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

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

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

Noticed Motion Date and Time:
 October 6, 2010
 9:30 a.m.

DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' MOTION TO
 OVERRULE OBJECTIONS AND
 COMPEL PRODUCTION OF
 DOCUMENTS

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INTRODUCTION

1
2 Contrary to Plaintiffs' assertions, Defendants have made robust productions in response to
3 Plaintiffs' document requests after conducting reasonable searches. Defendants have produced a
4 large number of documents relating to the chemical tests at issue, and the Department of Defense
5 ("DoD") and Department of the Army are conducting additional searches as a result of the
6 parties' meet-and-confer discussions and the Court's July 13, 2010 Order. The additional
7 productions that Plaintiffs seek to compel greatly exceed what, given the relatively discrete
8 Administrative Procedure Act ("APA") and Declaratory Judgment Act ("DJA") claims that are
9 before the Court, is an appropriate and workable scope of discovery.

10 It is important to observe at the outset that Plaintiffs' motion relies on significant
11 mischaracterizations of Defendants' searches and productions. The Central Intelligence Agency
12 ("CIA") has produced documents to Plaintiffs, as Plaintiffs undoubtedly are aware. Yet their
13 motion to compel relies on assertions that Defendants have identified no document as having
14 been produced by CIA, thereby suggesting that CIA has produced no documents in this litigation.
15 Plaintiffs' motion also asserts that it appears DoD and Army have not conducted searches at
16 Edgewood Arsenal, which was the Army's center for chemical research. DoD and Army focused
17 their search efforts in response to Plaintiffs' first set of RFPs on documents stored at Edgewood,
18 and Defendants explained to Plaintiffs well in advance of their motion to compel that DoD and
19 Army are continuing to search for additional documents at Edgewood.

20 The primary questions presented by Plaintiffs' motion are of overbreadth and undue
21 burden. Plaintiffs' 193 document requests are extremely expansive and in effect seek to conduct
22 a full-scale investigation of the government's Cold War era human testing programs, including of
23 CIA testing programs which, based on multiple extensive investigations, the Agency has
24 concluded did not involve tests on military personnel. The Army tests in which the named
25 Plaintiffs and putative class of veterans participated began over 60 years ago, and they spanned
26 more than 20 years. Plaintiffs' requests pertaining to those tests alone seek an extraordinary
27
28

1 volume of documents created between 1940 and the present, a great many of which are
2 searchable only by hand.

3 This is an action under the APA's provision for an order compelling discrete agency
4 action and the DJA. The Court dismissed Plaintiffs' challenge to the lawfulness of the tests, and
5 the remaining claims are relatively discrete requests for declaratory and injunctive relief in the
6 form of notification, medical care and release from secrecy oaths. Yet Plaintiffs proceed as if the
7 Court had not substantially narrowed the case and insist on extraordinarily extensive discovery
8 that is not necessary to address the claims that the Court allowed to proceed.

9 Further, much of Plaintiffs' motion to compel is premature. It addresses requests
10 concerning possible health effects associated with tested substances. However, in addition to the
11 substantial information regarding health effects already produced and publicly available, DoD
12 and Army have agreed to conduct additional searches for such information as a result of the
13 parties' meet-and-confer discussions. Plaintiffs' motion also focuses on servicemembers' consent
14 to tests. Following the Court's July 13 Order indicating that information regarding consent could
15 be relevant, DoD and Army are also searching for documents relating to test participants'
16 consent. Plaintiffs' motion additionally addresses information about the substances tested by the
17 Army, including their identity and the doses administered. Defendants have already produced a
18 great deal of this information. With respect to individual servicemembers' tests, DoD is in the
19 process of compiling as much information as possible about each individual servicemember test
20 and exposure through its ongoing multi-million dollar, multi-year investigation. DoD has
21 produced to Plaintiffs the database housing the compilation as of March 2010, and the
22 investigation is expected to be completed in September 2011.

23 The extraordinarily broad and onerous searches that Plaintiffs demand greatly exceed
24 what can be expected to produce information relevant to the claims before the Court and is
25 incompatible with reasonable progress of this litigation. To the extent that such searches might
26 encompass potentially relevant information, given the amount of information already produced
27 and in the public sphere, and the additional searches that DoD and Army have agreed to
28

1 undertake, any such relevance is outweighed by the disproportionate burden they would impose.
2 Plaintiffs' motion to compel should be denied.

3 **BACKGROUND**

4 This case arises out of chemical testing by the Army during the Cold War era. Each of the
5 six named individual Plaintiffs, as well as the two proposed additional individual plaintiffs, is
6 alleged to have undergone chemical testing at Edgewood Arsenal, an Army facility in Maryland.
7 Second Am. Compl. ¶¶ 29-87 (Dkt. No. 53); Proposed Third Am. Compl. ¶¶ 201-230 (Dkt. No.
8 88-1). The Second Amended Complaint seeks declaratory and injunctive relief under the APA, 5
9 U.S.C. § 706(1), and DJA, 28 U.S.C. § 2201(a), requiring Defendants to release Plaintiffs from
10 secrecy oaths; notify them and all military test participants of the tests in which they participated,
11 their exposures and any known health effects; to search for and provide participants, as well as
12 the Department of Veterans Affairs ("VA"), with available documentation concerning the tests;
13 and to provide participants with medical examinations and care. Plaintiffs further request a
14 declaration that consent forms signed by test participants are invalid, that the tests were unlawful
15 and that the "Feres doctrine" is unconstitutional. *See* Second Am. Compl.

16 **1. Judge Wilken's January 19, 2010 Order**

17 On January 19, 2010, Judge Wilken dismissed Plaintiffs' claim that the tests were
18 unlawful and the challenge to the Feres doctrine, and identified three issues that will proceed:
19 "the lawfulness of the consent forms, to the extent that they required the individual Plaintiffs to
20 take a secrecy oath"; whether Defendants may be compelled to provide test participants with
21 information about the nature of the tests based on the Wilson Directive, Army regulation 70-25
22 (1962), and the Department of Justice ("DOJ") document cited in the Second Amended
23 Complaint; and whether test participants are entitled to medical care. Order of Jan. 19, 2010 at
24 12-13, 15, 17 (Dkt. No. 59). Contrary to Plaintiffs' characterization, the Court's ruling did
25 narrow the scope of the case significantly as it dismissed Plaintiffs' challenge to the lawfulness of
26 the tests themselves. *Id.* at 13. The remaining questions before the Court are straightforward:
27 are the consent forms that Plaintiffs signed lawful to the extent that they required a secrecy oath;
28

1 should the Court, under the APA provision for agency action alleged to be unreasonably delayed
2 or withheld, compel Defendants to take “discrete agency action” to notify participants of
3 information about the tests based on the Wilson Directive and Army Regulation 70-25 (1962);
4 and are Plaintiffs entitled to Army-provided medical care. *Id.* at 12-17.

5 **2. The Overbreadth of Plaintiffs’ Requests and Extreme Burden on Defendants**

6 Ignoring the substantial narrowing of their claims, Plaintiffs’ 193 document requests
7 pursue a scope of discovery on par with a full-scale investigation of all of the chemical and
8 biological testing that the federal government conducted or sponsored after World War II and
9 encompasses many aspects that are not relevant to the three claims that the Court has allowed to
10 proceed. For example, Plaintiffs seek to compel documents in response to RFP 65, Pls.’ Mot. at
11 13-14, which seeks “All DOCUMENTS that CONCERN the storage, transport, handling,
12 disposal or sale of each nerve gas, psychochemical, toxic chemical and biological substance used
13 in the TEST PROGRAMS at the EDGEWOOD ARSENAL or any other project identified in the
14 Complaint,” Ex. A to Decl. of Caroline Wolverton (Ex. 8 hereto). The request encompasses all
15 invoices, bills of lading, inventories and other administrative minutiae concerning every
16 substance tested over a 20-year period, none of which bears on whether the Court should compel
17 Defendants to provide test participants with notification, provide them with medical care or
18 release them from secrecy oaths. *See also* Defs.’ Mot. for Protective Order Limiting the Scope of
19 Discovery (Dkt. No.140) (describing additional examples of overbroad document requests).

