

**BETTS, PATTERSON & MINES P.S.**  
Christopher W. Tompkins (WSBA #11686)  
[CTompkins@bpmlaw.com](mailto:CTompkins@bpmlaw.com)  
701 Pike Street, Suite 1400  
Seattle, WA 98101-3927

**BLANK ROME LLP**  
Henry F. Schuelke III (admitted *pro hac vice*)  
[HSchuelke@blankrome.com](mailto:HSchuelke@blankrome.com)  
600 New Hampshire Ave NW  
Washington, DC 20037

James T. Smith (admitted *pro hac vice*)  
[Smith-jt@blankrome.com](mailto:Smith-jt@blankrome.com)  
Brian S. Paszamant (admitted *pro hac vice*)  
[Paszamant@blankrome.com](mailto:Paszamant@blankrome.com)  
One Logan Square, 130 N. 18th Street  
Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

**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’ REPLY IN  
SUPPORT OF MOTION TO  
COMPEL PRODUCTION OF  
UN-REDACTED DOCUMENTS  
[ECF No. 38]**

Oral Argument To Be Decided  
Pursuant to Court’s Nov. 2 Order

**Related Case:**

SULEIMAN ABDULLAH SALIM,  
et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN  
JESSEN,

Defendants.

NO. CV-15-0286-JLQ

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1 The Government advances three primary rationales in opposing the Motion:  
2 (1) the Court has sanctioned the redactions irrespective of their legal propriety; (2)  
3 the redactions are legally valid, most solely because the Government has provided  
4 its Guidance Memorandum; and (3) the redactions' validity should be ignored for  
5 the sake of speed. The Government's positions are, at minimum, misdirected.  
6 These un-redacted documents are necessary to properly test and rebut the partisan  
7 SSCI Report that Plaintiffs greatly rely upon to advance their claims.

#### 8 **I. THIS DISPUTE HAS NOT BEEN ADDRESSED**

9 Defendants do not seek to "re-hash arguments" already decided. Opp. 3:15-  
10 17. Rather, they seek to compel production in un-redacted form or, at minimum, to  
11 compel identification of the specific privilege(s) relied upon for each redaction so  
12 that they can be properly vetted—a dispute not decided in connection with  
13 Defendants' prior motion (ECF 1). Nor did the Court's October 4 Order (ECF 31)  
14 assess the redactions propriety; it simply permitted the Government to commence  
15 production of documents in redacted form. The Government's subsequently filed  
16 Status Report (ECF 85), which merely identifies the *general* redaction criteria the  
17 Government is applying *as a whole*, and the impropriety of these criteria, along  
18 with the Government's continued failure to identify the privilege(s) relied upon for  
19 the redactions contained in specific documents, necessitates this Motion.

#### 20 **II. DEFENDANTS SEEK TO AVOID PROTRACTED DISCOVERY**

21 The Government has continuously sought to prolong, if not stall, discovery;  
22 its charge that the Motion represents a "scorched earth approach" that will  
23 "effectively slow this case to standstill," Opp. 1:17-21, is baseless hyperbole. The  
24 Government has produced only about 40 documents in 4½ months since service of  
25

1 the subpoenas in addition to those documents previously made public in response  
2 to FOIA requests. And, many of these documents are so heavily redacted—  
3 without specific explanation or apparent legal basis for the redactions—as to  
4 render them largely, if not entirely, meaningless.

5 Yet, the Government now urges that “Defendants should be required to  
6 identify specific documents material to their case that they have questions about,  
7 and then the Government can attempt to address those issues in an effort to narrow  
8 the scope and number of disputes that need to be presented to the Court.” Opp.  
9 5:1-4.<sup>1</sup> But in so urging, the Government seeks to shift its obligations to  
10 Defendants. The Government is redacting, and it is thus the Government’s  
11 Fed.R.Civ.P obligation to explain why it is entitled to perform each such redaction;  
12 it cannot simply provide Defendants with a buffet of purported potential global  
13 justifications and then require Defendants to guess which, if any, of the identified  
14 “justifications” form the rationale for the myriad redactions in a given document.<sup>2</sup>  
15 Moreover, the Government’s proposal is founded upon a false pretense as it will  
16 plainly jeopardize compliance with the discovery deadline.<sup>3</sup> When, after

17 \_\_\_\_\_  
18 <sup>1</sup> The Government claims its “limited” resources make this approach desirable.  
19 Opp. 7:23. But, there is no evidence that the same individuals involved in  
20 production efforts would also be involved in efforts to explain redactions.

21 <sup>2</sup> Defendants note that their July 27, 2016 letter explained why each claimed basis  
22 for the Government’s objections/redactions is unfounded. ECF 1-18.

