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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

DEFENDANTS' RESPONSE IN
FURTHER SUPPORT OF THIRD
AND FOURTH MOTIONS TO
COMPEL

Motion Hearing:
To Be Scheduled At Court's
Discretion
Oral Argument Requested

Related Case:

SULEIMAN ABDULLAH SALIM, et
al.,

Plaintiffs,

NO. CV-15-0286-JLQ

RESPONSE IN FURTHER SUPPORT OF
MOTIONS TO COMPEL
NO. 2:16-MC-0036-JLQ

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vs.

JAMES E. MITCHELL and JOHN
JESSEN,

Defendants.

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1 **I. INTRODUCTION**

2 Defendants¹ began this case at a disadvantage because the Government
3 controlled and controls the vast majority of the information needed for their
4 defense. Indeed, the Government not only physically controls the relevant
5 documents, but legally controls even what Defendants themselves may discuss
6 about Enhanced Interrogation Techniques (“EITs”) and the Program in which
7 they were used on High-Value Detainees (“HVDs”) (the “Program”). Still,
8 Defendants have worked diligently to obtain critical information from the
9 Government, with the Government resisting at each step. The Government’s
10 most recent briefing and related efforts are simply the most recent resistance
11 effort. The Government advances seven privileges to block three depositions and
12 prevent the further disclosure of information in 171 documents. But these
13 privileges have been asserted too broadly and/or without requisite underpinning.
14

15 For example, the state secrets privilege assertion largely envelops
16 information that is not secret (and the majority of which is not sought by
17 Defendants), while the deliberative process privilege assertion largely
18 encompasses information that is not deliberative and/or that has already been
19 disclosed by the Government in other contexts. Additionally, the Government’s
20 resistance to disclosure based upon the CIA Act, the National Security Act, and
21 the attorney-client privilege is advanced in a way that divests the Court of the
22 ability to properly assess whether such privileges have any application. The
23

24 _____
25 ¹ Capitalized terms herein shall have the meanings afforded such terms within the
26 Third and Fourth Motions and attendant briefing unless otherwise defined herein.

1 Government's assertion of the attorney-client privilege is, at best, overbroad, and
2 its reliance upon the attorney work product doctrine is inapplicable where, as
3 here, the Government is a non-party to the litigation.

4 The Government should be compelled to produce the witnesses whose
5 depositions have been subpoenaed and to disclose the information and documents
6 that have been improperly withheld. Defendants further request that, if necessary,
7 the Court conduct an *in camera* review of the documents they have identified as
8 having been improperly withheld or redacted to ensure that the Court's resulting
9 Order properly compels the Government to produce all non-privileged material.

10 **II. RELEVANT FACTUAL BACKGROUND**

11 The Court is no stranger to this dispute that began in June when Defendants
12 served *Touhy* requests upon the CIA and DOJ seeking documents related to the
13 Program that Defendants are alleged to have designed and implemented.
14 Defendants need this information to disprove Plaintiffs' allegations. Since then,
15 the Government has produced 60 previously-released documents (about 900 pgs.)
16 and another 240 newly-released documents (about 1,400 pgs.), while withholding
17 40 documents from production. While the documents produced touch upon some
18 of the critical issues in this action, most remain heavily redacted, often resulting
19 in the elimination of any context for remaining text. As such, in current form,
20 many of the documents do not afford Defendants their full potential defensive
21 value—namely, further establishing that Defendants always acted entirely within
22 the CIA's direction, supervision and control, and in any event, had no
23 involvement in the creation and implementation of any CIA program to capture,
24 render, detain and/or interrogate any of Plaintiffs, other than some limited contact
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1 with Plaintiff Rahman. In dispute now are the documents Defendants need to
2 mount their defense.²

3 Defendants also seek critical testimony from the individuals who directly
4 supervised their work with the CIA—Haspel and Cotsana.³ Part of this issue is
5 old news, as the Court previously denied the Government’s effort to prevent
6 Cotsana’s deposition and ordered Defendants to provide the Government with a
7 list of questions they planned to ask Cotsana. Following provision of this list, the
8 Government has refused to permit Cotsana to testify due solely to its
9 unwillingness to permit him to admit or deny his role in the Program. The
10 Government has refused Defendants’ request to depose Haspel for the same
11 reason, even though Haspel’s involvement with the CIA and the Program has now
12 been formally acknowledged due, in part, to her recent promotion to Deputy
13 Director of the CIA.

15 **III. ARGUMENT**

16 **A. Defendants Need the Discovery Sought**

17 Plaintiffs will likely claim that the Court need not address the
18 Government’s privilege assertions because this discovery is unnecessary in light
19 of the public record—the Senate Select Committee on Intelligence’s Study of the
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23 ² Defendants have also worked collaboratively with the Government in agreeing
24 that they do not seek certain types of information, as identified in the two
25 statements submitted pursuant to L.R. 37.1. ECF 60, 63.

26 ³ Defendants withdraw their request to depose John/Jane Doe.

1 CIA’s Detention and Interrogation Program (“SSCI Report”)⁴ and the additional
2 documents disclosed by the Government. But any such claim is wrong. In
3 denying Defendants’ 12(b)(6) motion to dismiss, this Court held that it was too
4 early to determine if Defendants were entitled to derivative sovereign immunity,
5 ECF 40 at 13-14, *i.e.* without discovery, the necessary inquiry “into whether the
6 contractor ‘exceeded his authority’” was not possible. *Id.* Factual discovery is
7 now over, yet Defendants remain hamstrung from explaining that they—at all
8 times—acted specifically at the Government’s direction and had no involvement
9 in the creation and implementation of any CIA program to capture, render, detain
10 and/or interrogate any of Plaintiffs, other than some limited contact with Plaintiff
11 Rahman. For example, Defendants have been unable to testify—or even discuss
12 with their attorneys—many of the details of the Program’s origins or its day-to-
13 day functioning. They cannot reveal certain discussions that occurred at
14 meetings, or name those that directed them to take certain actions. ECF 75-16 at
15 ¶¶13-41. But, more to the present point, they cannot testify as to information
16 outside their personal knowledge—which is why the testimony of Haspel and
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Cotsana is critical.

