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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** February 17, 2017 Without Oral Argument
Related **Case:** SULEIMAN ABDULLAH SALIM, et al., Plaintiffs,	NO. CV-15-0286-JLQ

vs.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

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I. INTRODUCTION

Petitioners Mitchell and Jessen ("Defendants") requested documents pursuant to two subpoenas issued to the CIA and DOJ (collectively, "US") in June 2016, and secured Orders compelling the production of certain of those documents by December 20 for use in the related action, *Salim, et al. v. Mitchell, et al.*, 15-cv-286-JLQ ("*Salim*"). (ECF Nos. 1, 30, 36, 38, 47, 52.) The Court's prior rulings did not address the propriety of the US's redactions of information, but required the US to "produce a privilege log asserting the privilege or other basis for redaction," (ECF No. 52 at 5), while noting that "Defendants and the US agree the issue of redactions/privilege will need to be addressed." (*Id.* at 4.)

On December 20, the US provided: (1) the vast majority of those 252 documents produced pursuant to the Court's directive; and (2) a privilege log. (Tompkins Decl. ¶ 4 and **Ex. B**.) The log lists numerous "privileges" claimed to be applicable to each document withheld or redacted. However, the US's withholding of documents and redactions based upon these "privileges" is errant. Primarily, several of the privileges require formal assertion through a proscribed method, and the US has not employed such methods, e.g. the state secret and deliberative process privileges. (Tompkins Decl. at **Ex. B** (identifying "subject to an assertion of the State Secrets privilege").) In terms of the other "privileges", the US has yet to explain their applicability, and instead merely seeks to block disclosure based upon its "Classification Guidance" memorandum ("Guidance Memorandum")—a document with no independent legal import, as Defendants previously explained. (ECF No. 38 at 3-4.)

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The US's reliance upon these "privileges" to withhold information is not limited to documents. Pursuant to the Court's Order (ECF No. 31 at 8), Defendants provided the US with a list of deposition topics for retired CIA officer James Cotsana. The US returned the list with objections to every substantive topic, asserting that the information is "subject to the assertion of the state secrets privilege," and advising that Mr. Cotsana would not be permitted to testify on those topics. (Tompkins Decl. at **Exs. C** & **E**.) The US also provided a Declaration from Mr. Cotsana identifying the very few topics upon which Mr. Cotsana may testify, i.e. name, that he worked for the CIA, that he executed nondisclosure agreements and that he is retired. (*Id.* at **Ex. D**.)

While the US—having taken six months to complete its limited document production—has recently agreed to re-review a limited set of documents and possibly provide additional information, the US desires to avoid properly invoking the privileges asserted, while acting as if it has. The US cannot have it both ways. If the US will not take the invocation steps necessary to enable the Court to assess the merits of its privilege claims, then the US must now produce un-redacted documents and permit unrestricted witness testimony.

Defendants do not seek to delay this case or pursue unnecessary motions. But as the Court's Order Re: Case Management Procedures provides, discovery concerning Plaintiffs' claims that Defendants designed, promoted, and implemented the methods alleged in the Complaint shall focus in part on "whether Defendants merely acted at the direction of the US, within the scope of their authority, and that such authority was legally and validly conferred, …"

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(15-cv-286-JLQ, ECF No. 51 at 3.) That information, unlike information on which Plaintiffs rely, is not in the public record and is vital to their defenses.

