

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAMES ELMER MITCHELL and  
JOHN JESSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 16-MC-0036-JLQ  
ORDER RE: MOTION TO  
COMPEL

**Related Case:**

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN  
JESSEN,

Defendants.

No. CV-15-0286-JLQ

BEFORE THE COURT is Petitioners/Defendants James Mitchell and John  
Jessen's Motion to Compel Production of Unredacted Documents (ECF No. 38 in case #  
16-mc-36). The Motion seeks to compel the Government to produce discovery  
documents in an unredacted format, or to produce a redaction/privilege log. The  
Government has filed a Response (ECF No. 48), and Defendants filed a Reply (ECF No.  
49). The Motion requested oral argument, but the court has determined oral argument is  
not necessary. See Local Rule 7.1(h)(3)(B)(iv) ("the Court may determine oral argument

1 is not warranted and proceed to determine any motion without oral argument").

2 **I. Discussion**

3 Petitioners James Mitchell and John Jessen in the miscellaneous action, 16-mc-  
4 0036, are the Defendants in the related case, *Salim et al. v. Mitchell et al.*, 15-286-JLQ,  
5 and are referred to as Defendants herein. Respondent is the United States, representing  
6 the interests of the Central Intelligence Agency ("CIA") and Department of Justice  
7 ("DOJ") in responding to a subpoena. Plaintiffs in the underlying action, 15-286-JLQ,  
8 allege Defendants worked under contract with the CIA and "designed, implemented, and  
9 personally administered an experimental torture program." (Complaint, ¶ 1). Plaintiffs,  
10 who bear the burden of proof on their claims, have consistently taken the position, "the  
11 facts necessary to adjudicate this matter are available in the public record." (ECF No. 34  
12 in Case # 15-286-JLQ, at p. 3). Plaintiffs stated "limited discovery, although unnecessary  
13 in light of the public record" may be relevant on two discrete topics. (*Id.* at p. 4).  
14 Plaintiffs asserted Defendants' discovery proposal was "overbroad, protracted, and unduly  
15 burdensome." (*Id.*).

16 In April 2016, when discovery was just beginning, Plaintiffs stated "Defendants  
17 should not be permitted to turn the discovery process in this case into a far-flung and  
18 irrelevant inquiry that will guarantee unnecessary expense and delay." (*Id.* at p. 6).  
19 Defendants served subpoenas on the CIA and DOJ in late-June 2016. The Government  
20 responded by contending that the requests were overbroad and not proportional under  
21 Fed.R.Civ.P. 26(b)(1). Defendants filed a Motion to Compel. (ECF No. 1 in case #16-  
22 mc-36). On October 4, 2016, after reviewing the extensive briefs of the parties and  
23 conducting a 90-minute hearing on September 29, 2016, the court issued its Order (ECF  
24 No. 31), which granted in part Defendants' Motion to Compel the Government to produce  
25 documents in response to subpoenas to the CIA and DOJ. The instant Motion to Compel  
26 seeks reconsideration of a ruling made by the court after an extensive hearing on  
27 September 29, 2016, and memorialized in the written Order of October 4, 2016.

## II. Discussion

At the September 29, 2016 hearing, the court stated it would "allow the government to continue to file in redacted format." (ECF No. 29, p. 23). The court further stated, in regard to Defendants' request for a privilege log: "I'm not going to order the privilege to be addressed by the government at the current time. But I will at an appropriate time." (*Id.* at p. 24). The court did require the Government to file the general rules and guidelines being used in redacting the documents. (*Id.* at 38). The court's October 4, 2016 written Order memorialized and supplemented the oral ruling. The court stated: "Given the Government's assertions that some of the relevant documents contain classified information, currently producing them with redactions during discovery is appropriate." (ECF No. 31, p. 5). The court further stated it would not require a formal privilege log "at this time". (*Id.* at p. 6).