As contractors who served as the Government’s “boots on the ground,”
Defendants were privy to only a small subset of communications involving the
Program. Defendants require the testimony of Haspel and Cotsana to connect the

⁴ The SSCI Report was released for publication on April 2, 2014 and is publicly
available at [https://web.archive.org/web/20141209165504/
http://www.intelligence.senate.gov/study2014/sscistudy1.pdf](https://web.archive.org/web/20141209165504/http://www.intelligence.senate.gov/study2014/sscistudy1.pdf)

1 dots between: (1) the cables sent from CIA Headquarters to the Chief of Base;
2 and (2) the instruction relayed by the Chief of Base to Defendants. Moreover,
3 Defendants' direct supervisors are *the* individuals that can best confirm that
4 Defendants followed all of the instructions that they were given and as to their
5 non-involvement with Plaintiffs. Absent such testimony, Plaintiffs may attempt
6 to discredit Defendants with documents—including the SSCI Report—that
7 purport to claim Defendants exerted “tremendous influence,” were not limited by
8 the instructions given to them, or were involved with all interrogations, including
9 Plaintiffs'. SSCI Report at 27 n.98.

10
11 As Plaintiffs' admit, their Complaint is based upon the SSCI Report, and
12 Defendants' position remains that this Report is inaccurate and misleading. In
13 particular, the SSCI Report conflates Defendants' actions related to HVDs with
14 the actions of other CIA officers who interrogated less-significant detainees: so-
15 called Medium or Low-Value Detainees. The SSCI Report also does not
16 distinguish between the events at detention facilities where HVDs were held and
17 COBALT, where Plaintiffs (non-HVDs) were held. Haspel and Cotsana are the
18 individuals that can dispel these misleading narratives arising from the SSCI
19 Report.

20 The documents Defendants seek are also critical to address other inaccurate
21 or misleading statements from the SSCI Report. The most obvious example is
22 Document 157, a July 26, 2002, cable that the SSCI Report cites for the
23 proposition that Defendants described the waterboard as an “absolutely
24 convincing technique.” SSCI at 36 n.159. Plaintiffs have repeatedly used this
25 proposition to argue that Defendants acted outside the scope of their authority,
26

1 and this Court has specifically cited this allegation as problematic. ECF 40 at 14.
2 While this language appears in the version of Document 157 that the Government
3 has produced, the remainder of the document is redacted. Declaration of Ann E.
4 Querns (“Querns Decl.”) attached hereto, at ¶23, Ex. 112 (US Bates 001839-40).
5 Thus, absent additional information, Defendants cannot prove that the redacted
6 content includes discussion of “contingencies if use of the waterboard is not
7 approved,” as the Government’s unclassified summary of this document asserts.
8 ECF 75-16 at App’x ¶85. Yet, plainly such information is critically important to
9 Defendants’ ability to contest Plaintiffs’ claims.

10
11 **B. The Government Has Not Properly Invoked the CIA Act**

12 **1. The CIA Act Provides Only a Narrow Exception**

13 The CIA Act “creates a very narrow and explicit exception” and cannot
14 be read “too broadly to permit withholding of any information related to the
15 CIA.” *Whitaker v. CIA*, 31 F. Supp. 3d 23, 34 (D.D.C. 2014) (quoting *Baker v.*
16 *CIA*, 580 F.2d 664, 670 (D.C. Cir. 1978)). In fact, “the plain text of the statute
17 limits protection from disclosure only to the functions and organization pertaining
18 to or about personnel[,]” and “although information related to the function and
19 organization of the Agency may relate directly to the function or organization of
20 agency personnel, it does not necessarily do so.” *Nat’l Sec. Counselors v. CIA*,
21 960 F. Supp. 2d 101, 170 (D.D.C. 2013). The Government thus bears the burden
22 of demonstrating that the CIA Act bars the specific discovery at issue. *Minier v.*
23 *CIA*, 88 F.3d 796, 800 (9th Cir. 1996). In fact, the Government must go further;
24 it must “discuss the facts or reasoning upon which” it bases its conclusion that the
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1 CIA Act justifies the withholding, so Defendants have the “opportunity to contest
2 that conclusion.” *Wiener v. FBI*, 943 F.2d 972, 983 (9th Cir. 1991).

3 **2. The CIA Act’s Applicability Has Not Been Demonstrated**

4 Here, the Government claims that the Act bars the depositions of Haspel
5 and Cotsana. The Government’s claim notwithstanding, the purpose of the
6 depositions sought is *not* to “discover the roles and functions these officers played
7 in the program.” ECF 75 at 15. Rather, as set forth in the Paszamant Affidavit
8 submitted in connection with the deposition subpoenas, *none* of the information
9 sought from the Haspel deposition implicates information covered by the CIA
10 Act. *See* ECF 75-12 at ¶11. On the contrary, Defendants seek only information
11 concerning *Defendants’ role* in the Program including, for example the Program’s
12 framework and implementation and whether Defendants’ actions/inactions fell
13 within the scope of legally and validly conferred authority. *Id.* Thus, while the
14 Government identifies the Paszamant Affidavit as the *sole* basis for its claim that
15 the Act bars Defendants’ deposition request for Haspel, it does not—and
16 cannot—explain how this information is sufficiently related to CIA-personnel
17 function and organization as to warrant CIA Act protection.
18

19 In addition to wrongly depicting the Paszamant Affidavit, the Government
20 further mischaracterizes the purpose of Defendants’ desire to question Cotsana by
21 citing to an outline prepared by Defendants containing the subject matters and
22 anticipated questions Defendants seek to pose to him. ECF 75-9. Yet, a cursory
23 review of the outline discloses that most *have nothing to do* with the categories of
24 information protected by the Act. For example, Defendants seek to question
25 Cotsana regarding the purpose of the Program and his understanding of
26

1 *Defendants'* role in the approval, design or development of the Program and the
2 extent, if any, of their direct involvement with Plaintiffs. ECF 75-9. These
3 subjects are simply not protected by the CIA Act.

