

The Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,
Plaintiffs,
v.
DONALD TRUMP, President of the United
States, *et al.*,
Defendants.

No. 2:17-cv-00094-RAJ

**DEFENDANTS' SUPPLEMENTAL
BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR LEAVE
TO SUBMIT DOCUMENTS *EX PARTE*,
*IN CAMERA***

RE-NOTED FOR: APRIL 27, 2018

1 **I. THE COURT HAS AUTHORITY TO RECEIVE AND REVIEW**
 2 **CLASSIFIED AND PRIVILEGED DOCUMENTS *EX PARTE* AND *IN***
 3 ***CAMERA* REGARDING PRIVILEGE ASSERTIONS**

4 The Court has the authority—and perhaps even an obligation—to review *ex parte* and *in*
 5 *camera* classified or otherwise privileged documents submitted in support of a privilege
 6 assertion. It is also entirely consistent with judicial ethics: Canon 3(A)(4)(a) of the *Code of*
 7 *Conduct for United States Judges* provides that a judge may “consider *ex parte* communications
 8 as authorized by law.” Such is the case here. Submission of classified and otherwise privileged
 9 material to a court for its *ex parte, in camera* review, particularly in support of a privilege
 10 assertion, is in full accord with longstanding precedent in this Circuit and nationwide.

11 Article III courts have inherent authority to review material *ex parte* and *in camera*,
 12 including classified material.¹ See, e.g., *Meridian Int’l Logis. v. United States*, 745 F.2d 740,
 13 745 (9th Cir. 1991) (quoting *United States v. Thompson*, 827 F.2d 1462, 1469 (9th Cir. 1987)
 14 (“this court has generally recognized the capacity of a district judge to ‘fashion and guide the
 15 procedures to be followed in cases before him.’”); *Arieff v. Dep’t of Navy*, 712 F.2d 1462, 1469
 16 (D.C. Cir. 1983) (“the receipt of *in camera* affidavits . . . when necessary . . . [is] part of a trial
 17 judge’s procedural arsenal.”²). Appropriate material for a court to receive *ex parte* includes
 18 classified information. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir.
 19 2007); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (“The court has inherent authority to
 20 review classified material *ex parte* and *in camera* as part of its judicial review function”). This
 21 principle is not limited to classified information. See *Gilmore v. Gonzales*, 435 F.3d 1125, 1129
 22 (9th Cir. 2008) (information protected by statute); *Torbet v. United Airlines, Inc.*, 298 F.3d 1087,
 23 1089 (9th Cir. 2002) (information protected by statute); *Thompson*, 827 F.2d at 1469 (sensitive
 24 information *not* protected by statute).

25

 26 ¹ At the April 12, 2018 telephonic hearing, Plaintiffs’ counsel did not indicate an intent to seek access to classified
 27 information. Accordingly, Defendants will not comment further upon that matter beyond reiterating that no
 28 Executive Branch entity could grant such a request, Exec. Order No. 13,526, 75 Fed. Reg. 707, §§ 4.1(a)(3) &
 29 6.1(dd), and the Court cannot order the Executive Branch to do otherwise, *Dep’t of Navy v. Egan*, 484 U.S. 518, 527
 30 (1988); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081–82 (9th Cir. 2010) (en banc); *Al-Haramain*
 31 *Islamic Found., Inc.*, 507 F.3d at 1203; *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990).

² The court’s opinion in *Arieff* makes clear that the declaration at issue was reviewed by the court both *in camera*
 and *ex parte*. *Arieff v. Dep’t of Navy*, 712 F.2d at 1469.

1 In addition, the Ninth Circuit has specifically approved of the use of *ex parte* procedures
2 to substantiate claims of privilege. *Kasza v. Browner*, 133 F.3d 1159, 1169 (9th Cir. 1998)
3 (“Elaborating the basis for the claim of privilege through *in camera* submissions is
4 unexceptionable.”); *see also In re City of New York*, 607 F.3d 923, 948–49 (2d Cir. 2010)
5 (discussing propriety of *in camera, ex parte* presentation of materials for privilege assessment);
6 *Wabun-Inini v. Sessions*, 900 F.2d 1234 (8th Cir. 1990) (affirming *ex parte, in camera* review of
7 submissions to support law enforcement privilege); *Alexander v. FBI*, 186 F.R.D. 154, 169
8 (D.D.C. 1999) (explaining that *in camera, ex parte* hearing was required to determine whether
9 law enforcement investigatory privilege applied).

