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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE**

JAMES ELMER MITCHELL and
JOHN "BRUCE" JESSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. 16-MC-0036-JLQ

**LOCAL RULE 37.1 PREHEARING
STATEMENT REGARDING
DEFENDANTS' MOTION TO
COMPEL**

Hearing Date: February 14, 2017

Hearing Time: 10:00 a.m., Telephonic

1 Related Case:

NO. CV-15-0286-JLQ

2 SULEIMAN ABDULLAH SALIM,
3 et al.,

Plaintiffs,

4 vs.

5 JAMES E. MITCHELL and JOHN
6 JESSEN,

7 Defendants.

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LOCAL RULE 37.1 STATEMENT
NO. 16-MC-0036-JLQ

I. INTRODUCTION

Over the course of the last several months, counsel for Petitioners (Defendants in related case No. CV-15-0286-JLQ) and the United States of America (“Government”) have conferred numerous times in an effort to resolve the areas of disagreement regarding the assertion of privileges and related redactions to the documents produced by the Government in response to nonparty document subpoenas Defendants served on the Central Intelligence Agency (“CIA”) and the Department of Justice (“DOJ”) on June 28 and 29, 2016, respectively. Most recently, counsel for Defendants and the Government conducted a telephone conference on January 27, 2017. Over the course of these discussions, the Government and Defendants were able to reach agreement on certain issues. This status report identifies the primary areas in which the Government and Defendants have reached agreement as well as the continuing areas of disagreement that require resolution by this Court.

II. DISCUSSION

A. Areas of Agreement.

Defendants and the Government agree that the following categories of information are not substantively significant and can be excluded from the scope of Defendants’ Motion to Compel:

- Information regarding any foreign government’s cooperation with the CIA in administering or hosting any aspect of the Program.
- Information regarding CIA sources, including names, physical descriptions, or any other identifying information.

- 1 • The substance of questions asked or answers given in interrogation by any
2 Plaintiff.
- 3 • The content and source of information provided to detainees during the
4 course of interrogations, debriefings, and interviews.
- 5 • Names of covert personnel, except to the extent they have relevant
6 information on command and control (as Defendants allege regarding
7 Cotsana).
- 8 • Details regarding interrogations of non-HVDs (other than plaintiffs) not
9 interrogated by Mitchell and/or Jessen, including techniques employed by
10 the interrogator.
- 11 • Contact information for any of the individuals in the documents: email
12 addresses, addresses, phone numbers, etc.
- 13 • Cable cites. Every cable has a line that states “CITE _____”. Sometime
14 this information is redacted, sometime it is not. In the SSCI Report, the
15 cites are used in conjunction with the dates to identify cables. For
16 example, a full cite in the SSCI Report is “_____ 10644 (201235Z AUG
17 02)”. If the date citation is provided (the “201235Z AUG 02”) then
18 Defendants do not need the “CITE” as well to identify the document.
- 19 • Classification designation. On many documents, there are redactions on
20 the top/bottom adjacent to the “TOP SECRET” designation that is crossed
21 out. There are also redactions at the start of each paragraph in some
22 documents that seem to be related to the classification marking. *See* US
23 Bates 001624. To the extent this information is simply another type of
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1 designation which does not contain substantive information, it can be
2 excluded.

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- 4 • The body of cables. Many of the cables have a break that states “BODY”
5 and then there is a large redaction before the date of the cable appears
6 below. *See* US Bates 001663. To the extent the information contained in
7 this portion of the cables is not substantive, it can be excluded.
 - 8 • All documents listed on the DOJ privilege log (1-60), except Document 2
9 (Bates 178-195), Document 6 (Bates 202-47), Document 22 (Bates 512-
10 25), Document 33 (Bates 602-868), and Document 55 (Bates 963-969).
 - 11 • Drs. Mitchell and Jessen’s contracts with the CIA (1-21 and 60-90 on the
12 CIA privilege log), except Document 16 (Bates 66-77), Document 19
13 (Bates 98-109), Document 66 (Bates 1583-1594), and Document 67 (Bates
14 1595-1609).

15 The Parties’ discussions continue and there is a potential for the exclusion
16 of additional documents and categories of information from the scope of
17 Defendants’ Motion to Compel.

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19 **B. Key Areas of Disagreement Requiring Court Resolution.**

20 To the extent that documents produced by the Government and deposition
21 testimony sought from the Government do not fall into one of the above
22 categories, Defendants and the Government continue to disagree about the
23 Government’s reliance upon various “privileges” or other reasons for
24 withholding information and the timing for the formal assertion of bases for
25 withholding.
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4 Defendants' position is that the Government has both attempted to
5 withhold documents or witness testimony based upon "privileges" that are not
6 applicable and has done so without complying with required procedures for
7 invoking such privilege claims. Specifically, the Government has cited the state
8 secrets privilege, Classification Guidance Memorandum, the NSA Act, the CIA
9 Act, the Privacy Act, and Executive Order 13526 as bases for withholding
10 documents or restricting witness testimony. Defendants have argued, since at
11 least July, 2016, that these documents and statutes do not confer common law
12 privileges pursuant to which documents or witness testimony may be withheld,
13 and assert that the Government may not rely on these "privileges" in response to a
14 Court-validated subpoena.
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16 In addition, the Government has acknowledged since April, 2016, that it
17 understands the required procedures for asserting the state secrets privilege and
18 other privileges upon which it relies and that it was aware that it may be required
19 to comply with those procedures in this case. The discovery cut off is two weeks
20 away and the Government has yet to properly invoke the state secrets privilege or
21 other claimed privileges upon which it relies for redacting or withholding
22 documents and restricting witness testimony. The Government must either take
23 the required steps to assert the privileges upon which it relies, so that the Court
24 can assess the merits of its privilege claims, or produce un-redacted documents
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1 and permit unrestricted witness testimony.

2 The Government's position is that formal privilege assertions were not
3 required when the Government served its privilege logs and are necessary only
4 in response to a motion to compel specific information. As explained in the
5 Government's opposition memorandum, the Government has proposed an
6 orderly set of procedures and deadlines for the submission of the Government's
7 formal privilege claims once the disputed issues in this case are properly
8 narrowed.
9

10 DATED this 31st day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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