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 Plowshares; Veterans Rights Organization; Bruce Price; Franklin
 8 D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane;
 9 Wray C. Forrest; Tim Michael Josephs; and William Blazinski

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

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

Case No. CV 09-0037-CW

**DECLARATION OF
 BEN PATTERSON
 IN SUPPORT OF PLAINTIFFS'
 MOTION TO COMPEL DISCOVERY
 FROM DEFENDANT DEPARTMENT
 OF VETERANS AFFAIRS**

Complaint filed January 7, 2009

1 I, Ben Patterson, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and am admitted
3 to practice before this Court. I am an associate with the law firm of Morrison & Foerster LLP,
4 counsel of record for Vietnam Veterans of America, Swords to Plowshares: Veterans Rights
5 Organization, Bruce Price, Franklin D. Rochelle, Larry Meirrow, Eric P. Muth, David C. Dufrane,
6 Wray C. Forrest, Tim Michael Josephs, and William Blazinski (“Plaintiffs”) in this action.
7 I submit this Declaration in Support of Plaintiffs’ Motion to Compel Discovery from Defendant
8 Department of Veterans Affairs. I make this Declaration based on personal knowledge and
9 discussions with support staff working under my direction. If called as a witness, I would testify
10 to the facts set forth below.

11 2. Attached hereto as **Exhibit A** is a true and correct copy of the Department of
12 Veterans Affairs’ (“DVA”) privilege log dated June 28, 2012.

13 3. The parties have met and conferred regarding the DVA’s June 28, 2012 privilege
14 log by letters dated July 5, 2012 and July 6, 2012. Attached hereto as **Exhibit B** is a true and
15 correct copy of a July 6, 2012 letter from Lily Farel, counsel for Defendants, to myself.

16 4. During a telephone call on July 13, 2012, the parties agreed that they are at an
17 impasse concerning the DVA’s June 28, 2012 privilege log.

18
19 I declare under penalty of perjury under the laws of the United States of America that the
20 foregoing is true and correct and that this Declaration was executed in San Francisco, California
21 on this 13th day of July, 2012.

22
23 /s/ Ben Patterson
24 Ben Patterson

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Attestation Pursuant to General Order 45, section X.B

I hereby attest that I have on file all holograph signatures for any signatures indicated by a “conformed” signature (/S/) within this e-filed document.

/s/ GORDON P. ERSPAMER

Gordon P. Erspamer

Exhibit A

Vietnam Veterans of America v. CIA
privilege log - June 28, 2012

Page #'s	Doc. Type	Date	Author	Recipient	Description	Privilege	Entire/Portion
DVA132 0001-0002	Email	5/4/2011	Allegra Long, Erik Shepherd	Erik Shepherd, Allegra Long	Redacted email chain reflecting deliberations regarding the possibility of modifications of procedure for verifying exposure and which pre-dates a decision on this issue.	DP	Portion
DVA132 0003	Email	7/5/2011	Allegra Long	Erik Shepherd; cc: Cheryl Flohr	Email chain reflecting deliberative discussion regarding draft document pertaining to potential updates to CBRNE exposure verification guidance and which pre-dates the final version of the document. The final version of the document was produced at DVA093 000032-33.	DP	Entire
DVA132 0005-0006	Email	5/10/2011	Anne Tomlinson, Glen Wallick, Allegra Long	Glen Wallick, Allegra Long, Anne Tomlinson	Email chain reflecting deliberative discussion regarding possibility of modifications to CBRNE/SHAD/MG guidance and which pre-dates a decision on this issue.	DP	Entire
DVA132 0007-0008	Email	5/4/2011	Erik Shepherd, Allegra Long	Allegra Long, Erik Shepherd	Redacted email chain reflecting deliberations regarding the possibility of modifications of procedure for verifying exposure and which pre-dates a decision on this issue.	DP	Portion

Vietnam Veterans of America v. CIA
privilege log - June 28, 2012

Page #'s	Doc. Type	Date	Author	Recipient	Description	Privilege	Entire/Portion
DVA132 0009-0011	Email	5/15/2011	Glen Wallick, Allegra Long, Anne Tomlinson	Allegra Long, Anne Tomlinson, Glen Wallick	Email chain reflecting deliberative discussion regarding possibility of modifications to CBRNE/SHAD/MG guidance and which pre-dates a decision on this issue.	DP	Entire
DVA132 0012-0014	Email with attachment	7/5/2011	Erik Shepherd, Allegra Long	Allegra Long, Erik Shepherd; cc: Paul Black, Cheryl Flohr	Email chain and attached draft red-lined memo reflecting deliberative discussion pertaining to CBRNE exposure verification guidance and which pre-dates the final document, which was previously produced as DVA093 000032-33.	DP	Entire