10 This is hardly surprising, because the factual basis for a privilege may itself be privileged.
11 In the absence of *ex parte* review there would be no meaningful way for a court to evaluate a
12 privilege assertion or a challenge to a privilege assertion without violating the very privilege at
13 issue. By protecting the ability of parties to claim privileges even where the reasons for it are
14 themselves privileged, *ex parte* review is a necessary component of the adversarial system.
15 Congress, via the Rules Enabling Act and the Supreme Court, has codified this principle in
16 Federal Rule of Civil Procedure 26(b)(5)(A)(ii), which permits a party to withhold information
17 concerning privilege assertions where that information is “itself privileged or protected.” Fed. R.
18 Civ. P. 26(b)(5)(A)(ii); *Greystone v. U.S. Coast Guard*, 107 F.3d 16, 1997 WL 51514, *3 (9th
19 Cir. Feb. 6, 1997) (unpublished) (“It is well settled that a court may examine an agency
20 declaration *in camera* and *ex parte* when release of the declaration would disclose the very
21 information that the agency seeks to protect.”). Thus, relying on *ex parte* procedures to submit
22 classified documents to substantiate a claim of privilege is well within long-standing precedent
23 from the Ninth Circuit and elsewhere.

24 Moreover, the Ninth Circuit has rejected challenges to the use of *ex parte* procedures as
25 contrary to due process. *See United States v. Ott*, 827 F.2d 473, 476–77 (9th Cir. 1987). In *Ott*,
26 the Ninth Circuit explained that, despite a criminal defendant’s assertion “that the *ex parte, in*
27 *camera* proceeding violated due process, . . . Congress has a legitimate interest in authorizing the
28 Attorney General to invoke procedures designed to ensure that sensitive security information is

1 not unnecessarily disseminated to *anyone* not involved in the surveillance operation in question.”
2 *Id.* (emphasis in original). Indeed, despite the Government’s *heavier* burden in criminal cases, it
3 is the norm, where classified information is involved, to submit documents *ex parte*, and even to
4 hold *ex parte* hearings. *United States v. Klimavicius–Viloria*, 144 F.3d 1249, 1261 (9th Cir.
5 1998) (“Ex parte hearings are generally disfavored. In a case involving classified documents,
6 however, *ex parte*, *in camera* hearings in which government counsel participates *to the exclusion*
7 *of defense counsel* are part of the process that the district court may use in order to decide the
8 relevancy of the information.”) (emphasis added).

9 The Southern District of New York—a venue with considerable experience in national
10 security-related matters—has concluded that the general reluctance to rely on *ex parte*
11 proceedings “dissipates considerably when the case raises national security concerns” and noted
12 that a court “may conduct an *in camera* review of *ex parte* agency affidavits after ‘attempt[ing]
13 to create as complete a public record as is possible.’” *ACLU v. Dep’t of Defense*, No. 09-cv-
14 8071, 2012 WL 13075286, *1 (S.D.N.Y. Jan. 24, 2012). There, the court concluded:

15 Important as the right to due process and the judicial system’s dedication to an
16 adversarial process are, protecting the national security would be a futile effort if
17 those interests automatically trumped national security concerns. The law reflects
18 these competing objectives and allows for some sacrifice of adversarial process in
19 limited circumstances where national security concerns are implicated.

20 *Id.* at *2. Here, the very presence of classified information necessarily means that national
21 security concerns are implicated, because that is the only category of information that can be
22 classified. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 §§ 1.2, 1.4 (Dec. 29, 2009)
23 (enumerating the types information that can be classified). Moreover, because courts necessarily
24 evaluate privilege claims *ex parte*, *see supra*, there is no additional concern raised when the
25 information related to the evaluation of the privilege is classified information, and, therefore,
26 must be reviewed *ex parte*.

