EXHIBIT F

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VIA EMAIL

Andrew I. Warden
U.S. Department of Justice
Civil Division
Federal Programs Bench
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
andrew.warden@usdoj.gov

Re: ***Salim et al. v. Mitchell et al.*, No. 2:15-CV-286-JLQ Central Intelligence Agency Subpoena**

Dear Andrew:

We write to meet and confer concerning the Central Intelligence Agency's ("CIA") July 19, 2016 response to the non-party subpoena issued by our clients, James Elmer Mitchell and John "Bruce" Jessen, defendants in the above-referenced matter ("Defendants"), on June 28, 2016 (the "Subpoena"). We disagree that the Subpoena is "massively overbroad," duplicative, or seeks irrelevant or otherwise non-discoverable information. However, in an effort to address the issues you raise, we request that you provide us with clarification as to the asserted applicability of certain statutes and privileges that you have identified. Additionally, as detailed herein, we have identified certain aspects of the Subpoena that we can clarify and/or that we are amenable to narrowing in an effort to resolve some of the objections advanced in order to avoid unnecessary motion practice. Finally, please advise as to when the CIA anticipates that it will begin producing responsive document, whether on a "rolling basis" (as I have suggested) or otherwise and a compliant privilege log, in light of the relatively short deadlines imposed by the Court.

I. OBJECTIONS PURPORTEDLY BASED ON STATUTES AND PRIVILEGES

A. Information Allegedly Protected Under Executive Orders 12333, 13470, 12958; the National Security Act; the CIA Act; and/or the State Secret Privilege

The CIA asserts that the Subpoena seeks "documents likely [to] include classified information and/or information protected by law from disclosure by, among other things, Executive Orders 12333, 13470, 12958, and 13526; . . . the National Security Act, 50 U.S.C. § 3024; the CIA Act, 50 U.S.C. § 3507, and the states secret privilege", and objects to the production of requested information on such basis. (July 19 Ltr. at 1-2.)

Defendants recognize that the listed Executive Orders, the National Security Act, and the CIA Act together provide certain authority for the CIA's systematic classification and protection of certain information related to national security. Defendants also acknowledge that when information protected by these Orders or statutes is sought pursuant to the Freedom of Information Act ("FOIA"), the information sought is exempt from disclosure. *See* 5 U.S.C. § 552(b)(1) and (3). However, any such exemption is inapplicable here—in the context of civil discovery. Indeed, it is well-settled that documents that are exempt from FOIA disclosure "are not automatically privileged in civil discovery." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006) (citing and quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984)). Therefore, the CIA is obligated to produce responsive documents that fall within the Executive Orders, the National Security Act, and/or the CIA Act, unless the CIA establishes that such documents are protected from disclosure pursuant to an applicable common-law privilege. Defendants request that the CIA withdraw its objections based upon the aforementioned Orders and/or statute, or provide us with authority establishing that such Orders and/or statute provide a basis to preclude or limit discovery in the present context.

Your assertion that the CIA previously provided Defendants with a description of subject matters related to the CIA's detention and interrogation program that it claims remain classified is inapposite. While Defendant's appreciate the guidance, such guidance does not render otherwise discoverable information non-discoverable. To the extent Defendants seek allegedly classified information that the CIA contends cannot be disclosed because of its importance in national security matters, the CIA has an option – it can avail itself of the state secret or other applicable privileges to prevent disclosure. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404 (D.C. Cir. 1984) ("The privileges which State claims will protect many of the documents produced, the state secrets and deliberative process privileges, are narrowly drawn privileges which must be asserted according to clearly defined procedures."). The state secret

privilege requires the CIA to assert (1) a formal claim of privilege; (2) lodged by the head of the department which has control over the matter; (3) after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1 (1953) Until such a privilege is properly asserted, the Federal Rules of Civil Procedure enable Defendants to seek and attain all information that is relevant (or otherwise discoverable) to the claims brought against them or their defenses thereto. *See* Fed. R. Civ. Pro. 26(b). To the extent that the CIA has not yet properly invoked the state secret privilege, it is not able to withhold discoverable documents on this basis. Defendants request that the CIA promptly produce any otherwise discoverable documents contemplated to be withheld because they are asserted to contain classified information or pursuant to the state secret privilege.

B. The Intelligence Identities Protection Act

The CIA relies upon the Intelligence Identities Protection Act, 50 U.S.C. § 3121b, to withhold responsive documents that could disclose the identities of covert intelligence officers, as purportedly sought by the Subpoena's Requests #9-11; 28. Defendants do not understand the statute's applicability to the CIA in this case. The Identities Protection Act is "a purely criminal statute that only authorizes criminal prosecution of those who intentionally disclose the identity of a covert agent." *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008). We are not aware of any authority for the proposition that the statute limits the CIA's disclosure obligations pursuant to a court order or subpoena. To the extent that the CIA believes otherwise, please provide us with authority supporting the CIA's position.

