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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

Defendants' opposition expressly acknowledges that they did not (and will not) properly invoke the law enforcement privilege before redacting and withholding documents pursuant to that privilege. Rather than adhere to the standard governing that privilege, Defendants have decided to create a new standard altogether. According to Defendants, they can use the law enforcement privilege to withhold and redact documents without actually invoking it; and only *if challenged* will they "formally" invoke the privilege and then provide the necessary declaration and explanations to justify withholding and redacting these documents pursuant to this privilege.

That is not the law. Courts, including this one, uniformly have made clear that to "claim this privilege" there (i) must be a formal claim by the head of the department, (ii) based on that official's personal consideration, (iii) that is specified with an adequate explanation why it properly falls within the scope of the law enforcement privilege. *See* Oct. 19, 2017, Order (Dkt. 98) at 3 (citing *In re Sealed Case*, 856 F.2d 268, 271-72 (D.C. Cir. 1988)). Defendants' acknowledgement that they never formally asserted the privilege (until now) demonstrates that their redactions and withholdings were improper all along, and deprived Plaintiffs of the ability to respond meaningfully to the invocation of the privilege (a 6-page reply brief is not enough).

Setting aside whether Defendants properly invoked the privilege in the first instance, the Emrich Declaration, provided only with Defendants' opposition, is plainly insufficient, and underscores Defendants' inability to satisfy the requirement of the law enforcement privilege. Mr. Emrich does not state whether he viewed each document personally, nor does he provide any specific explanation for why each document falls under the privilege. Instead, Mr. Emrich relies on generalized statements about the documents en masse. Worse, the declaration does not discuss why the Protective Order the Court entered would provide inadequate protection.



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Finally, Defendants' opposition illustrates why their privilege logs are improper. Remarkably, Defendants assert they were not required to provide these details because they had not yet "formally" claimed the privilege.

In sum, Defendants opposition makes clear they do not intend to follow the law governing this privilege—even though this Court expressly articulated the standard in its October 19 2017 order—and instead will continue withholding information based on privileges they have not formally asserted. The Court should grant Plaintiffs' motion.

## II. ARGUMENT

### A. Defendants Acknowledge They Did Not Properly Invoke the Law Enforcement Privilege Before Withholding and Redacting These Documents.

Defendants assert that they are not obligated to follow the requirements governing the law enforcement privilege, even when withholding or redacting documents pursuant to the privilege, unless their privilege assertions are challenged in the context of a motion to compel. Only then, according to Defendants, must they provide an affidavit to "formally invoke the law enforcement privilege." Dkt. 119 at 8. The Court should reject this argument for three reasons.

First and foremost, Defendants' argument contradicts the very standard governing this privilege. As this Court made clear, "to claim" the privilege—that is, to use it to justify withholding or redacting documents—the government must meet 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." Dkt. 98 at 3. But Defendants' position is that they need not follow through on any of those requirements to use this privilege to withhold documents: no need to formally invoke it, or have the proper agency official personally review the documents, or even specify in detail why that particular document must be withheld. Accepting this position would force receiving parties to play an endless game of bluff: speculating about whether the receiving party can actually meet the



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requirements of a privilege assertion—an impossible task when staring at a document that is entirely redacted or withheld altogether.

Second, there is no support for the "informal v. formal" distinction Defendants have manufactured to justify their approach to privilege. If a party asserts a privilege to withhold or redact a document, that is a formal assertion of that privilege, and that party must comply with the requirements governing the privilege. Defendants identify no basis for invoking the privilege on a provisional or interim basis, which would confer all the benefits of that privilege but avoid the burdens associated with it. Defendants' suggestion that to follow the law by providing a declaration would be too burdensome is disproven by the fact that they procured a declaration here (albeit one that is insufficient).

Third, none of the cases Defendants cite actually supports their argument. For instance, Defendants cite *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615 (D. Nev. 2013), for the notion that they need not produce an affidavit before "a formal challenge to the assertion." Dkt. 119 at 7. But *Phillips* is about the attorney/client privilege, which has completely different requirements that don't involve affidavits from the head of an agency. Defendants cite *Maria Del Socorro Quintero Perez, CY v. U.S.*, No. 13CV1417-WQH-BGS, 2016 WL 362508 (S.D. Cal. Jan. 29, 2016), but the court there considered and rejected the defendant's assertion of the law enforcement privilege because the declaration was insufficient. *Id.* at *4. Defendants also cite *S.E.C. v. Downe*, 92 CIV. 4092 (PKL), 1994 WL 23141, at *5 (S.D.N.Y. Jan. 27, 1994), but that decision expressly turned on that court's *local rules*, which don't apply here. None of these cases states that a defendant can use the privilege to withhold relevant documents without meeting the requirements for the privilege.

By contrast, in one of the foundational cases establishing the standard that now governs the law enforcement privilege, a district court made clear that "to properly support" the privilege, "the party also must submit, *at the time it files and serves its response to the discovery request*, a declaration or affidavit, under oath and penalty of perjury, from a responsible official within the



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agency who has personal knowledge of the principal matters to be attested to in the affidavit or declaration." *Kelly v. City of San Jose*, 114 F.R.D. 653, 669 (N.D. Cal. 1987) (emphasis added). The court explained that compelling "direct involvement by such officials in decisions about whether to invoke this privilege" on the front end is important for two reasons: (i) "[i]t educates agency personnel about the *competing* interests and public policies that assertion of this privilege implicates" and (ii) "enables agencies to develop consistent policies and practices relating to the circumstances under which they will assert the privilege and the manner in which they will do so." *Id*. at 670 (emphasis added).

