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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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO OVERRULE OBJECTIONS

Date: October 27, 2010
Time: 9:30 a.m.
Ctrm: F, 15th Fl.
Judge: Hon. James Larson

Complaint filed January 7, 2009

I. INTRODUCTION

For more than a year, Defendants steadfastly refused to agree to a protective order that would cover material covered by the Privacy Act and/or HIPAA. Relying on the absence of such an order, Defendants withheld or refused to produce key information that goes to the core of Plaintiffs' claims, including information about the participants in Defendants' testing programs. Only now, *after* Plaintiffs were forced to seek Court intervention, do Defendants concede that such an order is appropriate, and that the information Defendants' have withheld or redacted should be produced to Plaintiffs. This sequence of events well-illustrates Defendants' recalcitrance in discovery. Nevertheless, Defendants' Response to Plaintiffs' Motion for a Protective Order (Docket No. 139) ("Response") makes clear that all parties now agree that the Court should enter a protective order in this action, and that the parties now agree on most of the key provisions of that order. Accordingly, the Court need only resolve the parties' differences on a few key issues.

Central to the remaining disputes is Defendants' long history of using the absence of a protective order to justify withholding core information in discovery. Now that they finally have relented and agreed that a protective order is appropriate, it is critical that the order prevent Defendants from using the absence of protective order coverage as a pretext for withholding relevant information in the future. The remaining unresolved items flow from Defendants' unjustified refusal to agree to standard provisions that would permit Plaintiffs and non-parties — rather than just Defendants — to produce information for use in this litigation subject to the protective order, and Defendants' insistence on including unnecessary or unduly burdensome non-standard provisions. In short, Plaintiffs seek a protective order that will provide adequate protection for and appropriately limit the use of designated material — much of the most sensitive information to be produced, after all, is private medical information about Plaintiffs — without imposing undue cost and burden on Plaintiffs or providing Defendants further pretext for delaying and obstructing discovery in this case.

II. BACKGROUND ON FURTHER NEGOTIATIONS

In their Response, Defendants finally conceded what they had denied for over a year — that a protective order governing information covered by the Privacy Act and HIPAA is appropriate in this action. Nonetheless, Defendants proposed eight substantive changes to Plaintiffs' [Proposed] Protective Order. In an effort to resolve the remaining differences between parties about the appropriate terms for a protective order in this action, Plaintiffs initiated a meet-and-confer process with Defendants on September 23, 2010. The parties exchanged several letters to follow upon on those discussions.[1] Based on those efforts, the parties have significantly narrowed the areas of dispute, as described below.

A. Areas of Agreement

In an effort to compromise and seek agreement, in a show of good faith, Plaintiffs agreed to the following changes to their Proposed Protective Order, as requested by Defendants:

1. Remove reference to "classified information and documents maintained by Defendants or other government entities" from Section 3 (*see* Response at 2);
2. Add material protected by 38 U.S.C. § 5701 to description of information subject to protective order, to "facilitate production of those documents" (*see* Response at 5);
3. Include materials restricted from public access under Department of Defense Directives (DoDD) 5230.24 and 5230.25 and produced in the course of this litigation as subject to the terms of the protective order as appropriate (*see* Response at 6-7);

[1] *See* Decl. of Timothy W. Blakely in Supp. of Pls.' Reply in Supp. of Mot. for Protective Order and to Overrule Objections ("Blakely Decl."), Exs. A (Sept. 30, 2010 letter from T. Blakely to B. Bowen enclosing revised proposed protective order redlined to show changes from the proposed protective order submitted with Plaintiffs' Motion), B (Oct. 8, 2010 letter from L. Farel to T. Blakely), and C (Oct. 11, 2010 letter from T. Blakely to L. Farel enclosing further revised proposed protective order redlined to show changes from the proposed protective order submitted with Plaintiffs' Motion). For the Court's convenience, the redlined protective order enclosed with Exhibit C shows the differences between the proposed protective order submitted with Plaintiffs' Motion (Docket No. 122) and Plaintiffs' Amended [Proposed] Protective Order submitted with this reply brief.