23 <sup>3</sup> The Court previously noted that a lengthy conferral between Defendants and the  
24 Government could be viewed as interfering with Plaintiffs’ right to have their  
25 claims promptly resolved. ECF 80, p. 3. Also, the Government cannot have it

1 December 20, will the Government respond to Defendants’ questions concerning  
2 specific redactions, and how will Defendants then have time to challenge the  
3 redactions and recommence depositions to inquire about previously redacted  
4 documents? Plainly, they will have no time, which seems to be the Government’s  
5 plan. Conversely, the prompt production of un-redacted documents or, at  
6 minimum, the identification of which privilege(s) is relied upon for specific  
7 redactions will help ensure discovery’s timely completion.<sup>4</sup>

### 8 **III. THE GOVERNMENT’S REDACTIONS LACK LEGAL BASIS**

9 The Government *concedes* that “as a general matter the FOIA’s statutory  
10 exemptions do not ... justify withholdings in the context of civil discovery”, yet  
11 contends it should nevertheless be permitted to produce documents redacted in  
12 accordance with FOIA simply “to expedite production ...” Opp. 6:20-21.  
13 Defendants disagree. Speed alone cannot justify the discarding of well-settled  
14 discovery obligations particularly where, as here, it greatly hampers Defendants’  
15 ability to assess the propriety of the remaining redactions, *i.e.* the intermixing of  
16 improper FOIA-based redactions among others renders all treatment opaque.

17 In any event, the Government’s non-FOIA-based redactions are unfounded.  
18 For instance, the Government argues that its redactions based upon the unsigned  
19 Guidance Memorandum are “legally well-established and appropriate.” Opp. 6:12.  
20 Not so. In fact, the very decision relied upon in support of the Government’s

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22 both ways—asserting that lengthy conferrals are necessary while simultaneously  
23 resisting having its redactions adjudicated on an expedited basis.

24 <sup>4</sup> The latter approach is not novel. It is uniformly used in cases whenever an item  
25 is withheld based upon the claimed application of the attorney/client privilege.

1 position demonstrates the Guidance Memorandum's inadequacy. In *Wilson v.*  
2 *McConnell*, the court accepted the CIA's "Classification Guide" as a proper basis  
3 for redactions only after the Government submitted a declaration establishing that  
4 the Guide complied with the applicable executive order's classification  
5 requirements. 501 F. Supp. 2d 545, 553 (S.D.N.Y. 2007). Here, *the Government*  
6 *does not meet this burden*; it has advanced no declaration or supporting  
7 documentation substantiating that the Guidance Memorandum and the redactions  
8 based thereon comport with Executive Order 13526.

9 Further, the Government's claim that "numerous courts have upheld the  
10 CIA's assertion of its statutory privilege in the context of civil discovery," Opp.  
11 8:5-6, fails to acknowledge that the statutory privilege (1) is "*a very narrow and*  
12 *explicit exception*" and (2) *must be asserted pursuant to specific procedures in*  
13 *order to be upheld*. *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 176  
14 (D.D.C. 2013) (emphasis added); *Bothwell v. CIA*, No. 13-cv-05439, 2014 WL  
15 5077186, \*10 (N.D. Cal. Oct. 9, 2014) (requiring CIA affidavits be submitted to  
16 the Court).<sup>5</sup> Indeed, the CIA Act, 50 U.S.C. § 3507, only protects "information on  
17 the CIA's personnel and internal structure, such as the names of personnel, the  
18 titles and salaries of personnel, or how personnel are organized within the CIA."  
19 *Nat'l Sec.*, 960 F. Supp. 2d at 175. Where, as here, the Government applies the  
20 CIA Act too broadly, it *must* rectify this problem by either "disclos[ing] any

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22 <sup>5</sup> The Government does not mention that the cited decisions all included *in camera*  
23 review of relevant documents. See *Kronisch v. United States*, 83-civ-2458, 1995  
24 WL 303625, \*2 (S.D.N.Y. May 18, 1995). Defendants favor *in camera* review of  
25 the un-redacted production if it would assist assessment of the redactions.

1 otherwise non-exempt information” to the party seeking disclosure, or “fil[ing] a  
2 more sufficient declaration” with an “index that justifies the actual relationship  
3 between the withheld information and personnel functions of the CIA.” *Whitaker*  
4 *v. CIA*, 31 F. Supp. 3d 23, 35 (D.D.C. 2014). This is precisely what the  
5 Government should be obligated to do.

