 searches of these terms and to identify individuals who may have documents or material related to
20 these search terms.
21

22 13. In consultation with VA's Office of Information and Technology ("OI&T"), I have been
23 informed that expanding the search beyond what VA is already doing would also place an undue
24 burden on their office. For a number of months, OI&T has conducted at least 4,646 individual
25 searches resulting from 46 search terms. VA OI&T has used these 46 search terms to search
26 through approximately 9.4 terabytes (9,400 gigabytes) of data space in the attempt to locate
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1 documents responsive to Plaintiffs' ongoing discovery requests. These searches have been
2 conducted since October 2010, and are still in the process of being completed.

3 14. Since August 2010, VA has also been conducting an exhaustive search of the email
4 archives of 105 VA employees identified as potentially involved in topics allegedly at issue in
5 this lawsuit. These electronic searches have consisted of using all 46 search terms listed in the
6 above paragraph to search each of the 105 VA employees' email archives, and decrypting each
7 employee's password-protected emails separately in order to review all potentially responsive
8 documents. Starting in August 2010, this email search and review process has taken a total of one
9 year to complete. In addition to these electronic searches, VA hand-searched at least two file
10 cabinets of paper files in an attempt to find potentially responsive materials.

12 15. These additional search terms would burden VA with electronic search duties for many
13 years. Plaintiffs' demand would be arduous, time consuming, and burdensome for VA database
14 systems to handle. Hypothetically speaking, if OI&T added 10 additional search terms, based on
15 the burdens it has previously experienced, it would take a minimum of 3 additional months to
16 conduct electronic searches, and would require more than 975 individual searches across VA
17 servers, navigating more than 2.0 terabytes (2,000 gigabytes) alone, for an electronic search.

19 16. Over the course of the timeframe for which plaintiffs seek copies of documents, it is
20 estimated that VHA's research and development program may consist of over 500,000 research
21 protocols that would require review. Although research protocols range in size and complexity,
22 the average protocol is approximately 100 pages in length. Review of the research protocols for
23 purposes of plaintiffs' request would require an individual with a scientific background. In each
24 case, the entire contents of the research protocol file would require review, as titles of protocols
25 alone are not indicative of the use of the 340 ChemBio agents in the Department of Defense
26 database. In other situations, files may have been damaged due to flooding and other types of
27 issues beyond VA's control, such as the flooding that took place at Perry Point facility in July
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1 2008. Such problems will only further complicate and burden the review process for these
2 records. Therefore, VHA estimates that the review of each protocol may take approximately five
3 business days to review, depending on the length, complexity and conditions of records. Such
4 review would require an employee with a scientific background. Consequently, these individuals
5 would be taken away from their primary duties for an enormous period of time, resulting in a
6 detrimental impact on their ability to conduct ongoing, funded research. Additionally, such
7 review would undermine the ability of such employees to further administer VA's research
8 program. Because VA's research is vital to the health care of veterans, such a burdensome search
9 would serve as a significant detriment to VHA's mission of providing health care to the veterans
10 due to the fact that years of staff time would be diverted to conduct reviews of records.
11

12 17. Along with the approximately five days for review, additional time would have to be
13 allotted to locate the information. Storage decisions pertaining to research records are made on a
14 case-by-case basis by the VA Medical Center which approved the research study. In some
15 instances, staff may be required to pull records from off-site storage in various areas of the
16 country. The time and expense of retrieving records may be affected by variations in the records
17 management and storage process in place at each off-site storage facility. There is no single
18 facility where active and/or inactive research or testing records are stored. For example, some
19 facilities have contracted with other private record storage vendors to hold paper records at
20 alternative sites throughout the country.
21

22 18. The difficulty of searching paper records also impacts VHA's ability to search for records
23 of pre-1953 testing, especially since these records are likely to be in paper form due to their age.
24

25 19. Conducting a search for an additional 340 terms in the Department of Defense's ChemBio
26 database would divert enormous staff and resources from VHA and would have a substantial
27 adverse effect on VHA's ability to timely provide health care services to the more than 6.1
28 million veterans and their families we serve every day.

1 Expanding VHA's Search Terms to Include All Substances in the ChemBio Database is Unlikely
2 to Produce New Responsive Documents

3 20. Nor would searching for the additional substances be likely to uncover documents that
4 have not already been identified as potentially responsive to Plaintiffs' discovery requests. The
5 search proposed by Plaintiffs will likely provide numerous irrelevant documents such as articles
6 that happen to mention the names of many generic substances which are included in the list of
7 340 substances in the ChemBio database such as caffeine, chlorox and saline. Additionally,
8 conducting a search using the term saline will likely return almost every research document, since
9 saline is a substance commonly used in providing medical treatment and in research.

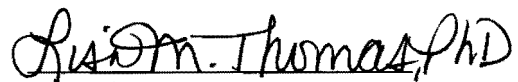
10 21. In addition, the search proposed by plaintiffs would likely result in large numbers of
11 duplicative documents. It is probable that many responsive documents within the possession of
12 VHA have already been identified through the search undertaken thus far. For example, VHA
13 has already produced a number of documents relating to saline, which is one of the 340
14 additional substances listed in the ChemBio data base, even though VHA did not conduct a
15 search of the term "saline", including the following:

- 17 • Under Secretary for Health Information Letter on Potential Health Effects Among
18 Veterans Involved in Military Chemical Warfare Agent Experiments Conducted from
19 1955 to 1975, IL 10-2006-010 (VHA001 0505)
- 20 • Directors' Conference Call on VBA Letter Writing Campaign for Veterans Who
21 Participated in Military Chemical Warfare Agent Experiments From 1955 to 1975- July 7,
22 2006 (VHA001 0513)
- 23 • VHA Issue Brief on Agent Orange on Sections of Fort Detrick (VHA001 1088)
- 24 • Annual Report to Congress on Federally Sponsored Research on Gulf War Veterans'
25 Illnesses for 2003(VHA001 1244)
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1 22. Other documents likely to be responsive to plaintiffs' motion, such as VA's annual reports
2 to Congress, are already available to them in a public forum. Beginning in 1955, VHA submitted
3 an annual report on VA medical research to Congress. The annual reports contain discussion of
4 research and health effects and would include testing of substances listed in the ChemBio data
5 base if they were used in testing during that period by VA. These reports have been made
6 available to the plaintiffs at the VA Central Office Library, 810 Vermont Avenue, NW, Room
7 975, Washington, D.C. 20420.

8 23. It is, therefore, probable that the documents that may be recovered in plaintiffs' proposed
9 searches overlap, to some extent, with documents that have either already been identified as
10 potentially responsive, are available to plaintiffs as public records, or will be produced to
11 plaintiffs once VA completes its review of the potentially responsive documents listed in
12 paragraph 10.

