

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF WASHINGTON
4

5 JAMES ELMER MITCHELL and
6 JOHN JESSEN,

7 Petitioners,

8 vs.

9 UNITED STATES OF AMERICA,

10 Respondent.
11

)
) No. 16-MC-0036-JLQ

) ORDER RE: MOTION TO
) COMPEL

12 **Related Case:**

13 SULEIMAN ABDULLAH SALIM, et al.,

14 Plaintiffs,

15 vs.
16

17 JAMES E. MITCHELL and JOHN
18 JESSEN,

19 Defendants.
20

)
) No. CV-15-0286-JLQ

) ORDER RE: MOTION FOR
) PROTECTIVE ORDER

21 BEFORE THE COURT are several motions: Petitioners/Defendants Mitchell and
22 Jessen's Motion to Compel (ECF No. 1 in case # 16-mc-36), the Government's
23 Response/Cross-Motion to Quash or Modify Subpoena (ECF No. 19 in case #16-mc-36),
24 and the Government's Motion for Protective Order (ECF No. 73 in case # 15-286).
25 Hearing was held on the Motions on September 29, 2016. Dror Ladin appeared for
26 Plaintiffs. James Smith and Brian Paszamant appeared for Petitioners/Defendants.
27 Andrew Warden, a Department of Justice (DOJ) attorney, appeared on behalf of the
28 Government. This Order memorializes and supplements the court's oral rulings.

I. Introduction

Petitioners James Mitchell and John Jessen in the miscellaneous action, 16-mc-0036, are the Defendants in the related case, *Salim et al. v. Mitchell et al.*, 15-286-JLQ, and are referred to as Defendants herein. Defendants move to compel Respondent (hereafter the "Government") to produce documents under Fed.R.Civ.P. 45. The Motion to Compel states Defendants issued subpoenas to the Central Intelligence Agency ("CIA") and Department of Justice ("DOJ") on June 27th and 28th, 2016. (ECF No. 1, p. 7). The subpoenas sought compliance (the production of documents) by August 1, 2016, in Washington, D.C.

The Government states it served written objections to the subpoenas on July 19, 2016. (ECF No. 10, p. 9). The Government objected, in part, based on the claims of overbreadth of the requests and burden to the Government. However, despite the objections, the Government states it expressed a "willingness to work with Defendants to narrow the scope of the document requests in order to facilitate production of a more focused and limited set of information." (*Id.* at 10). The Government states it "has (and continues to) produce documents responsive to the subpoenas". (*Id.*). The correspondence between counsel for the Government and counsel for Defendants, which is attached to some of the recent filings, indicates the parties were communicating and discussed alternative proposals, one of which was utilizing a Fed.R.Civ.P. 30(b)(6) deponent in order to minimize the burden of document production. On August 22, 2016, Defendants filed the Motion to Compel in the District Court for the District of Columbia, and a Motion to Transfer to this court. The Motion to Transfer was granted, and the Motion to Compel is now before this court as cause 16-MC-0036-JLQ.

In response to the Motion to Compel, the Government filed an Opposition brief/Cross-Motion to Quash or Modify Document Subpoenas (ECF No. 19). Defendants filed a Reply (ECF No. 23). Plaintiffs, who are not formal parties to the pending motions have filed a brief (ECF No. 25). Finally, Defendants and the Government filed a Statement concerning unresolved issues pursuant to Local Rule 37.1.

1 At oral argument on September 29, 2016, the court cautioned counsel concerning
2 the unique status of these discovery disputes. The current stated disputes are not between
3 the Plaintiffs and the Defendants. Rather, the pleadings reflect disputes between the
4 Government and the Defendants, the parties who allegedly entered into a contract for the
5 Defendants to provide services to the Government concerning the enhanced interrogation
6 program. The court was informed an indemnity agreement exists between the
7 Government and the Defendants and the Government is paying the Defendants' attorney
8 fees, presumably including those for the obviously extensive services provided to the
9 Defendants in the instant discovery dispute. Concern is raised because it could appear
10 that neither the Government or the Defendants have an interest in the prompt conclusion
11 of pretrial matters and timely addressing the substantive legal and factual issues under the
12 schedule set by this court in its Scheduling Order (ECF No. 59) dated July 8, 2016. The
13 Scheduling Order sets a discovery completion date of February 17, 2017, and a
14 dispositive motion cut-off date of March 31, 2017. The jury trial date is June 26, 2017.
15 The court intends to hold firm to the scheduled dates and it would be completely
16 inappropriate for the Government and the Defendants to take actions, or fail to act, in a
17 manner that would interfere with the court's schedule or the right of the Plaintiffs to have
18 their claims resolved in accordance with the Scheduling Order.