20 As Defendants’ Answer reflects, after World War II and during the Cold War the United
21 States conducted multiple chemical and biological tests and also contracted with outside
22 institutions that were performing tests of interest to the government’s research of chemical and
23 biological agents. *See* Dkt. No. 74. Those tests spanned more than 20 years, beginning over 60
24 years ago. *See id.* Plaintiffs’ document requests seek extensive records concerning all of those
25 tests generated over that long span of time and up to the present. Ex. A to Wolverton Decl. (Instr.
26 10 to each set of RFPs: “Unless otherwise specified, each request calls for all documents created,
27 received or dated between January 1, 1940 and the date of YOUR response to the request.”).

1 The number of very old DoD and Army records concerning the Army’s chemical and
 2 biological tests involving human subjects is enormous, as illustrated by the multiple previous
 3 investigations, the effort expended to identify test volunteers and the fact that the tests began
 4 over 60 years ago and spanned more than 20 years. Decl. of Michael Kilpatrick ¶ 17 (Ex. 3).
 5 Searching for all of the DoD and Army records that Plaintiffs seek — which would require
 6 substantial by-hand review — would require an enormous expenditure of time and resources. *Id.*

7 Plaintiffs’ document requests encompass individual records of each of the thousands of
 8 test participants. *E.g.*, Pls.’ RFP No. 34 (“Copies of all participant agreements and consent forms
 9 prepared for, given to or received from participants in the TEST PROGRAMS . . .”); *see* Decl. of
 10 Lloyd Roberts Decl., U.S. Army Medical Research Institute of Chemical Defense
 11 (“USAMRICD”) ¶ 5 (Ex. 4) (USAMRICD maintains individual case records of 7,839 test
 12 participants). Reviewing each individual personnel file for the documents that Plaintiffs seek
 13 would have to done manually. Roberts Decl. ¶ 7. Reviewing the 6,723 personnel files of
 14 Edgewood test participants alone would take approximately 1,680 man-hours. *See id.* Such a
 15 review would severely impede the USAMRICD Safety, Surety, Security and Intelligence Office’s
 16 ability to fulfill its other important responsibilities. *Id.*

17 With respect to CIA, the Declaration of Patricia Cameresi, Associate Information Review
 18 Officer, Director of Science & Technology, CIA, explains that Plaintiffs’ expansive requests for
 19 CIA documents likewise would require extensive hand searches as CIA’s archived records exist
 20 only in hardcopy form. Decl. of Patricia Cameresi, CIA Associate Information Review Officer,
 21 Directorate of Science & Technology ¶ 18 (Ex. 1). As an example of the degree of burden that
 22 Plaintiffs’ document requests pose, the Cameresi Declaration explains that collecting and
 23 reviewing the extensive information about CIA contractors involved in Project OFTEN that is
 24 sought by RFPs 133 and 134 *alone* would require approximately three months.¹ *Id.* ¶¶ 19-20. As
 25

26 ¹ RFP 133 requests “All COMMUNICATIONS and MEETINGS between YOU and the
 27 “principal contractor’ under Project OFTEN, as described in the first paragraph of the
 28 DOCUMENT bearing Bates stamp VVA 023838, and all reports, recommendations, summaries,
 budgets, assignments, research, test results, and analysis CONCERNING the activities performed
 (Footnote continues on next page.)

1 all of Plaintiffs' RFPs directed to CIA documents encompass "all" documents related to a given
2 topic, *see* Ex. A to Wolverton Decl., "the task of searching the CIA's archived records in
3 response to Plaintiffs' RFPs would place an inordinate burden on Agency resources." *Id.* ¶ 21.
4 Searching and reviewing CIA's electronically stored information in response to all of Plaintiffs'
5 extremely broad document requests also would require an unreasonable amount of CIA resources.
6 *Id.* ¶¶ 22-23. The Cameresi Declaration illustrates the burden by describing a preliminary search
7 relating to just one RFP, RFP 79, "All DOCUMENTS CONCERNING any one or more of the
8 following: The administration of LSD in eye drops in connection with the TEST PROGRAMS,
9 and the health effects of the same." *Id.* ¶ 23. The search returned 236 hits on "lysergic"² and
10 over 9,000 on "LSD." *Id.* To determine the responsiveness of the hits, CIA personnel would
11 have to review each document, which would put a strain on already limited Agency resources. *Id.*
12 Given that, as further explained in Ms. Cameresi's declaration and discussed below, CIA has
13 already provided Plaintiffs with the released versions of the more than 20,000 pages of documents
14 concerning the Agency's behavioral research programs as well as CIA's extensive public releases
15 of information about its behavioral research programs, Plaintiffs are in substantially the same
16 position as CIA to search those documents.³ *Id.* ¶¶ 6, 24. Further, given the information that CIA
17 has produced to Plaintiffs, there is no reason to expect that the extreme burden of the searches
18 Plaintiffs seek to compel CIA to undertake would result in documents that are relevant to this
19 action. *Id.* ¶¶ 21, 25.

20 The extremely burdensome discovery that Plaintiffs seek is inconsistent with the
21 straightforward claims before the Court and therefore is not reasonably calculated to lead to the
22 discovery of admissible evidence. The Court has identified a confined set of issues for resolution,

23 (Footnote continued from previous page.)

24 by the principal contractor." Ex. A to Wolverton Decl. RFP No. 134 seeks the same information
25 for the Project OFTEN subcontractor described on the same page of the same document. *Id.*

26 ² LSD is the acronym for lysergic acid diethylamide.

27 ³ CIA also provided Plaintiffs with the finding aid it maintains for the 20,000 page compilation of
28 information about CIA's behavioral research programs. Wolverton Decl. ¶ 13.

1 and a wide-ranging investigation is not necessary to decide them.⁴ Defendants therefore have
2 moved for a protective order limiting the scope of discovery. Defs.' Mot. for Protective Order
3 Limiting the Scope of Discovery. Dkt. No. 140.⁵

4 **3. Defendants' Document Searches and Productions.**

5 **a. Plaintiffs' Mischaracterizations**

6 Defendants take issue with numerous contentions made by Plaintiffs in their recent
7 discovery motions, in particular with regard to the nature and scope of Defendants' responses to
8 Plaintiffs' document requests.⁶

9 First, Plaintiffs wrongly assert that no documents have been identified as having been
10 produced by CIA. Pls.' Mot. at 2 ("Notably, Defendants have yet to identify a single document
11 produced by the CIA . . ."); *accord id.* at 17. CIA produced documents to Plaintiffs both in
12

13 ⁴ Contrary to Plaintiffs' characterization of the parties' meet-and-confer efforts, Defendants have
14 exercised their best efforts to negotiate a workable scope of discovery, including making two
15 proposals to target information bearing on the claims before the Court while avoiding undue
16 burden. Significantly, Plaintiffs' motion and supporting declaration omit Defendants' second
17 proposal, made July 30, 2010, which proposed to focus additional document searches on DoD and
18 Army records addressing known or suspected health effects associated with substances tested and
19 documents addressing consent to testing, as well as extensive documentation of Army's chemical
20 and biological tests generally, starting with records examined in previous investigations of the
21 tests. Ex. F to Wolverton Decl. However, Defendants' efforts have not been reciprocated by
22 Plaintiffs, who refused to make counter-proposals to address any deficiencies they perceived in
23 Defendants' proposals or to propose a list of key words or search terms as Plaintiffs indicated
24 they would provide during the parties' June 30 meet-and-confer. Contrary to Plaintiffs' assertion
25 that Defendants' proposals attempted to unreasonably limit Plaintiffs' ability to obtain additional
26 discovery, Defendants proposed that, given the mass of information at issue, discovery would be
27 both more productive and more expeditious if it proceeded based on agreed-upon categories of
28 information rather than in response to specific RFPs. Wolverton Decl. ¶¶ 9, 12. Defendants
further offered to consider discrete requests for specific additional documents and to endeavor in
good faith to provide such documents where they could be located through reasonable search
efforts and are not protected from disclosure by privilege or otherwise. *See id.*, Ex. F.