4 The Government's arguments also fail as to Defendants' document
5 discovery. Director Pompeo's declaration offers only general and speculative
6 statements that discovery should not be permitted to proceed under the CIA Act
7 "to the extent that" the categories of information contained in the documents at
8 issue "pertain to CIA employees and their functions[.]" ECF 75-16 at ¶¶29, 31,
9 34, 39, 42, but the appendix to such declaration and the CIA Privilege Log (ECF
10 75-6) fail to discharge the Government's burden. The Privilege Log does not
11 identify the *specific information* the Government has redacted or withheld
12 pursuant to the Act. But, to be sufficient, the Log must provide a clearer
13 description of the withheld information "to justify withholding that information
14 [under the Act] as related to the organization and functions of agency personnel,"
15 as opposed to "the organization of the CIA itself." *Sack v. CIA*, 53 F. Supp. 3d
16 154, 171 (D.C. Cir. 2014). Failure to do so deprives Defendants of the
17 opportunity to contest and the Court the opportunity to assess the Government's
18 conclusions and leaves them in the untenable position of having to surmise what
19 specific information has been withheld pursuant to this "very narrow and explicit
20 exception."
21

22
23 **C. The State Secret Privilege Has Been Invoked for Information**
24 **Defendants Do Not Seek or That Has Been Publicly Released**

25 When the state secrets privilege is asserted, the Court "must make an
26 independent determination whether the information is privileged[.]" *Al-Haramain*

1 *Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1202 (9th Cir. 2007), and the
2 Government’s assertion “must not [be] blindly accepted.” *El-Masri v. Tenet*, 437
3 F. Supp. 2d 530, 536 (E.D. Va. 2006) (citing *United States v. Reynold*, 345 U.S.
4 1, 10 (1953)). Rather, the assertion should be reviewed “with a very careful,
5 indeed a skeptical eye,” *Al-Haramain*, 507 F.3d at 1203, so as “[t]o ensure that
6 the state secrets privilege is asserted no more frequently and sweepingly than
7 necessary.” *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.D.C. 1983). Here, the
8 Government’s state secrets assertion encompasses information that: (1)
9 Defendants do not seek; (2) is not secret; or (3) will not harm national security.

11 **1. The Government Overstates the Information Sought**

12 The Government advances much argument as to why it cannot release
13 seven categories of information without risking danger to national security, ECF
14 75 at 21-26, but neglects to note that the vast majority of this information is not at
15 issue. Recognizing that they largely did not require such information to defend
16 themselves, Defendants agreed not to pursue discovery of most of the documents
17 encompassed by those categories (and so advised the Government as early as
18 June 2016). ECF 62 at ¶3. Indeed, the parties’ supplemental 37.1 Statement
19 explicitly states that Defendants are *not* seeking any documents encompassed by
20 three of the identified seven categories, i.e. (2) “information regarding foreign
21 government cooperation with the CIA; [(5)] intelligence information about
22 detainees and terrorist organizations, to include intelligence obtained or discussed
23 in debriefing or interrogation sessions; and [(6)] information concerning CIA
24 intelligence sources and methods, as well as specific intelligence operations.”
25 ECF 63. And, only a limited amount of information falling within the remaining
26

1 four categories is sought; specifically, only information that relates to the CIA's
2 command and control over Defendants and the extent, if any, of Defendants'
3 involvement with Plaintiffs.

4 For instance, as related to category 1 (“information that could identify
5 individuals involved in the CIA’s ... program”), Defendants have *never* sought to
6 discover the identities of all those involved in the Program. Rather, Defendants
7 seek to depose Haspel and Cotsana, whose role in the Program is publicly
8 known—who were Defendants’ direct supervisors and who have otherwise
9 unavailable personal knowledge about the CIA’s oversight of Defendants.
10 Likewise, Defendants do not seek wholesale information within categories 3 and
11 4 (“operation or location of any clandestine overseas CIA station, base or
12 detention facility” and/or “regarding the capture and/or transfer of detainees”),
13 but only information related to command and control. Stated differently,
14 Defendants do not desire to learn the whereabouts of CIA stations, bases, or
15 detention facilities—so long as Defendants can prove *when* they were or were not
16 present at said locations (to establish their noninvolvement with Plaintiffs).
17 Similarly, Defendants do not seek information concerning the capture and transfer
18 of all detainees; rather, they seek only information concerning their
19 noninvolvement in the capture and/or transfer of Plaintiffs, and their subsequent
20 interrogations, including their noninvolvement in the creation and/or
21 implementation of such activities. The same is true with regard to the last
22 category, (7) (CIA’s “internal structure or administration”). Defendants do not
23 desire information concerning the detailed and apparently complex inter-
24 workings of the CIA. Defendants merely seek information evidencing how the
25
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1 CIA exercised command and control over them. Surely, provision of information
2 concerning the chain-of-command under which Defendants acted *fifteen years*
3 *ago* does not require provision of granular details of human, financial,
4 communication, and technological resources, as the Government claims.

5 **2. Haspel and Cotsana’s Depositions Will Not Harm National**
6 **Security**

7 The Government’s “claim or justification of privilege” is not to be accepted
8 at face value. *Al-Haramain*, 507 F.3d at 1203. Thus, “[s]imply saying ‘military
9 secret,’ ‘national security’ or ‘terrorist threat’ or invoking an ethereal fear that
10 disclosure will threaten our nation is insufficient to support the privilege.” *Id.* To
11 uphold the privilege’s invocation the Government must demonstrate that there is a
12 reasonable danger that compulsion of the evidence will expose military matters
13 which, in the interest of national security, should not be divulged.” *Reynolds*, 345
14 U.S. at 10; *Ellsberg*, 709 F.2d at 58. The focus of the inquiry is “whether the
15 showing of the harm that might reasonably be seen to flow from disclosure is
16 adequate in a given case to trigger the absolute right to withhold the information
17 sought in that case,” *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982), and
18 begins by “determining whether th[e] information actually is a ‘secret.’” *Hepting*
19 *v. AT&T Corp.*, 439 F. Supp. 2d 974, 986 (N.D. Cal. 2006).

21 a. *Haspel’s Role in the Program Has Been Officially*
22 *Acknowledged*

23 The Government’s filings disclose that the sole basis upon which Haspel
24 and Cotsana’s depositions are resisted rests upon the contention that neither
25 individual has been officially acknowledged to have taken part in the Program
26

1 (not that, for example, the Program’s existence remains classified). ECF 75 at
2 28-32. But in advancing this claim, the CIA overlooks information that it has
3 released (or has permitted to be released) about Haspel. The CIA recently
4 announced Haspel’s promotion to Deputy Director of the CIA, stating:

5 Haspel is a career intelligence officer, having joined the CIA in
6 1985. She has extensive overseas experience and served as Chief of
7 Station in several of her assignments. In Washington, she has held
8 numerous senior leadership positions at CIA, including as Deputy
9 Director of the National Clandestine Service, Deputy Director of the
10 National Clandestine Service for Foreign Intelligence and Covert
Action, *Chief of Staff for the Director of the National Clandestine
Service, and in the Counterterrorist Center.*