13
14 I declare under penalty of perjury that the foregoing is true and correct. Executed in
15 Washington, D.C., on August 30, 2011.
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19 Lisa Thomas
20 Chief of Staff
21 Veterans Health Administration
22 U.S. Department of Veterans Affairs
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

Case No. CV 09-0037-CW (JL)

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

DECLARATION OF JOHN J. SPINELLI

I, John J. Spinelli, declare as follows:

1. I am a Senior Advisor to the Secretary of the Department of Veterans Affairs ("VA"). I was appointed to this position on January 21, 2009. Prior to that, I served as Deputy Director of the U.S. Army Center of Military History.

2. As a Senior Advisor, I am responsible for, among other things, advising the Secretary of Veterans Affairs on a range of strategy and policy issues regarding VA transformation, operations, and activities. I assist VA leadership in identifying, articulating, and disseminating vision, strategic guidance, operational priorities, and strategies for communication and legislative and public affairs. In this capacity, I supervise approximately six employees in the analysis and formulation of written documents and broad strategy regarding the VA budget, health and benefits programs, and other key business lines associated with VA transformation and operations for senior VA leadership. As Senior Advisor to the Secretary, I report to the Chief of Staff for the Department of Veterans Affairs.

3. In connection with my responsibilities as a Senior Advisor, I am generally familiar with this litigation brought by plaintiffs against various federal agencies, including VA, and I am able

1 to determine whether certain predecisional documents contain deliberative process materials, the
2 public disclosure of which would chill the decision-making process.

3 4. By delegation executed by the Secretary of Veterans Affairs, dated August 30, 2011, I
4 have been delegated responsibility to assert deliberative process over these documents. That
5 delegation is attached as Exhibit A.

6 5. During my tenure at VA, VA's efforts to notify veterans of the potential hazards to which
7 they were exposed during active service and adjudication of claims for disability compensation
8 and dependency and indemnity compensation have been of significant interest to many different
9 parties, including Congress, other Executive Branch agencies, the VA Inspector General's office,
10 Veterans Service Organizations, and others. As part of this interest, VA policy makers are often
11 called to explain decisions and actions taken by the Department in its notice and adjudication
12 efforts.
13

14 6. Based upon my review and personal consideration of each document, I hereby formally
15 assert the deliberative process privilege on behalf of VA for the following 494 documents, which
16 are potentially responsive to Plaintiffs' requests for production of documents.
17

18 **Documents Concerning Adjudication of Plaintiff's Claim for VA Disability**

19 **Compensation:**

20 7. The last two one-page VA documents on the February 11, 2011, privilege log are notes by
21 adjudicators written during the course of adjudicating Plaintiff Tim Joseph Michael's claim for
22 VA disability compensation and reveal a preliminary assessment of the information in the claims
23 file. These documents pre-date the May 2, 2011, VA letter notifying Mr. Josephs of VA's
24 decision granting Mr. Joseph's claim. (DVA005 000001-14). If released, adjudicators would be
25 hesitant to make notes during the course of gathering evidence necessary to decide claims and VA
26 supervisors would be deterred from providing written guidance to employees about the steps to
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1 take to develop and decide the more than 1.5 million claims for benefits that VA receives
2 annually. Such an effect would substantially decrease the quality of agency decisionmaking.

3 **Documents Concerning VA Executive Correspondence with Members of Congress,**
4 **Veterans Service Organization, and Heads of Other U.S. Government Agencies:**

5 8. The following 75 documents include drafts of letters for signature by the Secretary of
6 Veterans Affairs and senior VA management to members of Congress, Veterans Service
7 Organizations, and heads of other U.S. government agencies and supporting materials, which
8 outline the issues raised by, and ramifications of, the proposed draft correspondence. The
9 Secretary of Veterans Affairs and senior VA leaders must be allowed to gather information and
10 deliberate about the available options before responding in full to Members of Congress, Veterans
11 Service Organizations, and secretaries of other Departments in the Executive Branch of the U.S.
12 Government without the fear that their predecisional ideas will be subject to public scrutiny.
13 While the Department considers many ideas from many employees and stakeholders in
14 formulating policy, the ideas considered are merely the opinions of individuals, and not the
15 Department's official policy. It would greatly chill the policymaking process if these tentative
16 views could be subject to public scrutiny.

17 9. The documents stamped 00001, 00002, 00004, 00005, 00006, 00007, 00008-00010,
18 00020, 00032, 00049-51, 00052-56, 00057-00059, 00060, 00061, 00103, 00121, 00122, 00134,
19 VVA-VA 029839 (00139), 00140, 00141, 00146, VVA-VA 030466 (01207), 01208, 01209,
20 01210-11, 01212, 01213, 01214, 01215, 01216, 01217-19, 01220-22, VVA-VA 030468 (01226),
21 01388, VVA-VA 030593 (01394), and VVA-VA 030594-97 (01395-97) are duplicates or various
22 draft versions of letters for signature by the Secretary of Veterans Affairs to Members of
23 Congress regarding VA's efforts to notify veterans in the Department of Defense ("DoD")
24 database ("Chem-Bio Database") of their participation in testing of chemical and biological test
25 substances and papers and memoranda identifying the implications of various means that VA
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1 could employ to provide the notice. These drafts are works-in-progress assembled for
2 consideration and editing by VA managers, not final versions of the letters. If released, these
3 documents would inhibit the candid exchange of ideas necessary to develop sufficiently well-
4 considered and thorough responses to the inquiries of Members of Congress. Disclosure of these
5 documents would expose their drafters to potential criticism for suggestions that may never have
6 been adopted by management, thereby discouraging these individual from sharing their insights in
7 the future. This category of documents also is comprised of memoranda identifying the
8 implications of various types of notice that VA could employ, editorial commentary, and
9 contemplation of the risks for these options. If disclosed, these documents would reveal
10 preliminary judgments subject to further refinement and revision. Also, if such preliminary
11 material was publicly disclosed, VA employees would hesitate to provide candid advice to the
12 Secretary regarding available options, thereby hindering the Secretary's decisionmaking as well.
13 These documents pre-date the final version of these letters that were produced to Plaintiffs.
14 (VET001_000007, VET001_000008, VET001_000012, VET001_000013, VET001_000014-
15 000016, VET001_015098, VET001-015101-03, VET001_015333, VET001_015336,
16 VET001_015335, VET001_015334, VVA-VA023448, VVA-VA 023447, VET001_015327).

