THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' MOTION TO COMPEL RE LAW ENFORCEMENT PRIVILEGE

NOTE ON MOTION CALENDAR: FEBRUARY 23, 2018

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I. INTRODUCTION

In response to Plaintiffs' discovery requests, Defendants have broadly invoked the law enforcement privilege to justify redacting or withholding hundreds of responsive documents. But in doing so, Defendants have failed to satisfy the requirements for invoking that privilege. A governmental party cannot simply say the magic words, "law enforcement privilege," and on that basis alone withhold or redact responsive documents. The law requires more. Notably, the Court spoke to this issue in its October 19, 2017 Order. Dkt. 98. In that order, the Court compelled Defendants to produce a class list.[1] *Id*. at 3. Defendants had refused, in part, by arguing the information would be subject to the law enforcement privilege. In rejecting that argument, the Court articulated the law governing the law enforcement privilege, and pointed out that Defendants had failed to meet their burden:

> To claim this privilege, the Government must satisfy three requirements: (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. This privilege is qualified: "[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information."

Id. (citing *In re Sealed Case*, 856 F.2d 268, 271-72 (D.C. Cir. 1988)). Once again, Defendants refuse to comply with that standard. Specifically, and contrary to the Court's October 19 order, they refuse to provide a declaration from the head of the department formally claiming the privilege or even identify the agency official who reviewed the documents. Because Defendants have again failed to properly invoke the law enforcement privilege, the Court should order Defendants to produce these documents unredacted.

[1] Despite repeated requests, both in writing and over the phone, Defendants still have not produced the class list the Court ordered back in October 2017. Plaintiffs anticipate having to file another motion concerning this issue.

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Defendants also refuse to provide a proper privilege log with the requisite (and specific) details so that Plaintiffs can determine whether the privilege is being applied inappropriately or whether the interest in disclosure outweighs non-disclosure. This is not the first time Defendants have asserted that the rules governing privilege logs should not apply to them. In its October 19, 2017 Order, the Court made clear that Defendants could not simply withhold classified documents without "provid[ing] Plaintiffs with a proper privilege log." Dkt. 98 at 5. Defendants had also asserted that they did not have to search for documents relating to the Executive Orders because they claimed such documents would be subject to the deliberative-process privilege. The Court rejected this argument as well, explaining that "the Government fails to show why it is exempt from providing Plaintiffs with a privilege log." *Id*. The Court made clear that "the Government must provide a *proper privilege log* if it means to assert a deliberative-process privilege over certain documents." *Id*. (emphasis added). The same requirement for a "proper privilege log" should apply to Defendants' heavy reliance on the law enforcement privilege.

In sum, Plaintiffs are asking the Court to order Defendants either to produce the withheld material without redactions or comply with the threshold requirements for invoking the law enforcement privilege. To meet those threshold requirements, Defendants must—for each document they assert is privileged—submit an affidavit or declaration from the head of the department with control over the requested information (1) affirming that the agency generated or collected the materials at issue and maintained its confidentiality; (2) stating that the official has personally reviewed the materials in question; (3) identifying specific government interests that would be threatened by disclosure to plaintiff and/or plaintiffs' counsel, and (4) describing how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to government interests. Additionally, Defendants must provide a proper privilege log clearly stating the basis for the privilege in light of the protective order, and the identity of the official invoking it in each particular instance. Boilerplate narratives are plainly insufficient.

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II. RELEVANT PROCEDURAL BACKGROUND

This lawsuit challenges, among other things, the legality of the Controlled Application Review and Resolution Program ("CARRP"), created by Defendant U.S. Citizenship and Immigration Services ("USCIS") in 2008, Dkt. 47 ¶ 55, and related "extreme vetting" initiatives instituted in Executive Orders 13769, 82 Fed. Reg. 8977 ("First EO"), and 13780, 82 Fed. Reg. 13209 ("Second EO") *id.* ¶¶ 18, 138-141. Plaintiffs allege that CARRP implements an extra-statutory internal vetting program that discriminates on the basis of religion and/or national origin and indefinitely delays or pretextually denies immigration benefits to statutorily-qualified applicants. *Id.* ¶¶ 35-51, 62-76. The Court certified two nationwide classes of individuals subject to CARRP or a successor "extreme vetting" program: one made up of individuals who have applied for adjustment of status ("Adjustment Class"), and the other of individuals who have applied for naturalization ("Naturalization Class"). Dkt. 69 at 31.