11 Querns Decl. ¶28, Ex. 117 (emphasis added). Before this, the CIA permitted Jose
12 Rodriguez to refer to Haspel as a “head of one of [the CIA’s] earliest ‘black
13 sites,’” and as his “*chief of staff when [he] led the clandestine service.*” *Id.* at
14 ¶29, Ex. 118 (emphasis added). And, Rodriguez’s book specifically notes that
15 “[t]his material has been reviewed by the CIA to prevent the disclosure of
16 classified information.” *Id.*

17
18 Given these official acknowledgments of Haspel’s prior roles in the CIA, it
19 is hardly a secret that she was involved with the Program. *See Hepting*, 439 F.
20 Supp. 2d at 990 (“[I]n determining whether a factual statement is a secret, the
21 court considers only public admissions or denials by the government, ... [and] the
22 parties indisputably situated to disclose whether and to what extent the alleged
23 programs exist.”). The Government cannot credibly claim that national security
24 will be harmed, or even risked, if it again publicly acknowledges her
25 involvement. *Pickard v. Dep’t of Justice*, 653 F.3d 782 (9th Cir. 2011) (finding,
26

1 in the FOIA context, that the DEA could not refuse to admit or deny an individual
2 was confidential informant when their identity could be deduced from official and
3 documented public proceedings, even without a “official public pronouncement
4 regarding his status”).

5 b. *Additional Public Information Limits the Risks of*
6 *Disclosure*

7 Extensive media coverage and information released by the CIA related to
8 the Program further limits the risk that matters of national security would be
9 improperly disclosed if Haspel and Cotsana were deposed. The Government
10 acknowledges Haspel’s and Cotsana’s roles have been widely publicized in the
11 media. ECF 75 at 29. But, it argues that such publication does not impact its
12 state secret assertion when said information remains classified as TOP SECRET
13 and the risk that would flow from disclosure remains unchanged. *Id.* at 28. This
14 is wrong. First, “an executive decision to *classify* information is insufficient to
15 establish that the information is privileged.” *Mohamed v. Jeppesen Dataplan,*
16 *Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (emphasis in original). Second, the
17 harm the Government claims will result from disclosure—*i.e.*, threats to the
18 individual, jeopardized intelligence sources, and hindered recruitment—are either
19 less likely now, or have already occurred, given pervasive prior public disclosures
20 concerning the Program and Haspel and Cotsana’s involvement therein. *See e.g.*,
21 Querns Decl. ¶¶31-32, Exs. 121 and 122 (citing Matthew Rosenberg, *New C.I.A.*
22 *Deputy Director, Gina Haspel, Had Leading Role in Torture*, N.Y. Times (Feb. 2,
23 2017), [https://www.nytimes.com/2017/02/02/us/politics/cia-deputy-director-gina-](https://www.nytimes.com/2017/02/02/us/politics/cia-deputy-director-gina-haspel-torture-thailand.html)
24 [haspel-torture-thailand.html](https://www.nytimes.com/2017/02/02/us/politics/cia-deputy-director-gina-haspel-torture-thailand.html); *Oct. 20 Meeting The Truth Behind the CIA’s*
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26

1 *Detention and Interrogation Program*, Maine Association of Former Intelligence
2 Officers (Mar. 21, 2017, 6:35 PM), <http://www.afiomaine.org/2012/08/28/120/>).

3 The cases cited by the Government do not advance its position. Most
4 involve the propriety of specific FOIA exemptions—not the state secrets
5 privilege. *See Wolf v. CIA*, 473 F.3d 370, 378-80 (D.C. Cir. 2007) (examining
6 whether the CIA waived its right to invoke FOIA exemptions because it officially
7 disclosed information at issue); *Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir.
8 1999) (same); *Afshar v. Dep't of State*, 702 F.2d 1125, 1129-35 (D.C. Cir. 1983)
9 (same); *Phillippi v. CIA*, 655 F.2d 1325, 1329-31 (D.C. Cir. 1981) (same).
10 Further, unlike these cited FOIA cases, Defendants are not pressing this issue to
11 secure information for public disclosure, but to defend themselves; and, to do so,
12 they require testimony from Haspel and Cotsana about the specific control
13 exercised over Defendants by the CIA and their lack of involvement with
14 Plaintiffs.
15

16 Given the unique posture of this case, it is unclear why the Government
17 believes national security could be at risk if Haspel and Cotsana simply admit
18 their involvement in the Program (which is already publicly known) and provide
19 information about cables and documents that are already declassified. This is
20 especially true considering that specific Classification Guidance has been in place
21 during this entire case to ensure national security is not placed at risk and
22 additional classified information is not released. ECF 85-1 (No. CV-15-0286).
23 Surely, this case will not open the door for the CIA to be required to officially
24 acknowledge every media report or FOIA request claiming to identify classified
25 information. In the end, the Government's position does little more than float the
26

1 “ethereal fear” that national security is threatened—which is insufficient. *See*
2 *Hepting*, 439 F. Supp. 2d at 995 (refusing to accept the Government’s blanket
3 assertion of the state secret privilege where “the very subject matter of this
4 litigation has been so publicly aired” because it would “sacrifice liberty for no
5 apparent enhancement of security”).

6 **3. Release of All 171 Documents Will Not Harm National**
7 **Security, As Demonstrated by the Government’s**
8 **Erroneous Redaction of Public Information**

9 In support of its claim that all 171 disputed documents contain information
10 subject to the state secret privilege, the Government has now provided an
11 unclassified summary of each document. But these summaries do not weigh in
12 favor of the Court “accept[ing] at face value the government’s claim or
13 justification of privilege.” *Al-Haramain*, 507 F.3d at 1203. In fact, the Court
14 should be exceptionally critical of the Government’s privilege claim because, as
15 demonstrated by some documents already produced, the Government has
16 redacted information that is already public. Production here cannot harm national
17 security.
18

19 One example is Document 158, which is cable 10536. This cable is cited a
20 number of times in the SSCI Report, and the information in the SSCI Report
21 concerning this cable is more fulsome than can be gleaned from the version of the
22 cable produced to Defendants by the Government. Specifically, the SSCI Report
23 claims that cable 10536 states: “only the DETENTION SITE GREEN chief of
24 Base would be allowed to interrupt or stop an interrogation in process, and that
25 the chief of Base would be the final decision-making authority as to whether the
26