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19 10. The documents stamped 01407 and 01408 are two draft versions of a letter for signature
20 by the VA Chief Public Health and Environmental Hazards Officer to then-Senator Larry Craig
21 regarding a constituent's inquiry about testing of chemical and biological test substances of
22 Edgewood Arsenal and a written notation about which agency officials should participate in
23 responding to the inquiry. If released, these documents would inhibit the candid exchange of
24 ideas necessary to develop sufficiently well-considered and thorough responses by the
25 Department to the inquiries of Members of Congress. (DVA003 021513)

26
27 11. The documents stamped 00014, 00036, 00037, 00048, 00110, 00113, 00116, 00138,
28 01119, VVA-VA 030424 (01149), VVA-VA 030425-26 (01150-51), VVA-VA 030427-28

1 (01152-54), VVA-VA 030430-32 (01155-57), VVA-VA 030433-35 (01158-60), VVA-VA
2 030436-38 (01161-63), VVA-VA 030439-40 (01164-65), VVA-VA 030441-42 (01166-67),
3 VVA-VA 030443-44 (01168-69), VVA-VA 030798-99 (01717-18), and 03289 are duplicates or
4 various draft versions of letters for signature by the Secretary of Veterans Affairs to the Director
5 of The American Legion regarding VA's efforts to notify veterans in the Chem-Bio Database of
6 their participation in testing of chemical and biological test substances and papers. These drafts
7 are works-in-progress assembled for consideration and editing by VA managers, not final
8 versions of the letters. If released, these documents would inhibit the candid exchange of ideas
9 necessary to develop sufficiently well-considered and thorough responses to the inquiries of
10 organizations representing VA's veteran constituency. Disclosure of these documents would
11 expose their drafters to potential criticism and scrutiny for suggestions that may never have been
12 adopted by management, thereby discouraging these individual from sharing their insights in the
13 future. This category of documents also is comprised of memoranda identifying the implications
14 of various types of notice that VA could employ, editorial commentary, and contemplation of the
15 risks for these options. If disclosed these documents would reveal preliminary judgments subject
16 to further refinement and revision. Also, VA employees would hesitate to provide candid advice
17 to the Secretary regarding available options, thereby hindering the Secretary's decisionmaking as
18 well. These documents pre-date the final version of the letter to the Director of The American
19 Legion that was produced to Plaintiffs. (VET001-015273, VET001_015137)

22 12. The documents stamped VVA-VA 029801-02 (00028-29), 00109, 00111, 00112, 00114,
23 00115, VVA-VA 030621 (01442), 01689, VVA-VA 030786 (01701), VVA-VA 030786 (01702),
24 01703, VVA-VA 030798-99 (01717-18), 01791-92, and 01832-33 are duplicates or various draft
25 versions of letters for signature by the Secretary of Veterans Affairs to the Secretary of Defense
26 and Director of the Central Intelligence Agency ("CIA") requesting their assistance in VA's
27 efforts to notify veterans in the DoD Chem-Bio database of their participation in testing of
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1 chemical and biological test substances and papers. These drafts are works-in-progress
2 assembled for consideration and editing by VA managers, not final versions of the letters, and
3 pre-date the final versions of the correspondence which was provided to Plaintiffs. (VVA-VA
4 029878, VVA 029879, VVA-VA 029881, VVA-VA 029883). The document stamped 1713-14 is
5 an email discussing whether the Secretary of Veterans Affairs should respond to a letter from the
6 Secretary of Defense. If released, these documents would inhibit the candid exchange of ideas
7 necessary to implement VA programs. Disclosure of these documents would expose their
8 drafters to potential criticism and scrutiny for suggestions that may never have been adopted by
9 management, thereby discouraging these individuals from sharing their insights in the future. If
10 released, these documents would inhibit employees in providing candid advice and analysis to the
11 Secretary and the decisionmaking of the Secretary of Veterans Affairs. Release of the documents
12 would also adversely impact the exchange of information and resources between members of the
13 Executive Branch.

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16 13. The document stamped 03230-31 is a briefing paper written by John H. Thompson, then
17 VA Assistant General Counsel and currently VA Deputy General Counsel, to prepare senior VA
18 leaders for their testimony before a congressional committee by providing positional questions
19 and suggested responses to the questions. The agency employee who drafted this document
20 needed to provide his input with the understanding that he could provide senior VA managers
21 with his straight-forward, unvarnished advice that would remain part of the predecisional,
22 deliberative process that would be protected from further disclosure. If released, this document
23 would inhibit VA employees in providing candid advice and analysis to VA leaders and would
24 impact the exchange of information between Members of Congress and VA management.

25
26 14. In addition, because the document stamped 03230-31 is also a communication between a
27 VA attorney and VA employees, I have been advised that the document also qualifies as
28

1 privileged under the attorney-client privilege. I further understand that Plaintiffs are not
2 challenging VA's assertion of the attorney-client privilege.

3 15. The document stamped VVA-VA 031215 (03419) is a report on a briefing provided to the
4 Secretary of Veterans Affairs by VA employees to prepare the Secretary for an upcoming
5 meeting with Members of Congress about veterans exposed to chemical and biological agents
6 during their military service. The purpose of the briefing was to identify potential issues about
7 the VA benefits and services being provided to these veterans that might be raised by the
8 Members and to suggest responses to their inquiries. The agency employees who met with the
9 Secretary need to be able to provide their input with the understanding that they could provide
10 straight-forward, unvarnished advice that would remain part of the predecisional, deliberative
11 process that would be protected from further disclosure. If released, this document would inhibit
12 VA employees in providing candid advice and analysis to the Secretary of Veterans Affairs and
13 would impact the exchange of information between the Secretary and Members of Congress.
14

15 **Documents Concerning Collaboration Between DoD and VA To Provide Notice to**

16 **Test Subjects:**

17
18 16. The following 38 documents include reports on meetings between VA and DoD regarding
19 efforts to notify veterans exposed to chemical and biological substances and presentations during
20 the meetings, and briefings for VA employees about the meetings. VA must be allowed to gather
21 information, consult, and deliberate with other Executive Branch agencies about the best means to
22 carry out this important Department mission without fear that those preliminary deliberations
23 would be subject to public scrutiny. While the Department considers many ideas from many
24 employees and stakeholders in formulating policy, the ideas considered are merely the opinions
25 of individuals, and not the Department's policy. It would greatly chill the policymaking process
26 if these tentative views were subject to public scrutiny.
27
28

1 17. The documents stamped 00165-66, 00176-77, 00335-00370, VVA-VA 030492-98
2 (01263-68), 01321-27, VVA-VA 030547-54 (01345-52), and 01852-53 are duplicates and draft
3 reports and slides/presentations regarding collaborative efforts between DoD and VA to identify
4 the test subjects and notify them of exposure to chemical and biological substances during their
5 service. The documents discuss DoD's efforts to compile the Chem-Bio Database, each
6 Department's requirements for the Database, and the content of VA's draft notice letter and
7 DoD's draft Fact Sheet. These documents include discussion about allocation of responsibilities
8 between the Departments, analysis of the Chem-Bio Database, recommendations about how to
9 potentially improve the Database for VA purposes, suggestions about how VA should proceed to
10 provide notice, and timelines for completing projects. The documents, which are works-in-
11 progress, not final versions, were prepared to enable VA management to make decisions about
12 how to provide notice to veterans who were exposed to chemical and biological substances and to
13 identify the implications of various options. Disclosure of the documents would reveal
14 preliminary judgments subject to further refinement and revision. If the documents were
15 released, VA employees would hesitate to participate in the exchange of ideas and discussion
16 necessary to address how these types of projects should be undertaken. As a result, disclosure
17 would undermine VA's ability to notify veterans of exposure to potentially hazardous substances
18 during active military service.

