

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

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

Attorneys for Defendants Mitchell and Jessen

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE**

JAMES ELMER MITCHELL and
JOHN "BRUCE" JESSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. 16-MC-0036-JLQ

**FINAL LOCAL RULE 37.1
STATEMENT**

MAY 5, 2017

Related Case:

SULEIMAN ABDULLAH SALIM, et
al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN

NO. CV-15-0286-JLQ

FINAL RULE 37.1 STATEMENT RE:
DEFENDANTS' MOTIONS
TO COMPEL
NO. 2:16-MC-00036-JLQ

1 JESSEN,
2 Defendants.

3
4 **I. INTRODUCTION**

5 On January 31, 2017, the Government and Defendants filed a joint pre-
6 hearing statement pursuant to Local Rule 37.1 regarding Defendants' Third
7 Motion to Compel (ECF No. 54). See ECF No. 60. On February 10, 2014, after
8 further discussion between the Government and Defendants, the parties
9 supplemented that statement. See ECF No. 63. Following oral argument on
10 February 14, 2017, Defendants filed a fourth motion to compel (ECF No. 64), and
11 the Government formally asserted privileges over 170 documents that remained in
12 dispute (ECF No. 75). The Court has scheduled argument regarding the
13 Government's privilege assertion on May 5, 2017. In advance of that argument,
14 and pursuant to the Court's March 29, 2017 Order (ECF No. 81), the parties
15 jointly file this final statement pursuant to Local Rule 37.1 (the "Statement").
16

17 This Statement lists the areas in which the Government and Defendants
18 have reached agreement related to Defendants' Third and Fourth Motions to
19 Compel as well as the continuing areas of disagreement that require resolution by
20 this Court.

21 **II. DISCUSSION**

22 **A. Areas of Agreement**

23 1. *Documents*

24 Defendants and the Government agree that the following categories of
25 information are not substantively significant to the claims and defenses at issue in
26

1 this action and can be excluded from the scope of Defendants' Motions to
2 Compel. To the extent information falling within these categories appears in the
3 documents that remain at issue, Defendants do not seek this information.
4

- 5 • Information regarding any foreign government's cooperation with the
6 CIA in administering or hosting any aspect of the CIA's Enhanced
7 Interrogation Program (the "Program").
- 8 • Information regarding CIA sources, including names, physical
9 descriptions, or any other identifying information.
- 10 • The substance of questions asked or answers given in interrogation by
11 any detainee, including any Plaintiff or Abu Zubaydah.
- 12 • The content and source of information provided to detainees during the
13 course of interrogations, debriefings, and interviews.
- 14 • Names of covert personnel, except to the extent they have relevant
15 information on the development of the Program or command and
16 control (such as is alleged by Defendants regarding James Cotsana and
17 Gina Haspel).
- 18 • Details regarding interrogations of non-HVDs (other than Plaintiffs) not
19 interrogated by Drs. Mitchell and/or Jessen. This exclusion does not
20 include information about the interrogation techniques utilized or the
21 derivation or source of those techniques.
- 22 • Contact information for any of the individuals in the documents: email
23 addresses, addresses, phone numbers, etc.
24
25
26

- 1 • Cable cites. Every cable has a line that states “CITE _____”.
- 2 Sometimes this information is redacted, sometime it is not. In the SSCI
- 3 Report, the cites are used in conjunction with dates to identify cables.
- 4 For example, a full cite in the SSCI Report is “_____ 10644 (201235Z
- 5 AUG 02)”. If the date citation is provided (the “201235Z AUG 02”)
- 6 then Defendants do not need the “CITE” as well to identify the
- 7 document. If the date is not provided, Defendants seek the “CITE” so
- 8 as to identify documents referenced in the SSCI Report.
- 9
- 10 • Classification designation. On many documents, there are redactions on
- 11 the top/bottom adjacent to the “TOP SECRET” designation that is
- 12 crossed out. There are also redactions at the start of each paragraph in
- 13 some documents that seem to be related to the classification marking.
- 14 *See, e.g.*, US Bates 001624. To the extent this information is simply
- 15 another type of designation which does not contain substantive
- 16 information, it can be excluded.
- 17
- 18 • The body of cables. Many of the cables have a break that states
- 19 “BODY” followed by a large redaction before the date of the cable
- 20 appears below. *See, e.g.*, US Bates 001663. To the extent the
- 21 information contained in this portion of the cables is not substantive, it
- 22 can be excluded.
- 23
- 24 • References to specific CIA component offices.
- 25
- 26 • Cross-references to internal CIA documents.