In sum, Defendants' argument amounts to a candid acknowledgement that they did not properly assert this privilege, and do not plan on properly asserting any privilege unless forced to do so in the context of a motion to compel. If the Court is not inclined to grant the motion at this time, Plaintiffs request the opportunity to submit supplemental briefing to address the privilege's balancing test. Alternatively, the Court can review these document in camera to determine whether the balance favors disclosure.

**B. The Emrich Declaration Is Plainly Insufficient Because It Fails to Provide Specific Information about Each Document and Does Not Adequately Consider the Parties' Stipulated Protective Order.**

Setting aside whether Defendants must submit a declaration when using the privilege to withhold or redact information, the declaration Defendants submitted with their motion falls well short of meeting the requirements for this privilege for three reasons. First, Mr. Emrich does not analyze any specific document; instead, he provides a generalized list of reasons purporting to show why all these documents should be withheld. Dkt. 119-2, ¶ 12. The Court already rejected similarly non-specific and vague explanations in its October 19, 2017 Order compelling Defendants to produce a class list. Dkt. 98, *3-4. *See also Bernat v. City of California City*, No. 1:10-CV-00305, 2010 WL 4008361, at *6 (E.D. Cal. Oct. 12, 2010) (finding insufficient a declaration that failed "to evaluate the privilege in light of each particular request [or] [make] any showing demonstrating why the privilege should apply to the requests except in the most



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general of terms"); *S.E.C. v. Thrasher*, 92 CIV. 6987 (JFK), 1995 WL 46681, *11-12 (S.D.N.Y. Feb. 7, 1995), *aff'd*, 92 CIV. 6987 (JFK), 1995 WL 456402 (S.D.N.Y. Aug. 2, 1995) (finding insufficient a law enforcement privilege declaration that made conclusory assertions of general and speculative harm). Worse, allowing Defendants to wait until their opposition brief before "formally" invoking the privilege means Plaintiffs have only six pages to challenge the adequacy of the invocation. That is reason enough to reject Defendants' argument.

Second, the Emrich Declaration never addresses the stipulated protective order entered in this case, except to assert in passing that it would "not mitigate the risk." Dkt. 119-2, ¶ 11. There is no explanation about how disclosure under the protective order would threaten the (speculative) interests outlined in his declaration. All the alleged harms flow from "public disclosure" or disclosure to applicants. But disclosure under the protective order is not public. *See* Dkt. 86, ¶ 4 (Protective Order). *See also 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*, 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").

Third, perhaps more importantly than its flaws, the Emrich Declaration highlights why the redacted and withheld documents are so important. Mr. Emrich concedes that they include "policies and procedures [that] are integral to the proper vetting and adjudication of benefit applications filed with USCIS," and which directly relate to CARRP. Dkt. 119-2, ¶ 8. In other words, Mr. Emrich acknowledges that these documents, which include "overarching, finalized policies and procedures," are highly relevant to Plaintiffs' case. *Id*. Because the law enforcement privilege is qualified, the Court should find that the balance weighs in favor of disclosure and order these documents produced. *See* Dkt. 98 at *4 (ordering Defendants to produce a class list, despite invoking law enforcement privilege, after finding balance weighed in favor of disclosure and noting "there is a protective order in place").



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### C. Defendants' Privilege Logs Are Insufficient.

Rule 26 makes clear that privilege assertions must be accompanied by privilege logs that "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). Defendants cite many cases concerning adequate privilege logs, but none of them have anything to do with the law enforcement privilege.

It is axiomatic that the adequacy of any given narrative necessarily depends on the privilege being asserted. For some privileges, certain details are required, such as the identity of the attorney providing advice when asserting the attorney/client privilege. Those details allow a party to assess the privilege assertion per Rule 26(b)(5)(A)(ii). Defendants' privilege logs are inadequate because Defendants fail to identify the basis for the law enforcement privilege (especially in light of the protective order), or the person asserting it—two prerequisites to asserting this privilege. Omitting this information is akin to asserting the attorney/client privilege, but not identifying the attorneys involved in the communication on the privilege log. Ironically, although the Rule 26 requirements are designed to enable the receiving party to "assess the claim [of privilege]," *id*., Defendants attempt to justify their decision not to provide this information by stating that they have not formally asserted it in the first place.

A key requirement for the law enforcement privilege is identifying the person invoking it and the basis for doing so. If Defendants were to follow the requirements necessary to invoke this privilege before asserting it, then providing this information in their privilege log should not be burdensome. And as the *Kelly* decision explains, forcing the party asserting this privilege to meet these requirements—that is, forcing the responsible agency official to be directly involved in this invocation, rather than outsourcing it to attorneys litigating the case—ensures that the agency grapples with the "competing interests and public policies that assertion of this privilege implicates." *Kelly*, 114 F.R.D. at 670.



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' REPLY ISO 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 23rd day of February, 2018, at Seattle, Washington.

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