

The Honorable Richard A. Jones

**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’ UNOPPOSED MOTION  
TO RECONSIDER WAIVER OF  
PRIVILEGE**

**NOTE ON MOTION CALENDAR –  
MARCH 13, 2019**

On February 27, 2019, the Court issued an Order on Plaintiffs’ motion to compel regarding deliberative process privilege. Dkt. # 224. The Court ordered Defendants to produce a random sample of ten documents for *in camera* review, and the Court concluded that Defendants waived any privilege over four documents that were submitted to the Court for *in camera* review. *Id.* at 3. Defendants have now provided a random sample of ten documents for *in camera* review. Defendants respectfully ask the Court to reconsider its ruling that Defendants waived privilege over the four documents. Defendants acknowledge the high threshold of “manifest error” for gaining reconsideration of a prior Court order. Defendants believe, in this instance, the standard is satisfied in light of an apparent misapprehension that the four documents were shared with Plaintiffs’ counsel without the necessary precautions for preserving claims of privilege.

1 As set forth below, in continuing efforts to resolve disputes and remove unnecessary  
2 burdens on the Court, the parties agreed that the Plaintiffs' motion to compel could be effectively  
3 decided based on the Court's review of four instead of ten documents. To facilitate these  
4 discussions, Defendants shared the four documents with Plaintiffs under strict conditions,  
5 including, *inter alia*, that Defendants did not waive any privilege claims over the documents.  
6 Plaintiffs agreed to abide by those conditions, leaving all of the Defendants' privilege claims  
7 intact. Indeed, when Defendants reached out to Plaintiffs for their position on this motion,  
8 Plaintiffs indicated that they "do not oppose Defendants' request to reconsider the Court's  
9 statement that Defendants waived privilege over the four documents." Exh. A. However,  
10 Plaintiffs maintain that the Court should ultimately find that the documents are not privileged on  
11 the merits. *Id.* Accordingly, Defendants respectfully ask the Court to reconsider its finding on  
12 waiver of privilege.

### 13 **I. Background**

14 On April 19, 2018, Plaintiffs filed a motion to compel regarding deliberative process.  
15 Dkt. # 152. On April 30, 2018, Defendants filed a response supported by an affidavit from  
16 Matthew Emrich. Dkt. # 174 (response); Dkt. # 174-3 (affidavit). On May 21, 2018, the Court  
17 issued an Order reserving ruling on certain documents and allowed the parties an opportunity to  
18 file supplemental briefing regarding those documents. Dkt. # 189 at 7-9. Following the Court's  
19 Order, the parties resolved their differences with respect to all of the documents except those  
20 described in paragraph 17 of the Emrich affidavit.

21 In an effort to resolve the dispute over the paragraph 17 documents without further  
22 briefing, Defendants offered to allow Plaintiffs' counsel to preview four documents contained in  
23 Paragraph 17 under the following conditions: (1) information withheld pursuant to the law

1 enforcement and attorney-client privileges would remain redacted, but information withheld  
2 solely pursuant to the deliberative process privilege would not be redacted; (2) Defendants did  
3 not waive any deliberative process privilege claims over the documents or similar documents; (3)  
4 Plaintiffs' counsel would only share the documents with attorneys of record on the case (with  
5 one exception); and (4) shortly after previewing the documents, Plaintiffs' counsel would treat  
6 the documents as inadvertently-produced and take all of the steps outlined in paragraphs 4 and 7  
7 of the Court's August 15, 2017 Stipulated Order Pursuant to Federal Rule of Evidence 502(d)  
8 (*i.e.*, destroy the documents and any notes about the documents). Exh. B at ¶¶ 3-5. Once  
9 Plaintiffs' counsel agreed to these conditions, Defendants allowed Plaintiffs' counsel to preview  
10 the documents. *Id.* After previewing the documents, Plaintiffs' counsel stated that they intended  
11 to continue pursuing this motion to compel. *Id.* at ¶ 6.

12 On June 15, 2018, Plaintiffs filed a supplemental brief regarding the paragraph 17  
13 documents. Dkt. # 194. On July 6, 2018, Defendants filed a response and offered to provide the  
14 Court with a random sample of ten documents from paragraph 17 for *in camera* review. Dkt. #  
15 198 at 12.

16 On December 18, 2018, the Court held a status conference regarding, *inter alia*, the status  
17 of Plaintiffs' motion to compel. Dkt. # 211. During the conference, counsel for Defendants  
18 informed the Court that the parties might be able to agree on a narrower set of three to four  
19 documents for *in camera* review. *See* Exh. C at 21. The Court asked whether the parties wanted  
20 to meet and confer regarding narrowing the set of documents for *in camera* review, and the  
21 parties agreed to do so. *Id.* at 21-22. Following the status conference, the parties agreed to  
22 provide the Court with the four documents that Plaintiffs had previewed, rather than a random  
23 sample of ten documents. Dkt. # 212 at 2. The parties filed a Joint Notice informing the Court

1 that Defendants would submit the four documents for *in camera* review. *Id.* The Joint Notice  
2 stated that the four documents had been “shared with Plaintiffs,” but it neglected to mention the  
3 conditions under which the documents had been shared. *Id.* On February 5, 2019, Defendants  
4 submitted the four documents to the Court for *in camera* review. Dkt. # 218.

5 On February 27, 2019, the Court concluded that Defendants had waived “any privilege”  
6 over the four documents and ordered that they be produced to Plaintiffs in full. Dkt. # 224 at 3.  
7 The Court did not elaborate on the rationale behind its waiver finding, but presumably based it  
8 on the fact that Defendants had previously shared the documents with Plaintiffs. *Id.* Defendants  
9 respectfully request that the Court reconsider its waiver finding.

