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14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION

17 VETERANS FOR COMMON SENSE, and
 18 VETERANS UNITED FOR TRUTH, INC.,

19 Plaintiffs,

20 v.

21 JAMES B. PEAKE, M.D., Secretary of Veterans
 22 Affairs, *et al.*,

23 Defendants.

Case No. C-07-3758-SC

CLASS ACTION

**PLAINTIFFS' ADMINISTRATIVE
 MOTION TO FILE REPLY
 DECLARATION OF MOTHER
 CONTAINING PERSONAL
 IDENTIFYING INFORMATION
 UNDER SEAL**

CIV. L.R. 79-5; 7-11

Submitted for Immediate Determination

Complaint Filed July 23, 2007

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1 Plaintiffs VETERANS FOR COMMON SENSE and VETERANS UNITED FOR TRUTH,
2 INC. (“Plaintiffs”) seek an order from this Court to file the Reply Declaration of Mother in Support
3 of Plaintiffs’ Motion for Preliminary Injunction under seal. (“Reply Mother Declaration”). The
4 Reply Mother Declaration contains details regarding a veterans’ exposure to combat in Iraq, his
5 subsequent development of PTSD symptoms, and the tragic suicide of this veteran. This confidential
6 and private medical information has been lodged under seal to protect the witness’s privacy interests
7 and to prevent exposure to retaliation and harassment.

8 This Court has previously granted Plaintiffs’ similar motion in connection with Plaintiffs’
9 Motion for Preliminary Injunction, filed December 11, 2008. (“MPI”). Plaintiffs’ MPI was
10 supported by eight veteran and family member declarations containing similar confidential and
11 private medical information. Based upon privacy and retaliation concerns, this Court granted
12 Plaintiffs’ administrative motion to file those declarations under seal in its order January 10, 2008.

13 The Court should similarly grant Plaintiffs’ administrative motion, pursuant to Civil Local
14 Rules 7-11 and 79-5, sealing the personal identifying information contained in the Reply Mother
15 Declaration. This Administrative Motion is supported by the Declarations of Gordon P. Ersamer,
16 Paul Taira, Heather A. Moser, and Philip E. Cushman in Support of Plaintiffs Motion for Protective
17 Order, previously filed on November 30, 2007.¹

18 **I. LEGAL STANDARD**

19 “Historically, courts have recognized a general right to inspect and copy public records and
20 documents, including judicial records and documents.” *Nursing Home Pension Fund v. Oracle*
21 *Corp.*, C01-00988 MJJ, 2007 WL 3232267 at *1 (N.D. Cal. Nov. 1, 2007) (quoting *Kamakana v.*
22 *City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). For documents attached to non-
23 dispositive motions, however, “the usual presumption of the public’s right of access is rebutted.”
24 *Id.* at *2, quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)
25 (citation omitted). A motion for preliminary injunction is not dispositive for purposes of sealing

26
27 ¹ Plaintiffs’ Motion for Protective Order Restricting Disclosure of Confidential and Private
28 Information and Prohibiting Retaliation is set for hearing February 22, 2008.

1 records. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, MDL Docket No. 06-1791 VRW, 2007
2 WL 549854 at *4 (N.D. Cal. Feb. 20, 2007). In such circumstances, the “good cause” standard of
3 Federal Rule of Civil Procedure 26(c) will warrant the sealing of documents attached to non-
4 dispositive motions. *Nursing Home Pension Fund*, 2007 WL 3232267 at*2 (quoting *Foltz* 331 F.3d
5 at 1180). Rule 26(c) authorizes a court to enter “any order which justice requires to protect a party or
6 person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P.
7 26(c). Accordingly, this Court may order the Reply Mother Declaration be filed under seal for “good
8 cause” in accordance with Civil Local Rule 79-5.

9 Trial courts have broad discretion in determining what constitutes good cause, whether good
10 cause exists, and, if it does exist, what protection is appropriate when considering a protective order.
11 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The Ninth Circuit recognizes the privacy
12 protection afforded to personal medical information. *Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir.
13 1996) (recognizing an individual’s “strong interest in protecting the confidentiality of [one’s medical]
14 status.”). The right of privacy in the confidentiality of medical records has been accepted as good
15 cause to seal court records. *Kamakana* 447 F.3d at 1186; *Planned Parenthood Fed’n of Am., Inc. v.*
16 *Ashcroft*, No. C03-4872 PJH, 2004 WL 432222 at *2 (N.D. Cal. Mar. 5, 2004) (granting request to
17 seal medical record); *Samuels v. Cal. Dep’t of Corrections & Rehab.*, No. CIV 5-05-2337 GEB JFM
18 P, 2007 WL 1345701 at *10 (E.D. Cal. May 8, 2007) (documents containing mental health records
19 ordered filed under seal).