In the course of their document productions to Plaintiffs, Defendants have produced four volumes of privilege logs. Declaration of David A. Perez ("Perez Decl."), Exs. 1, 2, 3, and 4. These logs purported to invoke the law enforcement privilege for hundreds of documents, which Defendants have completely withheld or redacted (often times heavily). For example, Defendants withheld or substantially redacted: (i) a 2009 USCIS memorandum regarding the vetting and adjudication of CARRP cases (in Volume 1); (ii) the CARRP independent study course (in Volume 2); (iii) the USCIS Handbook National Background Identity and Security Checks Operating Procedures (in Volume 3); and (iv) the national security branch organizational charts (in Volume 4). Though these documents are obviously very different from one another, and even have different dates of creation, Defendants (for the most part) apply the same boilerplate language to these and hundreds of others:

> Document contains information that identifies internal case handling procedures on the adjudication of an immigration benefit application, to include criteria used to evaluate an applicant's eligibility for the immigration benefit, which might reveal the bases used to determine eligibility by agency officials, and if

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> disclosed will risk circumvention or evasion of the law; Document contains information about the types of information provided to law enforcement agencies in order to request information necessary to adjudicate an immigration benefit application which might reveal sensitive internal law enforcement case handling procedures and if disclosed will risk circumvention or evasion of the law.

See, e.g., Perez Decl., Ex. 1. For instance, Defendants use similar language regarding a USCIS Memorandum dated July 14, 2016, and a USCIS Supplemental Guidance on CARRP Cases from July 2011, both in Volume 1. *Id*. (DEF-00001095 and DEF-00001051). And alarmingly, Defendants apply similar boilerplate language to two documents in Volume 2 (DF-00002305 and DF00002209) without actually stating that they are invoking the law enforcement privilege. *Id*., Ex. 2. Despite applying the privilege to so many documents, Defendants never identify the agency official(s) invoking the privilege, let alone provide a declaration from that official that meets the requisite criteria.

On January 10, 2018, Plaintiffs requested a meet and confer to discuss the deficiencies with Defendants' privilege assertions. *Id*. Ex. 5 (1/10/2018 Perez E-mail to White). On January 19, 2018, the parties conferred by phone. During that call, Plaintiffs asked Defendants to identify the individual invoking the law enforcement privilege, and to provide more detailed and specific narratives, in accordance with the standard governing that privilege. Plaintiffs even read from a case outlining the elements of the law enforcement privilege. *Id*., ¶ 10. Defendants refused to identify any agency official who reviewed the withholdings and, in fact, would not even confirm whether an agency official reviewed the withholdings in the first place. During a follow up meet and confer on January 26, 2018, Defendants reiterated that they would not agree to identify the agency official invoking the privilege, and that their privilege logs were sufficient. *Id*. They claimed that they were not required to provide an affidavit from a certifying official, or to otherwise satisfy the elements of the law enforcement privilege, unless or until a court ordered them to do so. In other words, it does not appear that anyone at the relevant agencies reviewed

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these documents, much less specifically invoked the law enforcement privilege as the law requires.

On January 31, Defendants produced revised privilege logs, which contain the same flaws as the original logs (the revised logs are attached to the Perez Declaration). For instance, these revised logs still fail to identify the agency official invoking the privilege, and they do not explain how disclosure subject to the Stipulated Protective Order the Court entered in this case would somehow threaten the law enforcement interests at stake. *See* Perez Decl., Ex. 6 (1/31/2018 Carilli Letter to Plaintiffs).

Plaintiffs have asked Defendants to produce these documents unredacted because Defendants have not properly invoked the law enforcement privilege, and have not established the three elements required to sustain that privilege. Plaintiffs have also requested that Defendants comply with the clear standard governing the law enforcement privilege for each document over which they assert it, by providing an adequately detailed declaration from the head of the agency invoking the privilege, and a proper privilege log identifying each document for which the privilege is asserted, the agency official asserting the privilege (with accompanying declaration), and the basis for the privilege. Defendants refuse. The parties are at an impasse.

III. ARGUMENT

A. Legal Standard Governing the Law Enforcement Privilege

Rule 26 requires that a privilege log "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the claim." FED. R. CIV. P. 26(b)(5)(A)(ii). The information required to assess the privilege claim depends on what privilege is being asserted.

Here, Defendants have identified the law enforcement privilege as the basis for withholding and redacting hundreds of otherwise responsive documents. As this Court has already made clear, to properly invoke the law enforcement privilege, the government must

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satisfy three elements: (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 as to why it properly falls within the scope of the privilege. Dkt. 98 at 3; *see also Conan v. City of Fontana*, No. EDCV 16–1261–KK, 2017 WL 2874623, at *4 (C.D. Cal. July 5, 2017) (same); *Tuite v. Henry*, 181 F.R.D. 175, 176-77 (D.D.C. 1998) *aff'd*, 203 F.3d 53 (D.C. Cir. 1999) (same).

