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United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA,
et al.,

 Plaintiffs,

 v.

CENTRAL INTELLIGENCE AGENCY,
et al.,

 Defendants.

Case No.: 09-cv-0037 CW (JSC)

**ORDER RE: PLAINTIFFS’ MOTION
TO COMPEL (Dkt. No. 447)**

Now pending before the Court is Plaintiffs’ Motion to Compel Discovery from Defendant Department of Veterans Affairs (“DVA”). (Dkt. No. 447). The Court previously deemed the matter submitted without a hearing pursuant to Civil Local Rule 7-1(b). Having considered the parties filings and having reviewed the documents at issue *in camera*, the Court GRANTS the motion in part.

DISCUSSION

Plaintiffs’ Motion to Compel challenges Defendant DVA’s assertion of the deliberative process privilege over documents identified in its June 13, 2012 privilege log, and seeks reimbursement for Plaintiffs’ out-of-pocket costs associated with the resumed

1 depositions of Joe Salvatore and David Abbot. (Dkt. No. 447). In accordance with the
2 Court's June 22, 2012 Order establishing a briefing schedule regarding this motion,
3 Defendant submitted the disputed documents for review *in camera* on June 28, 2012. (Dkt.
4 Nos. 456, 461).

5 **A. Deliberative Process Privilege Documents**

6 The Court has discussed the deliberative process privilege in numerous prior orders
7 and incorporates the discussion and analysis of the privilege from these prior orders by
8 reference. (Dkt. Nos. 294, 327, 408, 423, 430, 436, 443). The Court will nonetheless
9 briefly address two of the arguments Defendant raises in its opposition to Plaintiffs' motion.
10 Defendant generally argues that Plaintiffs have not met their burden of demonstrating
11 substantial need for the documents because: 1) the documents are legally irrelevant to any
12 claim in this case, and 2) the discovery sought is cumulative.

13 Defendant's first argument, that the discovery is legally irrelevant, is unpersuasive.
14 Defendant contends that the Court must reevaluate the relevance of the documents to
15 Plaintiffs' facial bias claim against DVA in light of recent decisions by the Ninth Circuit and
16 United States Supreme Court. Defendant further seeks to have the Court defer consideration
17 of this motion to compel until after District Judge Wilken rules on DVA's pending Motion
18 for Leave to File a Motion for Reconsideration and Plaintiffs' pending Motion to Substitute
19 (both of which raise issues regarding these new cases and Plaintiffs' facial bias claim). The
20 Court declines to do so because the Court finds that a ruling on these motions would not be
21 dispositive of the question of whether Plaintiffs have a substantial need for this discovery.
22 The documents at issue are equally relevant to Plaintiffs' claims regarding the other
23 Defendants; specifically, much of this discovery relates to whether the other Defendants
24 failed to provide adequate notice to test participants including notice of the chemicals to
25 which they were exposed and any known health effects. The documents at issue herein and
26 addressed in the Court's prior Orders regarding the deliberative process are squarely relevant
27 to this claim.

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1 The Court finds Defendant's second argument, that the Court has previously failed to
2 consider whether this discovery is cumulative, similarly unavailing. Under F.T.C. v. Warner
3 Comms. Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), the Court's analysis of substantial need
4 considers: 1) the relevance of the evidence, 2) the availability of other evidence, 3) the
5 government's role in the litigation, and 4) the extent to which disclosure would hinder frank
6 and independent discussion regarding contemplated policies and decisions. Defendant
7 appears to be arguing that second factor, concerning the availability of other evidence,
8 incorporates a cumulateness analysis akin to that of Federal Rule of Civil Procedure 26.
9 See Fed. R. Civ. P. 26(b)(2)(C)(i) (stating that a Court may limit the scope of discovery
10 where "the discovery sought is unreasonably cumulative or duplicative, or can be obtained
11 from some other source that is more convenient, less burdensome, or less expensive").
12 Defendant thus contends that any further discovery from the DVA is cumulative because
13 Plaintiffs already have "an abundance of information and documents" regarding the
14 notification, claims, and verification processes.

15 The Court agrees that considerable discovery has been provided on this subject;
16 however, having reviewed the thousands of pages of documents submitted for *in camera*
17 review, the Court notes that these processes are far from clear or consistent, and in fact, seem
18 to have undergone numerous modifications over time. See, e.g., U.S. GOV'T
19 ACCOUNTABILITY OFFICE, GAO-08-366, CHEMICAL AND BIOLOGICAL DEFENSE: DOD AND
20 VA NEED TO IMPROVE EFFORTS TO IDENTIFY AND NOTIFY INDIVIDUALS POTENTIALLY
21 EXPOSED DURING CHEMICAL AND BIOLOGICAL TESTS (2008) (discussing issues with
22 notification, claims, and verification processes). Accordingly, the Court finds that Plaintiffs
23 have satisfied Warner's test for establishing substantial need – the documents sought are
24 both relevant and unavailable from other sources given that the documents reflect processes
25 which have evolved over time.¹

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28 ¹ The Court has discussed the other two factors at length in prior orders. (See, e.g., Dkt. Nos. 294, 430).