20 In addition, the Supreme Court has stated that access to judicial records “has been denied
21 where court files might have become a vehicle for improper purposes.” *Nixon v. Warner*
22 *Communications, Inc.*, 435 U.S. 589, 598 (1978). The Ninth Circuit agrees that “‘compelling
23 reasons’ sufficient to outweigh the public’s interest in disclosure and justify sealing court records
24 exist when such ‘court files might have become a vehicle for improper purposes.’” *Kamakana*, 447
25 F.3d at 1179, quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). The Ninth
26 Circuit has found not only good cause, but “that compelling reasons exist to keep personal
27 information confidential to protect an individual’s privacy interest and to prevent exposure to
28 harm....” *Nursing Home Pension Fund*, 2007 WL 3232267 at *2; see also *Foltz*, 331 F.3d at 1134-

1 37; *Kamakana*, 447 F.3d at 1184-86. The protection of confidential private information “is of
2 particular importance” when “witnesses can be susceptible to retaliation and harassment.” *Nursing*
3 *Home Pension Fund*, 2007 WL 3232267 at *2. A protective order is warranted to in such cases “to
4 reduce fears about litigation (expense, invasions of privacy, burdensome distractions, etc.) that can
5 dissuade parties whose rights have been violated from even trying to use the courts to seek redress.”
6 *Humbolt Baykeeper v. Union Pac. R.R. Co.*, 244 F.R.D. 560, 563 (N.D. Cal. 2007).

7 In this case, the privacy interests in protecting sensitive personal medical information along
8 with the witness’ susceptibility to retaliation and harassment outweigh the public’s right to access.

9 **II. GOOD CAUSE EXISTS TO SEAL PERSONAL IDENTIFYING**
10 **INFORMATION CONTAINED IN THE REPLY MOTHER DECLARATION**

11 As more fully explained in the previously filed Declarations of Gordon P. Erspamer
12 (“Erspamer Decl.”), Paul Taira (“Taira Decl.”), and Philip E. Cushman (“Cushman Decl.”), good
13 cause exists for filing this information under seal as it contains sensitive personal medical
14 information, and public disclosure would expose the witness to retaliation and harassment.

15 The veteran described in the Reply Mother Declaration suffered from Post-Traumatic Stress
16 Disorder (“PTSD”), which is a severe mental condition. The declaration details the symptoms,
17 diagnoses, and treatment for PTSD, as well as information relating to benefit claims for PTSD with
18 the Department of Veterans Affairs (“VA”). The veteran referenced in the declaration has also
19 committed suicide. This information is protected by statutory and constitutional rights to privacy and
20 should be subject to limited disclosure. As the Ninth Circuit acknowledges, “Congress has
21 recognized the importance of privacy in medical records in a variety of contexts, most prominently in
22 the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), Pub.L. No. 104-191,
23 110 Stat. 1936 (1996).” *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 970 (9th
24 Cir. 2006). The information is further protected from public disclosure by the Privacy Act, 5 U.S.C.
25 §§ 552a, *et seq.* *St. Michael’s Convalescent Hosp. v. Cal.*, 643 F.2d 1369, 1372-73 (9th Cir. 1981).

26 More importantly, the identity of this individual should be kept from the VA to protect against
27 possible retaliation and harassment. The threat of retaliation is serious and real, as expressed by
28 numerous veterans interviewed in connection with this lawsuit and the actual experience of witnesses

1 in prior litigation against the VA. Taira Decl., ¶ 2; Cushman Decl., ¶¶ 4-9; Erspamer Decl., ¶¶ 3-7.
2 Reprisals against a veteran may include adverse actions on pending claims for benefits from the VA,
3 suspension of any action at all on pending claims, and a refusal from the VA to treat the veterans for
4 PTSD or other medical needs. Taira Decl., ¶ 3; Erspamer Decl., ¶¶ 5-7. In this instance, the witness
5 may be retaliated against through adverse action on any claim related to service-connected death
6 benefits or by delay or denial of access to her son's VA or military service records. These fears are
7 not unfounded as witnesses in prior cases against the VA suffered retaliation similar to those
8 described above. Erspamer Decl., ¶¶ 3, 5-7; Cushman Decl., ¶¶ 4-9. There would be no prejudice to
9 the VA by the issuance of this sealing order. The VA and the general public simply have no need for
10 access to the personal identifying information contained in the Reply Mother Declaration. The VA's
11 interest can be fully protected by access to this information by the VA's counsel at the Department of
12 Justice alone.

13 **III. PLAINTIFFS' SEALING REQUEST IS NARROWLY TAILORED**

14 Plaintiffs seek protection only for the personal identifying information of individuals with a
15 legitimate privacy interest and with a genuine fear of reprisal from the VA. The Reply Mother
16 Declaration has been redacted and submitted under seal to protect this information. Consequently,
17 the proposed order is narrowly tailored to seal only that information for which good cause is shown.

18 **IV. PLAINTIFFS' PROPOSED PROTECTIVE ORDER SHOULD CONTROL THE** 19 **DISCLOSURE AND USE OF THE REPLY MOTHER DECLARATION**

20 Plaintiffs' Motion for Protective Order Restricting Disclosure of Confidential and Private
21 Information and Prohibiting Retaliation is set for hearing March 7, 2008. Plaintiffs' submitted a
22 revised Proposed Order in its reply brief to reflect the efforts of the parties to meet and confer on the
23 terms of the protective order. Plaintiffs therefore request that the information filed under seal be
24 given the protections described in Plaintiffs' revised Proposed Protective Order, filed February 6,
25 2008, until such time as a protective order is entered in this case. *Verigy US, Inc. v. Mayder*, No.
26 C07-04330 MWH RL, 2007 WL 2429652 at *5 (N.D. Cal. Aug. 4, 2007).

1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiffs request that the Court grant Plaintiffs' Administrative
3 Motion to File the Reply Declaration of Mother Containing Personal Identifying Information Under
4 Seal. A Proposed Order has been filed and served herewith.

5 Dated: February 11, 2008

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14 I hereby attest that I have on file all holograph signatures for any signatures indicated by a
15 "conformed" signature (/s/) within this efiled document.
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