4. Remove the following language from Section 2.2: "At least sixty days prior to the trial date, the parties shall meet and confer and submit any separate proposed protective order governing the treatment of confidential information during trial (*see* Response at 7);
5. Remove the following language from Section 4.3(b): "As set forth in Paragraph 2.2, this Protective Order specifically excludes any material or testimony to be produced or used during trial and a separate order will govern trial testimony" (*see* Response at 9);
6. Combine three definitions of Counsel (Outside, House, and Counsel — without Qualifier) into a single definition (*see* Response at 8);
7. Modify the definition of "Expert" to include a person "assigned by the Defendants" (*see* Response at 8); and,
8. Modify Section 7 to make clear that limitations on distribution of protected materials apply only to the receiving party and are not intended to restrict the producing party's ability to access or use information otherwise available to it independent of the litigation (*see* Response at 10).

Plaintiffs have incorporated these changes in the Amended [Proposed] Protective Order submitted with this reply brief.

B. Remaining Unresolved Items

The parties' negotiations have narrowed, but not resolved, disagreements over the scope and terms of a protective order to govern this litigation. Notwithstanding the parties' extended meet-and-confer process, Plaintiffs cannot agree to Defendants' position on the following five items:

1. Defendants' resistance to including language acknowledging the right of *all* parties (and non-parties) — rather than just Defendants — to designate for protection confidential material produced in discovery;
2. Defendants' resistance to a requirement that deposition and other pre-trial testimony be designated for protection within 30 days (*see* Response at 8-9);

3. Defendants' requirement that all electronic materials produced by Defendants be encrypted and stored and maintained exclusively at the offices of Plaintiffs' Counsel of Record (*see* Response at 9);
4. Defendants' proposed additions to Section 12 (*see* Response at 11); and,
5. Defendants' proposal to change the designation for protected materials from "confidential" to "covered" (*see* Response at 2 n.2).

Each of these remaining unresolved items is discussed in detail below.

III. ARGUMENT

Defendants' Response and subsequent negotiations have narrowed, but not resolved, the disputed issues with respect to the protective order. As described below, the Court should reject Defendants' position on the five issues remaining in dispute, and should enter Plaintiffs' Amended [Proposed] Protective Order.[2]

A. Production of Materials Produced by Plaintiffs and Non-Parties.

Defendants consistently have resisted agreeing to a protective order that permits *all* parties (and non-parties) — not just Defendants — to designate produced material for protection. Defendants' position is unreasonable, inconsistent with standard discovery practice, and contrary to the Northern District's Model Protective Order ("Model Order"). The protective order

[2] Defendants' Response also expresses "significant concerns" about Plaintiffs' possible contact with test subjects. (Response at 11.) Apparently, Defendants are concerned that some test participants "may not wish to be contacted" or "reminded of the past." (*Id.*) The irony of these expressed "concerns" is almost painful. Although Defendants may try to justify their historic failure to satisfy their legal duties to notify test subjects — and continued resistance to doing so — with such rationalizations, this reasoning betrays Defendants' failures to their test subjects. As Defendants make clear, their true concern is that "if test participants were given information about possible health effects, they might be predisposed to provide that information in response to questions about their symptoms or health effects." (*See* Decl. of Caroline Lewis-Wolverton in Supp. of Defs.' Opp'n to Plfs.' Mot. for Sanctions (Docket No. 148) ("Wolverton Decl.") at ¶ 15.) As the Court recognized in its motion to dismiss order, however, Defendants' regulations *require them* to notify test subjects of "possible" health effects related to participation in experiments. (Jan. 19, 2010 Order (Docket No. 59) at 14-16.) It is only because Defendants have *not* complied with their duty to notify test subjects, and because Defendants do *not* want to comply with their duty to provide health care, that they fear the test subjects learning about "possible health effects" resulting from Defendants' testing programs. Regardless, Defendants now concede that information about test subjects that Defendants long have withheld on the basis of Privacy Act and/or HIPAA objections should be produced under an appropriate protective order — notwithstanding Defendants' year-long refusal to do so.

governing this action must be mutual and must permit Plaintiffs and non-parties to designate appropriate material for protection so as to limit its use to this litigation. Plaintiffs are entitled to seek protection for information that implicates their rights to privacy, including, *inter alia*, personal private information such as health and financial records, and personal identifying information. Non-parties also may wish to protect information for these reasons or others, including safeguarding confidential, commercially sensitive, or proprietary business information.