C. The Privacy Act and the Trade Secrets Act

The CIA objects to the Subpoena to the extent that it seeks "confidential personal or business information" protected by the Privacy Act, 5 U.S.C. § 552a, or information protected by the Trade Secrets Act, 18 U.S.C. § 1905. (July 19 Ltr. at 4.) Please clarify how these statutes are applicable to this case, as neither appear to afford the CIA the right to withhold otherwise discoverable information.

The Privacy Act prohibits government agencies from disclosing records that an agency maintains within a "system of records"; 5 USC § 552a, i.e. a group of records from which information can be retrieved by the name of an individual or some other identifying feature. 5 USC § 552a(a)(5). But the Privacy Act contains a specific exception for the release of materials pursuant to the order of a court of competent jurisdiction. 5 U.S.C. § 552a(b)(11); *United States v. W.R. Grace*, 455 F. Supp. 2d 1140, 1147 (D. Mont. 2006) (Privacy Act did not obligate the Government to withhold documents responsive to the Court's discovery order). Thus, to the extent that information requested in the Subpoena falls within the scope of the Privacy Act, the

information can and must be disclosed in circumstances such as this—where a valid subpoena exists. Indeed, to secure discovery of materials potentially protected by the Privacy Act, Defendant must only follow the standard discovery process. *Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987).

The same is true for information that falls within the Trade Secrets Act. This Act provides penalties for government employees who disclose, in a manner not authorized by law, any trade information that is revealed to the employee in performance of official duties. The Act is meant to prevent the discretionary release of certain types of business information in the possession of government employees. 18 U.S.C. § 1905. However, when the disclosure is authorized by law—as it would be here—the Act provides the CIA with no basis to withhold discoverable information. *See United States v. W.R. Grace*, 455 F. Supp. 2d 1140, 1148 (D. Mont. 2006). To the extent that the CIA believes that Defendants misrepresent the scope or application of either of the foregoing Acts, please advise how and provide us with the authority supporting the CIA's position.

Finally, in an effort to alleviate any concerns that the CIA may have predicated upon one or both of the aforementioned Acts, Defendants would be amenable to entering into an appropriate confidentiality stipulation/proposed order. Please advise whether this is something you wish to explore and, if so, please propose a form of stipulated order for us to review.

D. The Deliberative Process, Confidential Informant, and Law Enforcement Privileges

The CIA identifies the deliberative process privilege, the confidential information privilege, and the law enforcement privilege as privileges that may apply to certain information sought by the Subpoena. (July 19 Ltr. at 4.) While Defendants acknowledge these privileges have been recognized by courts, each privilege must be invoked to shield disclosure of information -- something to Defendant's knowledge the CIA has not yet done.[1] Furthermore,

[1] To invoke the deliberative process privilege, a government must show that the information withheld is "predecisional" and "deliberative" in nature. *F.T.C. v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). A subpoena that simply seeks "drafts" of documents from the government does not automatically implicate the deliberative process privilege, as your July 19 Letter suggests. To invoke the confidential informant privilege, the government must show the information withheld is a communication that will tend to reveal the identity of persons who furnish information to law enforcement officials. *Roviaro v. United States*, 353 U.S. 53, (1957). To invoke the law enforcement privilege, three requirements must be met: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege." *In re Sealed Case*,

these privileges are not absolute and Defendants are entitled to an opportunity to explain why their need for the requested information should overcome any such invoked privilege which may be advanced. *See Cobell v. Norton*, 213 F.R.D. 1, 4 (D.D.C. 2003) (deliberative process privilege not absolute); *Perez v. Blue Mountain Farms*, No. 2:13-CV-5081-RMP, 2015 WL 11112414, at *2 (E.D. Wash. Aug. 10, 2015) (confidential informant and law enforcement privilege not absolute).

Defendants have detailed below why the documents sought by the Subpoena's various requests (as modified in some instances) are directly relevant to the claims and defenses at issue in this action, and therefore discoverable. As such, please advise as soon as possible which, if any, of the aforementioned privileges the CIA has invoked in response to the Subpoena, and specifically, in response to which Request(s), so that Defendants may further assess the viability of the CIA's position.

E. Attorney Work Product and Attorney Client Privilege

The CIA claims that certain information sought by the Subpoena may be withheld pursuant to the attorney work product privilege and/or the attorney client privilege. Although Defendants, of course, recognize the existence of these privileges, they cannot simply accept the CIA's blanket assertion that they may serve to prevent disclosure of otherwise discoverable documents or information in this action. Should the CIA contend that one or both of the aforementioned privileges apply to preclude disclosure of otherwise responsive documents, Defendants look forward to receiving a privilege log containing detail sufficient to enable Defendants to properly assess the CIA's privilege assertion.