19 **II. The Motion to Compel**

20 The parties have briefed the issue extensively. The court has considered all the
21 briefing, but first focuses on the Rule 37.1 Statement (ECF No. 26) of unresolved issues.
22 The Government and Defendants have agreed the DOJ subpoena may be limited to
23 “require only production of the final legal advice that the DOJ provided about the CIA’s
24 former detention and interrogation program.” (ECF No. 26, p. 2). The Government and
25 Defendants have also agreed to limit the search of documents regarding the CIA
26 subpoena to documents in the CIA’s RDINet database. Plaintiffs' brief (ECF No. 25)
27 reflects general agreement with these proposals.

28 The Government and Defendants continue to disagree on many subjects. First,

1 Defendants do not agree with the Government's proposal production be limited to
2 documents referenced in the SSCI Executive Summary Report. Second, those parties
3 disagree on the temporal scope of the subpoena. Third, those parties continue to state
4 disagreement on the substantive scope of the subpoenas. Defendants state they want all
5 of their requests complied with, and unredacted documents produced. The Government
6 states it wants the subpoenas quashed, or limited as suggested in its brief. Fourth, the
7 Government and the Defendants state disagreement on when Government privilege
8 assertions need to be made. Fifth, the Government and Defendants state disagreement on
9 whether alternative proposals to document production should be pursued first (such as the
10 Rule 30(b)(6) deposition). The Government suggests alternative proposals should be
11 pursued first. The Defendants state the document production should continue and the
12 depositions proceed.

13 On the first issue, the court agrees with Defendants. The scope of the subpoena is
14 not limited to documents referenced in the SSCI Executive Summary. If other relevant
15 and responsive documents, within the scope of discovery, are contained in the searchable
16 RDINet database, those documents shall also be produced, subject to any subsequent
17 Government assertions of privilege.

18 On the second issue of temporal scope, the Government contends the relevant
19 period of activity in this case ended in 2004, because that is when Plaintiffs were
20 released, or in Mr. Rahman's circumstance, was deceased. The Defendants seek the
21 temporal scope extended to present. The parties agree the relevant time frame began on
22 September 11, 2001. The court has ruled that as to documents which identify or refer to
23 the two Defendants in this case and their involvement with any of the three Plaintiffs, the
24 relevant time period extends from September 11, 2001 to present. The parties
25 acknowledge there are relevant documents in existence that were generated during
26 investigations after the release of the Plaintiffs. Defendants also request documents
27 pertaining to Abu Zubaydah as relevant to Defendants alleged role in the design of the
28 enhanced interrogation program. From the parties' arguments, it appears Zubaydah was

1 the first detainee involved in the program, and according to the Government he remains
2 in custody. As to documents referencing Abu Zubaydah, the relevant time period is
3 September 11, 2001 to August 1, 2004.

4 Third, as to the substantive scope of the subpoena, the proper scope is to focus on
5 the actions of the two Defendants and the detention and interrogation of the three
6 Plaintiffs. Plaintiffs, Defendants, and the Government all agreed on the scope of
7 discovery in Case # 15-286. The parties filed a Stipulation (ECF No. 47) which set forth
8 the scope of discovery at Paragraph 5. The court issued an Order on June 15, 2016 (ECF
9 No. 51, p. 2-3), which adopted the parties' stipulated limitation on the scope of discovery,
10 which was as follows:

11 Discovery shall focus on (1) the roles of Defendants and others in designing,
12 promoting, and implementing the methods alleged in the Complaint, as related to
13 Plaintiffs, including whether Defendants merely acted at the direction of the
14 Government, within the scope of their authority, and that such authority was
legally and validly conferred, and (2) Plaintiffs' detention, rendition, interrogation
and alleged resulting injuries. (ECF No. 51, p. 3).