21 18. The documents stamped 00271-77, 00392-00393, 01242-46, 01247, VVA-VA 030542-45
22 (01334-37), VVA-VA 030661 (01540), VVA-VA 030687-89 (01572-74), VVA-VA 030690-94
23 (01575-79), and 01627-39 are reports and slides/presentations regarding DoD's efforts to compile
24 the Chem-Bio Database and provide it to VA, each Department's requirements for the Database,
25 and the content of VA's notice letter and DoD's Fact Sheet. These documents include analysis of
26 the DoD Database, recommendations about how to potentially improve the Database for VA
27 purposes, discussion of allocation of responsibilities between the Departments, and timelines for
28

1 completing projects. They were prepared to enable VA superiors to make decisions about how to
2 provide notice to veterans who were exposed to chemical and biological substances and to
3 identify the implications of various options. If these documents were released, it would expose
4 VA's and DoD's decisionmaking process and would discourage candid discussion within VA and
5 between VA and DoD. As a result, disclosure would undermine VA's ability to undertake and
6 implement initiatives such as notifying veterans of their exposure to hazardous substances during
7 active military service.

8
9 19. The documents stamped VVA-VA 030396-97 (01100-01), 01128, 01170-71, 01172-73,
10 01174-75, 01176-77, 01178, 01179, 01332, VVA-VA 030822 (01757), 01849, and 01850-51 are
11 email communications between VA employees and between VA and DoD containing analysis of
12 the DoD Database and information provided by the CIA in response to correspondence from the
13 Secretary of Veterans Affairs, recommendations about how to potentially improve the Database
14 for VA purposes, and suggestions for responding to congressional inquiries about VA notice
15 efforts, and formulation of VA's policy with regard to the content of the notice and to which test
16 subjects notice would be provided. Disclosure of the documents would reveal preliminary
17 judgments subject to further refinement and revision. If these documents were released, it would
18 expose VA's and DoD's decisionmaking process and would discourage candid discussion within
19 VA and between VA and DoD, and VA employees would hesitate to participate in the exchange
20 of ideas and discussion necessary to address how these types of projects should be undertaken.

21
22 20. The documents stamped 01852-53, 01854-55, 01856, 01857, 01858, 01859-60, 01861,
23 01862, and 01863-64 are drafts of a memorandum for the record regarding a meeting between
24 congressional staff and VA employees regarding the status of VA's and DoD's efforts to provide
25 notice to test subjects and emails suggesting edits to the draft memorandum. The draft
26 memorandum was intended to advise VA management about issues of concern to congressional
27 staffers regarding VA's plans to provide notice to the test subjects. If released, these documents
28

1 would inhibit VA employees in providing candid analysis to their superiors of issues raised by
2 VA's notice plans. These documents pre-date the final version of the memorandum that was
3 produced to Plaintiffs. (DVA003-007669-70)

4 21. The document stamped VVA-VA 030754-60 (01652-58) are minutes of a meeting of the
5 DoD/VA Deployment Health Work Group on June 21, 2007, including discussion of issues
6 regarding eligibility for VA health care raised by test subjects in calls to DoD and legislation
7 under consideration by VA to address these issues. These minutes reflect internal deliberations
8 by VA policy-makers, who must be allowed to develop and pursue legislative initiatives and to
9 consider alternatives free of public scrutiny before submitting matters to Congress for its
10 consideration. It is critical to a proper functioning of the VA that it be able to examine all viable
11 options and to consider the ramifications of those options before ultimately presenting proposed
12 legislation to Congress.
13

14 **Documents Concerning Content of VA Notice Letter and DoD Fact Sheet Regarding**
15 **VA Health Care and Examination:**
16

17 22. The following 105 documents are emails between VA employees, including VA attorneys,
18 and duplicates and slides/presentations discussing what information VA's draft notice letter
19 should contain regarding the provision of VA health care and examinations to test subjects. VA
20 must be allowed to gather information, consult, and deliberate about the means legally available
21 to carry out a Department mission. While the Department considers many ideas from many
22 employees and stakeholders in formulating policy, the ideas considered are merely the opinions
23 of individuals, and not the Department's policy. It would greatly chill the policymaking process
24 if these tentative views could be subject to public scrutiny.
25

26 23. The documents stamped VVA-VA 030262-64 (00781-00783), VVA-VA 030265-67
27 (00784-00786), VVA-VA 030268-70 (00789-91), VVA-VA 030271-73 (00792-94), VVA-VA
28 030274-76 (00795-97), VVA-VA 030277-79 (00798-800), VVA-VA 030280-81 (00803-04),

1 VVA-VA 030282-83 (00805-06), VVA-VA 030284-86 (00807-09), VVA-VA 030287-88
2 (00810-11), VVA-VA 030289-90 (00812-13), VVA-VA 030291-92 (00814-15), VVA-VA
3 030293-94 (00816-17), VVA-VA 030295-96 (00818-19), VVA-VA 030297-98 (00820-21),
4 VVA-VA 030299-300 (00824-25), VVA-VA 030301 (00826), VVA-VA 030302 (00827), VVA-
5 VA 030303 (00828), VVA-VA 030304 (00829), VVA-VA 030305-06 (00830-31), VVA-VA
6 030307-08 (00832-33), VVA-VA 030309 (00834), VVA-VA 030310 (00835), VVA-VA 030311
7 (00836), VVA-VA 030312 (00837), VVA-VA 030313 (00838), VVA-VA 030314-15 (00841-
8 42), VVA-VA 030316 (00843), VVA-VA 030317-18 (00844-45), VVA-VA 030319-20 (00846-
9 47), VVA-VA 030321-22 (00848-49), VVA-VA 030323 (00850), VVA-VA 030324 (00851),
10 VVA-VA 030325 (00852), VVA-VA 0303300-34 (00857-61), 00875, 00876, 00877, 00878,
11 00911-12, 00913-14, 00915-16, 00917, 00918, 00919, 00931-34, 00943-47, 00948-51, 00952-53,
12 00954-55, 00956-59, 00960-61, 00962, 00987-91, 00992-96, 00997-01001, 01002-01006, 01007-
13 11, 01012-16, 01017-21, 01022-25, 01026-29, 01030-33, 01034-37, 01038-41, 01042-44, 01045,
14 01046, 01049-51, 01052-54, 01055-57, 01058-60, 01061-62, 01063-65, 01066-67, 01068-69,
15 01070-71, 01072-73, 01074, 01075, 01079, 01080-81, 01082, 01083, VVA-VA 030417-18
16 (01123-24), 01424-25, 01448, 01476-77, 01478-81, 01753-54, 01795-96, 01797, and 01820 are
17 duplicates and emails between VA employees, including VA attorneys, discussing whether legal
18 authority exists for providing VA health care and examinations to test subjects and the content of
19 VA's draft notice letter regarding the medical care VA will offer to provide and regarding the
20 possible health effects of the biological and chemical substances to which they were exposed.
21 The documents reflect preliminary judgments subject to further refinement and revision. Release
22 of these documents would infringe upon VA's deliberative process by hindering its ability to
23 obtain candid input from its employees about how to resolve critical health-care issues, which is
24 necessary for informed decisionmaking by VA senior leaders. These documents predate the final
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26
27
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1 version of the notice letter, dated June 30, 2006, which was previously produced to Plaintiffs.
2 (VVA-VA 023275-76).