⁵ Defendants have also moved for a protective order staying further discovery until the ongoing
DoD investigation is complete. Dkt. No. 134. Because that motion includes a request for
modification of the Case Management Order, it is noticed for hearing before Judge Wilken.

⁶ Defendants also emphatically reject Plaintiffs' implication that Defendants are deliberately
attempting to delay discovery, "knowing that the named Plaintiffs are aging veterans with a
myriad of ailments, and at least one has terminal cancer." Pls.' Mot. at 2. The suggestion that
any of Defendants' actions in this lawsuit bears any relation to the health or age of the named
Plaintiffs or other veterans, much less that they are directly connected as part of some sort of
"strategy of delay," is as baseless as it is offensive.

1 response to Plaintiffs' first set of RFPs and as part of Defendants' Initial Disclosures. Cameresi
2 Decl. ¶¶ 12-13. In addition, CIA produced to Plaintiffs more than 20,000 pages of documents
3 concerning CIA's behavioral research programs outside of discovery. Id. ¶¶ 6, 12, 24.
4 Defendants' discovery responses make it quite plain that CIA has produced specific documents.
5 See, e.g., Ex. C to Wolverton Decl. (Defs.' Am. Interrog. Resp. No. 4 (stating that "CIA
6 previously produced documents responsive RFP 14"). Indeed, some of Plaintiffs' subsequent
7 RFPs specifically discuss documents produced to Plaintiffs by the CIA as Initial Disclosures, with
8 reference to specific Bates numbers. See, e.g., Pls.' RFP Nos. 128, 138, and 139 (Ex. A to
9 Wolverton Decl.). It is therefore not tenable that Plaintiffs were unaware that CIA has, in fact,
10 produced documents.

11 Second, Plaintiffs erroneously assert that it appears that DoD and Army have not yet
12 searched for documents at Edgewood Arsenal, which was the Army's center for chemical
13 research. Pls.' Mot. at 4, 8 n.8. Edgewood and Ft. Detrick were the focus of DoD's and Army's
14 searches in response to Plaintiffs' first set of RFPs. Decl. of DoD Program Analyst Anthony Lee
15 ¶¶ 2-3 (Ex. 2). And Defendants have informed Plaintiffs that those locations have been the focus
16 of DoD's and Army's ongoing document searches since Defendants' production in response to
17 Plaintiffs' first set of RFPs. Ex. F to Wolverton Decl. (Letter of July 30, 2010 to Pls. at 2).

18 **b. DoD and Army Searches and Productions**

19 In response to Plaintiffs' first set of document requests and subject to Defendants'
20 objections thereto, DoD and Army conducted searches at offices at Edgewood and Fort Detrick
21 where documents concerning the Army's chemical and biological tests were expected to reside:
22 the U.S. Army Medical Research Institute of Chemical Defense (USAMRICD), the Edgewood
23 Arsenal Chemical Biological Center (ECBC) and the U.S. Army Medical Research Institute of
24 Infectious Diseases (USAMRIID). Lee Decl. ¶¶ 2-3. USAMRICD, located at Edgewood, is
25 responsible for medical chemical countermeasures research and development and maintains
26 certain documents related to the Army's use of human volunteers, including historical documents
27 from the Medical Research Volunteer Program. Roberts Decl. ¶ 2. ECBC, also located at
28

1 Edgewood, is Army's "principal research and development center for non-medical chemical and
2 biological defense, focusing on chemical and biological agent detection, protection, and
3 decontamination." Decl. of Patsy A. D'Eramo, Jr. ¶ 1 (Ex. 5). USAMRICD and USAMRIID are
4 the successor organizations to the units that conducted biological and chemical tests using
5 servicemembers at Fort Detrick and Edgewood. Decl. of Raymond Laurel ¶ 1 (Ex. 6). DoD and
6 Army produced to Plaintiffs the results of the searches with the exception of eight documents
7 identified on Defendants' privilege log and one document that fell within Defendants' objections,
8 a report concerning Project 112/SHAD -- a test program which the complaint specifically
9 excludes from this action -- that is publicly available and nevertheless will be produced. Lee
10 Decl. ¶ 2; Wolverton Decl. ¶ 7.

11 Included in production for DoD and Army are documents concerning possible health
12 effects associated with exposure to substances tested, e.g., VA's study guide "Health Effects from
13 Chemical, Biological and Radiological Weapons," which includes a chapter on "Long-Term
14 Health Effects amongst Experimental Subjects"; including the LSD Follow-up Study Report; a
15 copy of *Medical Aspects of Chemical and Biological Warfare*, which includes a chapter on "Long
16 Term Health Effects of Nerve Agents And Mustard" and a list of 126 references; and lists of
17 substances tested at Edgewood Arsenal and information about their chemical properties.
18 Wolverton Decl. ¶¶ 15-18. Also included in the production are documents with detailed
19 information about the identify and characteristics of the individual substances Army tested, for
20 example: lists of the chemicals tested on human subjects describing their composition; the "US
21 Chemical and Biological Tests Repository Acronym List"; the above-referenced *Medical Aspects*
22 *of Chemical and Biological Warfare*, which also includes, *inter alia*, a chapter on incapacitating
23 agents which contains 56 references; and the National Research Council ("NRC") *Review of*
24 *Acute Human-Toxicity Estimates for Selected Chemical-Warfare Agents*. *Id.* ¶¶ 17, 19-20.

25 DoD and Army's production also includes a copy of the database that DoD is compiling
26 through its ongoing investigation and that identifies each servicemember test participant, the
27 substance(s) tested, and provides additional information about the tests, including the amount
28

1 administered and route of administration (e.g., oral), where available. *Id.* ¶ 2. DoD and Army
2 also produced the individual test records of each of the named individual Plaintiffs. *Id.*

3 As a result of the parties' meet-and-confer discussions, DoD and Army are searching for
4 additional documents related to Army chemical and biological testing at Edgewood and other test
5 sites. The searches encompass the documents examined by the Army Inspector General ("Army
6 IG") during its 1975-1976 investigation of the Army's use of volunteers in chemical agent
7 research, documents pertaining to health effects of the substances that the Army tested. *See*
8 Kilpatrick Decl. ¶ 16. And as a result of the Court's July 13 Order indicating that information
9 regarding consent could be relevant, *see* Dkt. No. 112 at 5, the search also seeks documents
10 relating to test participants' consent. *See* Kilpatrick Decl. ¶ 16.

11 **c. CIA's Limited Nexus to Testing on Military Personnel and the Agency's Searches**
12 **and Productions**

13 Behavioral research conducted or sponsored by the CIA has been the subject of substantial
14 congressional and public attention. Cameresi Decl. ¶ 6. During the 1970s and 1980s, the CIA
15 conducted exhaustive hand searches of its files to identify all records relating to any drug testing
16 program sponsored by CIA in response to Congressional investigations, executive investigations,
17 numerous requests under the Freedom of Information Act ("FOIA"), civil litigation, and an
18 internal investigation commissioned by the Director of Central Intelligence to notify human
19 subjects of CIA research programs. *Id.* ¶ 7. Information about the CIA's behavioral research
20 programs that resulted from those searches has been made available to the public. *Id.* ¶¶ 6-7.
21 Accordingly, after 1975, the topic of CIA's behavioral research programs became "one of the
22 most thoroughly investigated and exposed aspects of the CIA's past activities." *Id.* ¶ 5.