A cursory review of the privilege log identifies documents withheld in their entirety that appear particularly relevant to the claims against Defendants, e.g. documents entitled "Origins of the Program"; "Eyes Only–Setting the Stage for the Ratcheting Up Phase Concerning Abu Zubaydah Interrogations, 12 July 2002"; "Email, Re: Jim and Bruce", "Draft CIA Cable, Eyes Only: HQS [Headquarters] Feedback on pending Issues re the Abu Zubaydah Interrogations (July 2002)"; "Note, June 2002, Subject: Interrogation Plan Input [relating to Abu Zubaydah]". (Tompkins Decl. **Ex. B** at doc. nos. 137, 166, 168, 228, 229.) Other documents germane to Defendant Jessen's involvement with detainee Rahman are so heavily redacted as to render them without necessary context, if not wholly indecipherable. (Tompkins Decl. at **Ex. G.**)

The US's unilateral and often wholesale nondisclosure—and the resulting prejudice to Defendants' ability to properly defend themselves—necessitates that Defendants again seek relief. Defendants request the US be ordered to produce un-redacted materials and permit unrestricted testimony, or follow the procedural requirements for formal invocation of the privilege(s) sought to be relied upon for each redaction and deposition topic so that such claims can be properly vetted.

II. RELEVANT FACTUAL BACKGROUND

In response to this Court's Order (ECF No. 31 at 9), on October 11 the US filed in *Salim* a statement identifying the guidelines it has employed in redacting documents ("Status Report"). (15-cv-286-JLQ, ECF No. 85.) The Status Report

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clarifies that the US is applying its *own rules* under the Guidance Memorandum, Ex. 1 to the Status Report, without regard to the Fed.R.Civ.P. (*Id.* at 6:20-22.) The US has failed to identify any legal underpinning for the Guidance Memorandum, claiming only that its withholding based upon the unsigned Guidance Memorandum is "legally well-established and appropriate." (ECF No. 48 at 6:12) But, as discussed herein, it is not.

On September 16, in opposing Defendants' initial motion to compel, the US contended that "a court should assess and resolve objections to a subpoena's scope before requiring a third party to formally assert privilege…" (ECF No. 19 at 28.) But, even now, over three months after the Court's order compelling the US's production, the US still has not formally invoked the privileges it seeks to rely upon and has not provided sufficient information for the Court to assess the merits and permissible scope of the claimed privileges. In so doing, the US is depriving Defendants of information critical to their defense.

Counsel for the US and Defendants have conferred and the US is unwilling to take further steps to formally invoke the claimed privileges, nor will it produce un-redacted documents or permit Mr. Cotsana to answer Defendants' proposed deposition questions. (Tompkins Decl. at ¶3 and **Ex. A**.)

III. ARGUMENT

A. The Bases for Nondisclosure are Unfounded, or, at a Minimum, have <u>Not been Properly Invoked.</u>

1. Nondisclosure Based upon The Guidance Memorandum.

As previously briefed (ECF No. 38), the US's Status Report explains that it has redacted and/or withheld documents under the Guidance Memorandum, (15-

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cv-286-JLQ, ECF No. 85 at 6:20-22), or "previous classification guidance about the [RDI] program[.]" (*Id.* at 3:20-23). Yet the US provides no information as to the origin of this document or its legal validity. Redactions founded upon the Guidance Memorandum must be disallowed absent authority supporting the Guidance Memorandum's so-called "guidance." *See Wilson v. McConnell*, 501 F. Supp. 2d 545, 553 (S.D.N.Y. 2007) (accepting CIA's "classification guide" as a basis for redactions only after the US submitted a declaration establishing that the guide complied with applicable executive order's classification requirement).

2. Nondisclosure Based upon the NSA Act, CIA Act, EO 13526 and/or the State Secrets Privilege.

The US identifies the NSA Act, CIA Act, Privacy Act, Executive Order 13526 ("EO") and the state secrets privilege as bases for nondisclosure. (15-cv-286-JLQ, ECF No. 85 at 6-7, 9:8-12; Tompkins Decl. at **Exs. B** & **E**.) But, the US fails to explain how these Acts and/or the EO support nondisclosure or redaction of documents *responsive to a Court-validated subpoena*.

First, to the extent the US claims these Acts or the EO codify or memorialize the state secrets privilege, or that such privilege justifies its nondisclosure, the US must first formally assert the state secrets 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 US: (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 asserted following that officer's personal consideration. *United States v.*

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Reynolds, 345 U.S. 1 (1953). Instead of following this path, the US attempts to rely upon the state secrets privilege without proper invocation, even though the US has acknowledged since April 2016 that it: (1) understands the procedure for asserting the state secrets privilege; and (2) may be required to assert that privilege in this case. (15-cv-286-JLQ, ECF No. 33 at 7-8.)