3 24. The documents stamped 00191-200, VVA-VA 029889-99 (00371-81), VVA-VA 030635-
4 45 (01465-75), VVA-VA 030835-43 (01770-78), and VVA-VA 030870-80 (01821-31) are draft
5 and other versions of an informative brief by the VA Office of Policy regarding VA efforts to
6 notify veterans exposed to chemical and biological substances. The brief discusses the proposed
7 content of VA's letter to these veterans, including claims for VA compensation and provision of
8 health care, potential weaknesses of various options presented in the brief, anticipated demand as
9 a result of VA notification, and suggested VA actions. It would greatly chill the policymaking
10 process if these tentative views and suggestions of VA employees could be subject to public
11 scrutiny. These documents all pre-date the final notice letter, dated June 30, 2006, produced to
12 Plaintiffs. (VVA-VA 023275-76).

13
14 25. The document stamped VVA-VA 031504-05 (04115-16) is a Veterans Health
15 Administration ("VHA") issue brief discussing the content of VA's draft notice letter to test
16 subjects regarding VA health care and internal VA deliberations about the provision of health
17 care and recommendations regarding the content of the letter. The document is deliberative
18 material assembled for consideration by senior VHA leadership before making a decision as to
19 the content of the letter. Disclosure of this document would stifle the provision of candid advice
20 from VA employees necessary to develop sufficiently well-considered and thorough strategies
21 governing health care for veterans. This document predates the final version of the notice letter,
22 dated June 30, 2006, which was previously produced to Plaintiffs. (VVA-VA 023275-76).

23
24 26. The documents stamped 01446-67, VVA-VA 031165-67 (03290-92), VVA 031168-69
25 (03293-94), 03874-75, and 04289-91 are email discussions about the content of the draft VA
26 notice letter and draft DoD Fact Sheet and suggested revisions to the letter and Fact Sheet. The
27 emails reflect deliberations and editorial commentary about the content of the letter to be sent by
28

1 VA to veterans. The drafts of the documents are works-in-progress assembled for consideration
2 and editing by VA and DoD managers, not final versions of the letter and Fact Sheet. If released,
3 these documents would reveal preliminary judgments subject to further refinement and revision
4 and would inhibit the candid exchange of ideas necessary for VA to carry out its mission of
5 notifying veterans of potentially hazardous exposures during active service. These documents
6 pre-date the final notice letter and fact sheet produced to Plaintiffs.

7
8 27. In addition, because some of these documents also contain communication between VA
9 attorneys and VA employees, I have been advised that the following documents also qualify as
10 privileged under the attorney-client privilege: VVA-VA 030262-64 (00781-83), VVA-VA
11 030265-67 (00784-86), VVA-VA 030268-70 (00789-91), VVA-VA 030271-73 (00792-94),
12 VVA-VA 030274-76 (00795-97), VVA-VA 030277-79 (00798-800), VVA-VA 030280-81
13 (00803-04), VVA-VA 030282-83 (00805-06), VVA-VA 030284-86 (00807-09), VVA-VA
14 030287-88 (00810-11), VVA-VA 030289-90 (00812-13), VVA-VA 030291-92 (00814-15),
15 VVA-VA 030293-94 (00816-17), VVA-VA 030295-96 (00818-19), VVA-VA 030297-98
16 (00820-21), VVA-VA 030299-300 (00824-25), VVA-VA 030301 (00826), VVA-VA 030302
17 (00827), VVA-VA 030303 (00828), VVA-VA 030304 (00829), VVA-VA 030305-06 (00830-
18 31), VVA-VA 030307-08 (00832-33), VVA-VA 030309 (00834), VVA-VA 030310 (00835),
19 VVA-VA 030311 (00836), 030312 (00837), VVA-VA 030313 (00838), VVA-VA 030317-18
20 (00844-45), VVA-VA 030319-20 (00846-47), VVA-VA 030321-22 (00848-49), VVA-VA
21 030323 (00850), VVA-VA 030324 (00851), and VVA-VA 030325 (00852). I further understand
22 that Plaintiffs are not challenging VA's assertion of the attorney-client privilege.
23
24

25 **Documents Concerning Draft VHA Legislative Proposals:**

26 28. The following 79 documents address potential legislative proposals developed and
27 discussed within VA relating to the various possibilities of healthcare coverage offered to
28 veterans who have been exposed to chemical and biological testing. These initiatives have been

1 developed by individuals at the Department and reflect internal deliberations and analysis about
2 veterans' legislative healthcare issues. VA decision-makers must be allowed to develop and
3 pursue legislative issues, and to consider alternatives, without fear of public scrutiny before
4 submitting matters to Congress for its consideration. It is critical to a proper functioning of the
5 VA that it be able to examine all viable options and to consider ramifications associated with
6 legislation before making a final proposal. Further, the premature release of such information
7 would confuse the public to the extent that proposals developed and discussed by VA were not
8 enacted or differ from any final legislation.
9

10 29. The documents in the privilege log stamped 00907-00908, 00909-00910, 00965, 00966-
11 00983, 00984-00986, 00987-00996, 01482-01484, 01536-01538, 02617-02619, 02620-02623,
12 VVA-VA 030993 (02625), 02780-02786, 02792-02796, 02801-02805, 02806-02807, 02808,
13 02838-02844, 02845-02851, 02852-02857, 02858-02863, 02870, 02874-02875, 02878-02883,
14 02884-02888, 02894-02896, 02897, 02898, 02899-02900, 02901-02902, 02903-02906, 02907-
15 02909, 02912-02917, 02918-02920, 02921-02925, 02931-02933, 02934, 02935, 02936-02937,
16 02938-02939, 02940, 02941-02943, 02951, 02954, 02955, 02958-02961, 02989-02993, 02994-
17 02997, 02998-03000, 03001-03003, 03004-03005, 03006, 03007, 03095-03100, 03137, VVA-VA
18 031128-031130 (03138-03140), VVA-VA 031131-031133 (03141-03143), VVA-VA 031134-
19 031135 (03144-03145), VVA-VA 031136-031137 (03146-03147), 03252-03264, 03452-03454,
20 03508-03509, 04123-04125, 04139-04141, 04142-04144, 04145-04146, 04147-04167, 04168-
21 04170, 04171-04175, 04188-04190, 04191-04193, and 04194-04196 are duplicates or different
22 versions of draft legislative proposals and analyses of those proposals that reflect deliberations
23 concerning healthcare coverage for veterans who have been exposed to chemical or biological
24 testing. The specific decisions at issue relate to whether to expand special treatment authority for
25 veterans who had participated in the Department of Defense's chemical and biological testing
26 programs. Such legislation never became law. These documents were prepared for the Under
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1 Secretary for Health and VA Chief Business Office. Release of these documents would infringe
2 upon VA's deliberative process by hindering its ability to obtain candid input from its employees
3 regarding legislative healthcare proposals.

