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15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF WASHINGTON

17 SULEIMAN ABDULLAH SALIM,
18 *et al.*,
19 Plaintiffs,

20 v.

21 JAMES E. MITCHELL and JOHN
22 JESSEN,
23 Defendants.

No. 2:15-CV-286-JLQ

24 STATEMENT BY THE UNITED
25 STATES ADDRESSING PROPOSED
26 DEADLINE FOR DOCUMENT
PRODUCTION BY THE CENTRAL
INTELLIGENCE AGENCY

GOVT'S STATEMENT RE: CIA PRODUCTION DEADLINE

1 The United States of America (“Government”) respectfully submits this
2 statement proposing January 20, 2017, as the appropriate deadline for
3 completion of document production by the Central Intelligence Agency (“CIA”)
4 in accordance with the Court’s October 4, 2016 Order (ECF No. 31). The Court
5 should adopt January 20, 2017, as the production deadline because it will allow
6 this case to move forward consist with the deadlines established by the Court’s
7 Scheduling Order, enable Defendants to receive final production of CIA
8 documents approximately one month prior to the close of discovery, and
9 provide the Government with additional time to complete the complex search
10 and review process for a voluminous quantity of classified national security
11 documents.

12 As an initial matter, the Government emphasizes that the disputes
13 between Defendants and the Government with respect to document production
14 are not part of a collusive effort to delay this case or deny Plaintiffs (or
15 Defendants) of their ability to present their claims (or defenses) to this Court.
16 Every dispute raised before the Court by the Government has been presented in
17 good faith, for legitimate reasons, and not to cause unnecessary delay.

18 Cases involving the use of national security information often present
19 complications, and this case is no exception. Matters that would be relatively
20 straightforward in an ordinary case, such as document discovery, are made far
21 more difficult by a host of factors unique to the national security context, such
22 as classification issues, security restrictions on access to information even
23 within the Government, and the Government’s obligation to protect
24 “information bearing on national security” from harmful disclosure, *Dep’t of*
25 *the Navy v. Egan*, 484 U.S. 518, 527 (1988). Put simply, discovery in national
26 security cases like this one presents unique challenges.

1 Even in the face of these difficult obstacles, the Government emphasizes
2 and reaffirms that it is working through these challenges diligently and in good
3 faith in order to comply with the Court's October 4 Order. The Government
4 recognizes the need for prompt resolution of Plaintiffs' claims as well as
5 adherence to the deadlines in the Court's Scheduling Order. The Government
6 also recognizes the importance of providing Defendants with a reasonable
7 amount of information about the primary topics relevant to this case. At the
8 same time, however, due regard must be given to the enormous complexities
9 presented by the large-scale discovery of national security information, and the
10 burdens such production place on the resources of the Government's national
11 security apparatus.

12 In an effort to address and balance all of these concerns, the Government
13 requests January 20, 2017, as the appropriate deadline for completing
14 production of the three categories of documents required by the Court's October
15 4 Order. *See* Gov't Status Report (ECF No. 85) at 10-11. As explained in the
16 Declaration of Antoinette Shiner (ECF No. 19; Gov't Ex. 13) ("Shiner
17 Declaration") and the Government's Status Report, the process required to
18 transfer approximately 36,000 classified documents one-by-one to a specialized
19 classified network, to assemble a team of security-cleared personnel to review
20 that voluminous quantity of documents for responsiveness, and then to have
21 experienced agency personnel conduct a detailed classification and privilege
22 review, will require significant time, even with the commitment of appropriate
23 resources to the project. *See* Gov't Status Report (ECF No. 85) at 10-11.

24 Indeed, much of the information required to provide a detailed estimate
25 of the time and resources required to complete this substantial project are
26 unknown at the present time. For example, the Government estimates that a

1 percentage of the 36,000 documents will not be responsive to the Court's
2 discovery requirements due to, among other things, duplicates and documents
3 that, upon further review, do not relate to this case. But it is difficult to estimate
4 how much time will be required to eliminate these "false positives" and narrow
5 the documents to only non-redundant documents responsive to the Court's
6 requirements. Similarly, the time required to perform classification and
7 privilege review is dependent on a variety of factors unknown at this time, such
8 as the number of documents to be reviewed, the page length of the documents,
9 the sensitivity of the information contained within the document, and the
10 number and scope of consultations with subject-matter experts that may be
11 required.