The privilege is qualified rather than absolute, which means that even if the elements above are satisfied, "[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). A "district court has considerable leeway" in striking that balance. *Id*. At all times the burden is on the government to show the information falls within the scope of the privilege. *In re Anthem, Inc. Data Breach Litig.*, 236 F. Supp. 3d 150, 166 (D.D.C. 2017).[2] The existence of a protective order that safeguards confidential information is also a relevant factor that courts may consider when striking this balance. *Id*. at 167 (Despite law enforcement privilege, "disclosure of these materials simply does not carry the risks the Government anticipates. First and foremost, all the materials to be disclosed will be covered by the protective order in the underlying litigation.").[3]

When striking the balance between disclosure and non-disclosure (assuming the three threshold elements have been met), courts may consider the following ten factors: (1) the extent

[2] *See also Miller v. Pancucci*, 141 F.R.D. 292, 300 (C.D. Cal. 1992) ("This balancing test has been moderately pre-weighted in favor of disclosure.").

[3] *Ibrahim v. Dep't of Homeland Sec.*, C 06-00545 WHA, 2009 WL 5069133, at *15 (N.D. Cal. Dec. 17, 2009), vacated and remanded on other grounds by, 669 F.3d 983 (9th Cir. 2012) (finding "law enforcement privilege balancing test militates in favor of authorizing disclosure" given "safeguards, such as a protective order"); *MacNamara v. City of New York*, 249 F.R.D. 70, 88-89 (S.D.N.Y. 2008) (ordering disclosure, even after finding that law enforcement privilege applied, because "disclosure of the documents subject to the restrictions of the Protective Orders will sufficiently mitigate the risks, if any, that may arise from disclosure"); *Nat'l Cong. for Puerto Rican Rights ex rel. Perez v. City of New York*, 194 F.R.D. 88, 96 (S.D.N.Y. 2000) (ordering disclosure, despite both law enforcement and "official information" privileges, "in light of the carefully crafted protective order already in place").

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to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact on persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. *Tuite*, 181 F.R.D. at 176-77; *Bernat v. City of California City*, No. 1:10–cv–00305 OWW JLT, 2010 WL 4008361, at *5 (E.D. Cal. 2010) (applying the 10-factor test to the analysis of the law enforcement privilege).

No single factor is dispositive. *In re Anthem, Inc. Data Breach Litig.*, 236 F. Supp. 3d at 160. "Additionally, in the context of the law enforcement privilege, 'need' is 'an elastic concept that does not turn only on the availability of the information from an alternative source.'" *Id.* (quoting *Tuite*, 98 F.3d at 1417).

B. Defendants Have Not Satisfied the Elements of the Law Enforcement Privilege.

Defendants have fallen far short of what the law requires to invoke the law enforcement privilege. Accordingly, the Court should order Defendants to produce (subject to the Stipulated Protective Order) unredacted copies of the documents for which they have improperly invoked the law enforcement privilege.

Moving forward, the Court should make clear that Defendants' mere reference to the law enforcement privilege does not come close to satisfying their burden. To properly assert any current or prospective invocation of the law enforcement privilege, Defendants must submit a declaration from the head of the department formally invoking the privilege. Such declaration

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must make clear that the agency official has personally reviewed the documents and the Parties' Stipulated Protective Order, has concluded that disclosure subject to the protective order would threaten law enforcement interests, and an thorough explanation of the basis for that belief. In addition to the declaration, Defendants must submit a proper privilege log with narratives that identify the head of the department invoking the privilege, and adequately describe the basis for invoking the privilege in light of the parties' Stipulated Protective Order. Simply invoking the law enforcement privilege using general and boilerplate terms is not enough.

Defendants' failure to produce a supporting declaration and proper privilege log violates not only the law governing that privilege, but also Rule 26, because Plaintiffs cannot assess the propriety of Defendants' numerous invocations of the law enforcement privilege if Defendants refuse to provide the basic information necessary to invoke it in the first place. First, Plaintiffs cannot determine whether the right agency official invoked the privilege (or *any* agency official, for that matter) if Defendants refuse to identify the agency official who purportedly invoked this privilege after personally reviewing the documents. And given Defendants' refusal to disclose *whether* an agency official actually reviewed each of these documents in the first place, it is likely that the head of the department has not reviewed these documents at all—meaning there has been no official invocation of the privilege.