4 30. In addition, because some of these documents also contain communication between VA
5 attorneys and VA employees, I have been advised that the following documents also qualify as
6 privileged under the attorney-client privilege: 00966-00983, 02780-02786, 02792-02796, 02801-
7 02805, 02838-02844, 02845-02851, 02852-02857, 02858-02863, 02878-02883, 02884-02888,
8 02912-02917, 02921-02925, 02958-02961, 02989-02993, and 03095-03100. I further understand
9 that Plaintiffs are not challenging VA's assertion of the attorney-client privilege.
10

11 31. The documents in the privilege log stamped 00024-00027, 00126-00129, 00178-00181,
12 00322-00325, 00330-00334, 01803-01808, 02768-02769, and 02871 are emails and memoranda
13 among the Under Secretary for Health, the Acting Assistant Secretary for Policy, Planning, and
14 Preparedness, and other VHA employees. These documents discuss comments, suggestions, and
15 edits to drafts of the Under Secretary for Health's Information Letter Regarding Potential Health
16 Effects Among Veterans Involved in Military Chemical Warfare Agent Experiments Conducted
17 From The 1950s To 1975. All of these documents predate the Information Letter that was
18 publicly disseminated, the final version of which was previously produced to Plaintiffs (VVA-VA
19 009880-009883). Disclosure of the documents would stifle the free exchange of ideas and
20 suggestions by VA subordinates which are necessary to informed decision-making by
21 management.
22

23
24 **Documents Concerning the Veterans Benefits Administration:**

25 32. The following 161 documents address the potential options the Veterans Benefits
26 Administration ("VBA") has considered for notifying and conducting outreach to veterans
27 exposed to chemical or biological substances during Army testing, and informing VA field
28 offices about the population of "Chem-Bio" veterans. Release of these pre-decisional,

1 deliberative documents would lead to extensive and confused questioning of VA personnel by the
2 public. Here, VBA asked its employees to think creatively about the goals of clearly
3 communicating notice and outreach to Chem-Bio veterans. If VBA employees are questioned or
4 otherwise scrutinized about this work, it would discourage their willingness to freely provide
5 feedback and recommendations in response to future requests from policy makers.

6 33. The documents in the privilege log stamped 00152-00159, 00301-00308, and 01485-
7 01492 are duplicates or different versions of the draft Training Letter circulated within the
8 Compensation and Pension Service of the Veterans Benefits Administration. These documents
9 discuss comments, suggestions, and edits to drafts of the Compensation and Pension Service
10 Director's Training Letter directed toward VA field offices. The purpose of the Training Letter
11 was to educate and inform VA field personnel about claims stemming from DoD's release of the
12 Chem-Bio Database. Disclosure of such documents would stifle the free exchange of ideas and
13 suggestions by VA subordinates which are necessary to informed decision-making by
14 management. These documents predate the final version of the Training Letter, dated September
15 12, 2006, which was previously produced to Plaintiffs. (VVA-VA 009395-009408).

16 34. The documents in the privilege log stamped 00175, 00207, 00396, 01131, VVA-VA
17 030599-030600 (01399-01400), 01402-01403, VVA-VA 030615-030617 (01431-01433), 01453-
18 01457, VVA-VA 030684-030686 (01569-01571), 01736-01738, 01739-01743, 01834, 01848,
19 VVA-VA 031189-032292 (03368-03371), 03455-03456, 03765-03767, VVA-VA 031500-
20 031501 (03992-03993), and VVA-VA 031568-031569 (04439-04440) are redacted outreach
21 reports and meeting summaries related to identifying, locating and communicating with veterans
22 who have been exposed to chemical or biological testing. These documents have been released
23 so as to include factual information, but have been redacted to protect public disclosure of
24 discussions of recommendations by VA employees in the course of formulating VA's approach to
25 conducting outreach to Chem-Bio veterans. If these currently redacted discussions were released,
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1 it would inhibit VA employees from openly expressing their ideas, and to creatively develop
2 policy for notifying veterans of a chemical or biological exposure. If such discussions were
3 halted by being subject to public release, VA would be prevented from developing, through input
4 and open discussion with its employees, the best and most appropriate services possible to our
5 nation's veterans.

6 35. The documents in the privilege log stamped 03420, 03421-03422, 03544-03545, 03565-
7 03566, 03596-03599, 03605-03606, 03607-03608, 03609-03610, 03626-03627, 03630, 03631-
8 03633, 03634-03635, 03664, 03666, 03672-03673, 03708-03710, 03711, VVA-VA 031364
9 (03759), VVA-VA 031382-031384 (03788-03790), 03876, 03884-03885, 03886-03887, 03904-
10 03905, 03906-03907, 03912, 03980-03981, VVA-VA 031499 (03991), 04015, 04324, VVA-VA
11 031566-031567 (04437-04438), 04461-04464, VVA-VA 031594-031595 (04469-04470), and
12 04479-04482 are emails regarding outreach efforts. Similar to the outreach reports and meeting
13 summaries, these documents contain a free flow of ideas necessary to develop successful
14 strategies for conducting outreach to veterans. It is important to the proper functioning of the VA
15 that it be able to fully and freely consider all options suggested by VA employees in the
16 continuing development of the notification and outreach program to Chem-Bio veterans. Release
17 of these documents would chill the contributions necessary to such consideration.

18 36. In addition, because some of these documents also contain communication between VA
19 attorneys and VA employees, I have been advised that the following documents also qualify as
20 privileged under the attorney-client privilege: 03626-03627 and 04324. I further understand that
21 Plaintiffs are not challenging VA's assertion of the attorney-client privilege.