1 CIA’s interrogation techniques applied to Abu Zubaydah would be discontinued.”
2 SSCI Report at 34 n.150. Yet, the un-redacted portions of that cable produced in
3 this action make no such statements. Querns Decl. ¶24, Ex. 113 (US Bates
4 001841-45). The same is true for Document 226, cited and quoted throughout the
5 SSCI Report. *See, e.g.*, SSCI Report at 41-43, n.187, 190, 191, 203. Many of the
6 quotes attributed to Document 226 therein do not appear in the produced version
7 of that document—unless they are under the four pages of redactions on that
8 document. Querns Decl. ¶27, Ex. 116 (US Bates 002019-23). These
9 inconsistencies demonstrate, unequivocally that the Government has redacted
10 information that has been publicly released in the SSCI Report. Surely, therefore,
11 this information cannot constitute state secrets and should be produced. *Ellsberg*,
12 709 F.2d at 57 (“[W]henever possible, sensitive information must be disentangled
13 from nonsensitive information to allow for the release of the latter.”).⁵

15 Skepticism of the Government’s redactions is well founded for another
16 reason—the Government’s acknowledged errors in its production. For instance,
17 the Government’s recent re-processing of redacted documents demonstrates that
18 the Government originally produced such documents with unnecessary
19 redactions. *See* Querns Decl. ¶10, Exs. 101 and 102. More recently, Defendants
20 learned that the Government’s document production may, in fact, be incomplete

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22
23 ⁵ There can be no dispute that Defendants are entitled to view information
24 contained in documents purportedly underpinning the information that the CIA
25 has already declassified in the SSCI Report, given Plaintiffs’ heavy reliance upon
26 the SSCI Report to support their claims.

1 and out of compliance with the Court’s October 4, 2016 Order. On February 21,
2 2017, the Government produced additional documents in response to a specific
3 inquiry from Defendants about missing documents. *Id.* at ¶6. And at least some
4 of the 15 additional documents subsequently produced contain terms such as
5 “SERE PSYCHOLOGIST” and “IC PSYCHOLOGIST,” for which the
6 Government in previous filings specifically claimed to have searched.⁶ *Id.*

7
8 These exemplar mistakes and the clear inconsistencies between the
9 documents produced and the information attributed to these same documents
10 within the SSCI Report confirm that the Government’s representation that all
11 redacted information would harm national security cannot be accepted outright.
12 The Court should compel the production, following an *in camera* review if
13 necessary, of those documents identified in the Querns Decl. ¶13, Ex. 105 as
14 having been improperly redacted or withheld on the basis of the state secrets
15 privilege, including with respect to information that has already been publicly
16 released, to ensure that “an appropriate balance is struck between protecting
17 national security matters and preserving an open court system.” *Al-Haramain*,
18 507 F.3d at 1203; *see also Reynolds*, 345 U.S. at 8 (appropriate judicial oversight
19 is vital to protect against “intolerable abuses”).
20

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23
24 ⁶ While all 15 documents produced on February 21, 2017, at United States Bates
25 #002340-90, contain redactions, *none* of them are referenced in Director
26 Pompeo’s Declaration or the attached unclassified summaries. *See* ECF 75-16.

1 **D. If the State Secret Privilege Is Upheld, Defendants May Need to**
2 **Seek Relief**

3 As the Government points out, the state secrets privilege is powerful: it
4 completely removes evidence from the case without considering such removal's
5 impact on Defendants. *Reynolds*, 345 U.S. at 11 (“[E]ven the most compelling
6 necessity cannot overcome the claim of privilege if the court is ultimately
7 satisfied that military secrets are at stake.”). Yet, Defendants are not without
8 recourse. When the state secrets privilege “deprives the defendant of information
9 that would otherwise give the defendant a valid defense to the claim, then the
10 court may grant summary judgment to the defendant.” *Kasza v. Browner*, 133
11 F.3d 1159, 1166 (9th Cir. 1998). Depending on what information remains
12 withheld, Defendants’ defense may be unfairly hampered—so much so that the
13 case cannot be fairly litigated. *See El-Masri v. U.S.*, 479 F.3d 296, 306 (4th Cir.
14 2007) (holding a proceeding involving state secrets may continue *only* when it
15 “can be fairly litigated without resort to the privileged information”); *see also In*
16 *re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007) (holding dismissal proper
17 where “the truthful state of affairs would deny a defendant a valid defense that
18 would likely cause a trier to reach an erroneous result”); *White v. Raytheon Co.*,
19 No. 07-10222, 2008 WL 5273290, at *3-5 (D. Mass. Dec. 17, 2008) (dismissing
20 claims after reviewing the privileged information and concluding there was “no
21 practical means by which [the defendant] could be permitted to mount a fair
22 defense without revealing state secrets”).
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24
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1 **E. The Deliberative Process Privilege Does Not Apply to All 58**
2 **Claimed Documents**

3 **1. The Unclassified Summaries Are Insufficient to Establish**
4 **the Privilege’s Application**

5 To establish the applicability of this privilege, the Government must prove
6 each document is both “predecisional” and “deliberative”, *Hongsermeier v.*
7 *C.I.R.*, 621 F.3d 890, 904 (9th Cir. 2010), and the “[t]he entity claiming the
8 privilege must offer a particularized explanation of why a document is privileged,
9 providing enough information to enable the opposing party and court to evaluate
10 the appropriateness of withholding the documents.” *Coleman v. Schwarzenegger*,
11 No. C01-1351, 2008 WL 2732182, at *4 (E.D. Cal. July 8, 2008). Importantly,
12 “[t]he designation of the documents ... as ‘drafts’ does not end the inquiry.”
13 *Arthur Anderson & Co. v. I.R.S.*, 679 F.2d 254, 257-58 (D.C.Cir.1982) (citations
14 omitted). Moreover, even when many documents are at issue, basic information
15 about the documents, such as the date of creation, author, or recipient, is still
16 required to properly assess whether the privilege is applicable. *Coleman*, 2008
17 WL 2732182, at *4. Here, the Government has not provided enough information
18 to make this assessment, *i.e.* it has not met its burden and its privilege assertion
19 therefore fails.
20

21 For many documents, the Government has provided only conclusory
22 statements without any details concerning the date or sender/recipient. *See e.g.*,
23 ECF 75-16 at App’x ¶48, Doc. #117; ¶54, Doc. #123; ¶129, Doc. #206. These
24 statements are simply insufficient. *See Cal. Native Plant Soc’y v. U.S. E.P.A.*,
25 251 F.R.D. 408, 413 (N.D. Cal. 2008) (holding statements that “do not assert the
26