The D.C. Circuit has previously rejected what the US is attempting. In *Northrop*, the court specifically rejected the State Department's attempt to claim documents were protected by the state secret privilege before they were reviewed and absent a formal invocation of that privilege from the head of that agency. 751 F.2d at 395. In that case, as here, the State Department was not a party. To prove its defense that the US's actions caused it to breach a contract and violate antitrust laws, McDonnell Douglas subpoenaed documents from the State Department and the State Department objected, claiming some of the documents were classified and subject to the state secrets privilege. *Id.* at 397, 403. The appellate court held that the district court improperly quashed the subpoena, explaining that the State Department was required to either formally invoke the state secret privilege—and demonstrate its applicability—or produce documents. *Id.* at 403-05. The same is true here. The US cannot rely on the state secrets or other privileges to shield disclosure without first formally invoking them and demonstrating their applicability.[1]

[1] If the state secrets privilege is invoked as broadly as the US suggests, Defendants may seek dismissal based on inability to present a fair defense. *See In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007); *White v. Raytheon Co.*, No.

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Second, The US's continued reliance upon the CIA and NSA Acts is misplaced.[2] The CIA and NSA Acts preclude disclosure to the public in accordance with FOIA exemptions. *See* 5 U.S.C. § 552(b)(1), (3). But, "[s]uch exempt documents are not automatically privileged in civil discovery", *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006), and the US does not demonstrate how the withheld information is privileged here.[3] Moreover, the US has not followed proper procedures for invocation of the narrow privileges potentially arising under these Acts. *See, e.g., Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 176 (D.D.C. 2013) (Act creates "a very narrow and explicit exception" to disclosure and must be asserted pursuant to specific procedures); *Bothwell v. CIA*, 2014 WL 5077186, *10 (N.D. Cal. Oct. 9, 2014) (CIA affidavits required); *Nat'l Sec.*, 960 F. Supp. 2d at 175 (Act protects "information on the CIA's personnel and internal structure, such as the names of personnel, the titles and salary of personnel, or how personnel are organized within the CIA."); *Whitaker v. CIA*, 31 F. Supp. 3d 23, 35 (D.D.C. 2014).

Finally, the US has failed to explain how its nondisclosure is in any way

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CIV.A. 07-10222-RGS, 2008 WL 5273290, at *5 (D. Mass. Dec. 17, 2008); *Zuckerbraun v. Gen. Dynamics*, 755 F. Supp. 1134, 1137-38 (D. Conn. 1990).

[2] The US agrees the CIA and NSA Acts are typically asserted "in connection with a formal assertion of the State Secrets Privilege." (ECF No. 48 at 8.)

[3] While the US concedes that it may not rely upon FOIA-based exemptions to withhold information, it also concedes that it has produced documents redacted in reliance upon such exemptions. (ECF No. 28 at 6:20-21.)

linked to the EO despite Defendants' request for this information since late July. (Tompkins Decl. **Ex. F** at 2.)

3. Nondisclosure Based upon the Deliberative Process, Law Enforcement and/or Attorney-Client Privileges.

Although the US claims reliance upon the deliberative process, law enforcement and attorney-client privileges, it has not followed required procedures or provided sufficient information to invoke these privileges. To properly invoke the deliberative process privilege, the US must demonstrate the information withheld is both "predecisional" and "deliberative". *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The US makes no effort to satisfy this two-prong test aside from listing the words "predecisional," "deliberative," or "draft." (Tompkins Decl. at **Ex. B**.) Further, while the US has "agreed to waive any deliberative process protections over information … discussing Defendants' role in the [CIA's] former … program," (15-cv-286-JLQ, ECF No. 85 at p.8:22-23), implementation of this selective waiver is left unexplained, even assuming *arguendo* that the US is entitled to employ selective waiver. *See Lindell v. City of Mercer Island*, 833 F. Supp. 2d 1276, 1282 (W.D. Wash. 2011) (allowing "selective waivers would be fundamentally unfair").

