

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

**NOTED FOR: APRIL 27, 2018**

**I. CONSIDERATION OF THE LODGED DECLARATIONS IS  
IMPORTANT TO CONSIDERATION OF THE RELIEF REQUESTED IN  
PLAINTIFFS’ SANCTIONS MOTION**

The Court’s *ex parte, in camera* consideration of the two declarations that Defendants have lodged with the Classified Information Security Officer (“CISO”) is necessary and appropriate here. Those two declarations—together with the six other privilege declarations filed on the public docket (Dkts. 146-2 to 146-7)—assert the law enforcement and deliberative process privileges over certain information in the Alien files (“A files”) of the named plaintiffs, and explain the basis for their application. Courts routinely consider information *ex parte, in camera*

1 in the course of evaluating privilege claims. *See* Dkt. 154 at 3 (citing, *e.g.*, *Kasza v. Browner*,  
2 133 F.3d 1159, 1169 (9th Cir. 1998)).

3 The Court has not previously considered these privilege assertions over this information.<sup>1</sup>  
4 To the extent, therefore, the Court accepts Plaintiffs' invitation (in their sanctions motion, Dkt.  
5 137) to consider ordering Defendants to produce the named Plaintiffs' *unredacted* A files, the  
6 Court needs to consider these declarations, together with those filed on the public docket, to  
7 evaluate whether such an order would be proper, given the serious law enforcement and national  
8 security interests at stake.<sup>2</sup>

9 **II. EX PARTE, IN CAMERA CONSIDERATION OF DECLARATIONS IN**  
10 **SUPPORT OF PRIVILEGE CLAIMS IS UNREMARKABLE**

11 As explained in Defendants' supplemental brief, Dkt. 154, the Court clearly has authority  
12 to consider information *ex parte* and *in camera* in deciding questions of privilege. Indeed, even  
13 Plaintiff's response, Dkt. 163, acknowledges that authority. *Id.* at 2-3 (citing *Abourezk v.*  
14 *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986)). Here, by asking the Court to order disclosure of  
15 named Plaintiffs' unredacted A files, Plaintiffs have asked the Court to order disclosure of  
16 privileged information—information over which the Court has yet to consider the relevant claims  
17 of privilege. Consequently, the Court's consideration of these declarations falls squarely within  
18 the types of situations in which even Plaintiffs acknowledge it is proper to consider material *ex*  
19 *parte* and *in camera*.

20 \_\_\_\_\_  
21 <sup>1</sup> Plaintiffs contend Defendants have not explained why they could not have raised these privilege claims  
22 over particular information in the A files in response to Plaintiffs' motion to compel in September 2017 (Dkt.  
23 91). In fact, Defendants explained in their opposition to Plaintiffs' sanctions motion that they could not have  
24 litigated privilege claims over particular information in the named Plaintiffs' A files that would concern the  
25 reasons why those individuals were in CARRP because they were, at that time, asserting a privilege to neither  
confirm nor deny whether any such information existed. Dkt. 146 at 12. At the time of Plaintiffs' September  
2017 motion to compel, the issue in dispute was whether Defendants had to acknowledge that named  
Plaintiffs were subject to CARRP, not whether any particular piece of information in their A files was  
privileged. To have litigated at that time the assertion of privileges over particular pieces of information  
would have required disclosing the existence of (some of) the very information for which Defendants were  
arguing they had a privilege not to disclose the existence.

26 <sup>2</sup> If the Court were not inclined to order production of the named Plaintiffs' unredacted A files in connection  
27 with the Plaintiffs' sanctions motion (as Plaintiffs request), or were to prefer to litigate privilege claims over  
the documents withheld from the A files separate and apart from the sanctions motion, then the Court would  
28 not need to consider the declarations lodged for *ex parte*, *in camera* review in connection with the sanctions  
motion (Dkt. 137), as they only address the application of privileges to those documents.

1 Defendants have filed those declarations that can be made public on the public docket.  
2 But, as explained in Defendants' motion for leave, Dkt. 147, the two declarations submitted for  
3 *ex parte, in camera* consideration contain sensitive non-public information about the basis for the  
4 asserted privileges that cannot be disclosed outside the government. *Id.* at 2. Additionally, as  
5 government counsel told the Court during its April 12, 2018 telephonic hearing on this issue, the  
6 Ghattas declaration is also classified, and cannot be made public for that reason as well.

7 **III. THE LODGED DECLARATIONS DO NOT GO TO THE MERITS OF**  
8 **EITHER THE CLAIMS IN THE CASE OR OF THE SANCTIONS**  
9 **MOTION**

10 Plaintiffs argue the Court may not rely on *ex parte* information to resolve the merits of  
11 their sanctions motion. Dkt. 163 at 3-4 (citing *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-  
12 01846-LHK, 2015 WL 3863249 at \*10 (N.D. Cal. Jun. 19, 2015), and *United States v.*  
13 *Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004)). This argument misses the mark. The declarations  
14 do not go to the merits of either Plaintiffs' claims in this case or their sanctions motion. Rather,  
15 the declarations are relevant to the appropriateness of the underlying privilege claims. We have  
16 submitted them to show the validity of those privilege claims. Cases restricting *ex parte*  
17 consideration of evidence on merits issues do not stand for the proposition that the Court cannot  
18 consider documents *ex parte, in camera* for the purpose of evaluating claims of privilege. *Apple*  
19 *Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2015 WL 3863249, at \*10 (N.D. Cal. June  
20 19, 2015) ("a court may review documents *in camera* to assess the scope of a privilege").