1 detail required to show the individual documents’ role in the decision making
 2 process” insufficient to establish privilege). Other summaries provide even less
 3 information. *See, e.g.*, ECF 75-16 at App’x ¶¶155, #233; ¶¶163, 241 (relying on the
 4 documents “DRAFT” status without information about the senders/recipients). In
 5 fact, even the Government’s arguably more robust summaries fall short because
 6 they leave it unclear whether each document “is an essential element of [the
 7 decision] process or possibly a peripheral item which just ‘beefs up’ a position
 8 with cumulative materials.” *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 6 (6th
 9 Cir. 1980); *see S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*,
 10 No. 06-2845, 2008 WL 2523819, at *9 (E.D. Cal. June 20, 2008). Because the
 11 Government has failed to carry its burden of demonstrating the applicability of
 12 the privilege, the Court should compel the production, following an *in camera*
 13 review if necessary, of those documents identified in the Querns Decl. ¶¶13, Ex.
 14 105, as having been improperly redacted or withheld on this basis.⁷

16 2. Information Withheld Is Not Pre-Decisional

17 “[A] document is predecisional if it was prepared in order to assist an
 18 agency decisionmaker in arriving at his decision.” *Hongsermeier*, 621 F.3d at
 19 904 (internal quotations omitted). Communications made subsequent to an
 20 agency decision are not protected. *See United States v. Farley*, 11 F.3d 1385,
 21

22 _____
 23 ⁷ Inconsistencies within the Government’s declarations further draw into question
 24 the accuracy of the summaries provided. For instance, Documents 121 and 133
 25 appear to be addressing the same document (US Bates 001663-66), but contain
 26 different summaries. ECF 75-16 at App’x ¶¶52, 61; ECF 75-6 at 38, 43.

1 1389 (7th Cir. 1993) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153
2 (1975)). Therefore, any documents about Zubaydah’s interrogation after August
3 3, 2002, when the CIA sent a cable to the detention facility approving EITs, are
4 not predecisional. See 75-19 ¶35, Doc. #123; Querns Decl. ¶21, Ex. 110 (US
5 Bates 001755-59). Documents that simply include after-the-fact discussions
6 “relevant to final decisions” or explain “why a document was created” such as
7 appear to be the case within Documents 39 and 108, also do not fall within the
8 privilege. ECF 75-16 at App’x ¶15, Doc. #39; ¶42, Doc. #108.
9

10 3. Information Withheld Is Not Deliberative

11 A document is “deliberative if its release would expose an agency’s
12 decisionmaking process in such a way as to discourage candid discussion within
13 the agency and thereby undermine the agency’s ability to perform its functions.”
14 *Hongsermeier*, 621 F.3d at 904 (internal quotations omitted). In essence, the
15 document must “reflect the personal opinions of the writer rather than the policy
16 of the agency.” *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118–
17 19 (9th Cir. 1988). Documents that “relate not to the adoption of agency policy,
18 but to the execution of policies that have already been adopted” fail this test.
19 *United States v. Hamilton*, No. CR11-415, 2012 WL 5834893, at *5 (W.D. Wash.
20 Oct. 4, 2012); *Fishermen’s Finest, Inc. v. Gutierrez*, No. C07-1574, 2008 WL
21 2782909, at *4 (W.D. Wash. July 15, 2008) (document regarding “how to
22 translate policy into regulatory language” and “communicate an already-made
23 decision” not privileged); see also *Greenberg v. U.S. Dep’t of Treasury*, 10 F.
24 Supp. 2d 3, 17 (D.D.C. 1998) (“instruction[s] from a senior to a junior official as
25 to what legal action should be taken” are not privileged).
26

1 Here, the Government has inappropriately withheld information from non-
2 deliberative documents. For example, Document 114 is a cable from CIA
3 Headquarters to the black-site that specifically states it is “HQS/ALEC guidance
4 on the next phase of the Abu Zubaydah interrogation.” Querns Decl. ¶19, Ex.
5 108 (US Bates 001641-47). This document is not deliberative, but instructions as
6 to how to execute CIA policy. The same is true for Documents 167 and 225.
7 Querns Decl. ¶¶25, 26, Exs. 114 and 115 (US Bates 001871-74) (“decision
8 authority”); (US Bates 002015-18) (“this cable specifically authorizes the use of
9 this techniques mentioned below”). The summaries provided for other
10 documents, e.g. Documents 117, 121, 123, 127, 131, 133, 139, 149, 206 and 223,
11 also suggest that such documents concern how officers should execute the CIA’s
12 already-adopted interrogation policy. ECF 75-16 at App’x ¶¶48, 52, 54, 57, 59,
13 61, 67, 77, 129, 146. One example is Document 131, which the unclassified
14 summary claims is a communication “requesting clarification and direction
15 regarding future interrogations of Abu Zubaydah.” ECF 75-16 at App’x ¶59.

17 A document is also not deliberative when it is purely factual. *Julian v.*
18 *Dep’t of Justice*, 806 F.2d 1411 (9th Cir. 1986). And when a document contains
19 both facts and deliberations, the factual portions of the document should be
20 separated and disclosed whenever feasible. *Assembly of State of Cal. v. U.S.*
21 *Dep’t of Commerce*, 968 F.2d 916, 921–22 (9th Cir. 1992). Document 247 has
22 been withheld in full, and the associated unclassified summary indicates that
23 much of the information on the document is factual, e.g. the document apparently
24 discusses the collection of “information about SERE techniques.” ECF 75-16
25 App’x at ¶169. But, to the extent that the Government has redacted factual
26

1 information about the SERE techniques, that information is simply not
2 deliberative. *See Equal Opportunity Emp't Comm'n v. Roy Farms, Inc.*, No. 12-
3 CV-3117-TOR, 2013 WL 6903756, at *1 (E.D. Wash. Dec. 31, 2013) (finding
4 deposition for the “specific purpose of clarifying factual issues” did not implicate
5 the deliberative process privilege).

6 Finally, some of those documents the unclassified summaries suggest are
7 “deliberative” still should not be redacted because when an agency has already
8 disclosed the deliberative process, the document is no longer protected by the
9 privilege. *Assembly*, 968 F.2d at 923 (finding deliberative documents would not
10 “expose the decision making process any more than it has already been
11 disclosed”). For Document 37, the Government claims to have redacted
12 discussions amongst CIA officers about Defendants’ specific tasking. ECF 75-16
13 at App’x ¶13. However, the seven-page redacted version of Document 37 that the
14 Government produced already discloses just these discussions. Querns Decl. ¶18,
15 Ex. 107 (US Bates 001102-08). Thus, the deliberative process has already been
16 revealed and the privilege is unnecessary. Identical reasoning is applicable to
17 Documents 120 and 136, where the Government has similarly already revealed
18 the deliberative process. ECF 75-16 at App’x ¶51, 64; Querns Decl. ¶¶20, 22,
19 Exs. 109 and 111 (US Bates 001656-62, 001788-92).

