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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

**PETITIONERS' MOTION TO COMPEL PRODUCTION OF UN-REDACTED DOCUMENTS**

Oral Argument Requested
November 28, 2016
Expedited Hearing Requested

NO. CV-15-0286-JLQ



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**Related Case:**

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.



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## I. INTRODUCTION

As the Court is well aware, Petitioners Drs. James Mitchell and John "Bruce" Jessen ("Defendants") requested documents pursuant to two subpoenas issued to the CIA and DOJ (collectively, "Government") back in June of 2016. And while the Government has produced a small number of documents, many of these documents are so heavily redacted (without specific explanation or justification) so as to vitiate their potential importance and use in the related action, *Salim, et al. v. Mitchell, et al.*, 15-cv-286-JLQ ("Action"). The Government's unilateral, unexplained and often wholesale redactions—and the prejudice to Defendants' ability to properly defend themselves arising therefrom—necessitates that Defendants seek relief. Defendants request that the Court order the Government to produce documents in un-redacted form or, at a minimum, specifically identify which privilege(s) the Government relies upon for each individual redaction applied so that these redactions can be properly vetted.

The Government also relies on improper bases to support its redactions. For instance, the Government relies on FOIA-based exemptions designed to prevent disclosure of "confidential information" *to the public*. Such exemptions have no application in this *private* action. The Government also seemingly relies on the state secrets privilege to support redactions, despite the fact the privilege has not been invoked. As shown, the Government's actions should be disallowed, and it should instead be compelled to promptly produce un-redacted documents.

## II. RELEVANT FACTUAL BACKGROUND

The Government has produced 90 documents, consisting of 1,475 pages, in response to the subpoenas, and has advised that it must review (and produce as appropriate) 36,000 additional, potentially-responsive documents by December 20. (ECF No. 85 at 11; ECF No. 91 at 2). As relevant to this motion, the Government has redacted many of the documents produced—some extensively. And in large part, if not entirely, the Government has provided no specific justifications to support these redactions. Thus, Defendants—left to guess what information was redacted and why—previously moved to compel production of un-redacted documents and a privilege log from the Government. (ECF No. 1).

This Court subsequently ruled that it was appropriate for the Government to make certain redactions—for example, where the redacted material was "classified"—but required the Government to submit a "statement identifying the rules/guidelines it is and has employed in redacting the documents." (ECF No. 80, p.5-6). The Court also ruled that the Government was not required to provide a "formal" privilege log "at this time" due to the supposed burden imposed. (*Id*.)

On October 11, 2016, the Government filed a statement in the Action identifying the rules/guidelines it has employed in redacting documents ("Status Report"). (ECF No. 85). The Status Report clarifies that the Government is applying its *own rules* under a "Classification Guidance" memorandum ("Guidance Memorandum"), Ex. 1 to the Status Report, without regard to the



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Fed.R.Civ.P. (*Id.* at p.6:20-22). Critically, the Status Report fails to identify which of the various "categories" of information delineated in the Guidance Memorandum are, in fact, present within specific documents—so as to purportedly justify the redactions inserted therein. (*Id.* at p.7:7-8:2). Thus, Defendants are left in the untenable position of having to guess as amongst various potential bases that the Government may be relying upon to justify the redactions contained within any given document. This, of course, renders Defendants wholly unable to assess and challenge the propriety of the redactions in contravention of the rights afforded to Defendants under the Fed.R.Civ.P.

## III. ARGUMENT

### A. The Government's Identified Bases for the Redactions are Unfounded, or, at a Minimum, Inadequately Disclosed.

#### 1. Redactions Based upon the Guidance Memorandum.

Within its Status Report, the Government explains that it has been redacting information from produced documents in accordance with the Guidance Memorandum, (ECF No. 85 at p.6:20-22), or "previous classification guidance about the [RDI] program[.]" (*Id.* at p.3:20-23). Yet, the Government provides no information identifying the origin of this Guidance Memorandum, nor attempts to explain its legal validity. Instead, the Government *presumes* that Defendants—and this Court—must simply accept its validity and application without further examination. Not so. Surely, before the Government may rely on this undated, unsigned and otherwise unsupported "guide" as controlling legal authority

justifying the withholding of information responsive to the subpoenas, it should be ordered to articulate the origins of and, more importantly, the legal basis for, all aspects of the Guidance Memorandum. Absent some legal framework by which to analyze the legal validity of the Guidance Memorandum, Defendants (and the Court) are improperly hobbled in their ability to test the propriety of the redactions apparently performed in accordance therewith. The Government's redactions founded upon the Guidance Memorandum should be disallowed absent legal authority supporting the Guidance Memorandum's so-called "guidance."