23 The Cameresi Declaration explains that "[a]fter scouring the Agency for documents
24 through these investigations and conducting extensive interviews of CIA personnel and DoD
25 personnel, the Agency has concluded that it did not fund or conduct drug research on military
26 personnel." *Id.* ¶ 12. The Declaration explains that based on the extensive searches of CIA
27 records relating to its behavioral research programs only a discrete portion even arguably could
28 relate to Plaintiffs' claims: those concerning "Project OFTEN," which "contemplated, but did not

1 consummate, funding on military volunteer subjects at Edgewood Arsenal.” *Id.* ¶ 8; *see also* Ex.
2 O to Wolverton Decl. (1977 CIA memo stating that, with regard to Project OFTEN, “I do not
3 believe that any drug or substance was actually ... used in human experimentation”), *id.*, Ex. N
4 (1975 CIA memo recounting that Dr. Van Sim, chief of clinical research at Edgewood, “was
5 positive that no work on human subjects was performed under the contract with the Agency”).

6 CIA produced the results of its review of its records concerning Project OFTEN in its
7 Initial Disclosures. Cameresi Decl. ¶ 12. CIA has also produced documents in response to
8 Plaintiffs’ first set of RFPs resulting from its searches for documents relating to the named
9 Plaintiffs, Edgewood Arsenal (where Plaintiffs allege to have participated in Army drug research)
10 and Fort Detrick, except for the documents identified as privileged on Defendants’ privilege log.
11 *Id.* ¶ 13. With respect to the 1975 CIA Records Retirement Request concerning Project OFTEN
12 documents that Plaintiffs’ motion references, Pls.’ Mot. at 5, CIA’s search included the
13 documents described in that retirement request but identified none responsive to Plaintiffs’ first
14 set of RFPs. Supplemental Cameresi Decl. ¶ 6 (Ex. 7). However, documents described therein
15 were included in CIA’s Initial Disclosures. *Id.* In addition, CIA has provided Plaintiffs outside
16 of discovery over 20,000 pages of documents concerning CIA’s behavioral research programs,
17 including documents relating to its broadest such program, named MKULTRA, even though that
18 program did not involve servicemembers as test subjects. Cameresi Decl. ¶¶ 6, 12, 24.

19 **4. The Ongoing DoD Investigation and Previous Investigations of Army Chemical** 20 **and Biological Test Programs**

21 Consistent with congressional direction and under Congress’s supervision, DoD is in the
22 midst of an investigation to identify all servicemembers who participated in the Army’s chemical
23 and biological tests and to compile as much information about individual tests and exposures as
24 possible, including “the test names, test objectives, chemical or biological agents involved, and
25 number of servicemembers and other personnel potentially affected by each test from 1942 to the
26 present timeframe.” Kilpatrick Decl. ¶¶ 10, 13-15 & Ex. 1 thereto (Stmnt. of Work, CBRNIAC
27 Task 729 ¶ 3.5). DoD is compiling the information on individual exposures in its Chemical and
28

1 Biological Tests Repository (“Chem-Bio Database”).⁷ *Id.* As referenced above, Defendants have
2 produced to Plaintiffs a copy of the database as of March 2010.

3 In addition to this ongoing DoD investigation, the Army’s chemical and biological tests
4 involving human subjects have been the subject of previous large-scale investigations, the reports
5 of which are either publicly available or have been produced to Plaintiffs. *See id.* ¶¶ 3-10. In
6 1975 and 1976, in response to congressional and public inquiry regarding the Army’s role in
7 researching hallucinogenic drugs, the Army IG conducted the above-referenced investigation of
8 the Army’s chemical agent testing between 1950 and 1975. *Id.* ¶ 3. The following year, the
9 Army published a report on the biological testing program between 1942 and 1977 at Fort
10 Detrick, Maryland, which is publicly available. *Id.* DoD has also expended considerable
11 resources to determine long-term health effects on test participants, including on a follow-up
12 study of test subjects exposed to LSD conducted in the late 1970s and investigations conducted
13 by the NRC in the early 1980s and in 2003 on possible long-term health effects of chemical
14 substances tested at Edgewood Arsenal. *Id.* ¶¶ 4–9. The results of those studies likewise have
15 been produced to Plaintiffs or are publicly available. *Id.* As a result of those investigations,
16 congressional and other public inquiries concerning the Army’s tests since the 1970s, the subject
17 has been aired extensively. *Id.* ¶ 11.

18 ARGUMENT

19 As described above, Defendants have substantial information concerning the tests at issue,
20 and as a result of meet-and-confer discussions and the Court’s July 13 Order DoD and Army are
21 searching for additional documents. However, Plaintiffs’ document requests are vastly overbroad
22 in light of the discrete APA and DJA claims before the Court. They encompass an enormous
23

24 ⁷ A primary objective of DoD’s investigation is to enable test participants to receive pertinent
25 information about the tests. Kilpatrick Decl. ¶ 15. Once test information is gathered for a given
26 participant, DoD enters it into the above-referenced Chem-Bio database and transmits it to VA so
27 that VA may notify the participant of the potential exposure and, in case the individual has health
28 concerns, provide guidance on scheduling a free clinical examination at a VA health care facility,
applying for VA health care benefits, and filing a VA disability claim. *Id.* The DoD
investigation is scheduled for completion in September 2011. *Id.* ¶ 14.

1 amount of very old documents, and the substantial burden of making all of the productions
2 Plaintiffs demand dwarfs any potential relevance.

3 **I. Legal Standard**

4 While the Federal Rules of Civil Procedure provide for liberal discovery, they do not
5 entitle a party to materials not reasonably calculated to lead to the discovery of admissible
6 evidence. Fed. R. Civ. P. 26(b)(1); *accord* Fed. R. Civ. P. 26(b)(1) advisory committee's note to
7 2000 amendment ("The rule change signals to the court that it has the authority to confine
8 discovery to the claims and defenses asserted in the pleadings . . ."). The rules also provide for
9 discovery to be limited where "the burden or expense of the proposed discovery outweighs its
10 likely benefit, considering the needs of the case, the amount in controversy, the parties' resources,
11 the importance of the issues at stake in the action, and the importance of the discovery in
12 resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii).

13 **II. Substantial Health Effects Information Has Been Produced and is Available**
14 **Publicly, and DoD and Army Are Searching for Additional Documents.**

15 Plaintiffs' claim for notification of information about tests they underwent, including of
16 known or suspected health effects, is brought under section 706(1) of the APA, which authorizes
17 courts to compel "agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. §
18 706(1). *See* Order of Jan. 19, 2010 at 14. As Judge Wilken's January 19 Order recognizes,
19 section 706(1) is directed to "discrete agency action." *Id.* at 15. The extensive and burdensome
20 discovery that Plaintiffs seek is not necessary to determine whether the Court should compel the
21 "discrete agency action" of notifying test participants of information about the tests based on the
22 Wilson Directive and Army regulation 70-25. *See id.* at 14-15.

23 Defendants have produced a substantial amount of material relating to possible health
24 effects associated with tested substances, and a great deal of information on the subject is
25 available publicly, as described above. *See supra* at 9. And DoD and Army have agreed as a
26
27
28

1 result of the parties' meet-and-confer discussions to search for additional documents pertaining to
2 health effects associated with tested substances.⁸ See Kilpatrick Decl. ¶ 16.

3 However, many of the requests for documents included in the motion to compel's section
4 on health effects are overbroad and unduly burdensome. To address Plaintiffs' entitlement to an
5 order requiring Defendants to provide test participants with information, including about possible
6 health effects, it is not necessary to produce the extensive documentation from thousands of
7 individual volunteer records that Plaintiffs' requests encompassed. See, e.g., RFP Nos. 21
8 (encompassing all individual complaints of physical or psychological harm related to tests) (Ex.
9 A to Wolverton Decl.). As described above, searches of individual test records would require
10 extensive by-hand review and severely impede USAMRICD staff's ability to fulfill other
11 important responsibilities. Roberts Decl. ¶ 7.