12 Notwithstanding the present uncertainty, the Government recognizes that
13 the Court has established firm deadlines for the management of this case,
14 including a February 17, 2017 date for the close of discovery, that will not be
15 changed absent a showing of "manifest injustice." *See* Scheduling Order at 2, 5
16 (ECF No. 59). Thus, given the need to propose dates within the deadlines set
17 by the Court, and taking into account the current information about the complex
18 production process, the Government's respectfully requests that the Court adopt
19 January 20, 2017, as the deadline for the CIA's document production.

20 The January 20 deadline will not prejudice Defendants. This date is
21 approximately one month prior to the close of discovery and will provide
22 Defendants with sufficient time to review the documents in advance of the
23 Court's deadline to file any motions to compel (February 17) or for summary
24 judgment (March 31). *See id.* at 2-3. Additionally, documents will be produced
25 to Defendants on a rolling basis as they are cleared for production.

1 Further, Defendants have no basis to claim any prejudice with the
2 January 20 deadline given the wide range of detailed information about the
3 operation of the CIA program that the Government has already produced. *See*
4 Gov't Status Report at 5-6. Defendants also plan to depose four CIA officials
5 regarding the former detention and interrogation program. In light of the
6 material information produced by the Government thus far, the three categories
7 of document production at issue now are, in the Government's view, at the
8 periphery of this case. For example, neither the Government nor, as we
9 understand it, Defendants, have any reason to believe that Defendants had any
10 involvement in the detention or interrogation of Plaintiffs Salim and Ben Soud.
11 Thus, the Government will likely end up producing no documents in this
12 category, but will still have to conduct searches to confirm. With respect to
13 Plaintiff Rahman, Defendants' apparent purpose at this point is to uncover,
14 however unlikely, new material information not already disclosed by the
15 Government in *three* separate comprehensive CIA reports about Rahman's
16 death, the operational cable traffic preceding Rahman's death, and interviews
17 with on-site personnel involved in Rahman's interrogation and detention. *See*
18 *id.* Similarly, the Government has produced documents addressing Defendants'
19 involvement in the development of the program and the specific interrogation
20 techniques they recommended. *See* Gov't Exs. 1-2, attached. Thus, further
21 searches on these topics may very well be duplicative of, and reaffirm, the same
22 information already produced.

23 By contrast, imposing a production deadline on the Government that does
24 not take into consideration the complex and burdensome requirements
25 associated with review and production of a large volume of classified national
26 security documents would significantly prejudice the Government. The

1 fulsome and systematic review process that the Government must undertake is
2 necessary to prevent the inadvertent disclosure of classified information that
3 reasonably could be expected to harm national security. Unreasonably
4 expediting this process has the potential to severely and unnecessarily harm this
5 significant interest. Additionally, truncating the amount of time the
6 Government has to complete this process will increase the likelihood of rushed
7 or mistaken redactions of information that is not classified or privileged. The
8 January 20 deadline, therefore, reduces the risk of redactions to information that
9 are both over- and under-inclusive to detriment of Defendants and the
10 Government, respectively.

11 The Government takes the Court's discovery obligations very seriously.
12 Out of respect for the Court, the Government requests an appropriate amount of
13 time to conduct a fulsome and systematic review of a large volume of national
14 security documents in order to ensure compliance with the Court's
15 requirements, consistent with the Government's duty to protect classified or
16 privileged information from unauthorized disclosure. The Government's efforts
17 are not designed to delay this case or otherwise prejudice Plaintiffs' ability to
18 present their claims to this Court. Rather, they reflect the practical reality that
19 the Government must review an enormous volume of documents, navigate
20 complicated security and classification requirements, and assiduously guard
21 against disclosure of information that could harm the national security.

22 For the reasons stated above, the Government respectfully requests that
23 the Court adopt January 20, 2017, as the deadline for the CIA to complete the
24 document production required by the Court's October 4, 2014 Order.
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1 Dated: October 14, 2016

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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