Defendants' refusal to accept this concept can only have one purpose: to further delay and hinder discovery in this action. If the protective order for this action does not permit non-parties to designate for protection confidential, sensitive, or proprietary information, for example, individual protective orders will have to be negotiated with those non-parties or further court intervention will be required. This inefficient and undesirable result is the predictable outcome of Defendants' continued resistance to agreeing to a mutual protective order. The Court should reject Defendants' myopic approach to the appropriate scope of a protective order for this action.

Defendants specifically object to the phrase "any other information protected by constitutional or statutory rights to privacy" in Section 3(iv) of Plaintiffs' Proposed Protective Order. (*See* Blakely Decl. ¶ 4, Ex. B at 1.) To attempt to end this dispute, Plaintiffs proposed adopting language from Section 1 of the Model Order. (*See* Blakely Decl. ¶ 5, Ex. C at 1.) Accordingly, Plaintiffs have revised the operative language of Section 3(iv) to read:

> "[A]ny other ***confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted***, including but not limited to information protected from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 201, and information protected by 38 U.S.C. § 5701."

B. Designation of Deposition and Pre-Trial Testimony for Protection.

In order for parties to comply with the terms of a protective order and appropriately safeguard designated information, it is critical that all parties have adequate notice of what information must be protected. Section 4.3(b) of Plaintiffs' Proposed Protective Order specifies the manner and timing of designating for protection testimony given in deposition or in other

pretrial proceedings. Defendants proposed to modify this section by deleting the following sentence: "Only those portions of the testimony that are appropriately designated for protection within the 30 days shall be covered by the provisions of this Protective Order." (Response at 8.)

Defendants' proposal must be rejected: it would unnecessarily leave open the question of what deposition or other pretrial testimony is covered by the Protective Order, leaving the parties uncertain about how to treat this testimony, which would result in unacceptable uncertainty and added burden. This would force all parties (and non-parties) to take special interim measures to protect all discovery, and to go through the cumbersome procedure of re-marking and re-classifying whenever Defendants get around to making designations. The existence of at least two versions for each document (the provisional category and the final categorization) will inevitably lead to mistakes in compiling witness files and deposition exhibits. Moreover, contrary to Defendant's assertion, this language does not contradict Section 3(a), which only defines the scope of the protective order and does not presume "that any information in one of the delineated categories is, by definition, protected." (Response at 8-9.) There is no presumption that information in the categories set out in Section 3(a) automatically is protected — the presumption is that *specifically designated and marked* information from those categories is protected. As noted above, this only makes sense: in order for parties to appropriately safeguard protected information, they must have notice of what material must be protected. Defendants' proposal violates this basic principle.[3]

C. Defendants' Proposals Requiring Encryption of Electronic Material and Restricting Materials to Office of Plaintiffs' Counsel of Record.

Defendants' proposals for encryption of electronic materials and requirement that materials produced by Defendants and the Department of Veterans Affairs ("VA") be stored and maintained exclusively at all times at the offices of Plaintiffs' Counsel of Record seek to impose

[3] Defendants' interpretation of Section 3(a) also renders the provisions of Section 4 — Designating Protected Materials — meaningless, and requires the parties either to guess what materials are protected or to assume that *all* pretrial testimony is covered — in conflict with the Section 4.1 prohibition on "[m]ass, indiscriminate, or routinized designations."

unnecessary burden and expense on Plaintiffs and would hinder Plaintiffs' ability to use discovery material to prosecute this litigation. The novel restrictions proposed by Defendants go well beyond the security requirements of the materials sought by Plaintiffs and, notwithstanding Defendants' arguments that such provisions are necessary, have not been included in other protective orders governing litigation in this district involving the VA as a party. (*See, e.g.*, Decl. of Daniel J. Vecchio in Supp. of Pls.' Mot. for Protective Order (Docket No. 123-13) ("Vecchio Decl.") ¶ 21, Ex. L at § 7.1.)[4] In addition, the Plaintiffs in this action are scattered throughout the country, and restricting information to the offices of Plaintiffs' Counsel of Record here in San Francisco would hinder Plaintiffs' ability to consult this information in pursuing their claims.