12 With respect to RFP 29, which Plaintiffs' motion specifically addresses, Pls.' Mot. at 11-
13 12, the Roberts Declaration explains that USAMRICD has no record of any test volunteer dying
14 during testing and does not maintain a record of hospitalizations, emergency room visits,
15 diseases, long-term medical conditions, or deaths related to participation in test programs.
16 Roberts Decl. ¶ 8. To determine whether a test volunteer was hospitalized, taken to an
17 emergency room or experienced a medical condition, individual test records would have to be
18 reviewed. Again, searches of individual test records would require such a large amount of time
19 and resources as to be unduly burdensome for the reasons explained above and in response to the
20 RFP. See Defs.' Resp. to RFP 29 (explaining that the request is "unduly burdensome insofar as it
21 seeks without limitation medical records and records of deaths over a period of time spanning
22 more than 50 years . . .") (Ex. A to Wolverton Decl.). With respect to Plaintiffs' challenge to the
23 objection to RFP 29 on the ground that it is not limited to servicemembers, Pls.' Mot. at 12, DoD
24 and Army's additional searches for information about possible health effects are not limited to

25 ⁸ Indeed, counsel for Defendants told counsel for Plaintiffs at the outset of the meet-and-confer
26 process that DoD and Army had agreed to conduct additional searches for information concerning
27 health effects of tested substances. Wolverton Decl. ¶ 8. Despite that representation, Plaintiffs
28 chose to file the instant motion.

1 information based on servicemember tests. *See* Kilpatrick Decl. ¶ 16. With respect to CIA, the
2 Cameresi Declaration explains that exhaustive searches have led the Agency to conclude that it
3 did not fund or conduct research on military personnel. Cameresi Decl. ¶¶ 8-12.

4 With respect to RFP 33's request for documents concerning "current test programs," *see*
5 Pls.' Mot. at 18, no individual Plaintiff alleges tests following 1976, when Army suspended
6 chemical tests using human subjects at Edgewood, Roberts Decl. ¶ 4. Because Plaintiffs do not
7 allege testing post-1975 and Plaintiffs cite nothing to suggest that testing continued after 1975,
8 RFP 33 is not reasonably calculated to lead to discovery of admissible evidence. Regarding RFP
9 Nos. 75-77, which seek documents concerning the NRC's studies on possible long-term health
10 effects of exposure to chemical agents, *see* Pls.' Mot. at 11, USAMRICD has the reports resulting
11 from the studies but has not identified documents related to the reports. Roberts Decl. ¶ 9.

12 In light of the substantial information regarding health effects that has been produced and
13 is publicly available, DoD's and Army's searches for additional documents concerning possible
14 health effects, the ongoing DoD compilation of information from individual records, the burden
15 of the additional productions that Plaintiffs demand with respect to health effects information is
16 disproportionate to any potential relevance. Plaintiffs' motion to compel such further productions
17 therefore should be denied.

18 **III. DoD and Army Have Produced Detailed Information About the Army's**
19 **Chemical and Biological Tests and Are Conducting Additional Searches.**

20 Plaintiffs also incorrectly suggest that Defendants have not produced documents
21 describing the tests, how they were conducted and details about the substances tested. The 1976
22 Army IG Report that DoD and Army produced to Plaintiffs discusses in great detail the tests, their
23 role in addressing the threat of chemical warfare during the Cold War Era, and how they were
24 conducted. *See* Ex. H to Wolverton Decl. (Table of Contents and Forward to Army Inspector
25 General Report, "Use of Volunteers in Chemical Agent Research," March 10, 1976⁹). DoD and

26 _____
27 ⁹ The entire Army IG report is voluminous. Should the Court wish to review it Defendants will
28 readily provide a copy upon the Court's request.

1 Army also have produced substantial information about the identity and characteristics of
2 individual substances that the Army tested. The production includes a list of the chemicals tested
3 on human subjects at Edgewood Arsenal that describes in detail the composition of the chemicals,
4 including their chemical type and pharmacological type as well as diagrams of the molecular
5 structures. Also included is the “US Chemical and Biological Tests Repository Acronym List”
6 and a list of tests conducted at Edgewood Arsenal and the agents tested that explains Army
7 designation codes. DoD and Army produced the above-referenced *Medical Aspects of Chemical*
8 *and Biological Warfare*, which also includes, *inter alia*, a chapter on incapacitating agents.
9 Regarding toxicity, they produced the *Review of Acute Human-Toxicity Estimates for Selected*
10 *Chemical-Warfare Agents* prepared by the National Research Council’s Committee on
11 Toxicology. Wolverton Decl. ¶¶ 17-20.

12 As described above, the ongoing DoD investigation is compiling detailed information
13 about each individual servicemember test, including the substance tested and, where available, the
14 dose (quantity) administered. Defendants produced a copy of the compilation as of March 2010
15 from which servicemember names were redacted.¹⁰ *Id.* ¶ 12.

16 In addition, as previously referenced DoD and Army are conducting additional searches
17 for documents related to the Army’s chemical and biological tests. Kilpatrick Decl. ¶ 16. This
18 search encompasses documents examined during the 1975-1976 Army IG investigation, *id.*,
19 which took place shortly after the Army’s human volunteer test program concluded and is the best
20 record of the program of which the Secretary of the General Staff for the Medical Research and
21 Materiel Command (the higher headquarters for USAMRIID and USAMRICD) is aware. Decl.

23 ¹⁰ As set forth in Defendants’ response to Plaintiffs’ motion for protective order and referenced
24 above, Defendants are amenable to an appropriate protective order covering third-party
25 information. *See* Dkt. No. 139. Entry of such an order will enable Defendants to provide an
26 unredacted copy of the DoD Chem-Bio database, which identifies the individual servicemember
27 test participants, as well as unredacted versions of the other documents Defendants produced
28 from which test participant names were redacted. Regarding footnote 12 to Plaintiffs’ motion, the
cover letter to the production mistakenly included RFP 44 among the RFPs to which the database
is responsive. RFP 26 was correctly included as the database is a registry of participants in
Army’s chemical and biological tests.

1 of Lt. Col. Raymond Laurel ¶¶ 1-2. However, given the age of many of the documents generated
2 in connection with the tests and the long period of time over which the tests occurred, it would be
3 unduly burdensome to produce “all” unpublished papers and reports concerning test results, *see*
4 RFP No. 25. *See* Kilpatrick Decl. ¶ 17. As explained above, RFP 65’s request for documentation
5 regarding the storage, handling and transport is not reasonably calculated to lead to discovery of
6 evidence bearing on the claims before the Court. *See supra* at 4.

7 With respect to Plaintiffs’ document requests concerning “septal implants,” Defendants’
8 written responses explain that “after [] conducting a reasonable search, Defendants have
9 identified only information concerning nasal implants used in the 1950s to treat pilots for disease
10 and radiation contamination.” Ex. B to Wolverton Decl. (Defs.’ Resp. to RFP No. 7). Further
11 supporting DoD’s position is the fact that no mention is made of such experimentation in the
12 comprehensive Army IG report. *See* Ex. H to Wolverton Decl. (Table of Contents). Because
13 Defendants have been unable to find any information on purported “septal implants” on
14 servicemembers, there can be no basis to further expand discovery to cover alleged implants in
15 non-servicemembers.

16 Given the productions Defendants have already made, the ongoing DoD investigation, and
17 DoD’s and Army’s continuing searches for documents concerning the Army’s chemical and
18 biological tests, Plaintiffs’ motion to compel further documents about how tests were conducted
19 and the substances that were tested should be denied.

20 **IV. DoD and Army Are Searching for Documents Concerning Consent.**

21 As set forth above, following the Court’s July 13 Order, DoD and Army are searching for
22 documents concerning test volunteers’ consent to tests apart from searches of individual test
23 records. *See* Kilpatrick Decl. ¶ 16. It is also noteworthy that the Army IG report discusses
24 consent of test subjects at length. *See* Ex. H to Wolverton Decl. (Army IG Report Table of
25 Contents). Again, DoD’s and Army’s ongoing searches encompass searches for the documents
26 that the Army IG examined. *E.g.*, Kilpatrick Decl. ¶ 16.