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21
22 There is also significant withholding of documents/information concerning
23 the implementation of interrogation techniques on Zubaydah. *See e.g.*, ECF 75-
24 16 at App’x ¶52, Doc. #121; ¶59, Doc. #131; ¶64, Doc. #136; ¶67, Doc. #139;
25 ¶129, Doc. #206; and ¶169, Doc. #247. But, copious information about this topic,
26 and the deliberations that led to the ultimate decisions, has been released by the

1 CIA, through the SSCI Report, other unclassified documents, and public
2 statements from those involved. Querns Decl. ¶16, Ex. 106. Therefore, some of
3 the information that has been redacted would not likely expose any more about
4 this particular deliberative process and will not undermine the CIA's ability to
5 function, which is the purpose of the privilege.

6 **F. If Deliberative Process Privilege Applies, Defendants' Need for**
7 **the Documents Outweighs the Government's Privacy Interest**

8 The deliberative process privilege is qualified. Where, as here, a litigant
9 establishes his need for the material and accurate fact-finding overrides the
10 Government's interest in non-disclosure, the privilege may be lifted. *FTC v.*
11 *Warner Comm'n*, 742 F.2d 1156, 1161 (9th Cir. 1984). Factors considered in
12 making this determination include the: (1) relevance of the evidence; (2)
13 availability of other evidence; (3) government's role in the litigation; and (4)
14 extent to which disclosure would hinder frank and independent discussion
15 regarding contemplated policies and decisions." *Id.* Application of these factors
16 to the present situation requires disclosure.

17 **1. The Evidence at Issue Is Highly Relevant and Cannot Be**
18 **Substituted**

19 In every case, the desirability of accurate fact finding weighs in favor of
20 disclosure. *Newport Pac. Inc. v. Cnty. of San Diego*, 200 F.R.D. 628, 638 (S.D.
21 Cal. 2001). And "where the agency's decision-making process is itself at issue"
22 this factor becomes even more relevant. *Greenpeace v. Nat'l Marine Fisheries*
23 *Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000); *N. Pacifica LLC v. City of*
24 *Pacifica*, 274 F. Supp. 2d 1118, 1124 (N.D. Cal. 2003).
25
26

1 Plaintiffs seek to hold Defendants liable for their claimed role in designing
2 the Program. *See e.g.*, Compl. ¶¶1, 20, 57, 58, 169, 180, 182. Thus, although the
3 Government is not a party to this action, whether the Government—as opposed to
4 Defendants—designed the Program is central, thereby making the CIA’s decision
5 making process highly relevant. The documents highlight this point. The
6 information redacted pursuant to the deliberative process privilege in each of the
7 following documents apparently relates to the process of developing interrogation
8 techniques. Querns Decl. ¶15 (citing ECF 75-16 at App’x ¶37, Doc. #103; ¶45,
9 Doc. #114; ¶48, Doc. #117; ¶61, Doc. #133; ¶63, Doc. #135; ¶77, Doc. #149;
10 ¶85, Doc. #157; ¶86, Doc. #158; ¶87, Doc. #159; ¶93, Doc. #167; ¶146, Doc.
11 #223; ¶148, Doc. #225; ¶149, Doc. #226; ¶ 168, Doc. #246). Plainly, this
12 information would provide details about who proposed interrogation techniques,
13 the CIA’s response, and how the CIA ultimately chose to use some techniques
14 and not others. Defendants cannot obtain this information from any other source
15 because Defendants were not involved in most internal discussions and the
16 Government has possession of all relevant documents.

18 Further, many of these documents are the best option to provide
19 Defendants with the relevant information, as the Government is not withholding
20 the substantive information relevant to command and control based upon other
21 privileges, such as state secrets. *See e.g.*, ECF 75-16 at App’x ¶42, Doc. #108;
22 ¶48, Doc. #117; ¶67, Doc. #139; ¶87, Doc. #159; ¶93, Doc. #167; ¶129, Doc.
23 #206. Document 206 is, perhaps, the best example. Information from this
24 document withheld as deliberative includes “suggestions regarding particular
25 interrogation techniques that could be employed in the future interrogations of
26

1 Abu Zubaydah, including the pros and cons of these various approach[es].” ECF
2 75-16 at App’x ; ¶129, Doc. #206. Conversely, the information withheld
3 pursuant to the state secrets includes content Defendants do not seek: names of
4 CIA employees and specific questions asked of Zubaydah. Therefore,
5 Defendants can obtain access to very important information if these documents
6 are not withheld pursuant to the deliberative process privilege.

7
8 **2. The Government Is Heavily Involved and Disclosure
9 Would Not Chill Discussion**

10 The Government has a primary role in this litigation as Plaintiffs are
11 indirectly challenging the CIA’s actions. *See Modesto Irrigation District v.*
12 *Gutierrez*, No. 06-453, 2007 WL 763370, at *12 (N.D. Cal. March 9, 2007)
13 (discussing the “primary” role of the government where a lawsuit challenged the
14 agency’s actions). Of course, Plaintiffs cannot sue the Government because of
15 sovereign immunity, but they can—and have—sued the Government’s
16 independent contractors who were acting at the direction and supervision of the
17 Government. Consequently, the Government’s actions lie at the core of this case.