15 Defendants claim (at ECF No. 23, p. 15) the court impliedly superseded that Order when
16 it entered its Scheduling Order (ECF No. 59), just three weeks later on July 8, 2016.

17 Defendants are incorrect. The Scheduling Order contained this court's standard Rule 26
18 language and did not impliedly overrule the very specific Order on scope of discovery
19 issued just three weeks earlier. Defendants' argument lacks merit for another reason: the
20 subpoenas were served in late-June, which was after the court's Order on the scope of
21 discovery, and before the Scheduling Order was issued on July 8, 2016. Defendants'
22 argument the scope of a subpoena issued on June 28th was based on the court's July 8th
23 Order lacks credibility.

24 Fourth, the Government and the Defendants state disagreement on whether the
25 documents can be produced in redacted form and whether the Government must now
26 formally assert privileges. Given the Government's assertions that some of the relevant
27 documents contain classified information, currently producing them with redactions
28 during discovery is appropriate. The court is herein directing the Government to file a

1 Statement identifying the rules/guidelines it is and has employed in redacting the
2 documents. However, the Government has asserted providing a formal privilege log at
3 this juncture would be unduly burdensome. The court will not require a formal privilege
4 log at this time.

5 The fifth issue, concerning whether alternative proposals to document production
6 should be pursued first, was not argued by the parties at the hearing. The court will not
7 require that such alternative proposals be pursued first, and instead will direct the
8 Government to continue document production pursuant to the subpoena. The parties may
9 pursue alternate forms of discovery, such as the proposed Rule 30(b)(6) deposition, if
10 they agree to do so. It also appears Plaintiffs are receptive to the proposal (ECF No. 25,
11 p. 9).

12 The Government's Response stated it had produced approximately 1,100 pages in
13 response to the subpoena. According to argument at the hearing, document production
14 continued right up until the hearing and the Government has now produced
15 approximately 1,500 pages. The Government shall continue to respond to the subpoena
16 in accord with the parameters set forth in this Order.

17 **III. Motion for Protective Order**

18 The Government seeks a protective order concerning proposed oral depositions
19 directing the Defendants to proceed first by deposition on written questions as to four
20 former or current CIA officers: John Rizzo, Jose Rodriguez, Jonathan Fredman, and
21 James Cotsana. (ECF No. 73, p. 2). The Government contends the spontaneous nature of
22 oral depositions could result in the inadvertent disclosure of classified information. The
23 Government contends it may be necessary to have several CIA officers attend such a
24 deposition, including an Information Review Officer, "to guide the deponents in the
25 appropriate scope or permissible content of the deponents' answers." (ECF No. 73, p. 7).
26 The Government contends an oral deposition could involve objections, instructions not to
27 answer, and possibly delay to assess whether the question implicates classified
28 information.

1 The Government's Motion is supported by the Declaration of Information Review
2 Officer Antoinette Shiner (ECF No. 73-2). She claims an oral deposition of any of the
3 four intelligence officers "carries with it great potential for inadvertent disclosure of
4 classified information." (ECF No. 73-2, ¶ 3). She further states that former aspects of the
5 interrogation program remain classified, such as "information pertaining to the location of
6 program facilities, the identities of officers who served in the program, and the names of
7 the countries who may have assisted the U.S. Government in facilitating program-related
8 activities." (*Id.*). It is the court's impression a deposition could occur, within the scope of
9 discovery in this case concerning these two Defendants and the three Plaintiffs, that
10 would not necessitate the disclosure of classified information on the three subjects
11 identified by Officer Shiner.

12 As to Mr. Cotsana, the Government contends that there is no publicly available
13 information confirming that he had any part in the interrogation program and the
14 Government cannot confirm or deny his participation in the program. Accordingly, the
15 Government contends a deposition would be fruitless as the Government would object
16 and instruct the witness not to answer any questions "that would tend to confirm or deny
17 whether Mr. Cotsana had any involvement in the program." (ECF No. 73, p. 5).