22 37. The documents in the privilege log stamped 00021, 00022-00023, 00123-00125, 00787-
23 00788, 00801-00802, 00822-00823, 00839-00840, VVA-VA 030344-030345 (00871-00872),
24 00879-00880, 02741, 03281-03284, 03351-03352, 03353-03354, 03531-03532, 03533-03534,
25 03535-03536, 03549-03550, 03732-03733, 03748-03749, 03950-03952, 04117-04118, 04119-
26 04120, 04121-04122, 04123-04124, 04125-04126, 04127-04128, 04129-04130, 04131-04132,
27 04133-04134, 04135-04136, 04137-04138, 04139-04140, 04141-04142, 04143-04144, 04145-04146,
28 04147-04148, 04149-04150, 04151-04152, 04153-04154, 04155-04156, 04157-04158, 04159-04160,
04161-04162, 04163-04164, 04165-04166, 04167-04168, 04169-04170, 04171-04172, 04173-04174,
04175-04176, 04177-04178, 04179-04180, 04181-04182, 04183-04184, 04185-04186, 04187-04188,
04189-04190, 04191-04192, 04193-04194, 04195-04196, 04197-04198, 04199-04200, 04201-04202,
04203-04204, 04205-04206, 04207-04208, 04209-04210, 04211-04212, 04213-04214, 04215-04216,
04217-04218, 04219-04220, 04221-04222, 04223-04224, 04225-04226, 04227-04228, 04229-04230,
04231-04232, 04233-04234, 04235-04236, 04237-04238, 04239-04240, 04241-04242, 04243-04244,
04245-04246, 04247-04248, 04249-04250, 04251-04252, 04253-04254, 04255-04256, 04257-04258,
04259-04260, 04261-04262, 04263-04264, 04265-04266, 04267-04268, 04269-04270, 04271-04272,
04273-04274, 04275-04276, 04277-04278, 04279-04280, 04281-04282, 04283-04284, 04285-04286,
04287-04288, 04289-04290, 04291-04292, 04293-04294, 04295-04296, 04297-04298, 04299-04300,
04301-04302, 04303-04304, 04305-04306, 04307-04308, 04309-04310, 04311-04312, 04313-04314,
04315-04316, 04317-04318, 04319-04320, 04321-04322, 04323-04324, 04325-04326, 04327-04328,
04329-04330, 04331-04332, 04333-04334, 04335-04336, 04337-04338, 04339-04340, 04341-04342,
04343-04344, 04345-04346, 04347-04348, 04349-04350, 04351-04352, 04353-04354, 04355-04356,
04357-04358, 04359-04360, 04361-04362, 04363-04364, 04365-04366, 04367-04368, 04369-04370,
04371-04372, 04373-04374, 04375-04376, 04377-04378, 04379-04380, 04381-04382, 04383-04384,
04385-04386, 04387-04388, 04389-04390, 04391-04392, 04393-04394, 04395-04396, 04397-04398,
04399-04400, 04401-04402, 04403-04404, 04405-04406, 04407-04408, 04409-04410, 04411-04412,
04413-04414, 04415-04416, 04417-04418, 04419-04420, 04421-04422, 04423-04424, 04425-04426,
04427-04428, 04429-04430, 04431-04432, 04433-04434, 04435-04436, 04437-04438, 04439-04440,
04441-04442, 04443-04444, 04445-04446, 04447-04448, 04449-04450, 04451-04452, 04453-04454,
04455-04456, 04457-04458, 04459-04460, 04461-04462, 04463-04464, 04465-04466, 04467-04468,
04469-04470, 04471-04472, 04473-04474, 04475-04476, 04477-04478, 04479-04480, 04481-04482,
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04987-04988, 04989-04990, 04991-04992, 04993-04994, 04995-04996, 04997-04998, 04999-05000,

1 04120, 04121-04122, 04126, 04128, and 04226-04227 are duplicates or similar drafts of the
2 notification letter that was sent to veterans who, as identified through the Chem-Bio Database,
3 have been potentially exposed to chemical or biological testing. The draft notification letters and
4 accompanying memoranda discuss variations of how to communicate to veterans the nature of the
5 testing, the availability of VA healthcare and medical exams, and the several ways the veteran
6 could contact the VA if they have follow up questions or health concerns. These documents are
7 works-in-progress, not final versions. As such, they contain deliberative material assembled for
8 consideration and editing by VBA personnel and senior managers. Disclosure of such revisions
9 would stifle the candid exchange of thinking necessary to develop sufficiently well-considered
10 and thorough strategies for communicating notification of test exposure to veteran populations.
11 These documents are internal deliberations that if subject to public release, would both chill
12 productive agency discussion and confuse the public. These documents all pre-date the final
13 notification letter issued by VA, dated June 30, 2006, which has been produced to Plaintiffs.
14 (VVA-VA 023647-023652).
15

16
17 38. In addition, because some of these documents also contain communication between VA
18 attorneys and VA employees, I have been advised that the following documents also qualify as
19 privileged under the attorney-client privilege: 00801-00802 and VVA-VA 030344-030345
20 (00871-00872). I further understand that Plaintiffs are not challenging VA's assertion of the
21 attorney-client privilege.
22

23 39. The documents in the privilege log stamped VVA-VA 0303300-030334 (00857-00861),
24 VVA-VA 030335-030339 (00862-00866), VVA-VA 030340-030343 (00867-00870), VVA-VA
25 030344-030345 (00871-00872), VVA-VA 030346-030349 (00881-00884), VVA-VA 030350-
26 030352 (00885-00887), VVA-VA 030353-030355 (00888-00890), VVA-VA 030356-030358
27 (00891-00893), VVA-VA 030359-030361 (00894-00896), VVA-VA 030362-030364 (00897-
28 00899), VVA-VA 030365-030367 (00900-00902), VVA-VA 030368-030369 (00903-00904),

1 00935-00942, 01047-01048, 01076, 01077-01078, 01085, VVA-VA 030624-020625 (01449-
2 01450), 02797, 02809-02812, 02813-02831, 02832-02833, 02836-02837, VVA-VA 031094-
3 031096 (02962-02964), VVA-VA 031097-031100 (02965-02968), VVA-VA 031101-031103
4 (02969-02971), VVA-VA 031104-031107 (02972-02975), VVA-VA 031108-031111 (02976-
5 02979), VVA-VA 031112-031114 (02980-02982), 03010-03014, 03015-03020, 03021-03025,
6 03026-03030, 03031-03037, 03038-03043, 03044-03049, 03050-03055, 03056-03061, 03062-
7 03066, 03067-03071, 03072-03076, VVA-VA 031118-031120 (03077-03079), VVA-VA
8 031121-031123 (03080-03082), VVA-VA 031124-031125 (03083-03084), VVA-VA 031126-
9 031127 (03085-03086), 03101-03106, 03107-03110, 03111-03115, 03116-03118, 03119-03122,
10 03123-03125, 03126-03128, 03129-03131, 03132-03134, 03135-03136, 03471-03472, 03473-
11 03474, 03517, 03555-03559, 03560-03563, 03588-03589, 03700-03705, 03706, 03724, 03768,
12 03769-03770, 03771-03772, 03773-03774, 03826-03830, 03831-03835, VVA-VA 031408-
13 031411 (03836-03839), 03878-03879, 03910-03911, 03914, 03915, VVA-VA 031478-031480
14 (03942-03944), 03945-03949, 03953-03958, 03982, 03988, and 03998 are emails discussing the
15 development of the notification letter. Disclosure of such emails would inhibit the open exchange
16 of ideas and suggestions necessary to develop sufficiently well-considered and thorough
17 strategies for communicating notification of test exposure to veteran populations. These
18 documents are internal deliberations that, if subject to public release, would both chill productive
19 agency discussion and confuse the public.