21 **IV. FOIA CASES DISCUSSING THE REQUIREMENTS FOR IDENTIFYING**  
22 **EXEMPT MATERIAL ARE INAPPOSITE IN THIS CONTEXT**

23 Plaintiffs also contend, citing Freedom of Information Act ("FOIA") cases, that  
24 Defendants have not created a public record of the information withheld and provided a detailed  
25 public justification. Dkt. 163 at 4. Obviously, the context in which these issues arise in FOIA  
26 cases is distinct from this case, and the FOIA cases Plaintiffs cite are inapposite on this point.  
27 Here, by their request for an order to disclose unredacted A files, Plaintiffs injected a routine  
28 privilege dispute into their sanctions motion, forcing Defendants to raise their privilege claims in  
response to the sanctions motion or risk having those serious and weighty claims deemed to have

1 been waived. Defendants have provided Plaintiffs with privilege logs identifying the material  
 2 withheld, identifying the applicable privilege claims, and explaining the bases for those claims.  
 3 Dkt. 153, Ex. 6. The Court's consideration of *ex parte, in camera* declarations in the course of  
 4 evaluating those privilege claims is appropriate.

5 **V. DEFENDANTS HAVE EXPLAINED BOTH HOW THE *EX PARTE, IN*  
 6 *CAMERA* REVIEW WOULD BE ACCOMPLISHED AND HOW THESE  
 7 *DECLARATIONS RELATE TO THEIR PRIVILEGE CLAIMS***

8 Finally, Plaintiffs argue that Defendants fail to explain "what the *ex parte, in camera*  
 9 process would entail and how this motion relates to Defendants' individual claims of privilege."  
 10 Dkt. 163 at 2 n.1. In fact, Defendants explained that they have lodged the two declarations with  
 11 the CISO. Should the Court grant Defendants' motion for leave, the CISO will work directly  
 12 with the Court to facilitate the Court's review of those declarations in a way that maintains  
 13 proper security over them. Dkt 154 at 5-6.<sup>3</sup> As Defendants have already explained above how  
 14 these declarations relate to their claims of privilege, there is no need to repeat that explanation  
 15 again here.

16 **VI. CONCLUSION**

17 For the foregoing reasons, and those in Defendants' motion for leave, Dkt. 147, and  
 18 supplemental brief in support of Defendants' motion for leave, Dkt. 154, the Court should grant  
 19 Defendants' motion and consider the lodged declarations *ex parte* and *in camera*, to the extent  
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21 \_\_\_\_\_  
 22 <sup>3</sup> It is the general practice of the Department of Justice to provide a notice to the court that classified material  
 23 has been lodged with the CISO for the Court's review without first moving for leave to do so. *See, e.g., Beck*  
 24 *v. FBI*, 15-cv-13662 (D. Mass.), ECF No. 56; *Restis v. Am. Coalition Against Nuclear Iran*, No. 13-cv-5032  
 25 (S.D.N.Y.), ECF No. 259; *Tarhuni v. Holder*, No. 13-cv-1 (D. Or.), ECF No. 76; *Fazaga v. FBI*, 11-cv-301  
 26 (C.D. Cal.), ECF No. 35; *Mohamad v. Holder*, No. 11-cv-50 (E.D. Va.), ECF Nos. 103, 170, 171, 182; *Al-*  
 27 *Aulaqi v. Obama*, No. 10-cv-1469 (D.D.C.), ECF No. 16; *Latif v. Holder*, No. 10-cv-750 (D. Or.), ECF Nos.  
 28 328 & 335; *De Souza v. Dep't of State*, No. 09-cv-896 (D.D.C), ECF Nos. 41 & 44; *Mohammed v. Holder*,  
 No. 07-2697 (D. Colo.), ECF No. 351; *Mohammed v. Jeppesen Dataplan, Inc.*, No. 07-cv-2798 (N.D. Cal.),  
 ECF No. 43-2; *Ibrahim v. DHS*, No. 06-cv-545 (N.D. Cal.), ECF No. 431. Here, as a courtesy, out of an  
 abundance of caution, and given the Court's stated desire to make as much information available to the public  
 as possible, ECF Nos. 65 ¶ 6 & 67, Defendants first moved for leave of Court.

1 the Court considers Plaintiffs' request that the Court order disclosure of the named Plaintiffs'  
2 unredacted A files.

3 Dated: April 27, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 27, 2018, 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 CM/ECF participants:

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