6 Next, although the Government cedes that statutory privileges are typically  
7 asserted “in connection with a formal assertion of the State Secrets Privilege,”  
8 *Opp.* 8:10-11, here it appears to rely upon the assertion of statutory privileges *in*  
9 *order to avoid* assertion of that Privilege. *Id.* 6:12-16 (Guidance Memorandum  
10 was supplied “in a practical attempt to ... avoid, where possible ... topics that  
11 remain classified or subject to a State Secrets Privilege assertion.”). This approach  
12 is backwards. Where the State Secrets Privilege applies, it must be formally  
13 asserted. Likewise, if the Government seeks to assert statutory privileges, they  
14 must be properly asserted. The Government has done neither.<sup>6</sup>

15 Finally, the Government’s claim that it has properly justified the redactions  
16 contained in the documents attached to the Motion is unfounded. The Government  
17 was required to explain the basis for the specific redactions in the Motion’s Ex. 3,  
18 not merely identify a list of general criteria globally “justifying” the redactions.  
19 Similarly, the Government is not excused from producing an un-redacted version  
20 of the Motion’s Ex. 4, or from specifying which privilege(s) were relied upon for  
21 the specific redactions contained therein, particularly as this report, authored by  
22 Defendants, *goes to the heart of Plaintiffs’ claims, i.e., Defendants’ role in*  
23 *designing the Program.* ECF 31 p.5.

24 \_\_\_\_\_  
25 <sup>6</sup> Privilege assertion does not depend upon a document’s materiality. *Opp.* 5:7-8.

1 DATED this 15th day of November, 2016.

2 BLANK ROME LLP

3 By s/ Brian S. Paszamant

4 James T. Smith, admitted *pro hac vice*

5 [smith-jt@blankrome.com](mailto:smith-jt@blankrome.com)

6 Brian S. Paszamant, admitted *pro hac vice*

7 [paszamant@blankrome.com](mailto:paszamant@blankrome.com)

8 Blank Rome LLP

130 N 18th Street

Philadelphia, PA 19103

9 Henry F. Schuelke III, admitted *pro hac vice*

10 [hschuelke@blankrome.com](mailto:hschuelke@blankrome.com)

Blank Rome LLP

11 600 New Hampshire Ave NW

12 Washington, DC 20037

13 Christopher W. Tompkins, WSBA #11686

14 [ctompkins@bpmlaw.com](mailto:ctompkins@bpmlaw.com)

15 Betts, Patterson & Mines, P.S.

16 701 Pike St, Suite 1400

Seattle, WA 98101

17 Attorneys for Defendants Mitchell and Jessen



**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of November, 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:

<p>Emily Chiang  <a href="mailto:echiang@aclu-wa.org">echiang@aclu-wa.org</a>                  ACLU of Washington Foundation                  901 Fifth Ave, Suite 630                  Seattle, WA 98164</p>	<p>Paul Hoffman  <a href="mailto:hoffpaul@aol.com">hoffpaul@aol.com</a>                  Schonbrun Seplow Harris &amp; Hoffman, LLP                  723 Ocean Front Walk, Suite 100                  Venice, CA 90291</p>
<p>Andrew I. Warden  <a href="mailto:Andrew.Warden@usdoj.gov">Andrew.Warden@usdoj.gov</a>                  Senior Trial Counsel                  Timothy A. Johnson  <a href="mailto:Timothy.Johnson4@usdoj.gov">Timothy.Johnson4@usdoj.gov</a>                  Trial Attorney                  United States Department of Justice                  Civil Division, Federal Programs Branch                  20 Massachusetts Ave NW                  Washington, DC 20530</p>	<p>Steven M. Watt, admitted <i>pro hac vice</i>  <a href="mailto:swatt@aclu.org">swatt@aclu.org</a>                  Dror Ladin, admitted <i>pro hac vice</i>  <a href="mailto:dladin@aclu.org">dladin@aclu.org</a>                  Hina Shamsi, admitted <i>pro hac vice</i>  <a href="mailto:hshamsi@aclu.org">hshamsi@aclu.org</a>                  ACLU Foundation                  125 Broad Street, 18th Floor                  New York, NY 10007</p>
<p>Avram D. Frey, admitted <i>pro hac vice</i>  <a href="mailto:afrey@gibbonslaw.com">afrey@gibbonslaw.com</a>                  Daniel J. McGrady, admitted <i>pro hac vice</i>  <a href="mailto:dmcgrady@gibbonslaw.com">dmcgrady@gibbonslaw.com</a>                  Kate E. Janukowicz, admitted <i>pro hac vice</i>  <a href="mailto:kjanukowicz@gibbonslaw.com">kjanukowicz@gibbonslaw.com</a>                  Lawrence S. Lustberg, admitted <i>pro hac vice</i>  <a href="mailto:llustberg@gibbonslaw.com">llustberg@gibbonslaw.com</a>                  Gibbons PC                  One Gateway Center                  Newark, NJ 07102</p>	

By s/ Karen L. Pritchard  
 Karen L. Pritchard  
[kpritchard@bpmlaw.com](mailto:kpritchard@bpmlaw.com)  
 Betts, Patterson & Mines, P.S.