- 1 • References to names of FBI personnel.

2 Defendants seek only the following categories of information withheld
3 from the Government's documents: (1) information concerning the CIA's
4 command and control over Defendants; and (2) information concerning the
5 extent, if any, of Defendants' involvement with the sources for and development
6 of interrogation techniques for use at Cobalt, including those used upon Plaintiffs.
7

8 Since the commencement of this litigation, the Government has produced
9 310 documents. By and large, the parties have reached agreement regarding these
10 documents, particularly with regard to the Government's redaction of
11 information. At the start of this most recent round of briefing, only 170
12 documents produced by the CIA remained at issue. The Government then
13 formally asserted privilege(s) over those 170 documents and provided
14 unclassified summaries of the information contained on the 170 documents that it
15 claims are privileged.¹
16

17 ¹ The Government did not formally assert privileges over the 15 documents it
18 produced with redactions on February 21, 2017, at United States Bates #002340-
19 90, nor did it provide unclassified summaries. Thus, this Statement does not
20 address those documents. As the Government has not asserted privileges for
21 these documents as required by the Court's prior Order (ECF No. 145),
22 Defendants assert that the Government must produce unredacted copies of these
23 documents. The Government's position is that these documents, which were
24 produced in partially redacted form after the filing of the Third and Fourth
25 Motions to Compel in response to an informal request for additional documents
26

1 Defendants do not challenge the privilege assertions concerning 122 of
2 these 170 documents. In agreeing not to challenge the privilege assertions related
3 to these documents, Defendants do not agree that the Government's assertion of
4 privileges as to these documents was proper. Rather, in many instances,
5 Defendants contend that the privileges advanced are not applicable but believe
6 that the information withheld, as represented in the corresponding unclassified
7 summary provided by the Government, is likely immaterial to Defendants'
8 defenses, and thus Defendants need not occupy the Court's time adjudicating
9 privilege issues as to those documents.
10

11 2. *Depositions*

12 On December 1, 2016, Defendants served a *Touhy* request and attendant
13 subpoena upon counsel for the Government, Mr. Warden, requesting the
14 opportunity to depose (1) CIA employee "Gina Doe" (who Defendants now
15 allege is Gina Haspel, the current Deputy Director of the CIA); and (2) John/Jane
16 "Doe" (who was identified in this way in recognition of his status as a covert CIA
17 employee).
18

19 With respect to the December 1, 2016 *Touhy* request, Defendants and the
20 CIA agree that the following matters are not at issue:

- 21 • The Government does not contest service of the *Touhy* request or the
22

23
24 by Defendants, do not fall within the scope of the current motions pending
25 before the Court. The Government's view is that Defendants never objected to
26 the redactions in these documents or filed a motion to compel their production.

1 attendant subpoena.

- 2
- 3 • Recognizing the CIA’s need to protect the identity of covert agents
 - 4 whose role in the CIA’s Enhanced Interrogation Program has not been
 - 5 released, Defendants withdrew their request to depose John/Jane “Doe”.

6 **B. Key Areas of Disagreement Requiring Court Resolution.**

7 1. *Documents*

8 Defendants and the Government continue to disagree as to whether the

9 following privileges apply to the following documents:

- 10
- 11 • The CIA Act as applied to Documents 37, 39, 40, 41, 46, 47, 48, 103,
 - 12 105, 114, 117, 122, 123, 127, 131, 133, 135, 136, 137, 139, 149, 157,
 - 13 158, 159, 163, 165, 167, 169, 185, 186, 192, 197, 206, 216, 217, 221,
 - 14 223, 224, 225, 226, 230, 233, 237, 241, 244, 246, 247, 250;
 - 15 • The State Secrets Privilege as applied to Documents 40, 41, 46, 48, 103,
 - 16 105, 114, 117, 122, 123, 127, 133, 135, 137, 149, 157, 158, 163, 165,
 - 17 167, 169, 185, 186, 192, 197, 217, 221, 223, 224, 226, 230, 233, 237,
 - 18 244, 246, 247, 250;
 - 19 • The Deliberative Process Privilege as applied to Documents 37, 39, 46,
 - 20 47, 103, 105, 114, 117, 123, 127, 131, 133, 135, 136, 137, 139, 149,
 - 21 157, 158, 159, 167, 197, 206, 221, 223, 225, 226, 230, 233, 237, 241,
 - 22 244, 247;
 - 23 • The National Security Act as applied to Documents 37, 39, 40, 41, 46,
 - 24 47, 48, 103, 105, 114, 117, 122, 123, 127, 131, 133, 135, 136, 137, 139,
 - 25 47, 48, 103, 105, 114, 117, 122, 123, 127, 131, 133, 135, 136, 137, 139,
 - 26