Second, Plaintiffs are unable even to determine whether any of these documents would qualify for the privilege because Defendants' explanations for asserting the privilege are so incomplete. Again, to invoke this privilege, such an explanation must be included in a sworn declaration, and later included in a privilege log. So far, all Defendants have produced is a privilege log that contains largely the same boilerplate language for all these documents—even those that are clearly very different in nature. At a minimum, such explanations must identify with particularity how disclosure *subject to a protective order* would interfere with an ongoing investigation. *See MacNamara v. City of New York*, 249 F.R.D. 70, 88-89 (S.D.N.Y. 2008) (ordering disclosure, even after finding that law enforcement privilege applied, because

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"disclosure of the documents subject to the restrictions of the Protective Orders will sufficiently mitigate the risks, if any, that may arise from disclosure").

Specific and adequate narratives, supported by a sworn declaration, are crucial to determine whether Defendants are properly invoking the privilege, and whether the privilege should be overruled (even if properly invoked) because Plaintiffs' interests in disclosure outweigh the government's interests in non-disclosure. For instance, in *Maria Del Socorro Quintero Perez, CY v. United States*, the court held that the defendants failed to make a threshold showing for privilege. No. 13cv1417-WQH-BGS, 2016 WL 362508, at *3 (S.D. Cal. Jan. 29, 2016). There, the government submitted a declaration from a retired U.S. Border Patrol Chief to support their assertion that two documents in their privilege log contained sensitive law enforcement information. *Id*. The court found the declaration insufficient because it failed to adequately address the harm that would result from disclosure, and provide *specific* information about how disclosure of *specific* documents would threaten *specific* governmental interests. *Id*. at *4. Further, the declaration did not state whether the declarant had personally reviewed the records at issue. *Id*. And it failed "to describe how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interests." *Id*.; *see also Hampton v. City of San Diego*, 147 F.R.D. 227, 230–31 (S.D. Cal. 1993) (citing *Kelly v. City of San Jose*, 114 F.R.D. 653, 670 (N.D. Cal. 1987)); *Bernat*, 2010 WL 4008361, at *6 (finding insufficient a declaration that failed to indicate that the declarant considered this particular privilege or to show why the privilege applied to each request except in the most general terms). Accordingly, the court ordered the defendants to disclose the documents subject to a protective order. *Maria Del Socorro Quintero Perez*, 2016 WL 362508, at *4.

In the past, Defendants have submitted facially defective declarations that purported to substantiate the law enforcement privilege. For instance, in their opposition to Plaintiffs' motion to compel last fall, Defendants submitted a declaration from James W. McCament, Acting

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Director of USCIS, to support their assertion of the law enforcement privilege over certain documents relating to the class list. Dkt. 94-5.[4] But the McCament Declaration never states whether McCament personally reviewed the records at issue. Nor does the declaration identify *specific* information about how disclosure of *specific* documents would threaten *specific* governmental interests. Additionally, the declaration does not describe how disclosure subject to the parties' stipulated protective order would create a substantial risk of harm to significant governmental or privacy interests. Based in part on these omissions, the Court ordered Defendants to produce a class list. Defendants' past reliance on a defective declaration raises serious questions as to whether they have properly invoked the law enforcement privilege for these hundreds of additional documents. Even worse, Defendants have yet to produce the bulk of their discovery, and Plaintiffs are concerned that Defendants will again rely heavily on the privilege in their subsequent productions.

Ensuring that Defendants clearly establish all three elements of the law enforcement privilege is particularly important because the privilege is qualified—it requires the Court to weigh the government's interests against the adverse party's needs. *See Tuite*, 181 F.R.D. at 176-77. If Defendants are unable or unwilling to submit an affidavit detailing each instance in which they are invoking the law enforcement privilege, that is a clear indicator that they have not established the elements necessarily to properly rely on that privilege. Thus, if no showing is made through a declaration or affidavit, the court should order full and unredacted disclosure of these documents. *Maria Del Socorro Quintero Perez*, 2016 WL 362508, at *2.

IV. CONCLUSION

Defendants have not made a threshold showing for the law enforcement privilege. Accordingly, Plaintiffs respectfully request that the Court order Defendants to produce the withheld material without redactions. For any prospective invocations of this privilege, the

[4] Defendants have made clear that they are not relying on the McCament Declaration for the law enforcement privilege assertions in their logs, which suggests McCament has not reviewed any of these documents.

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Court should make clear that Defendants must submit a declaration from the head of the department formally invoking the privilege, and containing an adequate explanation for the basis of the privilege in light of the parties' Stipulated Protective Order. Defendants must also provide a proper privilege log that will allow Plaintiffs to evaluate and if necessary challenge any such invocations.

DATED: February 8, 2018

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' MOTION TO COMPEL RE LAW ENFORCEMENT PRIVILEGE via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 8th day of February, 2018, at Seattle, Washington.

By: s/*David A. Perez*

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