To address Defendants' concerns, however, Plaintiffs have added as Section 7.3 of their Proposed [Amended] Protective Order the following paragraph from the Northern District of California Model Order:[5]

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

Plaintiffs believe that this Model Order provision provides adequate guidance for the protection of material to be produced in this action.

D. Defendants' Proposed Additions to Section 12 of Plaintiffs' Proposed Protective Order.

Plaintiffs object to Defendants' proposed additions of Sections 12.5 and 12.6 to Plaintiffs' Proposed Protective Order.[6] Although Defendants argued during meet-and-confer discussions

[4] Protective Order entered March 6, 2008 in *Veterans for Common Sense v. Mansfield*, No. C-07-3758 (N.D. Cal.). The Veterans Administration was a named defendant in that case. The U.S. Department of Justice was Counsel of Record for Defendants. Morrison & Foerster LLP was Counsel of Record for Plaintiffs.

[5] This is the exact language incorporated in Section 7.1 of the *Veterans for Common Sense v. Mansfield* Protective Order.

[6] During the course of the parties' meet-and-confer discussions, Defendants did not object to Plaintiffs' rejection of Defendants' proposed Section 12.4. (*Compare* Blakely Decl. ¶ 3, Ex. A at 5 (rejecting Section 12.4) *with* Blakely Decl. ¶ 5, Ex. B at 3 (defending only Sections 12.5 and 12.6).

that these sections provide clarification for the use and protection of the information, these sections do nothing of the sort. (*See* Blakely Decl. ¶ 4, Ex. B at 3; Response at 11.) Section 12.5 merely discusses the "discoverability, relevance, or admissibility of any record." This provision is unnecessary: the Protective Order does not purport to constitute a ruling on discoverability, relevance, or admissibility. Section 12.6, which states that that the Protective Order does not operate to waive any privileges or duties not to disclose information, also is unnecessary. It does, however, appears to foreshadow Defendants' intent to continue to resist future disclosure under the guise of questionable (and amorphous) privileges and duties. These provisions are superfluous and are potentially troublesome as they add unnecessary and potentially conflicting statements about the scope and purpose of the protective order. They should not be included.

E. Designation for Protected Materials.

Defendants propose to change the marking for material designated for protection to "covered," because they claim that the standard "confidential" marking would be confusing here given Executive Order 13526's provisions governing "confidential" material. (Response at 2 n.2.) Plaintiffs object to Defendants' attempt to introduce unnecessarily non-standard terminology into this protective order. Plaintiffs' Proposed Protective Order's use of a "confidential" marking should be adopted, for at least two reasons.

First, the Model Order — like virtually every protective order entered by state or federal courts — uses the term "Confidential" to identify protected material. Accordingly, non-parties understandably will expect to take advantage of a "Confidential" designation for confidential or proprietary information to be produced in this litigation. Moreover, federal government agencies are parties to many suits governed by protective orders using the term "Confidential" to identify material subject to protection, including suits in this district — Executive Order 13526 notwithstanding. (*See*, *e.g.*, Vecchio Decl. ¶ 21, Ex. L at 5-6.)

Second, Plaintiffs' Proposed Protective Order contemplates that material will be marked as "CONFIDENTIAL — PRODUCED SUBJECT TO PROTECTIVE ORDER," not merely as "Confidential." It is hard to see how this designation, which specifically references the protective order, will confuse recipients into believing that "Confidential" actually refers to something else.

Accordingly, using the term "Confidential" to identify information designated for protection will not be a source of confusion in this case.

IV. CONCLUSION

For the reasons discussed above, Plaintiffs request the Court enter Plaintiffs' Amended [Proposed] Protective Order.

Dated: October 13, 2010

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Responses and Replies

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Docket Text:
Reply Memorandum re [121] MOTION for Protective Order *and to Overrule Objections* filed byDavid C. Dufrane, Wray C. Forrest, Larry Meirow, Eric P. Muth, Bruce Price, Franklin D. Rochelle, Swords to Plowshares, Veterans Rights Organization, Vietnam Veterans of America. (Erspamer, Gordon) (Filed on 10/13/2010)

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