10 **II. Defendants have not waived privilege over the four documents.**

11 A motion to reconsider may be granted upon a showing of manifest error in the prior  
12 ruling. *See* Local Rules W.D. Wash LCR 7(h)(1). Defendants respectfully submit that the Court  
13 committed manifest error when it concluded that Defendants waived any privileges over the four  
14 documents.

15 In determining whether or not a party has waived a privilege, courts look to the following  
16 factors: “(1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time  
17 taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the  
18 overriding issue of fairness.” *See In re McKesson Governmental Entities Average Wholesale*  
19 *Price Litig.*, 264 F.R.D. 595, 599 (N.D. Cal. 2009).

20 Here, Defendants have not waived any privileges over the four documents submitted for  
21 *in camera* review. As discussed above, after significant negotiation and in a good-faith effort to  
22 narrow the issues before this Court, Defendants allowed Plaintiffs to preview the four documents  
23 only after Plaintiffs agreed that Defendants did not waive any deliberative process privilege

1 claims over the documents or similar documents. Plaintiffs also agreed to only share the  
2 documents with attorneys of record on the case (with one exception). Furthermore, after  
3 previewing the documents, Plaintiffs agreed to treat the documents as inadvertently-produced  
4 and take all of the steps outlined in paragraphs 4 and 7 of the Court's August 15, 2017 Stipulated  
5 Order Pursuant to Federal Rule of Evidence 502(d) (*i.e.*, destroy the documents and any notes  
6 about the documents). Exh. B at ¶¶ 3-5. Indeed, Defendants reasonably relied upon this Court's  
7 August 15, 2017 Stipulated Order Pursuant to Federal Rule of Evidence 502(d) when entering  
8 into this agreement with Plaintiffs. There, the Court stated that "the production of a document,  
9 or part of a document, shall not constitute a waiver of any privilege or protection as to any  
10 portion of that document, or as to any undisclosed privileged or protected communications or  
11 information concerning the same subject matter, in this or in any other proceeding." Dkt. # 83 at  
12 1. Thus, Defendants took extensive precautions not to waive any privilege claims while  
13 engaging with Plaintiffs to develop creative ways to resolve the privilege disputes at issue.

14 We are filing this motion because, in deciding that Defendants waived privilege over the  
15 documents, the Court was likely unaware of the precautions taken by the parties to protect the  
16 Defendants' privilege. Now that the Court is aware of the precautions Defendants took to protect  
17 their privileged information, the Court should reconsider its conclusion that Defendants have  
18 waived any privileges over the documents. *See In re McKesson*, 264 F.R.D. at 599. Indeed, to  
19 hold otherwise would be gravely unjust in light of the parties' express agreement that privilege  
20 would not be waived. *Id.*

21 Furthermore, Defendants allowed Plaintiffs to preview these four documents in a good-  
22 faith effort to avoid further litigation before the Court. A finding that the Defendants waived  
23

1 privilege by allowing Plaintiffs to preview the documents may discourage similar good-faith  
2 efforts by the parties going forward.

3 Finally, Defendants did not allow Plaintiffs to preview the four documents in their  
4 entirety. Defendants redacted limited portions of the documents as subject to the law  
5 enforcement and attorney-client privileges. Exh. B at ¶¶ 3-5. Thus, even if the Court construes  
6 Defendants' offer to allow Plaintiffs to preview the four documents as a waiver of deliberative  
7 process privilege, Defendants have not waived "any privilege," as stated in the Court's order.  
8 The law enforcement and attorney client privileges should continue to apply.

9 **III. Conclusion**

10 For the foregoing reasons, the Court should reconsider its ruling that Defendants waived  
11 any privilege over the four documents that were submitted for *in camera* review and conclude  
12 that Defendants have not waived any privilege over the documents.

1 Dated: March 13, 2019  
2 JOSEPH H. HUNT  
Assistant Attorney General  
3 Civil Division  
U.S. Department of Justice  
4  
AUGUST FLENTJE  
5 Special Counsel  
Civil Division  
6  
ETHAN B. KANTER  
7 Chief, National Security Unit  
Office of Immigration Litigation  
8 Civil Division  
9  
DEREK C. JULIUS  
Assistant Director  
10 Office of Immigration Litigation  
Civil Division  
11  
BRIAN T. MORAN  
12 United States Attorney  
13  
BRIAN C. KIPNIS  
Assistant United States Attorney  
14 Western District of Washington

Respectfully Submitted,  
  
DANIEL E. BENSING  
Senior Trial Counsel  
Federal Programs Branch  
  
LEON B. TARANTO  
Trial Attorney  
Torts Branch  
  
BRENDAN T. MOORE  
Trial Attorney  
Office of Immigration Litigation  
  
LINDSAY M. MURPHY  
Counsel for National Security  
National Security Unit  
Office of Immigration Litigation  
  
/s/Andrew C. Brinkman  
ANDREW C. BRINKMAN  
Senior Counsel for National Security  
Office of Immigration Litigation  
450 5th St. NW  
Washington, DC 20001  
Andrew.Brinkman@usdoj.gov  
Phone: (202) 305-7035

*Counsel for Defendants*

15  
16  
17  
18  
19  
20  
21  
22  
23

**CERTIFICATE OF SERVICE**

I hereby certify that on March 13, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/Andrew C. Brinkman  
ANDREW C. BRINKMAN  
Senior Counsel for National Security  
Office of Immigration Litigation  
450 5th St. NW  
Washington, DC 20001  
Andrew.Brinkman@usdoj.gov  
Phone: (202) 305-7035