1 Thus, having reviewed all of the documents submitted for *in camera* review on June
2 28, 2012, the Court finds that with respect to the following documents either 1) the
3 deliberative process privilege does not apply, or 2) Plaintiffs have demonstrated a sufficient
4 substantial need to overcome the qualified deliberative process privilege.

5 **1. Documents to be produced**

6 The Court finds that the following documents are largely factual and not deliberative.
7 To the extent that they contain deliberative information, the Court finds that Plaintiffs have a
8 substantial need sufficient to overcome the qualified deliberative process privilege.

- 9
- 10 • DVA097 0554-0557 – DVA appears to have produced this document in redacted
11 form. The Court sustains the claim of privilege to the emails, but finds that the
12 attachment, if not already provided in unredacted form, is not deliberative and
13 should be produced.
 - 14 • DVA097 0134-0136
 - 15 • DVA097 0539-0540
 - 16 • DVA097 0157-0158

17 Defendant describes the following documents as predecisional deliberative documents
18 of either the mustard gas training letter or the Edgewood Arsenal notice letter; however,
19 these documents post-date the documents to which they are said to be deliberative. Thus,
20 these documents are not predecisional, but rather part of the “working law” of the agency.
21 (Dkt. No. 430 at p. 4). Accordingly, the Court finds that Defendant has not met its burden
22 of demonstrating that the privilege applies to the following documents which post-date the
23 stated predecisional document and instead relate to how the agency implements its decisions.

- 24 • DVA090 0472-0475 – this document is dated March 7, 2007 and is purportedly
25 predecisional of a document dated June 30, 2006.
- 26 • DVA 090 0635-0637 – this document is dated September 29, 2007 and is
27 purportedly predecisional of a document dated June 30, 2006.
- 28 • DVA090 0419-0426 – this document is dated August 29, 2005 and is purportedly
predecisional of a document dated March 28, 2005.

- 1 • DVA097 0125-0133 – this document is dated August 8, 2005 and is purportedly
2 predecisional of a document dated March 28, 2005.

3 The following documents concern the process for providing notice to either the
4 Mustard Gas or Edgewood Arsenal test subjects. Defendant indicates that these documents
5 pre-date the final decisions regarding outreach to these two groups and states that those
6 decisions were memorialized in the notice letter and/or training letter. As an initial matter,
7 the Court notes that neither the notice letter nor the training letter seem to constitute a final
8 version of many of these documents. Instead, many of these documents appear to be internal
9 status updates or summaries of notification efforts, some of which are marked as draft, which
10 were presumably finalized and distributed within DVA. See, e.g., DVA090 0369-0370,
11 DVA097 0260-0273, DVA097 0275-0278. To the extent that there is no final version of
12 these documents, the Court finds that Plaintiffs have a substantial need for the documents
13 sufficient to overcome the qualified claim of privilege. Further, much of the information in
14 these documents is factual rather than deliberative. Accordingly, Defendant shall produce
15 the following documents.

- 16 • DVA090 0369-0379
17 • DVA090 0256-0257
18 • DVA097 0260-0273
19 • DVA097 0275-0278
20 • DVA097 0279-0281
21 • DVA097 0286-0288

22 Similarly, the Court finds that Plaintiffs have a sufficient substantial need for the
23 information contained in the following documents to overcome the qualified deliberative
24 process privilege.

- 25 • DVA090 0251
26 • DVA097 0187
27 • DVA097 0188-189
28 • DVA-97 0522-533 – Defendant may redact the private personal information.

- 1 • DVA090 0226-0228
- 2 • DVA097 0121-0124
- 3 • DVA097 0208-0209 – Defendant may redact that portion of the document covered
- 4 by the attorney client privilege, which the Court understands includes the email
- 5 sent on February 9, 2005 and the one sent on February 10, 2005 at 10:30 a.m.
- 6 • DVA097 0291-0322 – Defendant shall produce the draft notice letters at 0314-
- 7 0322.

8 The following documents all appear to be correspondence with the Mustard Gas
9 Mailbox or correspondence that the Court would expect to be routed through the Mustard
10 Gas Mailbox. The Court previously ordered Defendant to produce the Mustard Gas
11 Mailbox; as such, the Court is confused by the assertion of the deliberative process privilege
12 at this stage. (Dkt. No. 408 at p. 8). Nonetheless, the Court finds that to the extent these
13 documents are deliberative, Plaintiffs have a substantial need for the information sufficient to
14 overcome the qualified deliberative process privilege. Defendant shall produce the following
15 documents, but may redact the private personal information (social security numbers).