18 Defendants opposed the Motion for Protective Order and argued a deposition on
19 written questions under Fed.R.Civ.P. 31 is not an adequate substitute for an oral
20 deposition. (ECF No. 78). Defendants argued written questions may be less efficient,
21 given the likely need for follow up questions and the possibility of an oral deposition at a
22 later time. Defendants also argued the Government's proposal is in contravention of the
23 prior Stipulation concerning discovery procedures. The Stipulation provides in part:
24 "Attorneys for the United States and representatives from appropriate Government
25 agencies may attend all depositions and proceedings in this case and may make
26 objections they deem necessary to prevent the unauthorized disclosure of privileged or
27 classified information." (ECF No. 47, ¶ 14). The Stipulation further provides if an
28 objection based on classified, protected, or privileged information is made, the "witness

1 shall be precluded from responding to any questions to which objection is made pending
2 further order of the Court." (*Id.*). Paragraph 15 of the Stipulation provides the parties
3 shall meet and confer after the deposition if such objections are made.

4 The court **DENIES** the Motion for Protective Order. The parties are directed to
5 meet and confer further concerning the scheduling of the depositions and the best manner
6 for efficiently proceeding. Counsel shall discuss whether for some witness(es),
7 proceeding first through written questions pursuant to Fed.R.Civ.P. 31 would be more
8 efficient and practical. For example, with regard to Mr. Cotsana, the Government
9 suggests an oral deposition would result in the parties all traveling to New Hampshire and
10 then a record being made of objections, assertions of privilege, and instructions not to
11 answer. If Defendants persist in their request for an oral deposition of Mr. Cotsana, they
12 shall provide to the Government, at least 10 days prior to the deposition, a list of subjects
13 to be covered and anticipated questions.

14 **IT IS HEREBY ORDERED:**

15 1. The Motion to Compel (ECF No. 1) is **GRANTED IN PART** as set forth
16 herein.

17 2. The Government's Cross-Motion to Quash or Modify (ECF No. 19) is **DENIED**
18 as to the request to quash and **GRANTED IN PART** as to the request to modify as set
19 forth herein.

20 3. The Government's Motion for Protective Order (ECF No. 73) is **DENIED**.

21 4. The Government shall continue to produce documents responsive to the CIA
22 subpoena. The Government shall file a Status Report as to its compliance with the CIA
23 subpoena, on **October 11, 2016**, and every 21-days thereafter, if the document
24 production is not completed by October 11, 2016. The court observes the CIA subpoena
25 was served **94** days prior to oral argument on the Motion to Compel. The court will not
26 set a final cut-off date for completion of compliance with the CIA subpoena at this time.
27 Counsel shall confer and by **October 14, 2016**, advise the court of an agreed cut-off date.
28 If agreement is not reached, the Government and the Defendant shall each submit a short

1 brief (not to exceed 5 pages) as to their position on an appropriate deadline. Those briefs,
2 if necessary, shall be filed by **October 17, 2016**. The court will then set a cut-off date,
3 having in mind the concerns expressed at oral argument and herein that delay in the
4 prosecution of this case will not be allowed by reason of issues between the Government
5 and the Defendants.

6 5. The Government may continue to produce documents with redactions.
7 On or before **October 11, 2016**, the Government shall file a Statement identifying the
8 rules/guidelines it is employing in redaction of documents. This Statement shall also
9 specifically address Defendants' concerns with two redacted documents that were raised
10 at the hearing.

11 6. At the September 29, 2016 hearing there was discussion of Defendants'
12 contracts with the CIA including nondisclosure provisions. Both the Government and
13 Defendants offered to file those contracts with the court. The court believes such
14 documents will be useful to the court's understanding in the event there are further
15 discovery issues requiring the court's consideration. Accordingly, no later than **October**
16 **11, 2016**, the Government shall file those contracts and nondisclosure agreements
17 between the CIA and Defendants, which the court understands have previously been
18 produced to Defendant. If the nature of the documents so require, the documents may be
19 filed under seal.

20 7. In future filings, the parties shall adhere to Local Rule 10.1, **as modified by**
21 **this Order**, concerning courtesy copies. The parties shall submit courtesy copies of any
22 filing exceeding 50 pages, including attachments and/or exhibits. The courtesy copies
23 shall be 3-hole punched and tabbed, and clearly marked on the first page: "Judge's
24 Courtesy Copy of Electronic Filing". The courtesy copy should be generated, whenever
25 possible, after the document is electronically filed so that it bears the ECF number.

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