**2. Redactions Based upon FOIA Exemptions.**

The Government's reliance on FOIA exemptions to justify its redactions is also misplaced. (ECF No. 85 at p.2-5). Production in response to Defendants' subpoenas is not governed by FOIA; it is governed by the Fed.R.Civ.P. which require production of "non-privileged" documents. *See* FED.R.CIV.P. 26(b)(1), 45(e)(2)(A); *United States v. Reynolds*, 345 U.S. 1, 7 (1953) ("non-privileged" refers to privileges recognized by the law of evidence). And, it is well settled that not all FOIA exemptions have a common law counterpart. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006) ("It is unsound to equate the FOIA exemptions and similar discovery privileges"), *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984) ("If information in government documents is exempt from disclosure to the general



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public under FOIA, it does not automatically follow the information is privileged . . . and thus not discoverable in civil litigation."). Per the Ninth Circuit:

> FOIA is . . . directed to regulating the public access to documents held by the federal government; the public's 'need' for a document is unrelated to whether it will be disclosed. By contrast, the public right of access to court documents is grounded on principles related to the public's right and need to access court proceedings.

*Kamakana*, 447 F.3d at 1185 (internal citations omitted).

In relying upon the FOIA exemptions (ECF No. 85 at 2-5), the Government ignores the distinction identified by the Ninth Circuit in *Kamakana*, and in so doing, fails to address Defendants' need for these documents—documents that the Court has ordered be produced—in un-redacted form. Moreover, it provides no common-law or other basis recognized by the Fed.R.Evid. in defense of its FOIA-based redaction practices in contravention of both the Fed.R.Civ.P. and *Reynolds*.

The Government is also relying on an outdated scope of FOIA exemptions. To "expedite" its production, the Government has produced 60 documents (900 pages) in the DOJ's possession it claims were previously reviewed and redacted pursuant to then-existing FOIA guidelines, and thereafter released to the public. (ECF No. 85 at p.3:13-16).[1] However, the Government must surely do more to

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[1] The Government concedes certain "documents were reviewed and redacted according to *previous* classification guidance." (*Id.* at 3:20-22; emphasis added). Moreover, the Government also tacitly admits that it is both capable and willing



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comply with the subpoenas than simply re-produce its files from other matters, as redacted in accordance with rules applicable to these other matters.

**3. Redactions Based upon the NSA Act, the CIA Act, Executive Order 13526 and/or the State Secrets Privilege.**

The Status Report identifies the NSA Act, the CIA Act, Executive Order 13526 ("EO") and the state secrets privilege as bases for certain redactions. (ECF No. 85 at p.6-7; p.9:8-12). But, the Government fails to explain how these Acts and/or the EO authorize it to redact documents *in response to a subpoena* validated by this Court. If the Government is claiming these Acts or the EO codify or otherwise memorialize the state secrets privilege, or that such privilege justifies its redactions, it must first formally assert that privilege. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404 (D.C. Cir. 1984) ("state secrets and deliberative process privileges, are narrowly drawn privileges which must be asserted according to clearly defined procedures."). Assertion requires the CIA: (1) formally claim privilege; (2) lodge that privilege by the head of the department with control over the matter; and (3) attest that the privilege is being asserted following that officer's personal consideration. *Reynolds*, 345 U.S. at 1. To date, the Government has not asserted the state secrets privilege. Nor do these Acts and/or the EO—all relating to FOIA—standing alone provide a basis for

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to re-review prior redactions to reveal certain "key information"—like Defendants' names, or the name of a detention facility. (ECF No. 85, p.9:13-22).

redaction. And, until the Government identifies a common-law privilege embodied therein, it may not rely upon these sources to justify its redactions here.

The Court need look no further than "Exhibit DD" discussed within the Status Report to understand the extent to which the Government is relying upon the Acts and/or EO to justify its redactions. (ECF No. 85 at p.9:3-12) (Rosenthal Decl., **Ex. 1**). Wide swaths of this document—which the Government identifies as "a collection of six separate CIA operational cables dated November 2002 about the rendition, detention, interrogation, and death of Plaintiff Gul Rahman," (*id.* at p.9:6-8)—have collectively been redacted without explanation as to what redactions arise from which item(s). In fact, it is worse: the redactions are apparently based upon one or more of *eleven* "classification categories"—none of which are tied to any particular redaction. (*Id.* at p.9:9-10; p.7:7-8:2). Such treatment renders Defendants unable to assess the propriety of these redactions.[2]

**4. Redactions Based upon the Deliberative Process Privilege.**

Finally, the Government relies upon the deliberative process privilege to justify redacting almost the entirety of an 89-page CIA document titled *Summary and Reflections of Chief Medical Services on OMS Participation in the RDI*

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[2] Equally troubling are certain CIA cables where the author's name and other large portions have been redacted under FOIA. (Rosenthal Decl. **Ex. 2**). Without this information, Plaintiffs (or the SSCI Report) may claim Defendants authored said cables—leaving Defendants virtually unable to prove they did not.