- 16 • DVA097 074
- 17 • DVA097 075-076
- 18 • DVA097 077-078
- 19 • DVA097 079-080
- 20 • DVA097 081
- 21 • DVA097 083
- 22 • DVA097 087
- 23 • DVA097 092-094
- 24 • DVA 097 0221-0222
- 25 • DVA097 0223-0224
- 26 • DVA097 0225
- 27 • DVA097 0246
- 28 • DVA097 0290

- 1 • DVA097 0514-0516
- 2 • DVA101 01-03
- 3 • DVA097 084-085
- 4 • DVA097 088-089

5 Defendant has identified the following documents as deliberative documents
6 regarding a mustard gas white paper. The Court is not aware of a mustard gas white paper
7 and the binder of final documents submitted to the Court does not contain such a document.
8 To the extent there is no final version of the white paper, the Court finds that Plaintiffs have
9 a substantial need for the following draft documents, which are largely factual. If Defendant
10 has the final version of the mustard gas white paper, Defendant shall submit it to the Court.

- 11 • DVA097 357-368
- 12 • DVA097 392-410 – Defendant need only produce DVA097 404-410.
- 13 • DVA097 0411-0412
- 14 • DVA097 0426-0428

15 Similarly, DVA097 0171-0174 is described as “redlined deliberative edits regarding
16 DOD’s potential certification of the mustard gas database.” (Dkt. No. 460-1 at p. 14).
17 Defendant did not provide a copy of the final certification and instead states that the “signed
18 version of the certification may be available at the National Archives and Records
19 Administration.” (Id.) Based on the information before the Court, the Court finds that the
20 redlines on the draft are minor and to the extent they can be said to be deliberative, Plaintiffs
21 have a substantial need for the information therein sufficient to overcome the claim of
22 privilege. Accordingly, Defendant shall produce this document to Plaintiffs.

23 **B. Costs for Salvatore and Abbot Depositions**

24 In March of 2012, Plaintiffs brought a Motion to Compel seeking to resume the
25 depositions of Joe Salvatore and David Abbot. (Dkt. No. 404). The Court granted Plaintiffs
26 leave to resume the deposition of Joe Salvatore for a total of three hours based on the volume
27 of evidence relating to Mr. Salvatore which was produced following the Court’s review of
28 the first set of documents over which Defendant asserted the deliberative process privilege.

1 (Dkt. No. 406 at pp. 14-15). Plaintiffs also sought to resume Mr. Abbot's deposition based
2 on Defendant's discovery of his user file on an old VA server following his deposition and
3 following the close of fact discovery. Because neither party had reviewed the documents on
4 the server file at that time, the Court found that the request was premature as to Mr. Abbot.²
5 (Dkt. No. 406 at p. 15). The documents referenced above and reflected on the June 13, 2012
6 privilege log are at least in part the contents of Mr. Abbot's user file.

7 Plaintiffs now seek reimbursement of the costs of resuming the Salvatore and Abbot
8 depositions. Plaintiffs base their request on a statement in the Court's May 1, 2012 Order
9 discussing the prejudice which ensued from Defendant's production of the February 2012
10 privilege log following the close of fact discovery. The Court stated in a footnote that "the
11 question of remedy" for this prejudice was not before the Court. (Dkt. No. 420 at p. 3).
12 Plaintiffs characterize this as an "invitation" and state that "[p]ursuant to the Court's May 1,
13 2012 Order, Plaintiffs respectfully request the remedy that Defendants reimburse Plaintiffs'
14 costs involved in resuming the depositions of the two DVA deponents, Mr. Salvatore and
15 Mr. Abbot." (Dkt. Nos. 447 at p. 9; 463 at p. 4). To the extent that the Court's May 1, 2012
16 Order may be read as an invitation to do anything, it was an invitation to file a proper request
17 for relief relying on the pertinent legal authority. See, e.g., Fed. R. Civ. P. 37. The Court's
18 reference to a remedy is not a basis for relief in and of itself. The Court therefore denies
19 Plaintiffs' request for costs.

20 CONCLUSION

21 Accordingly, Plaintiffs' Motion to Compel (Dkt. No. 447) is GRANTED in part. As
22 set forth above, the Court finds that certain documents over which Defendant DVA has
23 asserted the deliberative process privilege are either not deliberative, and thus, not entitled to
24 any protection, or that the qualified deliberative process privilege is overcome by Plaintiffs'
25 substantial need for the documents. Defendant shall produce the documents identified above
26 by July 27, 2012. If Defendant has a final version of the mustard gas white paper, Defendant

27 ² The Court subsequently ordered Defendant to make Mr. Abbot, who is no longer a
28 government employee, available for a further deposition of no more than 3.5 hours. (Dkt. No.
456).

1 shall provide it to the Court by July 27, 2012; if not, Defendant shall produce to Plaintiffs the
2 related draft documents discussed above on that same date.

3 Plaintiffs request for costs related to the resumed depositions of Joe Salvatore and
4 David Abbot is DENIED.

5 **IT IS SO ORDERED.**

6 Dated: July 19, 2012

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9 JACQUELINE SCOTT CORLEY
10 UNITED STATES MAGISTRATE JUDGE
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