1 However, the large number of individual test participants makes unduly burdensome the
2 production of every individual participant agreement and consent form, as Plaintiffs seek to
3 compel, Pls.' Mot. at 15-16. As described above, to make such a production, Army would have
4 to search each individual test volunteer's test record by hand for the agreement and consent form.
5 Searching the nearly 8,000 test records for individual participant agreements and consent forms
6 would take nearly 2,000 man-hours. *See* Roberts Decl. ¶¶ 5, 7.

7 In light of DoD's and Army's agreement to search for documents concerning consent of
8 test participants, including the documents that the Army IG Report examined, and the extreme
9 burden associated with Plaintiffs' requests for information from individual test records, the
10 burden of further productions in response to the RFPs Plaintiffs assert address consent is
11 disproportionate to any potential relevance. Plaintiffs' motion to compel such further productions
12 therefore should be denied.

13 **V. DoD and Army Are Searching for Records of Army Chemical and Biological**
14 **Tests Conducted at Other Test Sites.**

15 Plaintiffs challenge Defendants' confining their responses to tests at Edgewood Arsenal.
16 Pls.' Mot. at 8. However, each of the named individual Plaintiffs, as well as the two proposed
17 additional Plaintiffs, alleges participation in tests only at Edgewood. Second Am. Compl. ¶¶ 29-
18 87 (Dkt. No. 53); Proposed Third Am. Compl. ¶¶ 201-230 (Dkt. No. 88-1). No class has been
19 certified, nor have Plaintiffs moved for class certification. Defendants therefore properly
20 objected to the RFPs to the extent they concerned Army tests at other locations. Nevertheless,
21 DoD and Army's ongoing document searches encompass all of the Army's chemical tests on
22 servicemembers, regardless of site of testing. *See* Kilpatrick Decl. ¶ 16; *see also* Ex. E to
23 Wolverton Decl. (Letter of July 12, 2010 to Pls. at 1-2) (proposing searches for health effects
24 information relating to substances tested on servicemember participants in chemical and
25 biological agent tests at any Army installation).

26 Because DoD and Army's ongoing searches encompass all Army tests on military
27 servicemembers and, as explained below, there is no basis for further discovery concerning CIA
28 tests, Plaintiffs' motion to compel with respect to additional tests should be denied.

1 **VI. Defendants Have Produced Information About Army-Funded Entities that**
2 **Tested Civilians, and DoD and Army’s Additional Searches Encompass**
3 **Documents that May Identify Army Test Officials.**

4 Plaintiffs incorrectly suggest that Defendants have refused to produce documents with
5 information about entities and individuals involved in tests conducted or funded by Army. *See*
6 *Pls.’ Mot.* at 20. The Army IG Report discusses at length and identifies based on what was found
7 to be “the most accurate data available” the civilian entities whose chemical research involving
8 civilian subjects Army funded through contracts. *See Ex. H to Wolverton Decl.* (excerpts of
9 chapter X “Contracts with Civilian Institutions” and “Contract Chart”). DoD and Army’s
10 continuing searches for information about the Army’s chemical and biological tests encompasses
11 searches for documents that may identify officials involved in planning or implementing the tests.
12 *See Roberts Decl.* ¶ 10. USAMRICD does not maintain a list of personnel who supervised testing
13 or rosters of personnel assigned to Edgewood Arsenal at the time of the tests. *Id.*

14 Given the Army IG Report’s identification of civilian research entities with which Army
15 contracted and DoD’s and Army’s continuing searches for documents that may identify Army
16 personnel involved in planning or implementing tests, Plaintiffs’ motion to compel further
17 information regarding entities and personnel supervising or conducting tests should be denied.

18 **VII. Defendants Have Produced Documentation of CIA’s Limited Nexus to Tests**
19 **on Military Servicemembers, and an Order Compelling Further Discovery of**
20 **CIA Is Unwarranted.**

21 As explained above, CIA concluded, based on extensive investigations that “scour[ed]”
22 the Agency for documents about its behavioral research programs and conducted extensive
23 interviews of CIA as well as DoD personnel, that its nexus to drug research on military personnel
24 was limited to DOD tests contemplated for a single substance in 1973 that were not consummated
25 before CIA terminated its funding of the program. *Cameresi Decl.* ¶ 11. Based on these
26 investigations and their wide-ranging review of documents concerning on CIA behavioral
27 research programs, there is reason to believe that only a discrete portion even arguably could
28 relate to Plaintiffs’ claims: those concerning “Project OFTEN,” which “contemplated, but did not
consummate, funding on military volunteer subjects at Edgewood Arsenal.” *Id.* ¶ 8. CIA has

1 produced to Plaintiffs the results of its review of Agency records concerning Project OFTEN, as
 2 well as the results of its searches for documents relating to the named Plaintiffs, Edgewood
 3 Arsenal and Fort Detrick, except for the documents identified as privileged on Defendants’
 4 privilege log.¹¹ *Id.* ¶¶ 12-13. In addition, CIA has provided Plaintiffs outside of discovery over
 5 20,000 pages of documents concerning CIA’s behavioral research programs, including documents
 6 relating to its broadest such program, named MKULTRA, even though that program did not
 7 involve servicemembers as test subjects. *Id.* ¶¶ 6, 12, 24.

8 Additional searches beyond these topics in response to Plaintiffs’ extensive and wide-
 9 ranging discovery requests would be highly unlikely to identify additional documents relevant to
 10 Plaintiffs’ claims.¹² *Id.* ¶ 23. However, they would impose an extreme burden on CIA’s limited
 11 resources, as Ms. Cameresi’s Declaration explains. *Id.* ¶¶ 15-23. Plaintiffs’ motion to compel
 12 further discovery of CIA therefore should be denied.

13 **VIII. Plaintiffs’ Motion Should Be Denied With Respect To Documents Concerning**
 14 **Government Investigations and Litigation.**

15 As previously discussed, the multiple investigations, congressional and other public
 16 inquiries concerning human testing since the 1970s have resulted in a great deal of information
 17 about the tests being available publicly. DoD and Army are in the process of searching for the
 18 documents that the 1975-1976 Army IG investigation examined. Kilpatrick Decl. ¶ 16. And
 19 Defendants have produced the report of that investigation. Wolverton Decl. ¶ 16.

20 _____
 21 ¹¹ Following the stay of discovery Defendants have requested or, if the request is denied
 22 following that ruling, to the extent that CIA has nonprivileged documents responsive to relevant
 23 RFPs within Plaintiffs’ additional sets of document requests resulting from its searches of its
 24 records for this matter to date, CIA will produce them.

25 ¹² Plaintiffs’ theory of relevance appears to be that cut-outs and contracts will lead them to
 26 information concerning Army testing programs or unearth some sort of evidence that CIA was
 27 involved in — and is therefore liable for — servicemember testing. Whatever may be said for
 28 these attenuated theories of relevance, Plaintiffs’ questions have been answered (in the negative)
 in the numerous investigations already conducted and by documents already produced to them.
 Plaintiffs’ allegations regarding CIA’s destruction of documents relating to MKULTRA are
 without merit. As explained above, CIA has concluded after exhaustive investigation that Project
 OFTEN was separate from MKULTRA and CIA’s review of its records reflects that only Project
 OFTEN contemplated research using military personnel. *See* Cameresi Declaration ¶ 12.

1 In DoD's and Army's ongoing searches, a compilation of documents titled "Human
2 Volunteer Historical Information – US Senate Inquiries" has been identified. Laurel Decl. ¶ 4. It
3 will be produced once an appropriate protective order is in place. See Defs.' Resp. to Pls.' Mot.
4 for Protective Order (explaining need for protective order covering technical data related to
5 chemical and biological substances and testing that is unclassified or has been declassified) (Dkt.
6 No. 139). No other compilations of congressional investigation documents are maintained at
7 USAMRICD or USAMRIID. *Id.* As described above, those commands are the successor
8 organizations to the units that conducted biological and chemical tests. *Id.* ¶ 1.