20
21
22 40. In addition, because some of these documents also contain communication between VA
23 attorneys and VA employees, I have been advised that the following documents also qualify as
24 privileged under the attorney-client privilege: VVA-VA 0303300-030334 (00857-00861), VVA-
25 VA 030335-030339 (00862-00866), VVA-VA 030340-030343 (00867-00870), VVA-VA
26 030344-030345 (00871-00872), VVA-VA 030346-030349 (00881-00884), VVA-VA 030350-
27 030352 (00885-00887), VVA-VA 030353-030355 (00888-00890), VVA-VA 030356-030358
28

1 (00891-00893), VVA-VA 030359-030361 (00894-00896), VVA-VA 030362-030364 (00897-
2 00899), 02797, 02809-02812, 02813-02831, VVA-VA 031094-031096 (02962-02964), VVA-VA
3 031097-031100 (02965-02968), VVA-VA 031101-031103 (02969-02971), VVA-VA 031104-
4 031107 (02972-02975), VVA-VA 031108-031111 (02976-02979), VVA-VA 031112-031114
5 (02980-02982), 03015-03020, VVA-VA 031118-031120 (03077-03079), VVA-VA 031121-
6 031123 (03080-03082), VVA-VA 031124-031125 (03083-03084), VVA-VA 031126-031127
7 (03085-03086), 03101-03106, 03107-03110, 03111-03115, 03116-03118, 03119-03122, 03123-
8 03125, 03126-03128, 03129-03131, 03132-03134, 03135-03136, VVA-VA 031408-031411
9 (03836-03839), and VVA-VA 031478-031480 (03942-03944). I further understand that Plaintiffs
10 are not challenging VA's assertion of the attorney-client privilege.
11

12 **Documents Concerning VHA:**

13 41. The following 34 documents address VHA and its contemplation of how to respond to an
14 apparent Congressional inquiry regarding veterans who had been tested at Edgewood Arsenal.

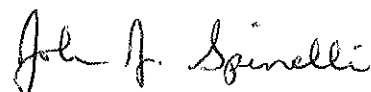
15 42. The documents in the privilege log stamped 02775-02779, 02787-02791, VVA-VA
16 031083-031087 (02864-02868), 02889-02893, 02926-02930, VVA-VA 031090
17 (02944), 02945-02949, VVA-VA 031091 (02950), 02952-02953, 02983-02987, 03087-03090,
18 03091-03094, 03466-03470, 03475-03478, 03553-03554, 03824-03825, 03843, 03882-03883,
19 03908-03909, 03959-03960, 04285-04288, 04300-04304, 04305-04309, 04332-04333, and
20 04336-04340 are emails among VHA and VBA employees discussing methods for responding to
21 an apparent inquiry from Congress regarding the status of VA and DoD efforts to notify veterans
22 who had participated in chemical or biological testing at Edgewood Arsenal. These documents
23 contain deliberative discussions concerning a decision regarding the proper response to a
24 Congressional inquiry. It is important to the proper functioning of the VA that it be able to fully
25 and freely consider all options suggested by VA employees in the continuing development of the
26
27
28

1 notification and outreach program to Chem-Bio veterans. Release of these documents would chill
2 the contributions necessary to such consideration.

3 43. In addition, because some of these documents also contain communication between VA
4 attorneys and VA employees, I have been advised that the following documents also qualify as
5 privileged under the attorney-client privilege: 02775-02779 and 03466-03470.

6 44. The documents in the privilege log stamped VVA-VA 030994-030995 (02636-02637),
7 VVA-VA 030996-030997 (02638-02639), VVA-VA 030998-031000 (02640-02642), VVA-VA
8 031001-031003 (02643-02645), VVA-VA 031004-031006 (02646-02648), VVA-VA 031007-
9 031010 (02649-02652), VVA-VA 031011-031014 (02653-02656), VVA-VA 031015-031018
10 (02657-02660), and VVA-VA 031019-031022 (02661-02664) are emails discussing the
11 possibility of creating future registries within VHA, how to configure such registries, and who
12 would be responsibility for such tasks. These documents contain deliberations regarding how to
13 form and establish a potential new registry within VHA, an agency decision that requires full and
14 free expression of ideas in order to accomplish its program objective. Disclosure of such email
15 discussions would stifle the candid exchange of ideas necessary to develop sufficiently well-
16 considered and thorough strategies for creating registries. These documents are internal
17 deliberations that if subject to public release, would both chill productive agency discussion and
18 confuse the public.
19
20

21 I declare under penalty of perjury that the foregoing is true and correct. Executed in
22 Washington, D.C., on August 30, 2011.
23

24 

25 _____
26 John J. Spinelli
27 Senior Advisor to the Secretary
28 U.S. Department of Veterans Affairs

Department of
Veterans Affairs

Memorandum

Date: AUG 30 2011
From: Secretary of Veterans Affairs
Subj: Delegation of Authority to Assert Deliberative Process Privilege
To: Senior Advisor to the Secretary of Veterans Affairs, John J. Spinelli

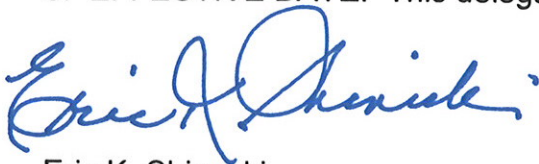
1. PURPOSE OF DELEGATION. The Department of Veterans Affairs (VA) has been named a defendant in Vietnam Veterans of Am. v. Central Intelligence Agency, No. CV 09-0037-CW (N.D. Cal.). Plaintiffs in that case seek to compel discovery of numerous documents that may include pre-decisional advice and deliberations of VA personnel. To invoke the deliberative process privilege applicable to such documents in litigation, Federal courts generally require a declaration, from the head of the Department or an officer of the Department to whom appropriate authority has been delegated, that is made after personal consideration of the documents at issue and that specifies the reasons for invoking the privilege.

2. DELEGATION. This memorandum delegates to John J. Spinelli, Senior Advisor to the Secretary of Veterans Affairs, the authority to assert the deliberate process privilege on behalf of VA in the case of Vietnam Veterans of Am. v. Central Intelligence Agency, No. CV 09-0037-CW (N.D. Cal.), based on his personal consideration of the relevant documents. This delegation includes the authority to determine whether the privilege should be invoked with respect to each document and to attest to the reasons for asserting confidentiality over the information withheld.

3. AUTHORITY. 38 U.S.C. § 512.

4. RESTRICTIONS. None.

5. EFFECTIVE DATE. This delegation of authority is effective upon signature.



Eric K. Shinseki