1 149, 157, 158, 159, 163, 165, 167, 169, 185, 186, 192, 197, 206, 216,
2 217, 221, 223, 224, 225, 226, 230, 233, 237, 241, 244, 246, 247, and
3 250;

- 4 • The Attorney-Client Privilege as applied to Documents 46, 47, 48, 127,
5 165, 216, 226, 237, and 247; and
- 6 • The Attorney Work Product Doctrine as applied to Documents 105 and
7 230.
8

9 The Parties attach a chart that lists all the documents that remain at issue
10 and the specific privileges advanced for each document that remain disputed. *See*
11 **Exhibit A**. For several documents listed on the chart, Defendants do not
12 challenge the information that the Government has withheld pursuant to specific
13 privileges. Those specific privileges are highlighted in bold on the chart.
14

15 The Government's position is that the following documents listed on the
16 chart that remain in dispute do not withhold the categories of information sought
17 by Defendants: 39, 41, 47, 48, 114, 117, 120, 122, 123, 127, 131, 133, 135, 136,
18 139, 159, 163, 167, 169, 206, 216, 221, 223, 225, 246. The Government's view is
19 that the unredacted portions of these documents disclose the relevant information
20 about Dr. Mitchell and Dr. Jessen, and the redactions pertain to other subjects.
21

22 2. *Depositions*

23 On September 6, 2016, Defendants sent counsel for the Government a
24 *Touhy* request seeking oral deposition testimony from James Cotsana, a retired
25 CIA officer who Defendants contend was their direct supervisor when they
26

1 worked for the CIA as independent contractors. Although the CIA has agreed to
2 produce Mr. Cotsana for a deposition (pursuant to the Court's October 4, 2016
3 Order), the parties dispute the permissible scope of the deposition. The CIA
4 contends that the State Secrets Privilege and the CIA Act apply and that the
5 substantive testimony Defendants seek is privileged and therefore may not be
6 elicited from Mr. Cotsana. Defendants believe that these privileges are
7 inapplicable because Mr. Cotsana's role in the CIA's Enhanced Interrogation
8 Program is not secret and the other privileges advanced are not applicable.
9

10 The Parties have the same dispute with respect to the December 1, 2016
11 *Touhy* request seeking testimony from Gina "Doe," who Defendants allege is
12 Gina Haspel. The CIA contends that the State Secrets Privilege and the CIA Act
13 apply and that the substantive testimony Defendants seek from Ms. Haspel is
14 privileged and therefore may not be elicited. Defendants again believe that these
15 privileges are inapplicable because Ms. Haspel's role in the CIA's Enhanced
16 Interrogation Program has been widely publicized and sufficiently acknowledged
17 by the CIA, thereby nullifying application of the various privileges advanced.
18
19

20 DATED this 14th day of April, 2017.
21

22 **BLANK ROME LLP**

23 By s/ Brian S. Paszamant
24 James T. Smith, admitted *pro hac vice*
25 smith-jt@blankrome.com
26 Brian S. Paszamant, admitted *pro hac vice*
paszamant@blankrome.com

1 Blank Rome LLP
2 130 N 18th Street
3 Philadelphia, PA 19103

4 Christopher W. Tompkins, WSBA #11686
5 ctompkins@bpmlaw.com
6 Betts, Patterson & Mines, P.S.
7 701 Pike St, Suite 1400
8 Seattle, WA 98101

9 Attorneys for Defendants Mitchell and Jessen

10 CHAD A. READLER
11 Acting Assistant Attorney General

12 MICHAEL C. ORMSBY
13 United States Attorney

14 TERRY M. HENRY
15 Assistant Branch Director

16 *s/ Andrew I. Warden*

17 ANDREW I. WARDEN
18 Senior Trial Counsel
19 United States Department of Justice
20 Civil Division
21 Federal Programs Branch
22 20 Massachusetts Avenue NW
23 Washington, D.C. 20530
24 Tel: (202) 616-5084
25 Fax: (202) 616-8470
26 andrew.warden@usdoj.gov

Attorneys for the United States of America