9 Given the multiple investigations of the tests at issue and studies of possible health effects
10 associated with test substances, there is no reason to believe that litigation records would contain
11 any relevant information that has not been previously disclosed as a result of those investigations
12 and studies or in court records. Further, court files are matters of public record and equally
13 available to Plaintiffs, and Defendants properly objected to Plaintiffs' request for them. See, e.g.,
14 *Tequila Centinela, S.A. de C.V. v. Bacardi & Co., Ltd.*, 242 F.R.D. 1, 11 (D.D.C. 2007)
15 ("Typically, courts do not order discovery of public records which are equally accessible to all
16 parties."); accord *Krause v. Buffalo and Erie Cty. Workforce Dvp. Consortium*, 425 F. Supp. 2d
17 352, 374-75 (W.D.N.Y. 2006).¹³ Given that DoD and Army are searching for the documents
18 examined during the 1975-1976 Army IG investigation, that they will provide a compilation of
19 documents regarding U.S. Senate inquiries, and the lack of reason to believe litigation files would
20 contain relevant information not already disclosed, Plaintiffs' motion to compel further
21 documents concerning government investigations and litigation should be denied.

22 Given that DoD and Army are searching for documents examined during the 1975-1976
23 Army IG investigation and trial and deposition transcripts for cases relating to Army tests, that

24 _____
25 ¹³ Because of CIA's limited nexus to drug research on military personnel, litigation documents
26 from lawsuits concerning CIA research projects, such as *Orlikow v. United States*, would not be
27 relevant to Plaintiffs' claims in any event. *Orlikow* was a suit under the Federal Tort Claims Act
28 concerning an alleged research project funded by CIA. The allegations in that case were that the
entire research activities took place at a civilian institution outside of the United States. *Orlikow*
v. United States, 682 F. Supp. 77, 79 (D.D.C. 1988).

1 they will provide a compilation of documents relating to Senate inquiries, Plaintiffs' motion to
2 compel further documents concerning government investigations and litigation should be denied.

3 **IX. Defendants Have Not Made Improper Wholesale or Boilerplate Objections.**

4 Plaintiffs incorrectly assert that Defendants have made improper wholesale, boilerplate
5 objections. Pls.' Mot. at 7. The objections set forth in the "General Objections" section of
6 Defendants' Response apply to many of Plaintiffs' 77 document requests. Rather than copy the
7 same objection each time that it applies to a particular request, Defendants referred to the
8 objection by number in responding to the particular request. *See* Defs.' Resp. to Pls.' First Set of
9 RFPs (Ex. B to Wolverton Decl.). Additionally, all of Defendants' general objections apply to
10 each RFP in order to cover the possibility that documents might be identified in the course of
11 document searches that Defendants did not reasonably anticipate in formulating their written
12 response to the RFPs. This use of general objections is not an improper boilerplate use of general
13 objections, as Plaintiffs suggest. *Cf. Duran v. Cisco Sys., Inc., L.L.C.*, 217 F.R.D. 499, 501 (C.D.
14 Cal. 2003) (addressing list of general objections without individual objections on list being tied to
15 specific discovery requests).¹⁴

16 Contrary to Plaintiffs' suggestion, Defendants have supported objections of undue burden
17 with an explanation of the burden that would be entailed in searching for all documents
18 responsive to the request. Defs.' Resps. to RFPs 25, 29, 34, 51, 61, 63 and 65¹⁵ (Ex. B to
19 Wolverton Decl.). For example, Defendants objected to RFP 34 (copies of all participants
20 agreements and consent forms) as follows: "Defendants object to this Request as unduly
21 burdensome insofar as it encompasses documents pertaining to several thousand individuals . . ."

22
23 _____
24 ¹⁴ Plaintiffs cite no authority for their suggestion that each individual Defendant was obligated to
25 prepare a separate set of written responses to Plaintiffs' single set of document requests.
26 Individual responses to each of Plaintiffs' document requests from each of the eight named
27 Defendants would be unwieldy. To that the extent there was any uncertainty as to the searches
28 conducted, the Lee and Cameresi Declarations explain the searches.

¹⁵ All are partial objections and Defendants produced responsive documents, with the exception
of in response to RFP 51. *See* Ex. B to Wolverton Decl.

1 Ex. B to Wolverton Decl.¹⁶ And Defendants' objections explain that to the extent the RFPs
2 encompass all documents received or dated between 1940 and the present, a span of over 70
3 years, they are unduly burdensome. *Id.* (Defs.' General Objection No. 10). The declarations of
4 DoD, Army and CIA officials elaborate on the burden associated with the additional discovery
5 Plaintiffs seek beyond that which DoD and Army are conducting, as discussed above.

6 **X. Defendants Properly Objected to Producing Documents Publicly Available or**
7 **Equally Available to Plaintiffs.**

8 Defendants are not obligated to produce through discovery documents that are publicly
9 available or equally available to Plaintiffs. *See, e.g., Tequila Centinela, S.A. de C.V.*, 242 F.R.D.
10 at 11 ("Typically, courts do not order discovery of public records which are equally accessible to
11 all parties."); *Krause*, 425 F. Supp. 2d at 374-75 ("[it] is well-established that discovery need not
12 be required of documents of public record which are equally accessible to all parties") (*quoting*
13 *SEC v. Samuel H. Sloan & Co.*, 369 F. Supp. 994, 995 (S.D.N.Y.1973)). Nevertheless,
14 Defendants' production includes documents that are publicly available, as Plaintiffs recognize.
15 *See* Pls.' Mot. at 2.

16 **XI. Defendants' Privilege Objections.**

17 Defendants' privilege log identifies the documents responsive to Plaintiffs' first set of
18 RFPs that Defendants withheld based on privilege. Plaintiffs are incorrect in suggesting that
19 Defendants have withheld based on privilege any documents identified in response to those
20 requests that are not identified on the log. The state secrets privilege as well as other privileges
21 are included in Defendants' objections to cover the possibility that documents covered by the
22 privileges might be identified in the course of document searches subsequent to service of written
23 responses that Defendants did not reasonably anticipate.

24
25 ¹⁶ *Accord, e.g.* Defs.' Objection to RFP 25, which seeks "All unpublished papers, reports or
26 manuscripts CONCERNING the results of the TEST PROGRAMS" ("Defendants object to this
27 Request as unduly burdensome insofar as it encompasses numerous papers, reports, or
28 manuscripts prepared during the Cold War timeframe, which began over 50 years ago and for the
reasons described in General Objections 3, 4, 5, 6, 7 and 8, above.") (Ex. B to Wolverton Decl.).

1 Upon further review, DoD has decided to no longer assert the deliberative process
 2 privilege over its documents that are listed on the privilege log and to produce them, the clear
 3 applicability of the privilege that is apparent from the descriptions on the log notwithstanding.
 4 *See* Ex. D to Wolverton Decl. Included on the log, however, are two documents prepared by the
 5 General Accounting Office (“GAO”) that are stamped as submitted to DoD for review and
 6 comment only and not to be otherwise shown or released documents. *Id.* GAO is an arm of
 7 Congress, and DoD has no authority to produce those documents that GAO specified DoD may
 8 not disclose. GAO is a not a party and Rule 34 does not require Defendants to produce
 9 documents belonging to it. *See, e.g., Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir.
 10 1985) (Rule 34 “may not be used to discover matters from a nonparty”).