Vietnam Veterans of America v. CIA
privilege log - June 28, 2012

Page #'s	Doc. Type	Date	Author	Recipient	Description	Privilege	Entire/Portion
DVA132 0034-0068	Email with attachments	6/28/2011	Paul Black, Kim Tibbitts	Erik Shepherd, Allegra Long, Paul Black	Email with redacted portions of attachments. The redacted portions of the attachments contain recommendations regarding outreach efforts, identification of test participants, notice letter revisions, and disability determinations, which pre-date decisions on those recommendations. The redactions on the attachments are identical or substantively similar to documents that were previously reviewed by the Magistrate Judge and over which the assertions of privilege were upheld. <i>See, e.g.,</i> DVA078 0130-0133; DVA078 02348-02350.	DP	Portion
DVA134 0236-0236	Memo	7/1/2011	Erik Shepherd, Allegra Long		Memorandum reflecting deliberative discussion pertaining to CBRNE exposure verification guidance and which pre-dates the final document, which was previously produced as DVA093 000032-33.	DP	Entire

Vietnam Veterans of America v. CIA
privilege log - June 28, 2012

Page #'s	Doc. Type	Date	Author	Recipient	Description	Privilege	Entire/Portion
DVA135 000047	Briefing Material	1994	Martie Adelman (VA OGC)	John Vogel	Briefing material prepared by OGC attorney for agency employee reflecting legal analysis about veteran allegation of LSD testing for purposes of testimony at congressional hearing.	AC	Entire

Exhibit B



U.S. Department of Justice

Civil Division
Federal Programs Branch

Mailing Address
P.O. Box 883
Washington, D.C. 20044

Overnight Delivery Address
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Tel: (202) 353-7633
Fax: (202) 616-8460
lily.farel@usdoj.gov

July 6, 2012

VIA EMAIL

Mr. Ben Patterson, Esq.
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105-2482

RE: *Vietnam Veterans of America, et al. v. CIA, et al.*, No. CV 09 0037-CW (N.D. Cal.)

Dear Mr. Patterson:

I write in response to your July 5, 2012 letter.

In that letter, you say “[a]t this stage, if DVA is unwilling to reconsider its privilege assertions, it may make the most sense for DVA to simply ask to submit these few documents to be included in the Court’s current *in camera* review.” But submission of documents for *in camera* review is premature. You do not assert that VA failed to adequately describe any of the entries in its privilege log, which may obviate the need for any *in camera* review. *Loving v. Dep’t of Defense*, 550 F.3d 32, 41 (D.C. Cir. 2008) (holding that trial court did not abuse discretion in refusing to consider deliberative process documents *in camera* where Vaughn index adequately described documents and assertion of privilege was supported by declaration); *Norton*, 336 F Supp. 2d at 1155 (holding that *in camera* review over deliberative process privilege documents unnecessary where government, through submission of materials to Court, satisfied its burden of establishing that documents were privileged).

In addition, Plaintiffs have not met their burden of establishing a substantial need for the documents identified on VA’s June 28, 2012 privilege log. *See Center for Biological Diversity v. Norton*, 336 F. Supp. 2d 1149, 1155 (D.N.M. 2004); *Moreland Prop., LLC v. City of Thornton*, No. 07-00716, 2007 WL 2523385 (D. Colo. Aug. 31, 2007)). In your letter, you assert a general need for documents related to “verifying” participation, but you fail to explain how these documents are not cumulative of the extensive amount of discovery already in Plaintiffs’ possession.

Furthermore, submission of these documents for *in camera* review is premature in the absence of a formal challenge by Plaintiffs and the formal assertion of the deliberative process privilege through a declaration.

Nor do Plaintiffs address any purported need for the documents that do not relate to verification. *See, e.g.*, DVA132 0005-6, 0007-0008, 0009-0011, 0034-0068, or DVA135 00047. Accordingly, please explain why Plaintiffs have a substantial need for these documents and why these documents are not cumulative of other discovery in this case. DVA135 00047 is covered by the attorney-client privilege. Please confirm that, consistent with Plaintiffs' prior position, Plaintiffs will not challenge VA's assertion of this privilege.

Finally, as you note, the parties and the Court have already spent considerable time on the question of deliberative process privilege. If Plaintiffs do not have any additional objections to VA's June 28, 2012 privilege log beyond what is articulated in your July 5, 2012 letter, we agree that a meet-and-confer may not be fruitful. The next step would be to either submit a joint statement regarding this dispute to the Court or the parties can jointly contact the Court to inquire whether it is possible to proceed directly with briefing. Please let me know which option Plaintiffs would prefer.

Sincerely,

A handwritten signature in black ink that reads "Lily Farel". The signature is written in a cursive, flowing style.

Lily Farel
Trial Attorney
Federal Programs Branch
United States Department of Justice