II. OBJECTIONS BASED ON ALLEGED OVERBREADTH, IRRELEVANCE, AND/OR VAGUENESS

A. Overbreadth Allegedly Based Upon Temporal Scope

The CIA objects to the Subpoena as "massively overbroad." (July 19 Ltr. at 2.) Specifically, the CIA claims that the temporal limitations of the Subpoena are excessive in that the Subpoena's temporal scope is September 11, 2001 until the present. But, the identified temporal scope is not overbroad considering the scope of Plaintiffs' claims. Specifically, Defendants requested and are entitled to discover documents dating back to September 11, 2001 because Plaintiffs' expressly assert that shortly after that date, Defendants designed and implemented a detention and interrogation program for the CIA's use on foreign nationals (the

856 F.2d 268, 271 (D.C. Cir. 1988) (citing *Black v. United States*, 564 F.2d 531, at 541-547 (D.C. Cir. 1977)).

"Program"). (*See* Compl. ¶ 22.) Similarly, Defendants requested and are entitled to discover documents generated through the present, despite Plaintiffs' earlier release, to the extent that such documents pertain to the claims and defenses at issue in this action. For example, a document detailing Plaintiff Rahman's detention and/or interrogation is no doubt discoverable irrespective of whether that document was generated years after his apparent death. Similarly, documents detailing Plaintiff Salim's detention and/or interrogation are no doubt discoverable irrespective of whether those documents were generated years after his release. Simply stated, the temporal scope of the Subpoena does not render it *ipso facto* overbroad.

Although Defendants are unable to limit the overall temporal scope of the Subpoena, they remain interested in exploring ways to limit the burden that their Subpoena places on the CIA. With this in mind and in an effort to reach an amicable resolution absent the need for the Court's intervention, Defendants have revisited the Subpoena's requests, and are amenable to revising certain requests, as detailed in the blacklined document attached to this letter as **Exhibit AA**. The attached document also identifies why the Subpoena's requests, particularly as modified, seek relevant and discoverable documents.

B. Relevance

The CIA next objects that the Subpoena seeks "information of questionable relevance." (July 19 Ltr. at 4.) The CIA claims that the relevance of each Requests is not apparent on its face. To ally the CIA's concerns, we have indicated the relevance of each Request in the attached **Exhibit AA**.

C. Objection Based Upon Compliance Timing

The CIA objects to the Subpoena to the extent it "fails to allow reasonable time to comply" because it requires the production of documents on August 1, 2016, 34 days after its issuance. (July 19 Ltr. at 3.) Unfortunately, given the Court's July 8, 2016 Scheduling Order, Defendants are not at liberty to permit the CIA months to identify and produce discoverable information; as you know, Defendants are obligated to serve a final list of trial witnesses by December 12, 2016 and all discovery must be completed by February 17, 2017. (ECF No. 59.) Notably, you posed no objection to those deadlines when participating in the telephonic hearing held by the Court despite being given the opportunity to do so. (*See* ECF No. 59.) Finally, it is a bit of a red herring for the CIA to advance an objection based on the Subpoena's response date when, to date, the CIA has not produced any documents pursuant to the Subpoena or even provided Defendants with a date on which it expects to begin production.

D. Objection Based Upon Alleged Vagueness

The CIA takes issue with certain terms as used or defined in the Subpoena as vague. (July 19 Ltr. at 2, 4.) For instance, the CIA takes issue with the term "relating to" as used in the Subpoena. In an effort to resolve this issue without the need for the Court's intervention, this verbiage applicable to the requests has been modified in attached **Exhibit AA**.

The CIA also objects to the term "CIA" as defined in the Subpoena to include "affiliated organization" and "consultants" and "contractors." The CIA finds this problematic because—as written—it potentially requires the CIA to obtain documents from other agencies. To be clear, Defendants seek documents from the CIA's affiliates, consultants, and/or contractors only to the extent that responsive documents lie within the CIA's possession, custody or control.

E. Objection Based Upon Alleged Duplication

The CIA claims that the Subpoena is "unreasonably cumulative or duplicative" and "seeks information that is otherwise available" from a less burdensome source because the CIA has previously publicly released certain relevant information. (July 19 Ltr. at 3.) Defendants do not seek to burden the CIA more than necessary, and have not ignored the existence of documents that have been previously released and are now held by third parties. Nevertheless, the prior public release of documents does not exempt the CIA from producing discoverable documents to Defendants. Moreover, Defendants assume (because the CIA has not specifically identified those documents to which it refers) that certain of these documents are the reports related to the treatment of Gul Rahman released pursuant to FOIA requests. But, these documents remain heavily redacted pursuant to FOIA exemptions that, as discussed above, are not applicable in this civil discovery context. Thus, these documents are not duplicative, as Defendants are entitled to un-redacted versions of these documents.

Finally, although we note your indication that the CIA has not made a "final decision" with regard to the Subpoena's requests, the CIA has advanced numerous objections (that are addressed herein). Unless promptly withdrawn, we will continue to consider those objections as the CIA's final position with regard to these matters.

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We look forward to the CIA's commencement of document production in a material manner and to receiving your response to the other issues raised in this letter by no later than Tuesday, August 2. Your anticipated cooperation is greatly appreciated, and Defendants are hopeful that the discussion contained herein and in the attached, along with the concessions identified in the attached, will help facilitate the CIA's prompt compliance with the remaining Subpoena requests.

Very truly yours,

BRIAN S. PASZAMANT

Attachment
cc: Hank Schuelke, III, Esquire (via email)
James Smith, Esquire (via email)
Christopher Tompkins, Esquire (via email)
Jeffrey Rosenthal, Esquire (via email)