There are three requirements to invoke the law enforcement privilege: (1) a formal claim of privilege by the head of the department having control over the requested information; (2) actual personal consideration by that official; and (3) specification of the information for which the privilege is claimed, with an explanation why it falls within the scope of the privilege. *In re Sealed Ca*se, 856 F.2d 268, 271 (D.C. Cir. 1988) (citations omitted). The US has not met these

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requirements and therefore cannot rely on this privilege to withhold information.

As to the attorney-client privilege, the US does not provide enough information for Defendants or the Court to evaluate the claimed privilege. If the US's position is that it cannot reveal information to explain the basis for these claims of privilege because that information is a state secret, the US must go through the process to formally asset the state secrets privilege.

B. Defendants Are Greatly Prejudiced by the US's Actions

The prejudice to Defendants from the US's redactions and testimony restrictions is plain. Defendants' main defenses include that they were under the plenary and direct control of the CIA and that they acted within the scope of authority properly delegated to them. The US's nondisclosure leaves Defendants hamstrung. For instance, Defendants reported directly to Mr. Cotsana, and everything they did was directed or approved by or through him. Yet the US will not permit Mr. Cotsana to testify to anything that would confirm or deny those facts, because his involvement in the CIA's former program is "subject to the assertion of the state secrets privilege." (Tompkins Decl. at **Ex. E**.)

The US also acknowledges that it would prohibit anyone from testifying on most of the topics proposed by Defendants. (*Id*. at **Ex. C**.) In fact, the US has clarified that these restrictions extend to Defendants, i.e. when information is claimed to be classified, Defendants are not only prohibited from reviewing documents or questioning witnesses on subjects crucial to their defense, they are barred from testifying about such information, or even disclosing it to their counsel. (15-cv-286-JLQ, ECF No. 33 at p.7-8 (discussing Defendants' NDAs)).

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Further, as the Court may recall, Plaintiffs claim that Defendants are liable even though they did not personally conduct Plaintiffs' interrogations because they "designed and implemented" the CIA's program. (*See* 15-cv-286-JLQ, ECF No. 1.) Nevertheless, the US has withheld a document entitled "Origins of the Program" under the NSA and CIA Acts, asserting it contains "classified information subject to the assertion of the State Secrets privilege," and deliberative process privilege. (Tompkins Decl. **Ex. B** at doc. 137.) Indeed, a review of the privilege logs reveal numerous documents that appear highly relevant to the defense, yet have been withheld based on various privileges that have not been formally asserted or are inapplicable. For example, the following additional documents *inter alia* have been withheld in their entirety: "Initial Draft Plan (March 16, 2002) [Outline for Interrogation Program]"; "Eyes Only–Setting the Stage for the Ratcheting Up Phase Concerning Abu Zubaydah Interrogations, 12 July 2002"; "Email, Re: Jim and Bruce"; "Roster and Training for CIA Interrogation Program, May 2003"; "Draft CIA Cable, Eyes Only: HQS [Headquarters] Feedback on pending Issues re the Abu Zubaydah Interrogations (July 2002)"; "Note, June 2002, Subject: Interrogation Plan Input [relating to Zubaydah]". (*Id*. doc. nos. 103, 137, 166, 168, 179, 228, 229.)[4] Other documents plainly germane to this matter are so heavily redacted as to render them without necessary context, if not wholly indecipherable. (Tompkins Decl. at **Ex. G.**)

Defendants simply cannot mount a fair defense if they are precluded from reviewing or disclosing evidence rebutting Plaintiffs' allegations.

[4] Logging of these documents means they fall within the parameters of discovery.

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DATED this 18th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th 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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