27 Finally, “[i]n determining whether *ex parte* and *in camera* review is appropriate, the court
28 must conduct an independent review of the contents of the classified submission . . . ‘accord[ing]
substantial deference to agency affidavits that implicate national security.’” *ACLU*, 2012 WL

1 13075286 at *1 (quoting *Assoc. Press v. Dep't of Defense*, 498 F. Supp. 2d 707, 710 (S.D.N.Y.
2 2007)).

3 **II. THE DEPARTMENT OF JUSTICE USES CLASSIFIED INFORMATION**
4 **SECURITY OFFICERS TO TRANSMIT CLASSIFIED MATERIAL TO**
5 **FEDERAL COURTS**

6 In cases where classified materials are submitted for review, Department of Justice
7 regulations require government counsel to take all appropriate action to protect the information
8 against unauthorized disclosure. *See* 28 C.F.R. § 17.17(a). These regulations set forth the
9 minimum security measures necessary to protect classified information, and require the
10 undersigned to ensure the Court's cooperation in adopting such measures. *See* 28 C.F.R.
11 § 17.17(a)(2). In civil proceedings, the security procedures include the following:

12 1. Classified information is not to be disclosed or introduced into evidence without the
13 prior approval of either the originating agency, the Attorney General, or the President. *See* 28
14 C.F.R. § 17.17(c)(2).

15 2. Attendance at any proceeding where classified information will be disclosed is to be
16 limited to those persons with appropriate authorization to access this information, whose duties
17 require knowledge or possession of the classified information to be disclosed. *See* 28 C.F.R.
18 § 17.17(c)(3).

19 3. Although Article III judges are automatically eligible to access classified information
20 pertaining to matters in litigation before them, access by other court employees is limited to
21 those individuals who have been determined eligible for such access by the Department of
22 Justice Classified Information Security Officer ("CISO")³ and who have been fully advised of all
23 pertinent safeguarding requirements and their liability in the event of unauthorized disclosure.
24 *See* 28 C.F.R. §§ 17.17(c)(3) and (c)(10); *id.* § 17.46(c).

25 ³ The CISO is part of the Litigation Security Section ("LSS"), a component of the Department of Justice's Security
26 and Emergency Planning Staff ("SEPS"). SEPS is responsible for developing policies, methods, and procedures for
27 the implementation of security programs for the Department of Justice, and provides advice, technical assistance,
28 and support to executive offices and personnel throughout the Department. The LSS is comprised of Security
Specialists who work with federal Judges at all levels to serve as CISOs. The CISOs assigned to the LSS assist
the courts primarily in connection with criminal cases where the Classified Information Procedures Act ("CIPA") is
applicable. *See* 18 U.S.C. App. III, § 9 & note. However, CISOs also provide litigation assistance in civil matters
involving classified or otherwise sensitive information to assist in implementation of 28 C.F.R. § 17.17(a) and other
relevant regulations.

1 4. Classified documents must be appropriately handled and stored. With regard to some
2 National Security Information (“NSI”) materials, Department of Justice implementing directives
3 require storage in approved areas and handling only by approved individuals, among other
4 security controls.

5 5. In the event that the Court wishes to hear any testimony or oral argument which the
6 government believes would include classified information, this testimony or argument is to be
7 recorded and transcribed pursuant to the instructions of the CISO. *See* 28 C.F.R. § 17.17(c)(7).

8 6. Any notes or other documents prepared by the Court or its personnel that contain
9 classified information are to be prepared, handled, and stored consistent with the directives of the
10 Department of Justice Security Officer, *see* 28 C.F.R. § 17.17(c)(7), and retrieved at the close of
11 the proceedings by the CISO for safeguarding or destruction, *see* 28 C.F.R. § 17.17(c)(9).

12 7. At the conclusion of the proceedings, all original classified information shall be
13 returned to the Department of Justice or the originating agency, or placed under court seal for
14 safekeeping by the CISO. *See* 28 C.F.R. § 17.17(c)(8).

15 Consistent with the Department of Justice’s practice in matters involving classified
16 materials to be reviewed *ex parte* by a court, the documents have been lodged with the U.S.
17 Department of Justice CISO, and are available to the Court upon request.

18 **III. CONCLUSION**

19 For the foregoing reasons, Defendant’s Motion for Leave to Submit Documents *Ex Parte*,
20 *In Camera* should be granted.

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1 Dated: April 20, 2018

Respectfully submitted,

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