11 Plaintiffs challenge to Defendants’ objection based on 50 U.S.C. § 403g is misplaced.
 12 CIA has produced a few documents with discrete redactions to protect information protected by
 13 section 403g. Supplemental Camaresi Decl. ¶ 5. CIA has withheld a few documents in full that
 14 “consist entirely of information protected by § 403g relating to CIA functions for processing
 15 FOIA requests.” *Id.* Section 6 of the Central Intelligence Agency Act of 1949, as amended,
 16 provides that the CIA “shall be exempted from . . . the provisions of any other law which require
 17 the publication or disclosure of the organization, functions, names, official titles, salaries, or
 18 numbers of personnel employed by the Agency.” 50 U.S.C.A. § 403g. Thus, § 403g exempts the
 19 information it covers from any provisions of law, including any concerning discovery, and its
 20 protection is absolute.¹⁷ The redactions contained in the documents identified on Defendants’
 21 privilege log contain just the type of information that § 403g protects. Suppl. Camaresi Decl. ¶ 4.

22
 23 ¹⁷ Contrary to Plaintiffs’ argument, *Linder v. Dep’t of Defense*, 133 F.3d 17 (D.C. Cir. 1998)
 24 (cited at Pls.’ Mot. at 24), does not require that to establish exemption under 50 U.S.C. § 403g
 25 CIA must provide a detailed explanation of potential harm to national security from disclosure.
 26 *Linder* involved documents implicating two separate statutory privileges, one that is now codified
 27 at 50 U.S.C. § 403-1(i) and 50 U.S.C. § 403g. *Linder*, 133 F.3d at 25. While the decision relates
 28 that CIA submitted a declaration explaining the potential harm from disclosure of information
 covered by both statutes, the court did not hold that a detailed explanation is required to establish
 protection under § 403g where that statute provides for absolute exemption. Section 403g reflects
 a Congressional judgment that the information listed in the statute *shall be exempted* from
 disclosure in the interests of the security of the foreign intelligence activities of the United States
 and to further the statutory protections of intelligence sources and methods specified by 50 U.S.C.

(Footnote continues on next page.)

1 **XII. Defendants Have Not Waived Objections to Plaintiffs' Additional Document**
2 **Requests.**

3 Plaintiffs erroneously assert that Defendants' objections to Plaintiffs additional sets of
4 RFPs have been waived because Defendants have not served written responses. Pls.' Mot. at 4.
5 Defendants have not served objections because they have sought a protective order staying further
6 discovery and a protective order limiting the scope of discovery. Dkt. Nos. 93, 134, 140. As this
7 Court has recognized, "the party responding to written discovery may either 'object properly or
8 seek a protective order.'" *Nelson v. Capital One Bank*, 206 F.R.D. 499, 500 (N.D. Cal. 2001)
9 (Chen, Mag. J.) (quoting 8 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal
10 Practice and Procedure § 2035 (2d ed. 1994), and citing Schwarzer, *et al.*, Federal Civil
11 Procedure Before Trial § 11:778 (2001)). *Nelson* recognizes that "[i]t would make little sense to
12 hold that in order to preserve objections to written discovery, the responding party must file
13 written objections rather than moving for a protective order." *Id.* Defendants have properly
14 sought and are entitled to guidance from the Court on whether further discovery is appropriate at
15 this time and what the appropriate scope of discovery is before they are required to respond to
16 Plaintiffs' additional 115 RFPs that, as discussed in Defendants' motion for a protective order
17 limiting the scope of discovery, are vastly overbroad and unduly burdensome. *See* Dkt. No. 140.

18 **CONCLUSION**

19 For the foregoing reasons, Plaintiffs' motion to overrule objections and compel production
20 of documents should be denied.

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(Footnote continued from previous page.)

27 § 403-1(i). Therefore, no further justification by the Executive Branch for withholding the
28 material is required.

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Dated: September 15, 2010

Respectfully submitted,

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

/s/ Caroline Lewis Wolverton
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GENERAL ORDER 45 ATTESTATION

I, Caroline Lewis Wolverton, am the ECF User filing this Motion for a Protective Order Staying Further Discovery and for Modification of Case Management Order. In compliance with General Order 45, X.B., I hereby attest that Patricia Cameresi, Anthony Lee, Michael Kilpatrick, Lloyd Roberts, Patsy D’Eramo, Jr. and Raymond Laurel have each concurred in the filing of their Declarations.

Dated: September 15, 2010

/s/ Caroline Lewis Wolverton
Caroline Lewis Wolverton
Attorney for Defendants

Beaudoin, Kathy E.

From: ECF-CAND@cand.uscourts.gov
Sent: Wednesday, September 15, 2010 11:55 PM
To: efiling@cand.uscourts.gov
Subject: Activity in Case 4:09-cv-00037-CW Vietnam Veterans of America et al v. Central Intelligence Agency et al Memorandum in Opposition

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Case Name: Vietnam Veterans of America et al v. Central Intelligence Agency et al
Case Number: [4:09-cv-00037-CW](#)
Filer: United States of America
Central Intelligence Agency
United States Department of the Army
Leon Panetta
United States Department of Defense
Michael V. Hayden
Robert M. Gates
Michael B. Mukasey
Pete Geren

9/16/2010

Eric H. Holder, Jr

Document Number: [143](#)

Docket Text:

Memorandum in Opposition re [128] MOTION to *Overrule Objections and Compel Production of Documents* filed by Central Intelligence Agency, Robert M. Gates, Pete Geren, Michael V. Hayden, Eric H. Holder, Jr, Michael B. Mukasey, Leon Panetta, United States Department of Defense, United States Department of the Army, United States of America. (Attachments: # (1) Affidavit Declaration of Patricia Cameresi, # (2) Affidavit Declaration of Anthony Lee, # (3) Affidavit Declaration of Michael Kilpatrick, # (4) Affidavit Declaration of Lloyd Roberts, # (5) Affidavit Declaration of Patsy D'Eramo, # (6) Affidavit Declaration of Raymond Laurel, # (7) Affidavit Supplemental Declaration of Patricia Cameresi, # (8) Affidavit Declaration of Caroline Wolverton, part 1, # (9) Affidavit Wolverton Declaration, part 2, # (10) Affidavit Wolverton Declaration, part 3, # (11) Affidavit Wolverton Declaration, part 4, # (12) Affidavit Wolverton Declaration, part 5, # (13) Proposed Order)(Wolverton, Caroline) (Filed on 9/15/2010)

4:09-cv-00037-CW Notice has been electronically mailed to:

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4:09-cv-00037-CW Please see [General Order 45 Section IX C.2 and D](#); Notice has NOT been electronically mailed to:

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9/16/2010

Document description:Affidavit Declaration of Patricia Cameresi

Original filename:H:\Fed Prog\bribowen\VVA\30b6 opposition 9-10\For filing\009 Signed Cameresi Declaration reduced.pdf

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Document description:Affidavit Declaration of Anthony Lee

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Document description:Affidavit Declaration of Michael Kilpatrick

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Document description:Affidavit Declaration of Lloyd Roberts

Original filename:K:\My Documents\Vietnam Veterans of Am\Oppns to mt compel and mot for sanctions\Oppn to MT Compel\2-Roberts Declaration - Signed.pdf

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Document description:Affidavit Declaration of Patsy D'Eramo

Original filename:K:\My Documents\Vietnam Veterans of Am\Oppns to mt compel and mot for sanctions\Oppn to MT Compel\5-Declaration_D'Eramo_CV09-0037-CW.pdf

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Document description:Affidavit Declaration of Raymond Laurel

Original filename:K:\My Documents\Vietnam Veterans of Am\Oppns to mt compel and mot for sanctions\Oppn to MT Compel\6-LTC Laurel Declaration - Signed.pdf

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Document description:Affidavit Supplemental Declaration of Patricia Cameresi

Original filename:K:\My Documents\Vietnam Veterans of Am\Oppns to mt compel and mot for sanctions\Oppn to MT Compel\Supplemental Cameresi Declaration 9.15.10.pdf

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Document description:Affidavit Declaration of Caroline Wolverton, part 1

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Document description:Affidavit Wolverton Declaration, part 2

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Document description:Affidavit Wolverton Declaration, part 4

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Document description:Affidavit Wolverton Declaration, part 5

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Document description:Proposed Order

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