18 Furthermore, as discussed earlier, the Government has already disclosed
19 copious information about its deliberations regarding the Program such that
20 further disclosure would not hinder frank and independent discussion regarding
21 contemplated policies and decisions. *Id.* Any such “hindering” occurred when
22 the CIA declassified the SSCI Report and other documents that revealed CIA
23 deliberations. With the Government facing no harm, Defendants’ need for this
24 information far outweighs any interest in non-disclosure. The Government, then,
25 must produce the information that has been withheld.
26

1 **G. The Government Has Not Met its Burden of Demonstrating the**
 2 **Applicability of the National Security Act**

3 The National Security Act may be invoked to withhold information relating
 4 to an “intelligence source or method.” *Sack*, 53 F. Supp. 3d at 166. The
 5 Government has failed to meet its “burden of demonstrating *in a non-conclusory*
 6 *fashion*” that the information withheld falls within this narrow scope. First, the
 7 Privilege Log forces Defendants to guess what information was withheld pursuant
 8 to the Act, as in every instance the Act is merely one of many privileges
 9 advanced. ECF 75-6. Moreover, the Log never once identifies what specific
 10 information within a document has been withheld based on this Act—as opposed
 11 any other privilege identified. The Government’s unclassified summaries afford
 12 little help because they do not assert a specific privilege, and Director Pompeo’s
 13 declaration does not overcome these shortcomings. While the declaration
 14 describes categories of information covered by the Act (ECF 75-16 at ¶¶11, 25,
 15 29, 31, 34, 39), it does not identify which documents, or which redactions, fall
 16 within these categories. In the end, the Government fails to meet its burden to
 17 demonstrate that information was properly withheld under the National Security
 18 Act.
 19 Act.

20 **H. The Attorney-Client Privilege and Attorney Work Product**
 21 **Doctrine Do Not Apply to All 25 Documents**

22 **1. The Government Does Not Meet Its Burden to Establish**
 23 **the Application of the Attorney-Client Privilege**

24 The Government must satisfy the following test for each document claimed
 25 protected by the attorney-client privilege:
 26

1 (1) Where legal advice of any kind is sought (2) from a professional
2 legal adviser in his capacity as such, (3) the communications relating
3 to that purpose, (4) made in confidence (5) by the client, (6) are at
4 his instance permanently protected (7) from disclosure by himself or
by the legal adviser, (8) unless the protection be waived.

5 *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). The Government
6 does not meet this burden with respect to the redactions applied to Documents 46,
7 47, 48, 127 and 226, and to Documents 165, 212, 216, 237, and 247, withheld in
8 full.

9 For example, the Government's Log (ECF 75-6) and the CIA Deputy
10 Director of Operations' declaration (ECF 75-19) do not establish how redactions
11 that contain "[i]nformation about particular *actions* attorneys took with respect to
12 advising CIA officers" (ECF 75-19 ¶78, Doc. #46); or "discussions and
13 recommendations *among CIA officers* concerning additional training and security
14 protocols" (ECF 75-19 ¶80, Doc. #48), constitute protected *communications*.
15 Likewise, the Government fails to demonstrate how certain documents reflect
16 communications *between a CIA attorney and the attorney's client*. See, e.g., Doc.
17 #226, ECF 75-19 ¶99 ("communication from CIA officers in the field to CIA
18 Headquarters"); Doc. #237, ECF 75-19 ¶101 (memorandum from one non-
19 attorney CIA officer to another non-attorney CIA officer where the memorandum
20 does not appear to have been prepared at the request of an attorney).
21

22 Separately, with respect to other withheld or redacted documents, the
23 Government has not met its burden of establishing that the communications were
24 undertaken for a *legal purpose*. See, e.g., Doc. #127, ECF 75-19 ¶88
25 (information "sent by a CIA attorney to another CIA officer for inclusion in a
26

1 collection of information the attorney was gathering”); Doc. #165, ECF 75-19
2 ¶91 (email communication describing a meeting of non-lawyer senior CIA
3 officers at which a lawyer was present). Additionally, where the Government
4 fails to offer any description of the withheld document, there surely can be no
5 basis for withholding that document on attorney-client privilege grounds. *See*
6 Doc. #247, ECF 75-19 ¶102 (no description of the second of “two *separate* email
7 chains from July 2002” that the Government asserts is withheld on attorney-client
8 privilege grounds.)
9

10 2. Communications with Defendants Are Not Protected

11 The Government’s assertion that the attorney-client privilege applies to a
12 document involving communications between a CIA attorney and Dr. Jessen—an
13 *independent contractor* to the CIA—is unfounded. (*See* Doc. #165, ECF 75-19
14 ¶91). Such communications are only covered by the attorney-client privilege
15 when the Government has demonstrated that the independent contractor is the
16 “*functional equivalent of an employee*” of the agency. *See Graf*, 610 F.3d at 1159
17 (9th Cir. 2010) (emphasis added). Here, the Government has made no showing
18 that either of Defendants “regularly communicated” with others on behalf of the
19 CIA or “managed [CIA] employees and [were] the CIA’s ‘voice in its
20 communications’ with counsel.” *United States v. Lonich*, No. 14-CR-00139,
21 2016 WL 1733633, *6 (N.D. Cal. May 2, 2016). Moreover, the Court recently
22 determined that Defendants were not the CIA’s agents. ECF 135 (No. CV-15-
23 0286). Thus, Document 165, which was withheld on the grounds that it reflects a
24 communication with a legal purpose between a CIA attorney and Dr. Jessen must
25 be disclosed.
26

3. The Work Product Doctrine Is Inapplicable

1 The Ninth Circuit has declined to extend “the work product privilege
2 outside the literal bounds of [Rule 26(b)(3)].” *In re Cal. Pub. Utilities Comm’n*,
3 892 F.2d 778, 781 (9th Cir. 1989) (Rule 26(b)(3) “*on its face, limits its protection*
4 *to one who is a party* (or a party’s representative) to the litigation in which
5 discovery is sought.”) (emphasis added)); *see* 6-26 Moore’s Federal Practice, §
6 26.70[4] (3d ed. 2007) (“If the document is prepared for a nonparty to the
7 litigation, work product protection does not apply, even if the nonparty is a party
8 to closely related litigation.”). In fact, the *unreported* case from the District of
9 Idaho cited by the Government in favor of extending work product protection
10 pursuant to Rule 45, relies upon authority outside the Ninth Circuit that has been
11 expressly *rejected* by another district court in a *reported* Ninth Circuit opinion.
12 *See United States v. Graham*, 555 F. Supp. 2d 1046, 1050 (N.D. Cal. 2008)
13 (rejecting reasoning and holding of *In re Student Finance Corp.*, No. 06-MC-69,
14 2006 WL 3484387, *10 (E.D. Pa. Nov. 29, 2006)). Further, the authority relied
15 upon by the Government to support its claim that Rule 26(c) permits the
16 application of work product protection to a non-party to litigation (ECF 75 at 39,
17 n.8), is *inapposite* as the Government has not sought a protective order with
18 respect to documents withheld on the basis of work product. Accordingly, the
19 Government’s assertion of the work product doctrine for Documents 101, 105,
20 106, 130, 214 and 230 is improper.

1 DATED this 22nd day of March, 2017.

2
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 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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