On October 11, 2016, the Government filed a statement addressing the rules and guidelines it is employing for redaction of documents. (ECF No. 85 in Case # 15-286). On October 20, 2016, the court issued an Order setting the document production deadline for December 20, 2016. (ECF No. 91). On October 28, 2016, Defendants filed the instant Motion. Defendants take issue with the Government's general reasons for the redactions and the specificity, stating: "The Government's identified bases for the redactions are unfounded, or, at minimum, inadequately disclosed." (ECF No. 38, p. 3). The Government opposes the current Motion and states "Defendants' efforts are focused on delay" and Defendants' "scorched earth approach" could slow the case to a standstill. (ECF No. 48, p. 1). However, the Government "acknowledges that there will likely be disputes over privilege the Court will need to adjudicate." (*Id.* at p. 2). Defendants are concerned that delaying resolution of the privilege issues may delay the case and contend producing the privilege log now may be more efficient. (ECF No. 38, p. 9)("The production of documents and a privilege log will take a certain number of man-hours to complete. Shifting the burden of producing the log to the end does not save time; it merely reorders the sequence of events.").

1 Defendants' arguments the redactions "vitate the potential importance" of the  
2 documents (ECF No. 38, p. 1) and the "redactions are so pervasive that they obscure  
3 much, if not all, of the relevant information" (*Id.* at p. 9), are not convincing. It appears  
4 Defendants do not know what was redacted, and therefore cannot assess the importance  
5 or relevance of the redacted information. Defendants argue the difficulty with the  
6 redactions is best understood by looking at a document titled "Recognizing and  
7 Developing Countermeasures to Al Qaeda Resistance to Interrogation Techniques: A  
8 Resistance Training Perspective." ( ECF No. 39-4). This document is heavily redacted,  
9 and the redactions obviously interfere with one's comprehension of the document.  
10 However, Defendants authored the article. Therefore, any prejudice to them from the  
11 redactions is minimal. Defendants presumably have an understanding of the paper they  
12 wrote, and being the authors of the document, probably have possession of an unredacted  
13 version. If Defendants do not have a copy, because it was considered classified, then  
14 Defendants already have an understanding of why it was redacted.

15 Regardless of whether Defendants are currently prejudiced by the redactions, the  
16 Defendants and the Government agree the issue of redactions/privilege will need to be  
17 addressed. At the September 29, 2016, hearing, the court stated it would not require a  
18 privilege log "at this time." However, nearly two months have now passed, and the  
19 production deadline is less than one month away. Additionally, the deadline for  
20 completion of discovery is February 17, 2017. The court finds it is appropriate for the  
21 Government to produce a privilege/redaction log at this time.

22 Preparing a privilege log should not be unduly burdensome, or necessitate  
23 extension of the December 20, 2016 deadline. According to the Defendants, the  
24 Government has produced less than 100 documents, although the exact amount is  
25 unclear. See Motion to Compel (ECF No. 38, p.2)("Government has produced 90  
26 documents"); but see Reply (ECF No. 49, p. 1)("Government has produced only about 40  
27 documents" in response to subpoena). Federal Rule of Civil Procedure 26(b)(5) requires  
28 that when a party withholds otherwise discoverable information by claiming privilege, it

1 must expressly make the claim of privilege and "describe the nature of the documents,  
2 communications, or tangible things not produced or disclosed...". If the Government has  
3 produced somewhere in the range of 50 to 100 documents, it would not be difficult to  
4 produce a privilege log as to those documents. The log is not required to include an entry  
5 every time a word or sentence in a document is redacted, but shall state the reason(s) why  
6 a document has been redacted.

7 **IT IS HEREBY ORDERED:**

8 Defendants' Motion to Compel Production of Unredacted Documents (ECF No. 38  
9 in case # 16-mc-36) is **GRANTED IN PART** and **DENIED IN PART**. The  
10 Government is not required to produce unredacted documents, but shall produce a  
11 privilege log asserting the privilege or other basis for redaction. The privilege log shall  
12 be produced by the conclusion of production, and no later than **December 20, 2016**.

13 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and  
14 furnish copies to counsel.

15 **DATED** this 23rd day of November, 2016.

16 s/ Justin L. Quackenbush  
17 JUSTIN L. QUACKENBUSH  
18 SENIOR UNITED STATES DISTRICT JUDGE  
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