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*Program*. (ECF No. 85 at p.8:8-16) (Rosenthal Decl., **Ex. 3**). But, contrary to the Government's position, this limited privilege does not automatically apply to a document simply because it is "stamped DRAFT." (*Id.* at p.8:11-14). Rather, to properly invoke this privilege, the Government must demonstrate that the information withheld both is "predecisional" and "deliberative" in nature. *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The Government makes no effort to satisfy this two-prong test. Further, while the Government advises that it has "agreed to waive any deliberative process protections over information . . . discussing Defendants' role in the [CIA's] former . . . program," (*id.* at p.8:22-23), how this selective waiver has been implemented in terms of consistency and otherwise is left entirely unexplained, even assuming *arguendo* that the Government is entitled to employ selective waiver—which it cannot. *See Lindell v. City of Mercer Island*, 833 F. Supp. 2d 1276, 1282 (W.D. Wash. 2011) (discussing how allowing "selective waivers would be fundamentally unfair").

**B. Documents Produced Demonstrate the Need for the Government to Specifically Identify the Basis for Each of Its Redactions.**

Under the auspices of expediency and burden, the Government received a reprieve from producing a "formal" privilege log "at this time." But, this reprieve is causing Defendants great prejudice in that is impeding their ability to understand, and thus challenge, any of the redactions unilaterally being imposed. This inability foists additional prejudice on Defendants to the extent they are being deprived of relevant information as the discovery deadline looms closer.

The Government claims it should not be forced to produce a privilege log now due to the burden associated with its "large" production. (ECF No. 19 at p.30:16-22.) This argument is faulty. 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. In fact, the burden of producing a log may become considerably greater the longer the Government waits; conversely, deciding this issue now may even result in the Government having to insert fewer redactions. Besides, unless the Government is contemporaneously logging redactions it will need to revisit them in the future, *i.e.*, necessitating duplicative effort. And if the Government *is* contemporaneously logging redactions, why should Defendants wait until after December 20 to receive a log? Indeed, how will Defendants have time to challenge the redactions at that point in light of the discovery deadline?

The breath and scope of the impediment confronting Defendants—in many cases, the redactions are so pervasive that they obscure much, if not all, of the relevant information contained with a document—can perhaps be best understood by reviewing the Government's redactions of a document *authored by Defendants* titled *Recognizing and Developing Countermeasures to Al Qaeda Resistance to Interrogation Techniques: A Resistance Training Perspective* ("Report"). (Rosenthal Decl., **Ex. 4**). This ten-page document "discusses the techniques and strategies for resisting interrogation described in captured Al Qaeda training



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manuals and other documents." *Id.* at #001149. Moreover, it "suggests methods for recognizing when sophisticated resistance to interrogation techniques are being employed" by "placing Al Qaeda resistance to interrogation techniques within a metaphor that illustrates their operational use," *id.*, and explains how "[s]killfully crafted countermeasures can be developed in such a way that they do not violate the Geneva Conventions." *Id.* at #001153. Plainly, the guidance offered *by Defendants* as to the "techniques and strategies" contemplated for use *by the CIA* on detainees is an issue that lies at the very heart of this action.

But the Government's redactions strip the Report of any real value. Five full pages are redacted in their entirety; another has only a single heading; and two more have less than a quarter page of visible text. Indeed, the key "metaphor" referenced by Defendants is absent, as is any discussion of "craft[ing] countermeasures" to "comply" with the Geneva Conventions. Nor is there any indication as to how much text was removed, why it was removed, and/or the legal basis for its removal. How can Defendants begin to assess such redactions? Redaction without specific explanation of this variety, endemic in the Government's production, is not countenanced by the Fed.R.Civ.P. *San Diego Navy Broadway Complex Coal. v. U.S. Dep't of the Navy*, 2008 U.S. Dist. LEXIS 1519, at *12 (S.D. Cal. Jan. 8, 2008) (requiring explanations for redactions).

## IV. CONCLUSION

For the foregoing reasons, Defendants' motion should be granted.



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DATED this 28th day of October, 2016.

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**STATEMENT CERTIFYING ATTEMPTS TO MEET AND CONFER**

Despite good faith efforts to resolve this matter without judicial intervention, the Government has not offered to compromise, and has declined to consent to expedited treatment.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2016, 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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